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JUDGES

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COURT RULES.

COURT OF APPEALS OF MISSOURI.

Rules of Practice in the Springfield Court of Appeals.

Adopted August 19, 1909.

Rule 1.—PRESIDING JUDGE. The Presiding Judge shall superintend all matters of order in the court room.

Rule 2.—WORDS APPELLANT AND RESPONDENT, WHAT THEY INCLUDE. Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—MOTIONS. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

Rule 4.—HEARING OF CAUSES. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

Rule 5.—DIMINUTION OF RECORD. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

Rule 6.—CERTIORARI TO PERFECT RECORD. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

Rule 7.—NOTICE OF WRITS OF ERROR. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—REVIEWING INSTRUCTIONS. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—BILLS OF EXCEPTIONS IN EQUITY CASES. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided

that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

Rule 10.—DUTY OF THE CLERK IN MAKING UP TRANSCRIPTS. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of —, 190—, executed on the — day of —, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—PRESUMPTION THAT BILL OF EXCEPTIONS CONTAINS ALL THE EVIDENCE. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—ABSTRACTS IN LIEU OF TRANSCRIPTS WHEN FILED AND SERVED. In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall

be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time.

Rule 13.—PRINTED TRANSCRIPTS. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

Rule 14.—ABSTRACTS, WHEN FILED AND SERVED. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—ABSTRACTS, WHAT THEY SHALL CONTAIN. Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—WHEN APPEAL IS RETURNABLE; CERTIFICATE OF JUDGMENT; TRANSCRIPT. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the

appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes, 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

Rule 17.—COSTS, WHEN ALLOWED FOR PRINTING ABSTRACTS AND RECORDS. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes, 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as prima facie evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—BRIEFS, WHAT TO CONTAIN AND WHEN SERVED. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain, separate and apart from the argument

or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—CITING AUTHORITIES IN BRIEFS. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

Rule 20.—EXTENSION OF TIME. In no case will extension of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—PENALTY FOR FAILURE TO COMPLY WITH RULES 12, 14, 15, 16 AND 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—AGREED STATEMENT OR CAUSE OF ACTION. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of

what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—MOTIONS FOR REHEARING. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, three copies thereof shall be deposited with the clerk for the use of the judges.

Rule 24.—ORAL ARGUMENTS. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying, if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

Rule 25.—NOTICE ON MOTION TO DISMISS OR AFFIRM. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the

court will require satisfactory proof that proper notice has been given.

Rule 26.—MOTION FOR AFFIRMANCE. On motion for affirmance under section 812, Revised Statutes, 1890, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—APPEARANCE OF COUNSEL. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—ALLOWANCE TO GARNISHEES. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—SERVICE OF ABSTRACTS AND BRIEFS IN CRIMINAL CASES. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—RETURN OF ORIGINAL WRITS. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—WITHDRAWING RECORDS. No record or any of the files in any cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

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THE SOUTHWESTERN REPORTER. VOLUME 122.

SCHROEDER v. TURPIN.

(Springfield Court of Appeals. Missouri. Nov. 2, 1909.)

COURTS (§ 231*)—JURISDICTION—ISSUES—TITLE TO REALTY.

A suit to set aside a deed for fraud directly involves title to real estate, within the Constitution, defining the jurisdiction of the Supreme Court, and when appealed to the Court of Appeals will be transferred to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 657; Dec. Dig. § 231.*]

Appeal from Circuit Court, Howell County; W. N. Evans, Judge.

Action by William G. Schroeder, revived in name of Anna Kendall, against Aurelius C. Turpin. From a judgment for plaintiff, defendant appeals. Cause transferred to the Supreme Court.

J. N. Burroughs, for appellant. O. L. Haydon and W. P. Campbell, for respondent.

GRAY, J. This is an action in equity to set aside certain deeds to lands situated in Howell county, on the alleged ground of fraud in their procurement. Under the decisions of the courts of this state, the title to real estate is directly involved, within the meaning of the Constitution, defining the jurisdiction of the Supreme Court. *Overton v. Overton*, 131 Mo. 559, 33 S. W. 1; *Lappin v. Crawford*, 92 Mo. App. 453; *Reed v. Colp*, 213 Mo. 577, 112 S. W. 255.

This court, therefore, has no jurisdiction of the case, for the reason that the jurisdiction of such matter is, by the Constitution of the state, vested solely in the Supreme Court, and accordingly the cause is transferred to that court. All concur.

FREEMAN et al. v. ST. LOUIS & S. F. R. CO.
(Springfield Court of Appeals. Missouri. Nov. 2, 1909.)

1. APPEAL AND ERROR (§ 1151*)—DISPOSITION OF CASE ON APPEAL—REMITTITUR OF EXCESSIVE DAMAGES.

Where the court erroneously confined the jury to one element of damages and plaintiff did not complain thereof, the verdict, excessive un-

der the instructions, though not excessive under the evidence, will be reduced by the amount of the excess.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.*]

2. CARRIERS (§ 163*)—SHIPPING CONTRACTS—RECITALS—BURDEN OF PROOF.

A recital in a shipping contract, limiting the carrier's liability, that it has two rates for shipment, and that the rate named in the contract is a special rate and is less than the rate charged for shipments at carrier's risk, in consequence of which reduced rate the agreement limiting the carrier's liability is made, is prima facie evidence that the rate named is a reduced rate, and the burden of proving the contrary is on the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 724; Dec. Dig. § 163.*]

3. CARRIERS (§ 156*)—SHIPPING CONTRACTS—CONSTRUCTION.

A shipping contract stipulating that in consideration of a reduced rate the shipper releases the carrier for breach of any contract to furnish cars at any particular time releases a claim of the shipper for damages for failure to furnish cars at a time agreed on, which damages had accrued at the time of the signing of the contract.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 156.*]

4. RELEASE (§ 50*)—PLEADING IN AVOIDANCE—NECESSITY.

A plaintiff claiming that the release pleaded by defendant was fraudulently procured must tender the issue by proper replication, as provided by Rev. St. 1899, § 654 (Ann. St. 1906, p. 670), or the issue is not raised.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 90; Dec. Dig. § 50.*]

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

Action by L. L. Freeman and another against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

W. F. Evans, J. T. Woodruff, Edgar P. Mann, and Joseph B. Todd, for appellant. Lorts & Breuer and C. C. Bland, for respondents.

COX, J. This is an action for damages for failure of defendant to furnish cars for a shipment of cattle at the time agreed up-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on by plaintiffs and agent of the defendant. The petition declares upon a contract to furnish two cars at Rolla August 4, 1908, and alleges that they were not furnished until August 5th, and in consequence thereof plaintiffs' cattle were required to be kept in the stock pens of defendant and suffered shrinkage. Damages are also claimed by reason of expenses for feeding and for decline in the market. The answer is a general denial and a plea of release under the shipping contract executed when the cattle were shipped on the 5th. Replication is a general denial. There was a trial by jury and verdict for plaintiffs for \$174.25. Afterward plaintiffs remitted \$74.25, and judgment was entered for \$100. Defendant appealed.

Appellant contends that the verdict is excessive after the remittitur was entered, and that error was committed by the court in giving and refusing instructions. The verdict is not excessive under the testimony, but is excessive under the issue submitted to the jury by the instructions. The jury were by the instructions restricted to one element of damages—that of shrinkage in the weight of the cattle—and, if it is to be confined to that element alone, the contention of appellant is right that under the evidence the highest amount that could be recovered was \$92.94. Why the jury were restricted to that one element of damages under the evidence in this case does not appear, but plaintiffs are not complaining and the judgment could be released of its excessiveness by a remittitur here if that were its only defect.

The evidence shows that on August 2d plaintiffs ordered two cars for August 4th, and were notified by defendant's agent on August 4th that the cars would be there ready to load at 7 p. m. that day. Plaintiffs then drove their cattle to Rolla, and placed them in defendant's stock pens ready to load. The cars did not come until late August 5th, and the cattle were loaded about 8 p. m. that day, and started to their destination—East St. Louis, Ill. A shipper's contract was signed by plaintiff Lennox, in whose name the shipment was made, and the agent of the defendant. This contract was upon a blank furnished by the company, and recited that the company has two rates for shipment of freight, and that the rate named in this contract, to wit, \$26.88 per car, is a special rate, and is less than the rate charged for shipments at carrier's risk, in consideration of which reduced rate "it is mutually agreed between the parties hereto as follows:" Then follow 16 provisions, among which we find the following: "(7) For the consideration aforesaid the shipper agrees to waive and release, and does hereby release the company from any and all liability * * * for breach of any alleged contract to furnish cars at any particular time, and the shipper hereby releases, and does waive and bar any and all causes of action for any damage whatsoever that has accrued

to the shipper by any written or verbal contract prior to the execution hereof, concerning said stock, or any of them." It is contended by appellant that this contract is an absolute defense, and that by it plaintiffs released any claim they may have had for damages on account of failure of defendant to furnish cars on the day it agreed to, and the refusal of the court to so instruct the jury is now urged for a reversal. It is conceded that one holding a claim like this for damages against a railroad may release it for a valuable consideration, and, that if, as recited in this contract, plaintiffs were given a reduced rate on this shipment in consideration for this release, that would be a sufficient consideration to support it.

The real question at issue here is as to the effect of the recitals in this contract that the rate there charged—\$26.88 per car—is a special and reduced rate. Appellant contends that this recital must be taken as prima facie evidence of its truth, and therefore casts the burden of proving that it was not a reduced rate upon the plaintiffs, and, to support this contention, cites *McFadden v. Railroad*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. Rep. 721, *Wyrick v. Railroad*, 74 Mo. App. 406, *Shelton and Childress v. Railroad*, 131 Mo. App. 560, 110 S. W. 627, and *Mires v. Railroad*, 134 Mo. App. 379, 114 S. W. 1052, which are squarely in point, and sustain appellant's position. To controvert this we are cited by respondent's counsel to the case of *George v. Railroad*, 214 Mo. 551, 113 S. W. 1099, 127 Am. St. Rep. 690, which, it is contended, establishes a different doctrine; but a close examination of that case convinces us that, instead of promulgating a different doctrine, it in reality supports the other cases. In the *George* case the contract recited: "Said rate being less than the rate charged for shipments transported at carrier's risk, for which reduced rate and other considerations, it is mutually agreed between the parties hereto as follows:" No special rate was mentioned, so that it could not be ascertained by an examination of the contract what rate was charged. The court held in that case that the failure to specify the rate rendered the recital that the rate charged was a reduced rate nugatory, and, by placing it upon that ground, held inferentially that if the rate charged had been inserted, as it was in this case, then the recital in the contract would have been prima facie evidence that the shipment was made at a reduced rate.

We appreciate the force of the suggestion by respondent's counsel that the logic of requiring the rate charged to be inserted would also require the regular rate to be inserted, so the court and jury might determine whether there was a substantial reduction, or whether the whole matter was a mere pretense to enable the carrier to escape its common-law liability, but as the Supreme Court has squarely held in *McFadden v. Railroad*, 92 Mo. 343, 4 S. W. 689, 1 Am. St.

Rep. 721, to the contrary, and has practically held the same thing in the George Case, *supra*, we are bound by these decisions, and must, therefore, hold that in this case the contract in evidence was *prima facie* evidence that the rate charged—\$26.88 per car—was a reduced rate, and, there being no other evidence on the question, the instruction asked by defendant upon that question should have been given.

It is contended by respondents that the damages for failure to furnish the cars at the time agreed upon had already accrued at the time the shipping contract was signed, and therefore could not have been contemplated by the parties in executing this contract. The contract itself precludes us from adopting this theory. A mere reading of paragraph 7 of the contract, above set out, will show that it was prepared for the very purpose of covering cases like this, and that it does cover it. If this matter was not contemplated, and was not, in fact, a part of the consideration for the reduced rate, yet, if there was no fraud, imposition, or coercion used in securing the signature of plaintiff Lennox to the contract, he must, after having signed it, be conclusively presumed to have known its contents at the time he signed it. If plaintiffs contend that the signature of Lennox to this contract which includes the release pleaded by defendant was fraudulently or wrongfully procured, they should tender that issue by proper allegations in the replication as provided in section 654, Rev. St. 1899 (Ann. St. 1906, p. 670). In the absence of such pleading, that issue is not in the case. If it be true that the rate charged was not a reduced rate, this may be shown upon a retrial of the case.

Holding, as we do, that under the evidence as preserved in this record the court erred in refusing defendant's instruction as to the effect of the shipping contract, the judgment is reversed and the cause remanded. All concur.

LONG et al. v. GREENE COUNTY ABSTRACT & LOAN CO. et al.

(Springfield Court of Appeals. Missouri. Nov. 2, 1909.)

COURTS (§ 231*)—JURISDICTION—ACTIONS INVOLVING REAL ESTATE.

An action which has for its object, in part, the setting aside of a deed of trust of real estate as without consideration and fraudulently procured, involves title to real estate, and an appeal therein to the Court of Appeals must be certified to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 657; Dec. Dig. § 231.*]

Appeal from Circuit Court, Greene County; Alfred Page, Judge.

Action by Oscar Long and another against the Greene County Abstract & Loan Company and others. Judgment for plaintiffs,

and defendants appealed to the Court of Appeals. Cause certified to the Supreme Court.

W. R. Self and T. J. Murray, for appellants.
Henry C. Young, for respondents.

COX, J. This is an action which has for its object, in part, the setting aside of a deed of trust covering certain real estate in the city of Springfield, on the ground that it was without consideration and fraudulently procured. Under the authority of the case of *Overton v. Overton*, 131 Mo. 559, 33 S. W. 1, this action involves the title to real estate, and must, therefore, be certified to the Supreme Court, which is accordingly done. All concur.

O'DAY et al. v. SANFORD et al.

(Springfield Court of Appeals. Missouri. Nov. 2, 1909.)

1. PLEADING (§ 350*)—JUDGMENT ON PLEADINGS—NATURE OF MOTION.

While a motion for judgment on the pleadings is in the nature of a demurrer, in that it admits all facts well pleaded, it differs therefrom, in that, if the motion is sustained, judgment goes at once for the moving party, while on demurrer the judgment is not final if the other party pleads over; but, in both cases, the motion raises only an issue of law.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1053; Dec. Dig. § 350.*]

2. WILLS (§ 748*)—ACTION BY LEGATEE—PROMISSORY NOTE.

A legatee to whom the executors have assigned, as part of his share under the will, a negotiable note executed to testator, occupies the same position as testator would have occupied in suing thereon.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1923; Dec. Dig. § 748.*]

3. COURTS (§ 91*)—RULE OF DECISION—DECISION OF SUPREME COURT.

The Court of Appeals is bound by a decision of the Supreme Court in a case where the question decided was in issue.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 325; Dec. Dig. § 91.*]

4. BILLS AND NOTES (§ 443*)—RIGHT OF ACTION—ACTION BY MAKER.

That the payee of a note was also one of the makers would not prevent his maintaining an action at law thereon.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1405; Dec. Dig. § 443.*]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by John O'Day and another against E. L. Sanford and another. From a judgment for defendants on the pleadings, plaintiffs appeal. Reversed and remanded, with directions for trial on the merits.

W. D. Tatlow, for appellants. J. T. White, for respondents.

GRAY, J. On August 27, 1908, the appellants filed in the circuit court of Greene county, Mo., the following petition: "Plaintiffs state that, for value received, the de-

defendants executed and delivered to John O'Day the following note and obligation, to wit: 'Springfield, Mo., Dec. 30, 1898. Three months after date we promise to pay to the order of John O'Day at Exchange Bank of Springfield, Mo., five hundred dollars, for value received, without defalcation or discount, with eight per cent. interest after due until paid. For newspaper mail. John O'Day. E. L. Sanford. H. S. Jewell.' Plaintiffs further state that on or about the day of August, 1901, the said John O'Day, the ancestor of the plaintiffs, departed this life testate and appointed by his last will and testament E. W. Bannister and Sue I. B. O'Day, the executors thereof, who, after his said will was duly probated in the probate court of this county, duly qualified as said executors. Plaintiffs further state that afterwards, and under the terms of said will and the orders of said court, the said note was duly assigned and transferred to these plaintiffs by said executors as a part of their distributive share of the said estate of John O'Day, deceased. Wherefore plaintiffs pray judgment against defendants on said note for \$500, with interest from maturity at 8 per cent. per annum, and for cost of suit, and for such other relief as the plaintiffs may be entitled to thereon." In proper time the respondents answered, admitting the signing of the note, and alleging that the payee in said note, John O'Day, ancestor of the plaintiffs, signed said note as maker and as principal therein, and the respondents signed as sureties for him, and that O'Day retained said note in his possession until his death, and did not at any time negotiate or transfer the same to any person. The answer further alleged that no consideration was received by the respondents for signing said note. Appellants replied denying the allegations of the answer, except it was admitted that John O'Day, the payee, was also one of the signers, and expressly denied that respondents signed said note for the accommodation of O'Day, and alleged said note was signed by all the signers thereof in furtherance of a joint enterprise in which they were all interested, and that said O'Day did not receive anything from such joint enterprise, which was the purchase of a newspaper afterwards turned over to defendant Jewell, and whatever, if anything, was received from the sale of such paper, was received by the defendant Jewell. After the filing of this reply, the respondents filed a motion for judgment on the pleadings, which was sustained, and judgment entered.

A motion for judgment on the pleadings partakes of the nature of a demurrer, in that, it admits all facts that are well pleaded, but, if sustained, judgment goes at once, and in this it differs from a demurrer. If the demurrer is sustained, the order is not a final judgment. The party has a right to plead over. *Sternberg v. Levy*, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438. The motion, like the demurrer, raises an issue of law

only. *State ex rel. v. Simmons Hardware Co.*, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676. The motion for judgment is based upon the fact that John O'Day, the payee in the note, was also one of the makers thereof, and it is claimed that an action at law cannot be maintained on a note by the payee, if he is one of the makers, and this is the only question to be decided, as, from our view, the appellants stand in the same position that John O'Day would occupy, if alive and suing on the note in his own name.

In passing upon a question of law, it is the first duty of this court to examine the decisions of the Supreme Court of this state and ascertain if that court has decided the question, and, if it has, to follow its decision. Of course, this means that the question decided by the Supreme Court was one of the issues to be decided in the case. We believe that this question was before the Supreme Court in *Willis v. Barron*, 143 Mo. 450, 45 S. W. 239, 65 Am. St. Rep. 673. In that case the executrix of R. T. Willis, deceased, brought an action to recover one-half of the amount of two notes executed by the firm of Willis & Barron, composed of R. T. Willis and P. J. Barron, to R. T. Willis in his lifetime. The plaintiff recovered judgment in the circuit court, from which defendant appealed to the Kansas City Court of Appeals, and that court, upon a division of opinion, certified the cause to the Supreme Court. Judge Gantt states the point before the court as follows: "Appellant insists upon two propositions to reverse the judgment: First, that an action at law cannot be maintained by one partner upon a promissory note executed to him individually by the partnership of which he is a member." The authorities are reviewed at length, and the conclusion is reached that the action was properly brought and could be maintained. It will not be necessary to review the authorities cited by Judge Gantt, or to review his opinion, but simply to state that upon that authority we decide the question against the respondents.

The respondents have called our attention to the following cases from this state: *Young v. Chew*, 9 Mo. App. 387; *Knaus v. Givens*, 110 Mo. 58, 19 S. W. 535; *First National Bank v. Payne*, 111 Mo. 291, 20 S. W. 41, 33 Am. St. Rep. 520; *Lowrie v. Zunkel*, 49 Mo. App. 153. In *Young v. Chew* the action was by an indorsee against the makers of a note given by a firm to one of its members, and while the court said in that case, "It is not questioned that the payee himself could not have maintained a suit at law on account of the insuperable objection that he would have been both plaintiff and defendant in the same action," it was not necessary for the court to decide that question, and it was therefore dictum. In *Knaus v. Givens* the Supreme Court cites the case of *Young v. Chew*, and says of it the following: "The case asserts the correct doctrine that, not-

withstanding no action of law can be maintained on a negotiable promissory note, executed by a firm to one of its members, yet it is well settled that this incapacity to sue does not attend the indorsee of such paper." But that case, like the Young Case, was an action by the indorsee. In *Bank v. Payne* a suit was brought upon the indorsement of the defendants of a note given by Robert H. Payne to himself, and he was one of the indorsers. Payne indorsed the note to the bank, and the action was brought in the name of the bank, and the only point really in the case was whether the bank, as indorsee, could maintain an action on the note, and the court held it could. And the same may be said of the case of *Lowrie v. Zunkel*. In that case one Zunkel made a note payable to himself and indorsed it, and the suit was brought by the indorsee.

If the cases cited by respondents were all of the Missouri authorities on the question, we would affirm the judgment; but the case of *Willis v. Barron*, above cited, is the last decision of the Supreme Court "upon the question." In that case the identical issue was presented that is presented here, while in the cases cited by respondents the question presented here was not an issue, and it was not necessary for the court to decide the same.

Taking this view of the cause, the judgment will be reversed, and the cause remanded, with directions to the trial court to try the case on its merits. All concur.

WERTHEIMER-SWARTS SHOE CO. v. McDONALD.

(Springfield Court of Appeals. Missouri. Nov. 2, 1909.)

1. PLEADING (§§ 354, 367*)—MOTIONS—INDEFINITENESS.

A motion to strike out an answer setting up breach of warranty because too indefinite and uncertain does not lie; the proper practice being by motion to make more definite and certain.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1092-1095, 1173-1193; Dec. Dig. §§ 354, 367.*]

2. PLEADING (§ 352*)—STRIKING OUT—GROUNDS.

An answer to a complaint for the price of goods, which sets up a general denial and special pleas of breach of warranty, cannot be stricken as an entirety because the special pleas state no defense, since the general denial would be sufficient defense to the action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1086-1088½; Dec. Dig. § 352.*]

3. PLEADING (§ 93*)—INCONSISTENT DEFENSES—SPECIAL PLEA.

Under Rev. St. 1899, § 605 (Ann. St. 1906, p. 635), providing that a defendant may set forth in his answer as many defenses as he may have, provided they are not inconsistent with each other, a defendant in an action for price of goods may not set up a general denial and special pleas alleging a breach of warranty.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. § 93.*]

4. PLEADING (§§ 93, 352*)—SPECIAL PLEAS—WAIVER OF GENERAL ISSUE.

Where, in an action for the price of goods, the answer sets up a general denial and also special pleas alleging breach of warranty, the pleas, being inconsistent with the general denial, waived it, and a motion to strike out the entire answer for inconsistent defenses will not lie.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 189, 1086-1088½; Dec. Dig. §§ 93, 352.*]

5. PLEADING (§ 350*)—JUDGMENT ON PLEADING—NATURE.

A motion for judgment on pleadings partakes of the nature of a demurrer, in that it admits all the facts well pleaded, and, if sustained, judgment goes at once; while, if a demurrer is sustained, the party may plead over.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1053; Dec. Dig. § 350.*]

6. SALES (§ 435*)—ACTIONS FOR PRICE—BREACH OF WARRANTY—SUFFICIENCY OF SPECIAL PLEAS.

In an action for price of goods, special pleas setting up breach of warranty held to be sufficiently certain and definite to state a good defense.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 435.*]

7. SALES (§ 261*)—"EXPRESS WARRANTY"—WHAT CONSTITUTES.

The sale of a chattel with any representation or positive affirmation of its quality and condition made with the intention of being relied on, and, in fact, relied upon, is an express warranty for the breach of which an action will lie; no special form of words being necessary to create such warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. § 261.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2613-2614; vol. 8, p. 7658.]

8. SALES (§ 261*)—EXPRESS WARRANTY—QUALITY.

A statement by the seller of chattels that his goods are equal in quality to other well-known articles similar in kind is an express warranty.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 727-735; Dec. Dig. § 261.*]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by the Wertheimer-Swarts Shoe Company against E. W. McDonald for the price of goods. From a judgment for plaintiff after a motion striking out the amended answer, defendant appeals. Reversed and remanded.

J. T. White and R. H. Davis, for appellant.
O. R. Puckett and Hamlin & Seawell, for respondent.

NIXON, P. J. The petition in this case is as follows: "In the Circuit Court, January Term, 1908. State of Missouri, County of McDonald—ss.: Wertheimer-Swarts Shoe Company, Plaintiff, v. E. W. McDonald, Defendant. Plaintiff states: That it is and at all times hereinafter mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Missouri. That defendant is justly and truly indebted to the plaintiff in the sum of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

two hundred and sixty-four dollars (\$264.00), being the reasonable and agreed price of goods, wares and merchandise sold and delivered by said plaintiff to the defendant during the month of May, 1907, at his special instance and request, full particulars of which will appear in the account herewith filed and marked 'Exhibit A.' That the annexed itemized account is just, true and correct and the same is due and remains payable; that all just and lawful offsets, payments and credits have been thereon allowed and that there is now unpaid and owing on said account, after allowing all just credits, deductions and offsets, the said sum of two hundred and sixty-four dollars, which accrued and became payable October 1, 1907. Wherefore plaintiff prays judgment against defendant for the sum of \$264.00 with interest thereon at the legal rate of six per cent., from the first day of October, 1907, for costs herein to be taxed and all proper relief. O. R. Puckett, Attorney for Plaintiff." "Exhibit A," attached to the foregoing petition, is an itemized account of the goods alleged to have been purchased by the defendant. To the petition the defendant filed the following amended answer: "In the Circuit Court of Greene County, Missouri, January Term, 1909. Wertheimer-Swartz Shoe Company, Plaintiff, v. E. W. McDonald, Defendant. Comes now the defendant, and for amended answer to plaintiff's petition denies each and every allegation in said petition contained, and, further, answering, this defendant says that on or about the _____ day of _____, 1907, defendant gave a verbal order to J. W. Sheppard, traveling salesman for plaintiff, for a bill of shoes amounting in price to \$360, which shoes were to be shipped to defendant by plaintiff, and the bill therefor was by the terms of the agreement of purchase to be dated July 1, 1907, and due in 90 days thereafter; that Sheppard representing the plaintiff, in order to induce the defendant to make such order and purchase such shoes, on behalf of the plaintiff, represented, warranted, and stated to the defendant that the shoes handled by him for plaintiff and sold by plaintiff, and the shoes to be shipped to defendant on such order were of first-class quality, made of good leather for the style and price, were well put together, would wear well; that a guaranty of good quality went with every shoe to be delivered on the order; that the shoes were as good as or better than the shoes of the same and similar style and price sold by the Hamilton-Brown Shoe Company, whose shoes were well and favorably known in the community where defendant had his store, and as good as or better than other shoes of the same style and price sold in that community, and said Sheppard, on behalf of the plaintiff, at said time, further agreed as part of the contract of sale that plaintiff would warrant all of the shoes shipped on said order to be as above represented, and, in order to introduce the line of shoes

mentioned in the order into that community, the plaintiff would at the next trip of the said Sheppard, which was to be about six months from the date above mentioned, take up all the shoes ordered and received by the defendant from the plaintiff and remaining unsold, provided the said shoes were not as above warranted, or were not of the quality as above represented by said Sheppard, or were not such as to give satisfaction to defendant and defendant's customers. Defendant further says that he relied upon said statements, warranties, and agreements and was induced thereby to give the order as above stated, and paid plaintiff \$100 on account thereof, but that the plaintiff did not ship to the defendant shoes of the kind or quality ordered, but did ship a bill of shoes similar in number, size, and price, which shoes so shipped and delivered to the defendant were of inferior quality, made of poor and rotten leather, or imitation leather, were not well put together, but would tear and rip and go to pieces with ordinary wear of a few hours, and at most a few days, were not as good as the shoes of similar price and style sold in that community by Hamilton-Brown Shoe Company, but were, in fact, worthless and unmerchantable. Defendant further says that neither said traveling salesman nor any one else representing plaintiff came to defendant's place of business in about six months or at any other time; that defendant, on discovering the kind and quality of the shoes shipped to him as aforesaid, notified the plaintiff and offered to return to plaintiff all the shoes shipped to him as aforesaid and remaining unsold, and plaintiff refused to accept the same; that defendant now has on hand ready to deliver to the plaintiff a quantity of shoes shipped to him as aforesaid, amounting in price, by the invoice thereof, to \$268, and is ready and willing at all times to deliver same to the plaintiff. (2) Defendant for further answer and defense herein says that on or about the _____ day of _____, 1907, defendant gave a verbal order to J. W. Sheppard, traveling salesman for plaintiff, for a bill of shoes amounting in price to \$360, which shoes were to be shipped to defendant by plaintiff and the bill therefor was, by the terms of the agreement to purchase, to be dated July 1, 1907, and due in 90 days thereafter; that said Sheppard, who was agent and traveling salesman for plaintiff, in order to induce the defendant to make such order and purchase such shoes, on behalf of plaintiff, represented, warranted, and stated to the defendant that the shoes handled by him for plaintiff, and sold by plaintiff, and the shoes to be shipped to defendant on such order, were of first-class quality, made of good leather for the style and price, were well put together, would wear well; that a warranty of quality went with every shoe to be delivered on the order; that said shoes were as good as or better than the shoes of the same and

similar style and price sold by the Hamilton-Brown Shoe Company, whose shoes were well and favorably known in the community where the defendant had his store, and as good as or better than other shoes of the same style and price sold in that community. Defendant further says that he relied upon said statements, warranties, and agreements, and was induced thereby to give the order as above stated, but that plaintiff did not ship to the defendant shoes of the kind or quality ordered, but did ship to the defendant a bill of shoes similar in number, size, and price, which shoes so shipped and delivered to the defendant by the plaintiff were of inferior quality, made of poor and rotten leather, or imitation leather, and were not well put together, but would tear and rip and go to pieces with ordinary wear of a few hours and at most a few days, were not as good as the shoes of similar price and style sold in that community by Hamilton-Brown Shoe Company, but were in fact worthless and unmerchantable. Wherefore defendant says that by reason of the premises there has been a failure of the consideration for the account sued on, and that defendant owes plaintiff nothing by reason thereof, and asks to be discharged with its costs. (3) Defendant, further answering and for further defense herein, says that on the — day of —, 1907, he agreed to purchase of the plaintiff a certain bill of shoes, the style and numbers of which, and the price of which, are given in the itemized statement attached to plaintiff's petition and marked 'Exhibit A,' for the price and sum of \$360; that plaintiff shipped to defendant an invoice of shoes amounting to the said sum of \$360 of the same style, numbers, and sizes as mentioned in said 'Exhibit A,' but that said shoes so shipped as aforesaid and received by defendant were made of poor and rotten leather, or imitation leather, and were not well put together, but would tear and rip and go to pieces with ordinary wear of a few days, and were in fact worthless and unmerchantable. Wherefore defendant says that by reason of the premises the consideration for the account sued on has wholly failed, and defendant asks to be discharged with his costs. (4) Defendant for further answer and counterclaim says that he in the month of —, 1907, ordered from plaintiff a bill of shoes amounting to \$360 in price, as set forth in the first paragraph of this answer, and at the same time and as a part of the same transaction defendant ordered of and from the plaintiff another bill of shoes, to be shipped to defendant at an earlier date than the order first above mentioned, which other order was for shoes amounting to \$150, which said sum defendant paid to plaintiff; that plaintiff accordingly shipped to defendant before the shipment of the larger order, to wit, in the month of —, 1907, shoes amounting in price to \$150; that, when the defendant ordered the said last mentioned bill of shoes,

the plaintiff represented, stated, and warranted the shoes to be shipped in pursuance to the order were of the best quality, made of good leather for the style and price, would wear well, were as good as or better in quality than the shoes of similar style and price sold in the community of defendant's store by the Hamilton-Brown Shoe Company; that defendant relied upon said statements and warranties, and was induced thereby to make said order and said payment; that in truth and in fact the shoes shipped as aforesaid were of inferior quality, were made of poor leather, were not well put together, were not as good in quality as shoes of similar style and price sold by Hamilton-Brown Shoe Company in the community of defendant's store; that said shoes would rip, tear, and wear out with a few hours of ordinary use and wear and were and are in fact worthless and unmerchantable. Wherefore defendant says he has been damaged in the sum of \$150, for which he prays judgment. (5) Defendant for another and further counterclaim herein says that on or about the — day of —, 1907, he gave a verbal order to plaintiff for a bill of shoes amounting in price to \$360, the styles, numbers, and prices of which are stated in the itemized statement attached to plaintiff's petition and marked 'Exhibit A'; that plaintiff warranted, represented, and stated to defendant that the shoes ordered of plaintiff and to be shipped to defendant under said order were of first-class quality, made of good leather for the style and price, were well sewed and well put together, and would wear well; that the shoes shipped by plaintiff and received by defendant were of inferior quality, made of poor and rotten leather, or imitation leather, were not sewed and well put together, but would tear and rip and go to pieces with ordinary wear of a few days and were in fact worthless and unmerchantable. Defendant further says that, in making said contract of purchase, he relied upon the representation, warranties, and agreements so made as aforesaid, and that he paid to plaintiff on said order the sum of \$100 before he discovered the worthless and unmerchantable condition of said shoes. Wherefore defendant says that by reason of the premises he has been damaged in the sum of \$100, for which he prays judgment. R. H. Davis and J. T. White, Attorneys for Defendant."

Thereafter the plaintiff filed a motion to strike out the amended answer of the defendant, which motion is as follows: "Wertheimer-Swartz Shoe Company, Plaintiff, v. E. W. McDonald, Defendant. Motion to Strike Out Defendant's Answer. Comes now the plaintiff, and moves the court to strike out each and every count in defendant's amended answer, viz., one, two, three, four, and five, for the reason that the facts as stated in each and every one of said counts constitutes no defense to plaintiff's cause of ac-

tion as stated in the petition herein. And because the pretended representations and warranties therein stated are too indefinite and uncertain, in fact amounts to no warranty whatever. O. T. Hamlin, O. R. Puckett, Attorneys for Plaintiff."

Upon hearing this motion was by the trial court sustained, and, the defendant refusing to plead further, judgment was entered for the plaintiff in the sum of \$262, the amount sued for, and costs. The defendant in due time and mode perfected his appeal. The question presented to this court is as to the propriety of the trial court's action in sustaining the above motion, striking out the defendant's amended answer, and in entering judgment for the plaintiff.

This question is one solely as to the law under the rules of pleading and practice in our state. The most cursory examination of the answer in this case shows, first, a general denial of each and every allegation in the petition, and, following the general denial, five other separate defenses are attempted to be set out by the pleader in his answer. In effect and logically all the special pleas, considered together, confess the plaintiff's cause of action, and then attempt to set up warranties growing out of the sale of the goods mentioned in plaintiff's petition. These warranties, the pleader alleges, were broken by the plaintiff, which he claims should entitle him either to defeat the action in toto or reduce the amount of plaintiff's recovery. By section 605 of the Revised Statutes of 1899 (Ann. St. 1906, p. 635) it is provided: "Sec. 605.—* * * The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both. They must each be separately stated in such manner that they may be intelligibly distinguished, or refer to the cause of action which they are intended to answer." These several causes of defense—No. 1 to No. 5, inclusive—set out in this answer, grow out of the plaintiff's cause of action if its statements are to be accepted. They are separately stated and in such a manner that they may be intelligibly distinguished. The motion of the plaintiff upon which the trial court struck out the entire answer and entered judgment for the plaintiff sets out two reasons which are intended to show why it should be granted, and why each and every count in the defendant's answer—namely, one, two, three, four, and five—should be stricken out. One of these grounds is, "Because the pretended representations and warranties therein stated are too indefinite and uncertain." As to this objection—that the answer is indefinite and uncertain—it is sufficient to say that, if the fact were true as stated, it could not be reached under our practice act by a motion to strike out, but the proper practice would be by motion to make the pleading more definite and certain.

MacAdam v. Scudder, 127 Mo. 345, 30 S. W. 168; State ex rel. v. Edmundson et al., 71 Mo. App. 172, and cases therein cited. The other reason for striking out the entire answer is that the counts constituted no defense to the plaintiff's action. It is enough to say in reply that on the very face of the record there stands a general denial, which, if well pleaded, and without further answer, would certainly constitute an absolute and complete defense to the plaintiff's petition. This legal proposition is primer law and no authorities are needed to support it. The real fault with the answer, if any, is not that its counts do not state a defense, but that the defenses stated are inconsistent with each other. The section of the statute cited does not limit the number of defenses that may be pleaded, but, as construed by the courts, it does inhibit inconsistent defenses. That the general denial and the plea of warranty in this case are inconsistent is patent on the face of the answer. The pleading first denies the allegations of the petition. It then confesses and seeks to avoid them by setting up warranties. There is no question but that such an answer is in violation of the common-law rules of pleading, and is flatly at variance with our Code regulations on the subject. As a question of pleading, the law in this state has been long established that a party cannot traverse and at the same time confess and avoid the same allegations; that such a pleading is subject to the objection that it is inconsistent with itself and also open to the charge of duplicity. The decisions supporting these propositions are abundant. We cite Coble v. McDaniel, 33 Mo. 363; Darrett v. Donnelly, 38 Mo. 492; Adams v. Trigg, 37 Mo. 141; Atteberry v. Powell, 29 Mo. 429, 77 Am. Dec. 579; McCord v. Railroad, 21 Mo. App., loc. cit. 95. In the case of State ex inf. v. Delmar Jockey Club, 200 Mo., loc. cit. 66, 92 S. W. 185, 98 S. W. 539, all these cases are considered. But it does not necessarily follow that plaintiff's motion to strike out the entire answer should have been sustained and judgment given for the plaintiff on the pleadings because the answer was defective. Such a rule would certainly be a travesty on justice, and would be a violation of every legal principle which seeks by rules of pleading and practice to arrive at the true substance of things, and not be drawn into a judicial chase after false shadows. The law is otherwise. The plea of general denial is simply waived when it is followed by special pleas as in this case. Price v. Mining Co., 83 Mo. App., loc. cit. 474; Bank of Monett v. Stone & Prickett, 93 Mo. App., loc. cit. 294. As stated by Smith, P. J., in the Price Case, supra: "It is a rule of pleading that a general denial is overcome by a subsequent confession and attempted avoidance"—citing McCord v. Railroad, 21 Mo. App. 95.

In most of the cases just cited the question was raised after trial. The motion to

strike out in this case in its legal effect was a demurrer, and such motions are governed by the rules which govern demurrers. *Sappington v. Jeffries*, 15 Mo. 628; *Cashman v. Anderson*, 26 Mo. 67. A motion for judgment on the pleadings partakes of the nature of a demurrer, in that it admits all facts that are well pleaded, and, if sustained, judgment goes at once. In this it differs from a demurrer. If the demurrer is sustained, the order is not a final judgment. The party has a right to plead over. *Sternberg v. Levy*, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438. The motion, like the demurrer, raises an issue of law only. *State ex rel. v. Higgins*, 84 Mo. App. 531; *State ex rel. v. Simmons Hardware Co.*, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676.

The only case in our state to which our attention has been called where a motion to dismiss before trial was considered is that of *State ex rel. v. Rogers*, 79 Mo. 283. This case seems to be nearly parallel to the case under consideration. In that case the answer contained several defenses consisting of a general denial followed by special defenses. The plaintiff demurred to the whole of the answer on the ground that the same constituted no defense to the action. The demurrer was sustained and judgment rendered on the petition for want of further answer as in this case. The Supreme Court there held that where the answer consists of a general denial and special pleas, and the latter do not in terms admit facts sufficient to entitle plaintiff to a judgment, a demurrer to the whole answer will not lie. The proper method of testing the sufficiency of the special pleas is to demur to them only or to move to strike them out. This case seems never to have been overruled or criticised, and, in the light of the latest decisions of the Supreme Court, points out the true rule of practice in such cases, and accords with the liberal principles of the modern law of pleading and practice.

The general denial in this case having, as we have seen, in law been waived by the special pleas, we are brought finally to a consideration of their sufficiency. We take the following quotation from the defendant's answer (count No. 2) as an example of his manner of pleading the warranty: "That said Sheppard, who was agent and traveling salesman for plaintiff (at the time of the sale), in order to induce the defendant to make such order and purchase such shoes on behalf of plaintiff, represented, warranted, and stated to the defendant that the shoes handled by him for the plaintiff, and sold by plaintiff, and the shoes to be shipped to defendant on such order, were of first-class quality, made of good leather for the style and price, were well put together, would wear well; that a warranty of quality went with every shoe to be delivered on the order; that said shoes were as good as or better than the shoes of the same and similar style

and price sold by the Hamilton-Brown Shoe Company, whose shoes were well and favorably known in the community where the defendant had his store, and as good as or better than other shoes of the same style and price sold in that community. Defendant further says that he relied upon such statements, warranties, and agreements, and was induced thereby to give the order as above stated, but that plaintiff did not ship to the defendant shoes of the kind or quality ordered, but did ship to the defendant a bill of shoes similar in number, size, and price, which shoes so shipped and delivered to the defendant by the plaintiff were of inferior quality, made of poor and rotten leather, or imitation leather, and were not well put together, but would rip and tear and go to pieces with ordinary wear of a few hours, and at most a few days, were not as good as the shoes of similar price and style sold in that community by Hamilton-Brown Shoe Company, but were in fact worthless and unmerchantable." If this does not state a cause of action on a breach of warranty, it gives countenance to appellant's assertion: "Then the English language is incapable of expressing a cause of action." That the sale of a chattel with any representation or positive affirmation of its quality and condition, made with the intention of being relied upon and in fact relied upon, is an express warranty for the breach of which an action will lie, has long been the law in English speaking communities. No special form of words is necessary to create a warranty. It is now more than 200 years since Lord Holt first settled the rule in *Cross v. Gardner and Medina v. Stoughton*, which Butler, J., in 1789 laid down in an opinion given by him in the famous leading case of *Pasley v. Freeman*, as follows: "It was rightly held by Holt, C. J., and has been uniformly adopted ever since, that an affirmation at the time of a sale is a warranty, provided it appears in evidence to have been so intended." It is a matter of contract between the parties, and the decisive question is the real intention as to whether the affirmation of fact was made for the purpose of inducing the purchase in the one instance, and whether it was relied upon by the purchaser in the other. *Childs v. Emerson*, 117 Mo. App. 671, 93 S. W. 286; *Haines v. Neece*, 116 Mo. App. 499, 92 S. W. 919; *Young v. Van Natta*, 113 Mo. App. 550, 88 S. W. 123; *Danforth v. Crookshanks*, 68 Mo. App. 311; *Carter v. Black*, 46 Mo., loc. cit. 385. A statement by the seller of chattels that his goods are equal in quality to other well-known articles similar in kind is an express warranty. *Strauss v. American Chewing Gum Co.*, 134 Mo. App., loc. cit. 114, 114 S. W. 73; *Murphy v. Gay*, 37 Mo. 535; 30 Am. & Eng. Ency. of Law (2d Ed.) p. 138. The authorities already cited could be increased to an extent only limited by the time and diligence of the compiler.

Under these principles, the case must be reversed and remanded, which is accordingly done. All concur.

LETT'S-SPENCER GROCER CO. v. MISSOURI PAC. RY. CO.

(Kansas City Court of Appeals. Missouri.
May 3, 1909. On rehearing,
Nov. 1, 1909.)

1. CARRIERS (§ 92*)—RECOVERY OF GOODS BY CONSIGNOR—EFFECT OF GARNISHMENT.

Gen. St. Kan. 1901, § 5278, providing that an order of attachment binds the property attached from the time of service, and the garnishee shall be liable from the time he is served for all property in his hands, and section 5282, providing that a garnishee shall be served personally with summons and making him liable from the time served, places defendant's property in custodia legis from the time of the service of notice upon the garnishee, so that a railroad company ceased to hold defendant's property as a carrier after service of notice of garnishment upon it, but held it as the court's custodian, and was not liable as for conversion for nondelivery of the goods to the consignor on his exercising his right of stoppage in transitu.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 365; Dec. Dig. § 92.*]

2. SALES (§ 289*)—SELLER'S REMEDY—STOPPAGE IN TRANSITU—NATURE OF RIGHT.

The right of stoppage in transitu is merely an extension of the seller's lien for payment of the purchase money.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 824; Dec. Dig. § 289.*]

3. SALES (§ 291*)—STOPPAGE IN TRANSITU—INSOLVENCY OF BUYER.

The right of stoppage in transitu arises upon the discovery by the seller, while the goods are in transit, that the buyer is insolvent.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 827; Dec. Dig. § 291.*]

4. SALES (§ 299*)—STOPPAGE IN TRANSITU—EFFECT.

The exercise of the right of stoppage in transitu by the seller vests in each party to the sale the rights he had before the goods were delivered to the carrier.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 855; Dec. Dig. § 299.*]

5. SALES (§ 296*)—STOPPAGE IN TRANSITU—TERMINATION OF TRANSIT.

The unloading and placing of the goods in the carrier's warehouse does not necessarily prevent the exercise of the right of stoppage in transitu, so that the seller could exercise such right the day after the goods had arrived at destination, but while they were still in the carrier's possession.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 839; Dec. Dig. § 296.*]

6. SALES (§ 294*) — REMEDIES OF SELLER — STOPPAGE IN TRANSITU—PRIORITY OF LIEN—GARNISHMENT.

The seller's right of stoppage in transitu while the goods were still in the carrier's possession could not be impaired by the garnishment of the goods by a creditor of the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 834; Dec. Dig. § 294.*]

7. ATTACHMENT (§ 287*)—PROCEEDINGS—PARTIES—INTERVENTION OF SELLER.

The seller, after giving notice of the exercise of his right of stoppage in transitu, may

interplead to enforce his right of possession in attachment proceedings by a creditor of the buyer.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. § 999; Dec. Dig. § 287.*]

8. ATTACHMENT (§ 300*)—CLAIMANT OF PROPERTY—WRONGFUL ATTACHMENT—ACTION FOR POSSESSION OF GOODS.

The seller, after giving notice of the exercise of his right of stoppage in transitu, may enforce his right to possession by an appropriate action against the officer who levied an attachment against the goods at the suit of a creditor of the buyer, or by an action against the creditor and officer jointly.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1068, 1069; Dec. Dig. § 300.*]

Appeal from Circuit Court, Buchanan County; Henry M. Rainey, Judge.

Action by the Letts-Spencer Grocer Company against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Martin L. Clardy and Ben. J. Woodson, for appellant. Culver & Phillip, for respondent.

JOHNSON, J. Plaintiff sued defendant in the circuit court of Buchanan county for damages for the alleged wrongful conversion of certain goods, wares, and merchandise. A jury was waived, the cause was submitted to the court on an agreed statement of facts, and judgment was rendered for plaintiff in the sum of \$405.63, the value of the property. Defendant appealed. Plaintiff, a wholesale merchant at St. Joseph, sold the goods in question to the W. C. Ross Construction Company of Stockton, Kan., and delivered them to defendant at St. Joseph for transportation to Stockton. They arrived at Stockton November 29, 1907, and were unloaded into defendant's depot at that place. The construction company was insolvent at the time of the sale, but that fact was not known to plaintiff until December 9th. On November 29th, the day of the arrival of the goods at Stockton and while they were still in the possession of defendant, a creditor of the construction company brought suit on a demand against that company before a justice of the peace at Stockton, and caused a garnishment summons to be issued and served on defendant. On December 9th plaintiff notified defendant in writing of its purpose to exercise the right of stoppage in transitu, offered to pay defendant's charges, and demanded the goods. The demand was refused, and this suit followed.

The plaintiff in the garnishment suit in Kansas recovered judgment against the construction company for \$174.63 and costs. Defendant answered as garnishee, stating that it held the goods, but that their vendor (plaintiff here) had exercised the right of stoppage in transitu. Notwithstanding this defense, the justice ordered defendant to deliver the goods to the constable on the payment by that officer of the freight charges amount-

ing to \$26.66. Compliance with this order being refused by defendant, the attachment plaintiff brought a statutory action against defendant in Rooks county, Kan., based on the order. Defendant answered, claiming that the notice by the plaintiff in the present suit of the exercise of its right of stoppage in transitu excused defendant from obeying the order made by the justice. The issues thus raised were tried in the district court of Rooks county, a court of record of general jurisdiction, and submitted to the court, but at the time of the present suit judgment had not been rendered in that action. Plaintiff was asked by defendant to intervene in the Kansas suits, but did not comply with the request, and was not made a party to either suit. The statutes of Kansas and decisions of the Supreme Court of that state bearing on the issues before us were introduced in evidence. In support of its contention that the facts above stated compel a judgment in its favor, defendant argues that the effect of the service on defendant of the garnishment summons was to impound the property, to place it in the custody of the law, and to make defendant its custodian, subject to the orders of the Kansas court; therefore, that defendant was disabled by law from complying with the demand of plaintiff to return the goods, and being thus disabled, cannot be held to have converted the property on account of having done that which the law compelled it to do. On the other hand, plaintiff argues that its right of stoppage in transitu gave it a lien on the goods for the purchase price superior to any lien a creditor of the vendee could acquire by attachment or garnishment; that this lien and the right to enforce it were in force at the time of the garnishment summons, since they would not be lost until actual delivery of the property to the vendee, and, being thus in force, the right was not impaired by the garnishment of the carrier, but could be exercised and enforced against the carrier, regardless of any actions brought to subject the property to the payment of the debts of the vendee to third persons.

Pertinent provisions of the statutes of Kansas relating to garnishment proceedings in justices' courts are as follows: "An order of attachment binds the property attached from the time of service, and the garnishee shall stand liable to the plaintiff in attachment for all property, moneys and credits in his hands, or due from him to the defendant, from the time he is served with the written notice mentioned in section thirty-seven." Section 5278, Gen. St. Kan. (Dassler) 1901. "A garnishee summons shall be issued and personally served, in the same manner as an ordinary summons and from the time of such service the garnishee shall stand liable to the plaintiff for all property, money and articles in his hands or due from him to the defendant." Section 5282, Gen. St. Kan. 1901. The effect of these statutes is to place in custodia

legis the property of the defendant in a garnishment suit from the time of the service of notice on the garnishee. Rood on Garnishments (1896 Ed.) § 194; Drake on Attachments (6th Ed.) § 251. In legal effect the property came under the control of the Kansas court as completely as would have been the case had the officer of that court seized it under writ of attachment; the only difference being that in the latter case the constable would have held the property as legal custodian, while in the case in hand the defendant, on the service of notice, ceased to hold it as a common carrier, and thereafter held it as the court's custodian.

This brings us to the question of whether a vendor may enforce his right of stoppage in transitu before the goods have been actually delivered by the carrier to the vendee, but after they have been seized by an officer of the court under writ of attachment issued in a suit of a creditor of the vendee, or, what is practically the same thing, after they have been impounded by service on the carrier of a garnishment summons. "All authorities agree that the right of stoppage in transitu is nothing but an extension of the vendor's lien on the goods for the payment of the purchase money." Schwabacher v. Kane, 18 Mo. App. 126. "The transit is held to continue from the time the vendor parts with the possession until the purchaser acquires it; that is to say, from the time the vendor has so far made delivery that his right of retaining the goods and his right of lien * * * are gone to the time when the goods have reached the actual possession of the buyer. * * * The stoppage in transitu is called into existence for the vendor's benefit after the buyer has acquired title and right of possession and even constructive possession, but not yet actual possession, * * * and the insolvency of the purchaser is a sufficient justification for exercising the seller's right, though the sale be unconditional and time be given to the purchaser. This right of stoppage is not precluded until the goods have actually reached the buyer or under circumstances equivalent thereto." Estey v. Truxel, 25 Mo. App. 238. The right is based on the equitable rule that one man's property shall not be taken to pay another man's debt. It arises from the discovery by the vendor during the transitus of the insolvency of the vendee, and the ordinary effect of its exercise is "to vest in each party to the contract of sale the rights he had before the possession of the goods sold was delivered to the carrier." Milling Company v. Railway, 97 Iowa, 719, 66 N. W. 1059, 59 Am. St. Rep. 434. "The unloading of the goods and the placing of them in the warehouse of the railroad company does not necessarily terminate the transitus nor put an end to the right of stoppage. So long as they remain in the hands of the carrier or middlemen as such, the right does not cease." Symms v. Schotten, 35 Kan. 310, 10 Pac. 828. The ap-

plication of these rules to the facts in hand compels the holding that at the time of the service of the garnishment summons on the defendant the right of stoppage was vested in plaintiff, and could not be destroyed or impaired by any process issued at the suit of a creditor of the vendee. Further, we agree with plaintiff that, "after a notice of stoppage has been given, the seller may enforce his right of possession thereupon accruing by intervention in the attachment proceeding by interpleader to determine the rights of the parties, or by appropriate action against the officer who levied the writ, or jointly against the creditor and the officer, *or against the carrier or middleman who has refused on account of the attachment to redeliver the goods to the seller.*" But obviously the remedy we have italicized, which is the one sought to be enforced in the present case, would not obtain if, at the time of the service on the carrier of notice to stop the goods, the carrier no longer holds them as a common carrier, but has been transformed into an officer of the court and holds them as the custodian of the court. Plaintiff concedes in his brief that, "If the officer actually seizes the goods and takes them out of the possession of the railroad company and into his own possession under the writ of attachment or execution, then replevin must be brought against the officer because such action must be brought against the person in possession." So in the present case, when the notice of stoppage was served by plaintiff, the property passed out of the possession of the defendants as a carrier into the custody of the law. "After the seizure of the goods by the sheriff under the attachment, they were in the custody of the law, and the

defendant could not comply with the demand of plaintiffs without a breach of it, even admitting the goods to have been at the time in his actual possession." *Stiles v. Davis*, 66 U. S. 101, 17 L. Ed. 33. Holding the goods as the receiver or officer of the court, as it did, how could defendant accede to the demand of plaintiff without violating its duty to the court? It was compelled by sovereign power to hold the goods subject to the orders of that power and its obedience to the command of sovereignty was its first duty. It was not guilty of the conversion of the goods for the simple reason that it exercised no control of its own over them, but, as we have seen, merely held them as the instrument of a higher power to which it owed obedience. The right that inured to plaintiff was not lost or impaired by the service of the garnishment on defendant, but the particular remedy now sought to be enforced was lost by the jurisdiction assumed by the Kansas courts over the res to which the lien attached. Defendant committed no wrong against any right of plaintiff, and consequently cannot be held liable as a wrongdoer.

The judgment is reversed. All concur.

On Rehearing.

BROADDUS, P. J. A rehearing was granted in this case because of the importance of the legal questions involved, and the possibility that the former decision might be erroneous. But after a careful consideration of the case anew we are satisfied that there can be no question but what the decision correctly states the law, and that it results in justice as well.

Reversed. All concur.

HARING et al. v. SHELTON et al.

(Supreme Court of Texas. Nov. 3, 1909.)

1. ADVERSE POSSESSION (§ 71*)—LIMITATIONS—STATUTES.

The three-year statute of limitation does not protect one not deraining title from the state.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 422; Dec. Dig. § 71.*]

2. ADVERSE POSSESSION (§ 82*)—LIMITATIONS—STATUTES.

The five-year statute of limitation does not protect one claiming under a deed from an individual, where he does not show the date of the recording of the deed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 468; Dec. Dig. § 82.*]

3. EXECUTORS AND ADMINISTRATORS (§ 148*)—SALE OF REAL ESTATE—VALIDITY—BURDEN OF PROOF.

Where a will does not authorize the independent executrix to sell real estate, a purchaser from her has the burden of proving that at the time of the sale such conditions existed as would authorize the probate court to order a sale.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 595-601; Dec. Dig. § 148.*]

4. EVIDENCE (§ 317*)—HEARSAY EVIDENCE.

In trespass to try title, in which defendant claimed under a deed on a sale by an independent executrix to pay debts of testator, declarations of the executrix as to the existence of debts at the time of the sale, made after the sale, are inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

5. WILLS (§ 439*)—CONSTRUCTION—INTENTION OF TESTATOR.

In construing wills the object is to ascertain the intention of the testator, and an intention not inconsistent with the rules of law will govern.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.*]

6. WILLS (§ 602*)—CONSTRUCTION—ESTATE CREATED—DEFEASIBLE FEE.

Testator devised to his wife, "her heirs and assigns forever, the following described land, * * * and it is my will that my said wife and her heirs shall hold said land in fee simple forever, or so long as she shall remain a widow." *Held*, that the wife took a fee-simple title, determinable on her remarriage.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1356; Dec. Dig. § 602.*]

7. VENDOR AND PURCHASER (§ 229*)—BONA FIDE PURCHASER—NOTICE.

A purchaser of realty from a devisee who took a fee-simple title thereto, determinable on her remarriage, is charged with notice of the terms of the will and takes only the devisee's title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 482; Dec. Dig. § 229.*]

Error from Court of Civil Appeals of First Supreme Judicial District.

Action by J. W. Shelton and others against J. G. Haring, in which the First National Bank of Crockett intervened. There was a judgment of the Court of Civil Appeals (114 S. W. 389) affirming a judgment for plaintiffs, and defendant and intervener bring error. *Affirmed*.

Nunn & Nunn, for plaintiffs in error. Aldrich & Crook, for defendants in error.

BROWN, J. From the opinion of the Court of Civil Appeals we copy the following statement of the case: "In this case J. W. Shelton et al. sue J. G. Haring in trespass to try title to recover a tract of land. The First National Bank of Crockett intervened, setting up that it had acquired Haring's title. Upon trial without a jury the plaintiffs had judgment for an undivided four-ninths of the land sued for, and from the judgment defendants appeal. Conclusions of fact and law by the court were filed. The case turned upon the validity of a deed to Haring by C. C. Shelton, surviving widow, in her own right and as independent executrix of W. M. Shelton, ancestor of plaintiffs, to convey the land, and the effect of this deed depended upon: (1) The existence of debts against the estate of the testator at the date of the deed, to authorize the independent executrix to sell, and (2) upon the estate vested in her as devisee by the terms of the will, as authorizing her to convey in her own right. If the existence of such debts was shown, and, if not, if the will vested in her the entire estate instead of an estate limited to her widowhood, her deed conveyed the land, and plaintiffs in either event were not entitled to recover. The court found on both issues against the defendants. W. M. Shelton was twice married. Appellees (plaintiffs below) are some of the children of the first marriage. Shelton and his first wife owned in community a tract of land in Falls county. After the death of the first wife and the second marriage to C. C. Shelton, Shelton exchanged the Falls county land for land in Houston county, of which the land in controversy is a part, taking the title to the Houston county land to himself and his second wife, C. C. Shelton. Shelton died leaving a will which was duly probated, wherein he named his wife independent executrix, after devising to her his entire estate, in the following language: 'I give and devise unto my beloved wife, C. C. Shelton, her heirs and assigns forever, the following described tracts or parcels of land, to wit: A tract of 51 acres in Houston county, Texas, about 4 miles N. W. from the town of Crockett, and fully described in a deed to me by H. G. Sanders, bearing date June 11, 1892. Also a tract of 210 acres of land in said county and state, on the Wm. White headright survey, about 4 miles N. W. from the town of Crockett, and fully described in the above-mentioned deed from H. G. Sanders to me, except 50 acres heretofore sold by me to Alex Anderson, which is reserved out of the said 210 acres tract, said two tracts being formerly known as the West Christian place, and now occupied by me

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and my said wife as our homestead, and it is my will that my said wife, C. C. Shelton, and her heirs shall hold said lands in fee simple forever, or so long as she shall remain a widow.' No express power to sell is given by the will. Shelton died in 1893. In 1895, two years after Shelton's death, Mrs. Shelton in her own right, and as independent executrix, executed to J. G. Haring a deed to the land in controversy, reciting that it was done to pay debts of the estate. Mrs. Shelton married again in 1903. The suit was filed in 1904. She died after the suit was filed and before trial."

It is unimportant to the disposition of this case whether the property in question was the community property of Shelton and his first wife or not, unless we shall find it necessary to reverse the judgment of the Court of Civil Appeals upon one or both of the following propositions, which are contended for by the plaintiffs in error in this case: (1) It is claimed that the trial court and Court of Civil Appeals erred in finding and holding that there were no debts against the estate of Shelton at the time of the sale made by his widow to Haring, and therefore that the sale was not made for the purpose of paying the debts due from Shelton's estate. (2) It is contended by plaintiffs in error that the trial court and Court of Civil Appeals erred in holding that the will of Shelton did not vest an estate in fee simple in his widow, C. C. Shelton.

The defendant and intervener pleaded the statute of limitations of three and five years; but they did not deraign title from the state. Therefore the three-year statute did not apply, and they claimed the five-year statute of limitation under the deed from Mrs. C. C. Shelton, but did not show the date when it was recorded. Having failed to show themselves entitled to the bar of either period of limitation, it is not necessary for us to pass on the assignment which presents that question.

The second and third assignments of error assert that the trial court and Court of Civil Appeals erred in holding that there were no debts against the estate of W. M. Shelton. There being no provision in the will authorizing the sale by the executrix, the burden of proof was on the purchaser to show that at the time of the sale such conditions existed as would have authorized the probate court to order the sale of the land. *Freeman v. Tinsley* (Tex. Civ. App.) 40 S. W. 835; *Roberts v. Connellee*, 71 Tex. 16, 8 S. W. 626; *Mayes v. Blanton*, 67 Tex. 247, 3 S. W. 40. The evidence introduced upon this question was not so conclusive as to authorize this court to say that the trial court and Court of Civil Appeals erred in holding that the evidence did not show that debts existed against the estate of W. M. Shelton.

At the trial the defendant and intervener

offered to prove the declarations of Mrs. C. C. Shelton, made after her second marriage and after the sale of the land, to the effect that debts existed against her husband's estate at the time the sale was made, which evidence the trial court excluded. There was no error in this ruling. The testimony offered was hearsay, and therefore not admissible.

The principal questions in this case are: What title did Mrs. C. C. Shelton take under the terms of the will, and what interest did she convey to J. G. Haring by her deed to him? The will of W. M. Shelton contained the following provisions: "I give and devise unto my beloved wife, C. C. Shelton, her heirs and assigns forever, the following described tracts of land." Then follows the description of the tracts of land in that paragraph of the will and in the succeeding paragraph. After the description of the property, we read in the will: "It is my will that my said wife, C. C. Shelton, and her heirs, shall hold said lands in fee simple forever, or so long as she shall remain a widow." The language first quoted was sufficient to vest in Mrs. C. C. Shelton the title in fee simple to the interest of the testator in the land and did so vest that title in her; but, by the language which was used in the succeeding paragraph of the will, the estate was qualified and converted into a fee-simple estate determinable upon a future contingency, that is, upon the second marriage of Mrs. C. C. Shelton. "The intention of the testator is the first and great object of inquiry in the construction of wills, and it must govern, provided it be not inconsistent with the rules of law." *Laval v. Staffell*, 64 Tex. 372. It is evident that Shelton did not intend to give to his wife the lands in question, free of the claims of any one in the future; but it was his purpose that his widow should have the property as her own, subject to the condition that she should remain a widow.

In the case above cited the testatrix used this language: "I give and bequeath to my son, Alcide Francois Phaneuf, the store and lot which I own in the city of San Antonio, on the north side of the Main street, and on the south of the San Antonio river, between lots belonging to Mr. August Nette, druggist (on the east and west). This legacy is made with the following restrictions, namely: That before my said son shall have completed his twenty-fifth year, he shall have no other right over the real estate and fixtures which I bequeath to him than to receive and dispose of the revenue thereof, without having the right in any manner to incumber, mortgage or sell the said property before he shall have completed the twenty-fifth year of his age; and if my said son should leave this world (which God forbid) before having reached that age, in that case the lot, house, or store aforesaid shall

pass in full right and free from all charges in full property to my aforesaid daughter, Maria Reine Celine Phaneuf." The court held that that provision which restrained the devisee from selling or mortgaging the property was void, but also held that the provision which limited the estate granted to Alcide was lawfully limited by the provision that, if he should die before he reached his twenty-fifth year, the property should pass to another, and the court said: "The provision therefore that the estate should pass to the appellant in case of the death of Alcide before reaching the age of 25 years was one which the testatrix was authorized to make, and there is nothing in the restraint upon alienation that can prevent this will and intention of the testator from being carried out. Treating the provision as to alienation as void, we must read the will as if no such restriction had been imposed. Alcide is then left with the power of selling or mortgaging all the interest or title he held in the property under the will; that is, a fee-simple estate liable to be defeated upon the contingency of his dying before becoming 25 years of age. To this extent only could he have sold or incumbered the estate had the restriction as to alienation not been made. The insertion of the void condition could not certainly have given him greater power over the estate than he would have had without it. The mortgage to Grothaus therefore furnished him security only to the extent of Alcide's title to the land, as above stated. Grothaus took the risk of Alcide's living to the age of 25 years. If that contingency happened, the entire fee-simple estate was pledged to him for the payment of his debt; otherwise, his security could last only to the death of Alcide, and, if the property in the meantime had been sold in satisfaction of the mortgage, the title of the purchaser would have expired with the death of Alcide."

That case is very similar in its facts to the one under consideration, and conclusively establishes the fact that in this case Mrs. Shelton took the fee-simple title, determinable upon her marriage, and that the plaintiffs in error, the bank, and Haring, took the title of Mrs. Shelton, and no more, which was terminated in their hands by her second marriage, the same as it would have been if the title had remained in her. No claim is made that they acquired any rights as innocent purchasers from Mrs. Shelton, and, indeed, the facts show that no such claim could exist, for their title was derived through the will, by which the limitation was plainly expressed, and the purchasers from Mrs. Shelton were charged with notice of the terms of the will under which they derived their right.

The judgments of the district court and Court of Civil Appeals are affirmed.

HOPKINS et al. v. HOPKINS.

(Supreme Court of Texas, Nov. 3, 1909.)

1. DEEDS (§ 128*)—ESTATE GRANTED—RULE IN SHELLEY'S CASE—"HEIRS."

The granting clause of a deed was to the grantor's son H. and to his "heirs," "on the terms and conditions hereafter stated," the habendum clause to H. and his "heirs," the special warranty to H. and his "heirs," and the "terms and conditions hereafter stated" were: "The intention * * * is to vest sufficient title in * * * H. to the * * * property so that he can, during his life, use, occupy, and enjoy it * * * as completely as though he had a fee simple, and at his death his children are to have a fee-simple title. Should * * * H. die without issue, then the title * * * is to revert in us * * * if we are living; if we are not living, then according to the descent and distribution laws * * * such of our heirs are to receive and have the same title as he gets, and whoever inherits said property hereafter shall have a fee-simple title." Held, that the rule in Shelley's Case did not apply, so as to vest the fee in H.; it appearing from the subsequent terms and conditions referred to in the granting clause, and which are to be read as if incorporated in it, that the word "heirs" therein is used, not in its legal sense, but in the sense of "children" or "issue" of H. living at his death, who are to take by purchase, as remaindermen.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 413-415; Dec. Dig. § 128.*]

2. DEEDS (§ 129*)—CONSTRUCTION—"CHILDREN"—"ISSUE."

The words "children" and "issue" in a deed will not be read as meaning "heirs," where not to do so will carry into effect the lawful intention of the grantor that the grantee take only a life estate, and his children living at his death the remainder; while to do so would defeat such intention.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 416; Dec. Dig. § 129.*]

Error from Court of Civil Appeals of Second Supreme Judicial District.

Action by Samuel B. Hopkins against Carrie A. Hopkins, guardian of Carrie B. Hopkins, a minor, and others. Judgment for plaintiff was affirmed by the Court of Civil Appeals (114 S. W. 673), and error is brought in behalf of said minor. Reversed and dismissed.

D. H. Morrow and Lewis & Phillips, for plaintiffs in error. Davis & Thomason, for defendant in error.

WILLIAMS, J. This action was brought by defendant in error to obtain a construction of a deed and an adjudication that it vested in him a fee-simple title to the land conveyed by it. A copy of the deed in question is attached to the petition and is from S. B. Hopkins and his wife, Mary B. Hopkins, to plaintiff, their son. It states that it is made in consideration of love and affection, and the parts material to the decision are as follows, in their order: (1) Granting clause, "unto our said son, Samuel Bunch Hopkins, and to his heirs, upon the terms and conditions hereinafter stated." (2) Hab-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

endum clause, "to our said son and his heirs." (3) Special warranty of title to "said premises unto our said son, Samuel Bunch Hopkins, and his heirs." (4) The following: "The intention of this conveyance is to vest sufficient title in our said son, Samuel Bunch Hopkins, to the above-described property, so that he can, during his life, use, occupy and enjoy it, and receive therefrom all the benefits as completely as though he had a fee-simple title, and at his death his children are to have a fee-simple title. Should our son, Samuel Bunch Hopkins, die without issue, then the title to said property is to revert in us as completely as though this conveyance had never been made, if we are living; if we are not living, then according to the descent and distribution laws of Texas such of our heirs are to receive and have the same title as he gets, and whoever inherits said property hereafter shall have a fee-simple title." We have, for convenience in reference, numbered the clauses. It appears from the petition that both the grantors are dead, leaving three children, plaintiff and two sisters. The father, however, survived the mother and married again and left a widow and a daughter, Carrie B. Hopkins, the plaintiff in error. This widow and the two full-sisters and the half-sister of plaintiff are the defendants in this action. The defense is made in behalf of the minor half-sister, and was presented only by demurrer to the petition, which was overruled, and judgment was rendered for plaintiff in accordance with his prayer. The appeal from this judgment and, upon its affirmance, this writ of error, were prosecuted in behalf of the minor.

The question argued is whether the plaintiff took a fee-simple title, or only an estate for life. It is the contention of the plaintiff below, sustained by the Court of Civil Appeals, that the deed vested in him the fee by force of the rule in Shelley's Case, which is, briefly, thus stated: "If an estate for life, or any other particular estate of freehold, be given to one, with remainder to his heirs, the first taker shall be held to have the fee, and the heirs will take by descent, and not by purchase." Counsel for defendant (plaintiff in error) contend that the rule has no application, for the reason that, if we try to apply it to the granting clause, the habendum clause, and the warranty, without regard to the words, "upon the terms and conditions hereinafter stated," we find, not a life estate, but a fee-simple estate granted to the first taker, while, if we regard the words just quoted and the last provision in the deed to which those words evidently refer, we find a life estate granted to the first taker and a remainder, not to heirs, but to children. The several parts of the deed are not to be considered without reference to each other, but are to be construed together and the effect of one upon the other so determined; and a question upon which

the decision must depend does thus arise as to the application of the rule in Shelley's Case.

The grant in the first clause to Samuel Bunch Hopkins and to his heirs, if that were all, unquestionably would create in him a fee simple; but we cannot stop at those words, because the clause itself does not stop with them. The added words, "upon the terms and conditions hereinafter stated," are a part of the granting clause itself and of equal dignity with the other language of that clause. Until we look to other parts of the deed to see the "terms and conditions," we cannot rest upon the assumption that the estate granted is such as the other words, by themselves, would convey, for, as we shall see, it was competent for the grantors, notwithstanding the use of words proper to the creation of a fee simple, to show by other provisions in the deed that those words were used in a restrictive, but legitimate, sense, in which they would create a life estate only. The reference in the first clause to other parts of the deed for provisions that might determine the quantity of the estate granted had the effect of importing into the granting clause those other parts and of making them a part of that clause as fully as if they had been written therein. The deed thus read is a grant to the first taker and to his heirs; the estate granted to the former being in effect further defined as a life estate. If this were all, the rule in Shelley's Case would undoubtedly control and vest in the first taker a fee simple; but, after restricting the first estate to one for life, the deed grants the remainder in fee to the "children" of the first taker. It then provides for a reversion to the grantors, if living, should the first taker die without "issue."

We think it obvious that those who are to take after the death of the first taker are thus called indiscriminately "heirs" and "children" and "issue." The legal effect of the deed depends on the meaning of the grantors in using those words. If they meant heirs in the legal sense—that is, those appointed by law to take by inheritance from the first taker in regular succession from generation to generation—the rule in Shelley's Case would apply and vest the fee in him, for no mere declaration of an intention to limit the estate to one for life could prevail over the effect given by law to the use, in its legal sense, of the technical word "heirs." On the other hand, if that word was used as it often is used by unskilled persons only to designate the children, or the issue, who should be living at the death of the first taker, to take by purchase, as remaindermen, it expresses a perfectly lawful intent to which effect must be given. The real difficulty often arising in such cases results from the misuse of words and is experienced in fixing upon those which express the true intention of the grantors, for the

word "heirs" is often used in the sense of "issue," and even of the still more restricted one of "children," while both the latter terms may be used when those to take generally by inheritance, as heirs in the broadest sense, are in mind. 2 Washb. Real Property, 653, 654.

In this case, however, we have not found much difficulty in reaching the conclusion that the grantors, when they used the words "heirs" and "issue" and "children," all the time had in mind one or the other of two classes of persons, viz., such "children" as the first taker should leave at his death, or such "issue" as he should leave at that time. All that militates against this view is the use of the word "heirs." As we have seen it is always permissible to ascertain from the whole language of an instrument that that word was used in a narrower sense than its true one and to give to it the effect it should have in that narrower sense provided the other language clearly indicates the restricted use. When the word is first used in this deed, referring to those who are to take after the first taker, it is at once followed by others which point to explanatory provisions to be introduced later. We look to those and find the words "children" and "issue" referring to the same class in provisions whose validity depends on the interpretation of all of the words in a sense more restricted than the true sense of the word first used. The estate first granted is in effect declared to be one for life, which it could not be if the remainder in fee really were limited to heirs; but the remainder in fee is granted to "children," and not limited to heirs, and this is a perfectly valid disposition, unless the word "children" is to be read as meaning "heirs" broadly. This we think should not be done. The clear intent can have effect by construing the words as we have indicated. According to the principle uniformly applied by this court in this very connection, the construction which carries into effect the intention, where that is lawful, is to be adopted in preference to that which defeats it. *Hancock v. Butler*, 21 Tex. 804; *Simonton v. White*, 93 Tex. 50, 53 S. W. 339, 77 Am. St. Rep. 824. That by "children" and "issue" the grantors did not mean "heirs" in the general sense essential to the application of the rule in *Shelley's Case* is indicated by the phrase, "at his death," which designates those persons of the class intended then living who are to take the fee by purchase and not by inheritance. *Hancock v. Butler*, supra, 21 Tex., at page 817. These words properly are words of purchase, and in order to treat them as words of limitation such use of them must clearly appear. The word "heirs" cannot be held to have that effect when the instrument shows, as we think this does, that it is the one mistakenly used.

We might pursue the discussion through the other language of the fourth clause to show the plain intention of the grantors to restrict the first taker's interest to a life estate and to grant the remainder in fee to his children or issue; but the question at last turns upon the meaning of the word "heirs" in this particular deed, and we have no doubt that it was used in the sense of one or both of the later words, "children" and "issue." Whether "children" is to be broadened to mean "issue," or "issue" narrowed to mean "children," is wholly immaterial to this controversy, since either word designates as remaindermen, to take by purchase, and not by inheritance, a class of persons to be ascertained at the death of the first taker. When we find the sense in which "heirs" is used in the first clause, there is no reason whatever for assuming that the word has a broader meaning in the second and third clauses.

It is argued that the warranty to Samuel Bunch Hopkins and his heirs has especial force in favor of plaintiff's contention, since he would leave nothing to his heirs if he took only a life estate, and there would therefore be nothing for the warranty to heirs to operate upon; but if the heirs referred to are merely the children, or issue, as we have held, and take the fee by purchase, the warranty applies as fully as if the fee vested in the ancestor and descended to the heirs by inheritance. Neither the habendum nor the warranty clause furnishes anything to change the question as it arises upon the granting clause. We do not intend to determine questions as to rights that may arise in others than children, or issue, under the fourth clause, since our conclusion that plaintiff took only a life estate ends the case. We may say, however, that this conclusion results in the further one that the provision that, in defined circumstances, the estate is to go according to the law of descent and distribution, cannot mean that it is to go to the heirs of Samuel Bunch Hopkins, Jr., since only a life estate is vested in him.

The exception to the petition should have been sustained, and, as there is no probability that a better case can be stated, the proper judgment to be here rendered is one of reversal and dismissal.

Reversed and dismissed.

KEITH et al. v. GUEDRY.

(Supreme Court of Texas. Nov. 3, 1900.)

1. PUBLIC LANDS (§ 172*)—FORFEITURE—EVIDENCE.

One claiming the benefit of a forfeiture under Act Aug. 30, 1856 (Laws 1856, p. 81, c. 150), providing that when a survey has been made on a conditional certificate, and the field notes returned to the General Land Office, the unconditional certificate shall be returned to and filed in such office by a certain time, or the sur-

vey shall be forfeited, has the burden of proving the facts necessary to establish it; so that in case of doubt it will be presumed a survey was made, not by virtue of the conditional certificate, but by virtue of the unconditional certificate, in which case there would be no forfeiture.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 540, 541; Dec. Dig. § 172.*]

2. CONSTITUTIONAL LAW (§§ 93, 123, 190*)—RETROACTIVE LAWS—IMPAIRING OBLIGATION OF CONTRACTS—VESTED RIGHTS—PUBLIC LANDS.

Act Nov. 29, 1871 (Laws 2d Sess. 1871, p. 45, c. 57), providing that in all locations and surveys of land theretofore made by virtue of any of certain certificates, embracing a headright certificate, and in which the field notes have been returned to the General Land Office, and the certificate by virtue of which the survey was made is not on file in such office, and has not been withdrawn for location of unlocated balance, such certificate shall be returned to and filed in such office within a certain time, or the location and survey shall be void, is not retroactive, and does not impair the obligation of contracts or vested rights, in contravention of Const. art. 1, § 16; it not impairing the rights of the grantee to the certificate, or the right to acquire land by locating it, but merely providing conditions on which title to land located on may be completed, with forfeiture of imperfect rights in default of compliance with the conditions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 177, 183, 293-297, 530; Dec. Dig. §§ 93, 123, 193.*]

3. PUBLIC LANDS (§ 172*)—FORFEITURE—EVIDENCE.

Under Act Nov. 29, 1871 (Laws 2d Sess. 1871, p. 45, c. 57), declaring void prior locations and surveys on certificates not returned to the General Land Office within eight months after passage of the act, defendant, who claimed under such a location and survey, would have to show, as against plaintiffs, to whom a patent was issued on a subsequent location, that the certificate was returned within such time, which would show a vested right in him superior to that of plaintiffs, unless they prove that, after deposit of defendant's certificate in such office, it was withdrawn therefrom by defendant, or some one authorized by him to do so, in which case his survey was forfeited.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 540, 541; Dec. Dig. § 172.*]

Error from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by J. F. Keith and another against Gustan Guedry. Judgment for defendant was affirmed by the Court of Civil Appeals (114 S. W. 392), and plaintiffs bring error. Reversed and remanded.

Andrews, Ball & Streetman and George D. Anderson, for plaintiffs in error. Greens & Nall and J. W. Lockett, for defendant in error.

BROWN, J. J. F. Keith and the Keith Lumber Company brought this suit against Gustan Guedry to recover title and possession of so much of the John M. Bowyer 1,238½-acre survey as is in conflict with the John P. Wilds 640-acre survey, situated in Hardin county. Keith and the Keith Lumber Company claimed under John H. Kirby by warranty deed, and made him a party

defendant in the suit. The petition contained the usual allegations in actions of trespass to try title, and also set up a claim on the part of the plaintiffs to the land under the statute of three years' limitation. The defendant disclaimed title to all of the land except that covered by the Wilds survey, which he described in his answer, and answered by a plea of not guilty and of three, five, and ten years' statutes of limitation. The trial court instructed the jury as follows: "You are instructed by the court that, unless the plaintiffs can recover under the statute of three years' limitation (upon which you will hereinafter be instructed), then your verdict should be for the defendant, Gustan Guedry, upon the issue of title to the land." The jury returned a verdict for the defendant.

We extract from the opinion of the Court of Civil Appeals the following statement of the facts of the case: "The appellants claim under the John Bowyer survey of 1,238½ acres, which was surveyed March 30, 1881, for J. W. Lawrence, by virtue of duplicate certificate No. 35/137 issued January 24, 1879, in lieu of certificate No. 1,062, issued by the board of land commissioners of Harris county on August 9, 1851, to John M. Bowyer. The field notes of the survey were filed in the General Land Office April 12, 1881, and on October 25th of that year were indorsed as being in conflict with the John P. Wilds survey, and on November 9, 1883, were indorsed corrected. On July 2, 1886, patent was issued for the land described by the field notes to Levi Ketchum and James D. Rhea, as assignees of James M. Bowyer, which was recorded in Hardin county, where the land is situated, in 1897. It is conceded by the appellee that appellants connected themselves by a complete chain of title with the patentees. The appellee claims the John P. Wilds unpatented survey of 640 acres, which, except a small portion in conflict with the Cochran survey, is covered by the Bowyer survey, claimed by appellants. This survey was made on April 30, 1856, by virtue of the land certificate hereinafter mentioned, and the field notes thereof filed in the General Land Office, July 14, 1856. On July 4, 1839, the board of land commissioners of Jefferson county, under the act of January 4, 1838, issued to John P. Wilds conditional headright certificate No. 46, for 640 acres, which certificate recites all the facts entitling him to it under the law and prerequisite to its issuance. On July 18, 1836, the clerk of said board reported to the General Land Office a list of certificates issued by it, which included the one above mentioned. The board of commissioners appointed under the act of January 29, 1840 (Laws 1840, p. 139), to inspect the records of the boards of land commissioners and ascertain by satisfactory testimony what cer-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tificates for land had been issued by the respective boards to legal claimants, and report to the Commissioners of the General Land Office such certificates as they should find to be genuine and legal, in its report of May 24, 1841, pronounced such conditional certificate genuine and legally issued. On November 8, 1845, the board of land commissioners of Jefferson county, under the act of January 15, 1841, defining the mode by which the holders of conditional certificates shall establish the same, issued to John P. Wilds his certificate No. 46 for 640 acres; he having established his right thereto in accordance with the provisions of said act, and the order of the board reciting the names of the witnesses, the date and number of his conditional certificate, and its class and number of acres. The 640 acres in controversy were surveyed April 30, 1856, by A. H. Redding, surveyor of Jefferson county, which then included what is now Hardin county. The field notes of the survey recite that it was made by virtue of headright certificate No. 46, and they were recorded in the surveyor's office April 30, 1856, and were, as before stated, on July 14, 1856, with map there-to attached, filed in the General Land Office, and on March 27, 1886, they were, in such office, indorsed in pencil as being in conflict with the Bowyer survey. The evidence tends to show that a certificate was filed with the field notes; but whether the conditional or unconditional it does not disclose with any degree of certainty. It has not been in the land office since this suit was filed, and no witness who testified in the case had any recollection of ever having seen it there on file. The questions as to whether it was filed, and, if it was, which certificate, were not submitted to the jury, because deemed by the trial court of no importance, under its view of the case."

It was not disputed that the plaintiffs had the title which was granted by the state by virtue of the location of the John M. Bowyer survey, and the defendant, Gustan Guedry, had the title which was acquired by the location of the John P. Wilds survey. The case was brought to this court by writ of error sued out by the plaintiffs in the court below. The statute of August 30, 1856 (Laws 1856, p. 81, c. 150), prescribed that when a survey of land had been made upon a conditional certificate, and the field notes returned to the General Land Office, the unconditional certificate should be returned and filed in the land office on or before the 1st day of August, 1857, and, upon failure to comply with that requirement, the survey should be forfeited. The terms of that statute do not apply to the present case because the testimony does not show that the survey in question was made by the conditional certificate issued to J. P. Wilds. It is at least doubtful, according to the findings of the Court of Civil Appeals, whether the survey was made by the conditional or the uncondi-

tional certificate, and, in such state of facts, the court will presume that it was made by virtue of the unconditional certificate, which would sustain the rights acquired thereby. One who claims the benefit of such forfeiture must prove the facts necessary to establish it. The constitutionality of the law of 1856 becomes immaterial in this state of the evidence.

On the 29th day of November, 1871, the Legislature of this state enacted that: "In all locations and surveys of land heretofore made by virtue of any such certificate, as is specified in the first section of this act, and in which the field notes have been returned to the General Land Office and the certificate by virtue of which the survey was made is not on file in the General Land Office, nor has been withdrawn for location of unlocated balance as is provided in the first section of this act, such certificate shall be returned to, and filed in the General Land Office within eight months from the passage of this act, or the location and survey made by virtue thereof, shall be null and void." Laws 2d Sess. 1871, p. 45, c. 57. The J. P. Wilds certificate, being a headright, was embraced in the terms of the first section of that act, therefore included in the part of the second section copied above. At the date of that enactment the J. P. Wilds certificate was not in the General Land Office, neither was it returned to that office prior to the 29th day of July, 1872. It follows that by the unmistakable language of the law the survey made under that certificate became void, and on March 30, 1881, the land was subject to location and appropriation by the certificate of John M. Bowyer, then located thereon, unless it shall appear that the unconditional certificate was at some time prior to July 29, 1872, on file in the General Land Office.

The honorable Court of Civil Appeals laid down these propositions: (1) That the issuance of the certificate to J. P. Wilds constituted a contract between him and the state under which he was entitled to appropriate 640 acres of the public domain. (2) That the location and survey of the land and return of the field notes to the General Land Office under that certificate constituted a vested right in the owner of it to that survey of land. Upon these propositions the Court of Civil Appeals based its conclusion that the act of November 29, 1871, was in conflict with article 1, § 16, of the Constitution of the state, which reads as follows: "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made." It is claimed that the law is retroactive and violated the obligation of the contract and impaired the vested right secured by the location and survey. The act of 1871 here in question did not in any manner impair the rights of the grantee to the certificate issued to Wilds, nor did it destroy the right to acquire land by locat-

ing it. Only the location and survey are made void. After the forfeiture of the survey, the certificate might still have been located upon the public domain of the state. Therefore there was no impairment of the terms or the legal effect of the contract between the state and the citizen. The law did not destroy the right acquired by the location. "In all such cases, however, the imperfect right is lost through the failure of the person who claims, and seeks to assert it, to do what he knew he must do, and without which the law promised nothing. That the law may be passed after the imperfect right has an existence does not make it objectionable."

It is true that a survey under the Wilds certificate and the return of the field notes and certificate would have constituted a vested right in that land to the extent that it secured to the owner of the certificate a right to perfect his imperfect title to the land in the manner and time prescribed by law, or that should thereafter be prescribed; but it did not invest the owner with the title to the land that remained in the state until the patent should be issued. In order to complete his title Wilds, or his assignee, was required to present the certificate to the Commissioner of the General Land Office and procure a patent for the land. The location and survey could not have been perfected into full title without presenting the certificate to the Commissioner of the General Land Office and depositing it with him. It would be implied that the certificate upon which the patent was issued should be delivered up to the state. The Legislature had the authority to prescribe a time within which those acts should be performed and to declare a forfeiture of the survey on failure of the owner to comply with the terms expressed. *Snider v. Methvin*, 60 Tex. 499. In that case this court said: "That the Legislature may prescribe a time within which a person must perform acts necessary to the vestiture of title to land is certainly true; and that, in case of failure to comply with such a requirement, imperfect rights, such rights as could be made perfect only by compliance, may be annulled by legislation declaring the utmost limit of time which shall be given to perform such acts. Instances of the exercise of such power by the Legislature are seen in those acts requiring surveys already made to be returned within a given time or the surveys to become null and void, and in acts prescribing the period within which land certificates of the various classes should be presented to the several boards and tribunals created to determine the validity and genuineness of such claims."

To the instances mentioned by the court we would add the following: In 1876 the Legislature enacted a law (Laws 1876, p. 46, c. 48, § 4, as amended by Laws 1879, p. 35, c. 35), providing that in case the records of

deeds of any county had been, or should be, destroyed by fire, every owner of land whose deed had been recorded in said records should have four years' time within which to re-record the instrument, and, in case of failure to do so, the destroyed record should no longer constitute notice of the existence of the deed. The Supreme Court sustained this law as being valid. *O'Neal v. Pettus*, 79 Tex. 254, 14 S. W. 1065. On the 5th day of February, 1840, the Congress of the Republic of Texas passed an act whereby it required that all of a certain class of certificates which had been previously issued should be presented to a board of commissioners created by that act within a given time, and that the person claiming to own such certificate should be required to establish its validity, and in case it was not presented or not proved to be genuine the right under such certificate should cease. The Supreme Court of the state held that law to be constitutional, although it did in fact destroy the right claimed to have been acquired by reason of the issuance of the certificate. *Hosner v. De Young*, 1 Tex. 764. In the year 1856 the Legislature passed a law which required that each owner of a land certificate of certain classes theretofore issued should present his certificate to a commissioner to be appointed, and by proof to establish its validity and failing to do so the certificate should cease to be of any force. That law was sustained in an opinion delivered by Chief Justice Moore in the case of *Durrett v. Crosby*, 28 Tex. 688. Other similar laws which have been sustained might be cited; but we deem these sufficient. We are of opinion that the Court of Civil Appeals erred in holding the act of the 29th or November, 1871, to be void, and for such error the judgment in this case must be reversed, and the cause remanded.

In remanding the cause we think it proper to say that, the state having issued a patent upon the location made under the Bowyer certificate, it will devolve upon the defendant below to prove that the unconditional certificate issued to J. P. Wilds was located and the field notes and certificate returned to and deposited in the General Land Office at some time prior to the 29th day of July, 1872. Such proof in our opinion would show a vested right which would be superior to the right upon which the patent was issued, unless the plaintiffs shall prove that, after the Wilds certificate had been deposited in the land office, it was withdrawn therefrom by the owner of the certificate, or by some person authorized by him to do so. *Snider v. Methvin*, cited above. If such proof should be made by the plaintiffs, then the survey made by the Wilds certificate must be held to have been forfeited under the act of November 29, 1871, and plaintiffs would be entitled to recover the land in controversy.

Reversed and remanded.

FRANKS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

CRIMINAL LAW (§ 1090*)—APPEAL—QUESTIONS REVIEWABLE.

Where accused stated in his motion for new trial that he was not prepared for trial, not having been able to procure material evidence, because he had no attorney to attend to his case, and that his motion for a continuance when the case was called was overruled, but there was no bill of exception reserved to such matters, and nothing in the record verifying such statement, except such mention in the motion for new trial, the questions raised would not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1090.*]

Appeal from Criminal District Court, Dallas County; Robt. B. Seay, Judge.

T. O. Franks was convicted of crime, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This record is before us without a statement of facts or bills of exceptions.

There is a statement in the motion for new trial that appellant was not prepared for trial, not having been able to procure material evidence on account of having no attorney to attend to his case; and he further states that he made a motion for continuance when the case was called for trial, and that the court overruled this, and he was compelled to go to trial unprepared. There is no bill of exception reserved to this matter, and there is nothing in the record verifying this statement, except the mention of it in the motion for new trial. As the record is presented, we are unable to review these questions.

The judgment will therefore be affirmed; and it is so ordered.

Ex parte GULLEDGE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

ANIMALS (§ 50*)—STOCK-LAW ELECTION—VALIDITY—DESCRIPTION.

Under Sayles' Ann. Civ. St. 1897, art. 4980, providing that a petition for a stock-law election from the freeholders of a subdivision of a county shall properly describe such subdivision and the boundaries thereof, a stock-law election is invalid where the petition, the order of commissioners' court, the notices of election, and the proclamation of the county judge ordering an election contained no particular description by metes and bounds of the subdivision in which the election was to be held.

[Ed. Note.—For other cases, see Animals, Cent. Dig. §§ 149-151; Dec. Dig. § 50.*]

Habeas corpus, on the relation of J. F. Gullidge, to secure his release from custody. Relator discharged.

Norman & Shook, for appellant. F. J. McCord, Asst. Atty. Gen., and C. F. Gibson, Co. Atty., for the State.

RAMSEY, J. This is an original application for writ of habeas corpus, made to this court in term time. The application involves the validity of the stock-law election held in Cherokee county. It is averred and proven that the petition upon which the election was held, as well as the order of the commissioners' court, the notices of election, and the proclamation of the county judge putting same in effect and ordering said election, contained no particular description by metes and bounds of the territory in which such election was to be held, and in fact was thereafter held, other than as justice precinct No. 2, Cherokee county, Tex.; and it is therefore averred that said election, by reason of the failure to describe particularly such justice precinct No. 2 by metes and bounds, is invalid.

That such an election is invalid is too clear for discussion. Article 4980 of the Revised Civil Statutes is as follows: "Such petition shall set forth clearly the class or classes of animals enumerated in the preceding articles which the petitioners desire shall not run at large in such county or subdivision, as the case may be; and if the petition be from the freeholders of a subdivision of any county such subdivision shall be particularly described and the boundaries thereof designated." Applicant's position has been sustained directly both by the decisions of this court and the Supreme Court. *Cox v. State* (Tex. Cr. App.) 88 S. W. 812; *Railway Company v. Tolbert*, 100 Tex. 483, 101 S. W. 206; *Railway Company v. Tolbert* (Tex. Civ. App.) 90 S. W. 508. In this connection it should be stated that originally application was made to the county judge of Cherokee county, who indorsed on such application a statement that his own judgment was that the writ should be granted, but that, in view of the importance, not only to relator, but to the inhabitants of the territory to be affected by the decision, and inasmuch as by the discharge of the relator there could be no such authoritative decision of the question as was to be desired, it was suggested that the application be made to us in the first instance. We think the authorities above cited are conclusive, and that, indeed, the matter is settled past discussion.

Relator is accordingly ordered discharged.

HANKINS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

1. INDICTMENT AND INFORMATION (§ 173*)—VARIANCE—NAME OF ACCUSED.

An indictment for selling liquors to "Jim W." is not supported by proof of a sale to "Will

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

W.,” in the absence of evidence that the buyer is also called or known as “Jim W.”

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 539; Dec. Dig. § 173.*]

2. INTOXICATING LIQUORS (§ 233*)—PROSECUTIONS—ADMISSIBILITY OF EVIDENCE.

Evidence that the proprietor of the drug store where the alleged sale of liquors was made had employed the accused, a day or two before, to haul away empty beer and whisky bottles, is inadmissible, as not tending to show a sale by the accused.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 233.*]

Appeal from Johnson County Court; J. B. Haynes, Judge.

John Hankins was convicted of violating the local option law, and he appeals. Reversed.

Phillips & Bledsoe, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the county court of Johnson county, Tex., on the 18th day of February of this year, on a charge of selling intoxicating liquors in violation of the local option law, and his punishment assessed at a fine of \$50 and imprisonment in the county jail for 40 days.

1. The indictment in the case alleges sale by appellant to one Jim Washington. The only proof in the record as to the sale is by one Willis or Will Washington. The statement of facts shows the following: “Willis Washington, being duly sworn, testified for the state as follows: ‘My name is Will Washington. * * * I told him I wanted to get some whisky, and gave him 75 cents. He got a pint bottle of whisky and gave it to me.’” There is no other reference to the name of the prosecuting witness in the record, except at one time he was referred to as Washington. The rule is elementary that the name of the person to whom the alleged sale was made shall be proven to be the same person as alleged in the indictment. There is no evidence in the record that this witness, Will or Willis Washington, was ever called or known as Jim Washington. This variance was fatal to a conviction. *Perry v. State*, 4 Tex. App. 566.

2. Again, we think the court erred in admitting in evidence the testimony of Ward Roper to the effect, in substance, that about a day or two before the alleged sale he sent appellant to Ft. Worth with a wagon and team, in which he carried a load of empty bottles to sell, and among these bottles were beer bottles, frosty bottles, whisky bottles, medicine bottles, and all kinds of bottles. Roper, it should be stated, was the proprietor of the drug store where the sale was alleged to have been made. This testimony did not tend to show a sale by appellant, and the only effect of same would probably be to prejudice the jury against appellant, and perhaps impress them that Roper was

engaged in an unlawful business, and in this manner injure the rights of appellant.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

MEYER v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

CRIMINAL LAW (§ 1182*)—APPEAL—AFFIRMANCE.

Where no error appears in a record containing no statement of facts or bill of exceptions, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Frank A. Meyer was convicted of burglary, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. This appeal is prosecuted from a conviction of burglary, had in the criminal district court of Dallas county, in which judgment the punishment of appellant was assessed at three years' confinement in the state penitentiary. The record contains neither statement of facts nor bill of exceptions.

No error appearing, under the rules of this court, it only remains for us to affirm the judgment, which is accordingly done.

DAVIS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

CRIMINAL LAW (§ 1182*)—APPEAL AND ERROR—AFFIRMANCE.

Where no error appears in a record containing no statement of facts or bill of exceptions, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3203-3214; Dec. Dig. § 1182.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Johnnie Davis was convicted of burglary, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted in the district court of Hunt county on a charge of burglary, and his punishment assessed at two years' confinement in the reformatory.

The record is before us without a statement of facts or bill of exceptions. The indictment is in the usual form, and the charge of the court is a correct and proper presentation of the law applicable to the facts of the case.

No error appearing, the judgment is in all things affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

BRANDT v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

1. CRIMINAL LAW (§ 1090*)—BILL OF EXCEPTIONS—CONDUCT OF JURORS.

That a jury in a criminal case received testimony and evidence and wrong information as to the evidence in the case from one of their members cannot be reviewed, in the absence of bill of exceptions evidencing all the facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2821; Dec. Dig. § 1090.*]

2. CRIMINAL LAW (§ 1159*)—REVIEW—EVIDENCE—APPROVAL OF VERDICT.

Where a verdict convicting defendant has been approved by the trial court, and the evidence, if believed, justifies the conviction, it will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074–3083; Dec. Dig. § 1159.*]

Appeal from District Court, Ft. Bend County; Wells Thompson, Judge.

Lucius Brandt was convicted of assault with intent to rape, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant prosecutes this appeal from a judgment had in the district court of Ft. Bend county on April 26, 1909, convicting him of the offense of assault with intent to rape, and assessing his punishment at confinement in the penitentiary for a period of two years.

Appellant's motion for a new trial raises three questions: First, that the jury received testimony and evidence against defendant from one of their own members which was not introduced before the court, and which was to the effect that appellant had served a term of years in the state penitentiary, which had a detrimental effect on his cause; and, again, that one of the jurymen, being in doubt as to the testimony of one of the witnesses, was informed by the other members that a certain matter occurred at a different time from the date and time in fact such event happened, and that the jurymen, therefore, on such erroneous information, changed his mind, and accordingly his verdict, to the detriment of appellant. The last contention is that the verdict is contrary to the law and the evidence.

There is no bill of exceptions in the record, nor is the charge of the court complained of in the motion. It is manifest, under the well-settled rules governing this tribunal, that the first two matters mentioned above cannot, in the absence of bill of exceptions evidencing all the facts there stated, be considered by us. The evidence in the case is far from satisfactory, though the prosecuting witness testifies to an assault by such means and force and under such circumstances as, if believed, to justify the jury in concluding that appellant was guilty. This ver-

dict has received the sanction and approval of the learned trial court, and we feel that we ought not, as here presented, to interfere.

Finding no error in the proceedings of the court below, the judgment is hereby in all things affirmed.

GEE v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

1. CRIMINAL LAW (§ 596*)—CONTINUANCE—GROUNDS—ABSENT WITNESSES—IMPEACHING TESTIMONY.

A continuance for absent testimony is properly refused, where such testimony could only be used to impeach a state's witness, who is to testify in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1328–1330; Dec. Dig. § 596.*]

2. INTOXICATING LIQUORS (§ 236*)—UNLAWFUL SALES—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Testimony of the state's witness that he gave accused 25 cents to get him some whisky, and that accused shortly afterwards gave him a drink of whisky, was sufficient to justify a conviction for violating the local option law.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 236.*]

Appeal from Montague County Court; A. W. Ritchie, Judge.

J. D. Gee was convicted of violating the local option law, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law. When the case was called for trial, appellant moved to continue the case on account of the absence of Mark and Ophelia Black. By these witnesses he expected to prove that the state's witness and alleged purchaser, Winniger, on or about the 25th of February, 1909, while at the house of said witnesses Black, stated to them that his (witness') father had given or offered to give said witness a horse, bridle and saddle if he would testify against this defendant in this case. This evidence was sought to impeach the credibility of the state's witness, Winniger. The court did not err in overruling this application. Where the absent testimony could only be used for the purpose of impeaching a state's witness, who is to testify in the case, the continuance should be refused. *Garrett v. State*, 37 Tex. Cr. R. 198, 38 S. W. 1017, 39 S. W. 108; *Rodgers v. State*, 36 Tex. Cr. R. 563, 38 S. W. 184. In *Butts v. State*, 35 Tex. Cr. R. 364, 33 S. W. 866, it was held that a continuance should not be granted to obtain evidence that is only impeaching. See, also, *Franklin v. State*, 34 Tex. Cr. R. 203, 29 S. W. 1088; *Bolton v. State* (Tex. Cr. App.) 43 S. W. 1010.

The only other question suggested for consideration is the alleged insufficiency of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence. The evidence of the state's witness was sufficient to justify the verdict of the jury. He testified he gave appellant 25 cents to get him some whisky, and that appellant shortly afterwards gave him a drink of whisky.

There being no error in the record requiring a reversal, the judgment is affirmed.

COUCH v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

BAIL (§ 77*)—FORFEITURE—PROCESS—SERVICE OF CITATION—SUFFICIENCY.

Under Code Cr. Proc. 1895, art. 480, entitling sureties on a bail bond to notice of forfeiture proceedings by service of citation the length of time and in the manner required in civil actions, and requiring the officer executing the citation to make the return as provided for return of citation in civil actions, a return of service and citation reading, "Came to hand 22d day of August, 1908, and executed on * * * C. 22d day of August, 1908, in B. county," was not sufficient to sustain a default judgment against a surety on a bail bond.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 337; Dec. Dig. § 77.*]

Appeal from Brown County Court; A. M. Brumfield, Judge.

Proceeding by the State against J. C. Couch. From a judgment for the State, by default, defendant appeals. Reversed and remanded.

Scott & Foster, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This appeal is from a forfeiture of a bail bond. The judgment was taken by default.

It is contended that the service and execution thereof, as shown by the officer's return, is not sufficient. The return as to the service and execution of the papers, notice, etc., is as follows: "Came to hand 22d day of August, 1908, and executed on J. C. Couch 22d day of August, 1908, in Brownwood, Tex., and executed on C. H. Benney Sept. 1, 1908, in Brownwood, Tex."—signed by the sheriff, by a deputy. Under all the authorities, this service is not sufficient. Article 480, Code Cr. Proc. 1895, provides as follows: "Sureties shall be entitled to notice by service of citation, the length of time and in the manner required in civil actions, and the officer executing the citation shall return the same in the manner provided for the return of citations in civil actions." In proceedings upon forfeited bail bonds and recognizances, the sureties are entitled to notice, by service of citation, for the length of time and in the manner required in civil actions. *Middleton v. State*, 11 Tex. 255. For collation of authorities generally, see *White's Ann. Code Cr. Proc.* § 436; *Batt's Ann. Civ. St. art.* 1225, and citations in notes; *Fulton v. State*, 14 Tex. App. 32;

Rutherford et al. v. Davenport et al. (Tex. App.) 16 S. W. 110; *Russell et al. v. Butler et al.* (Tex. Civ. App.) 71 S. W. 386.

The judgment by default under the service and execution of the process is not sufficient to sustain the judgment by default under the authorities cited.

The judgment is reversed and remanded.

MARTIN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

1. INTOXICATING LIQUORS (§ 239*)—ILLEGAL SALES—EVIDENCE—ISSUES.

Where accused, on a trial for selling intoxicating liquors on election day, admitted the sale of six bottles of liquor to prosecutor, who testified that five bottles intoxicated him, and testified that the liquor was warranted to be nonintoxicating, that he had seen people drink as many as half a dozen bottles many times and that it never intoxicated, and that he had told the wholesale men that he wanted nothing that could not be legally sold in local option territory, the evidence raised the issue of honest mistake of fact; and the court, on request, must submit the issue.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 239.*]

2. INTOXICATING LIQUORS (§ 231*)—ILLEGAL SALES—EVIDENCE—ADMISSIBILITY.

Where, on a trial for selling intoxicating liquor on election day, prosecutor testified to the purchase of six bottles of liquor, and that five bottles made him intoxicated, and accused testified that the liquor was nonintoxicating, it was error to exclude the testimony of a witness that he had drunk as many as six or eight bottles a day many times, and that it was nonintoxicating.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 291; Dec. Dig. § 231.*]

Appeal from Montague County Court; A. W. Ritchie, Judge.

Wes Martin was convicted of selling intoxicating liquor on election day, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. The appeal in this case is prosecuted from a conviction had in the county court of Montague county for selling intoxicating liquors on election day.

The only issue made in the case was in respect to the intoxicating quality of the liquor sold. The sale was admitted. W. G. Bralley, sheriff of the county, testified that on the 12th day of December, 1908, he bought six bottles of liquor, which appellant told him at the time was frosty; that he took them home, and the next morning drank five bottles of them; and that they intoxicated him so that he could hardly walk. Appellant testified that he sold the six bottles to Mr. Bralley, as stated by him; that the liquor was straight frosty, and warranted to be nonintoxicating; that he had

seen people drink as many as a half dozen bottles many times, and that it never intoxicated him or any one else; that he had told the wholesale men he wanted nothing that could not legally be sold in local option territory.

1. In this state of the record, appellant requested the court to charge the jury as follows: "You are further instructed that if a person, laboring under a mistake as to a particular fact, shall do an act which would otherwise be criminal, he is guilty of no offense, unless he was guilty of a degree of carelessness or negligence which the law regards as criminal; and in this case, if you believe from the evidence that the defendant in this case was mistaken as to the character of the goods he so sold, if he sold any as alleged, and that he believed, and had reasons to believe, that the same was not intoxicating, then in that event you will acquit the defendant." While the evidence is slight on the issue of honest mistake of fact, nevertheless it was sufficient to raise the issue, and under the authority of numerous cases of this court this issue should have been submitted. We do not desire to be understood as holding that the requested charge was in every respect accurate as applied to the facts in evidence; but it was undoubtedly sufficient to have called the attention of the court to the matter, and, in substance, at least, should have been given. See *Walker v. State*, 50 Tex. Cr. R. 496, 98 S. W. 843; *Patrick v. State*, 45 Tex. Cr. R. 587, 78 S. W. 947; *Mayne v. State*, 48 Tex. Cr. R. 93, 86 S. W. 329; *Uloth v. State*, 48 Tex. Cr. R. 295, 87 S. W. 822; *McRoberts v. State*, 49 Tex. Cr. R. 288, 92 S. W. 804.

2. Again, there was error in the action of the court in excluding the testimony of J. T. Stallings, offered by appellant. Stallings, the bill shows, was justice of the peace of Bowie precinct, in Montague county, and had been for some ten years. He testified that he was acquainted with appellant's place of business, and had drank a great deal of the frosty through the past summer and up to the time his place closed. Thereupon he was asked how much he had ever drank, and whether or not it was intoxicating. To this question, and the answer sought to be elicited thereby, counsel for the state objected, and the court sustained the objection, and refused to let the answer go to the jury. The witness would have answered, as the bill recites, that he had drank as many as six or eight bottles a day many times, and that it was nonintoxicating. It seems too clear for discussion, as the matter is presented, that this testimony was admissible, and on another trial should be received.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

RANKIN v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

CRIMINAL LAW (§ 509*)—CONTINUANCE—SURPRISE.

In a prosecution for violating the local option law, after the state's witness had testified to buying whisky from accused in the presence of two others, which accused denied, accused applied for a continuance on the grounds of surprise. The application stated that the persons claimed to have been present at the sale would testify to the contrary, and their affidavits attached denied that they were present, or that they ever saw accused sell whisky to any one. *Held*, that the application for continuance should have been granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1333, 1334; Dec. Dig. § 599.*]

Appeal from Montague County Court; A. W. Ritchie, Judge.

Dan Rankin was convicted of violating the local option law, and he appeals. Reversed and remanded.

Albert S. Phelps, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law. The state's witness Ward testified that he was in Sunset on the 25th of December, 1908, and was in George Powell's light plant, and Jack Rankin and Bob Davis were both present while he was there; that appellant gave him a bottle of whisky; that he gave somebody \$1.25 for it, but did not remember whether he gave it to appellant or his brother, Jack Rankin, but he thought he gave it to appellant; that he had been drinking that day, and was drunk at the time. Dan Rankin testified that it is untrue that he ever met Ward in George Powell's light plant, and that it was untrue that he ever sold him a bottle of whisky at any time. The parties went to trial, and, when this state of case developed, appellant's counsel asked the court to permit him to withdraw his announcement of ready for trial on account of the absence of two witnesses, Jack Rankin and Bob Davis; that he was surprised at this testimony, and was unaware of what the witness Ward would testify as to the purchase—the time and place; that he had gone to Ward, and tried to ascertain what his testimony would be, to the end that he might prepare his case for trial. Ward denied that appellant had gone to him and asked him about the matter. Application for continuance or postponement was made, in which appellant states that he could prove by these two witnesses that they were not present at the time and on the occasion, and that no such transaction occurred. We are not stating the details of the application. The application was overruled and appellant convicted.

As a part of the motion for new trial, the affidavits of Davis and Jack Rankin are at-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

tached to it as exhibits. In these affidavits they swear most positively they were not present in the town of Sunset, in George Powell's light plant, and saw Dan Rankin or anybody else deliver to said witness a bottle of whisky, or brandy, or any other kind of a bottle; nor did they see Ward deliver to Rankin or anybody else a dollar, or any other sum of money. They further state that no such circumstance occurred on December 25, 1908, or at any other time, and it is not true that they were ever in George Powell's light plant at said time, or any other time, when Ward and Dan Rankin were present. We are of opinion that under the circumstances of this case this application should have been granted. *McNamee v. State* (Tex. Cr. App.) 97 S. W. 96; *Sessions v. State* (Tex. Cr. App.) 98 S. W. 243; *Blackburn v. State*, 48 Tex. Cr. R. 286, 87 S. W. 692; *Gilford v. State* (Tex. Cr. App.) 78 S. W. 692; *Cravens v. State* (Tex. Cr. App.) 103 S. W. 921; *Casey v. State*, 51 Tex. Cr. R. 433, 102 S. W. 725; *McKinney v. State*, 41 Tex. Cr. R. 413, 55 S. W. 337.

The judgment is reversed, and the cause is remanded.

FLOURNOY v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

1. CRIMINAL LAW (§§ 778, 789*)—TRIAL—INSTRUCTIONS—PRESUMPTION OF INNOCENCE—REASONABLE DOUBT.

A charge that defendant is presumed to be innocent till his guilt is established by legal evidence, and that in case the jury have a reasonable doubt as to guilt they must acquit, correctly instructs as to the presumption of innocence and reasonable doubt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1846-1849, 1904-1922; Dec. Dig. §§ 778, 789.*]

2. CRIMINAL LAW (§§ 1056, 1064*)—REVIEW ON APPEAL—QUESTIONS NOT RAISED BELOW.

Criticisms of a charge made in the brief on appeal cannot be considered, when not mentioned on the motion for new trial nor presented by exceptions on the trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2668, 2670, 2683; Dec. Dig. §§ 1056, 1064.*]

Appeal from District Court, Smith County; R. W. Simpson, Judge.

Major Flournoy was convicted of theft, and he appeals. Affirmed.

W. F. Boyette, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of hog theft. The record is without bills of exceptions or statement of the facts.

The motion for new trial criticises the charge given by the court. The charge, we think, is a sufficient presentation of the law on the general propositions in regard to theft of hogs. The following charge given by the court is urged as error: "The defendant is

presumed to be innocent until his guilt is established by legal evidence, and in case you have a reasonable doubt as to his guilt you must acquit." The objection is thus stated: The court should have charged: "The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt." This criticism is rather hypercritical. The charge given, we think, does instruct the jury as to the presumption of innocence and reasonable doubt. In addition to this, the court submitted the issues to the jury, informing them that, before they could convict, the evidence in the case must show beyond a reasonable doubt that appellant was guilty.

There are some other criticisms of the charge in the brief which are not mentioned in the motion for new trial, nor were exceptions taken to these matters on the trial. As these matters are presented, they cannot be considered.

There being no error in the record, the judgment is ordered to be affirmed.

WALTERS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

CRIMINAL LAW (§ 1090*)—APPEAL—RECORD.

Where the indictment is valid, and there is neither bill of exceptions, statement of facts, nor motion for new trial, the judgment will be affirmed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2789, 2803-2827, 2927, 2928, 2948-3204; Dec. Dig. § 1090.*]

Appeal from Criminal District Court, Dallas County; Robert B. Seay, Judge.

Will Walters was convicted of burglary, and appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This appeal is prosecuted from a conviction of burglary, had in the criminal district court of Dallas county on June 30, 1909, wherein appellant was convicted of said offense, and his punishment assessed at two years' confinement in the penitentiary.

As the record comes to us, there is neither bill of exception, statement of facts, nor motion for a new trial. The indictment is valid. In this state of the record, it follows, of necessity, there is no question which we can review, and the judgment of conviction is therefore affirmed.

McCLEARY v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

1. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction declaring that there was evidence before the jury "tending" to impeach

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

witness, which could be considered, if at all, for impeachment purposes only, was erroneous, as on the weight of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748; Dec. Dig. §§ 763, 764.*]

2. HOMICIDE (§ 300*)—TRIAL—INSTRUCTIONS.

An instruction that defendant had the right, on a peaceable mission, to seek out decedent and ask him to retract insulting language, and to arm himself for his necessary self-defense if he apprehended danger at the time he sought such apology, and that if defendant, on a peaceable mission, sought out decedent and asked him to apologize, and decedent refused to do so, and it reasonably appeared to defendant that he was in danger of death or serious bodily harm, and acting thereunder he shot decedent, to acquit, placed an improper limitation on defendant's rights by the words "on a peaceable mission."

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

Ramsey, J., dissenting in part.

Appeal from District Court, Falls County; Richard I. Munroe, Judge.

Nat McCleary was convicted of an unlawful homicide, and he appeals. Reversed and remanded.

Nat Lewellyn and Spivey, Bartlett & Carter, for appellant. F. J. McCord, Asst. Atty. Gen., and Tom Connally, Co. Atty., for the State.

RAMSEY, J. Appellant was convicted in the district court of Falls county on the 24th day of February, 1909, and his punishment assessed at two years' confinement in the penitentiary. From such judgment of conviction he appeals to this court, and asks that same be reversed for many reasons.

The facts in evidence showed that appellant, who was a young white boy about 19 years old, on or about the 25th day of October, 1908, in the village of Durango, in Falls county, shot and killed John Shaderick. Shaderick was a negro man some 35 years of age. Appellant established a good reputation in the community where he was raised as a peaceable, quiet, inoffensive man. The testimony of the appellant tended to establish the fact that the deceased was a dangerous and quarrelsome man, though this was contested by the state, which introduced some evidence to the effect that his reputation was good as a peaceable, quiet, and an inoffensive citizen. The evidence showed that on the day of the homicide appellant, with Bonner Peavy, E. C. Stuart, and Dallas Stuart, left the town of Lott in a buggy, and some distance from this town, on the way to Durango, they passed Will Reed, who was in a wagon, in which was also the deceased and another negro. Soon after passing the wagon containing Reed and the negroes, appellant and one of his companions went back to the wagon to get some whisky. The occasion of their going back and what occurred is dis-

puted in the testimony; but it is conceded that there was some rough language used between the appellant and deceased. Appellant's witnesses testified that deceased called him a son of a bitch and attempted to strike him with his knife. This was probably between 4 and 5 o'clock in the afternoon. The parties named above continued their journey to Durango, where appellant obtained a gun and made inquiry for some large shot, saying that he wanted to kill some ducks. Some of the witnesses testify that appellant walked with the deceased, Shaderick, and another negro, from near a man named James' place down to where the stores were situated in the village of Durango. Deceased was shot three times. One shot was over the eyebrows, another on the cheek, and the third near the temple.

Appellant, by his testimony, if believed, makes a case of self-defense. He explains his possession of the gun with the statement that he intended to see Shaderick and demand an apology, and apprehended that, as a result of his mission, deceased might assault him, and for his protection, and not for any other purpose, he had provided himself with a gun; that later on he felt that, if he exhibited the gun, the negro might think he was looking for trouble, and for this reason provided himself with a pistol, and with this on his person approached Shaderick, and said to him more than once that he thought that he owed him an apology; that, on making this statement to deceased the third time, deceased turned towards him, put his hand in his pocket, and said he would apologize to no white man, with an oath, and started, as he believed, with a weapon in his hand, to advance upon him; and that he shot Shaderick in the belief that his own life was in danger. Appellant's testimony to this effect was somewhat strongly supported by the evidence of E. C. Stuart, Bonner Peavy, and one Stevens, and his contention found some support, also, in the testimony of Will Reed. The testimony of most of these witnesses related to the direct issue of self-defense, and was in substantial accord with the statement and testimony of appellant, and was, of course, of the highest importance to his defense.

The county attorney, acting for the state, sought to impeach these witnesses, and not wholly without success, by producing and having them identify, and subsequently offering in evidence, written statements, some of which were made on the examining trial, soon after the tragedy, and others made before the grand jury. In some of these statements, one of the witnesses, at least, who had testified to the acts of deceased in putting his hand in his pocket and advancing on appellant, testified on the examining trial that at the time of the shooting, or at any

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

event at the time the first shot was fired, and just before, he did not and could not see deceased. The testimony of other witnesses positively affirmed some matters on the trial as true which were not mentioned at all as having occurred in their testimony on the examining trial.

1. In this state of the case, the court instructed the jury as follows: "There is testimony before you tending to contradict or impeach the witnesses Will Reed, E. C. Stuart, Bonner Peavy, and Mose Stevens. As to the effect of said impeaching or contradicting testimony, if any, you are instructed that you can only consider the same for impeachment purposes, if at all, and for no other purpose." We think, considered altogether, that this charge must be held to be on the weight of the evidence. *Santee v. State* (Tex. Cr. App.) 37 S. W. 436; *Stull v. State*, 47 Tex. Cr. R. 547, 84 S. W. 1060.

In the first-cited case the court gave the following charge: "You are further instructed that evidence has been admitted before you tending to show that, about the time defendant is charged to have received and concealed the property charged in the indictment, he received property belonging to another person than R. K. Lane that was stolen. You can consider said testimony in determining what knowledge the defendant had with reference to the property described in the indictment at the time he received or concealed the same, if he did receive or conceal it, and for no other purpose." After adverting to some other errors in this charge, Judge Henderson, speaking for the court, uses this language: "Now, in this connection, the court, in the charge above quoted, tells the jury that the evidence admitted tended to show that defendant, about the time charged in the indictment, received the Felson goods, and that they were stolen. Webster defines the word 'tend' to mean as follows: 'To be directed, as to any end or purpose; to aim; to have or give a leaning; to exert activity or influence; to act as a means; to contribute to.' As above defined, the charge of the court would convey to the jury that the judge believed that the testimony had an aim or leaning in the direction of showing that such other goods were stolen; that said evidence contributed to show such fact. If the Felson goods had not been stolen, then the fact that the defendant subsequently had possession of the same would not constitute any inculpatory evidence against him as to having knowingly received the alleged stolen goods he is charged in the indictment to have received. If, on the other hand, said goods were stolen property, then it would constitute a criminative fact against the defendant. Certainly the court could not assume as an admitted fact that said goods were stolen; but it was his duty to submit such issue fairly to the jury, and it occurs to us that the use of the word 'tending,' in

the charge of the court, was a suggestion to the jury that the evidence aimed and contributed to establish the fact that said Felson's goods were stolen, and so was an invasion of the province of the jury."

The charge of the court considered in the case of *Stull v. State*, supra, was to this effect: "The testimony before you of defendant as to his having been charged with any other crime or crimes than the one for which he is now on trial was admitted only for the purpose of going to the credibility of the defendant as a witness, and for no other purpose, and you will consider it for no other purpose whatever." Commenting on this charge, the court say: "Said charge is upon the weight of the evidence, and assumes that defendant had testified he had been charged with other crimes. It is also upon the weight of the evidence, because it tells the jury that it 'goes to his credibility,' which is equivalent to telling the jury that it affects his credibility, because the jury knows, as does any person with ordinary sense, that if it 'goes to his credibility' it cannot strengthen it, but if it 'goes to his credibility' it 'goes' against his credibility. The court should have so instructed the jury on this phase of the case as to leave it with the jury as to whether it had any effect at all on defendant's testimony. It is a question for the jury to determine what effect any fact has on the weight to be given the testimony of any witness, and is entrenching upon the function of the jury for the court to tell them in his charge that 'certain testimony is admitted for the purpose of going to the credibility of the defendant as a witness.'"

While it is true in this case the court says that the jury may consider the same for impeachment purposes, if at all, it is open to the criticism and objection that it begins with an affirmative statement that there is testimony before them tending to contradict the witnesses named. There is no provision of our criminal law which the courts have guarded more jealously than that prohibiting courts from commenting on the weight of the evidence. In respect to testimony so vital as that of these witnesses we cannot see on what ground this charge could be upheld, and for this reason we think the case should be reversed.

2. There are quite a number of other questions raised on the appeal touching the admissibility of testimony, application for continuance, and remarks of counsel, most of which we deem it unnecessary to discuss.

Among other things, the court instructed the jury as follows: "But in this connection you are charged that the defendant had the right, on a peaceable mission, to seek out the deceased and ask him to apologize to him, or retract the insulting language, if any, he claimed the deceased had used towards him, and he also had the right to arm himself for his necessary self-defense, if he apprehended

danger at the time he sought such apology or retraction, if any, from the deceased; and if you believe from the evidence that the defendant, on a peaceable mission, sought out the deceased and asked him to apologize to him, or retract the insulting language he claimed the deceased had used towards him, and that when he made such request, if any, the deceased refused to do so, and if you further believe from the evidence that at the time the fatal shot was fired it reasonably appeared to the defendant, from the acts and demonstrations of the deceased, if any, or from the words of the deceased, coupled with his acts and demonstrations, viewed from the standpoint of the defendant, that the deceased was then making an attack on the defendant, or the defendant believed that he was in the act of making an attack on him, which, from the manner and character of it, caused the defendant to have reasonable expectation or fear of death or serious bodily harm, and that, acting under such reasonable apprehension or fear, the defendant shot and killed the said John Shaderrick, then and in that event you will acquit him; or if you have a reasonable doubt thereof you will acquit him." The contention is earnestly made that this charge was erroneous, and that the words "on a peaceful mission" placed an improper limitation on appellant's rights. Appellant refers, in support of his proposition, to the following cases: *King v. State*, 51 Tex. Cr. R. 208, 101 S. W. 237, 123 Am. St. Rep. 881; *Airhart v. State*, 40 Tex. Cr. R. 470, 51 S. W. 214, 76 Am. St. Rep. 736; *Mitchell v. State*, 50 Tex. Cr. R. 180, 96 S. W. 43; *Pratt v. State*, 50 Tex. Cr. R. 227, 96 S. W. 8; *Melton v. State*, 47 Tex. Cr. R. 451, 83 S. W. 822; *Gant v. State* (Tex. Cr. App.) 116 S. W. 801.

The majority of the court think this charge, under the evidence, erroneous, and that same should operate as a reversal. My own opinion is that in the respect complained of the charge is not erroneous, but in accordance with all the authorities in this state, except the case of *King v. State*, 51 Tex. Cr. R. 208, 101 S. W. 237, 123 Am. St. Rep. 881. See *Mitchell v. State*, 50 Tex. Cr. R. 180, 96 S. W. 43; *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17; *Melton v. State*, 47 Tex. Cr. R. 451, 83 S. W. 822; *Winters v. State*, 37 Tex. Cr. R. 582, 40 S. W. 303; *Winters v. State* (Tex. Cr. App.) 51 S. W. 1110; *Hall v. State*, 42 Tex. Cr. R. 444, 60 S. W. 769; *Hall v. State*, 43 Tex. Cr. R. 479, 66 S. W. 783; *Beard v. State*, 47 Tex. Cr. R. 50, 81 S. W. 83, 122 Am. St. Rep. 672; *Craig v. State*, 48 Tex. Cr. R. 500, 88 S. W. 208; *Keith v. State*, 50 Tex. Cr. R. 63, 94 S. W. 1044. And, by comparison, see *Bush v. State*, 40 Tex. Cr. R. 539, 51 S. W. 239.

For the errors pointed out, the judgment of the court below is reversed, and the cause is remanded.

CRAVENS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

1. CONSTITUTIONAL LAW (§ 46*)—VALIDITY OF STATUTE—NECESSITY OF DETERMINATION.

Where a statute may be sustained as a local or special law, the court will not inquire whether the statute, if treated as a general law, is unconstitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 43-45; Dec. Dig. § 46.*]

2. STATUTES (§ 93*)—LOCAL AND SPECIAL LAW—VALIDITY.

Acts 30th Leg. (Laws 1907, p. 177) c. 88, fixing the compensation of county attorneys in cities of over 30,000 and under 40,000 population according to the census of 1900, is not invalid as a local or special law, within Const. art. 3, § 56, prohibiting special legislation, but is a valid law, within article 11, § 5, providing that cities having more than 10,000 population may have their charters granted or amended by special act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.*]

3. STATUTES (§ 61*)—PUBLICATION OF LOCAL AND SPECIAL STATUTES—PRESUMPTIONS.

The court, in the absence of proof to the contrary, must presume that the Legislature, in adopting a local or special law, complied with Const. art. 3, § 57, and Rev. St. 1895, art. 3260, relating to publication of notice of intention to apply for the passage of local or special laws; and this is true, though the act purports on its face to be a general law.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 56; Dec. Dig. § 61.*]

Appeal from Criminal District Court, Galveston County; El. R. Campbell, Judge.

Lizzie Cravens was convicted of crime. From an order denying her motion to retax the costs in the case, she appeals. Affirmed.

R. H. & Alice S. Tiernan and John T. Wheeler, for appellant. Miles Crowley, James B. & Charles J. Stubbs, and F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This is an appeal prosecuted by Lizzie Cravens from an order of the criminal district court of Galveston county, refusing to retax the cost in a case in said court wherein she had been convicted, and to exclude and strike therefrom the sum of \$10 assessed and taxed as a proper fee of the county attorney of Galveston county for representing the state therein. The order appealed from in substance adjudges the fees so taxed to be proper and legal, and recites: "It is therefore ordered, adjudged, and decreed that the aforesaid motion to retax costs be and the same is hereby in all things overruled." Appellant was allowed 20 days after adjournment within which to file bill of exceptions and statement of facts.

By bill of exception it is recited that the following facts were adduced in evidence by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

appellant: A complaint was filed in the corporation court in Galveston on November 23, 1908, in which appellant was charged with unlawfully being under the influence of intoxicating liquors in a public place in the city of Galveston on said day; the fact that she was fined the sum of \$1 in the corporation court, from which judgment she gave notice of appeal to the criminal district court of Galveston county, Tex. She also offered in evidence the transcript of the record of said court, which shows, among the cost in said corporation court, was a fee of \$10 of the county attorney. It further appears that on the 5th day of February, 1909, in said criminal district court, appellant pleaded guilty to said charge, and was fined the sum of \$10, and the cost adjudged against her in the last-named court, including a fee of \$10 to the county attorney; that thereafter she filed her motion to strike out the fee of \$10 taxed for the county attorney of Galveston county, claiming that the act of the Legislature of Texas under and by virtue of which said fee was taxed was in contravention of the Constitution, illegal, and void. The bill recites that appellant had paid the sum of \$28.05 into the registry of the court, this being the sum taxed against her (including final costs), less the said fee of \$10 so taxed against her for said county attorney. This was all the evidence adduced on the hearing of the motion.

Appellant asserts that the act of the 30th Legislature (Laws 1907, p. 177, c. 88), fixing the compensation of county attorneys in cities of over 30,000 population and under 40,000 population, according to the census of 1900, is unconstitutional, because it is in contravention of section 56, art. 3, of the Constitution of Texas, and that same is a local and special law. This article of the Constitution provides, in substance, that the Legislature shall not, except as otherwise provided in this Constitution, pass any local or special law authorizing any of the several matters and things therein named. Among the matters and things against which special legislation is inhibited are the following: Incorporating cities, towns, or villages, or changing their charters. This provision of the Constitution is to be construed in connection with section 5 of article 11 of the Constitution, which in terms provides that cities having more than 10,000 inhabitants may have their charters granted or amended by special act of the Legislature. In this case the act in question on its face is framed in form as if it were intended to be a general law, and yet it relates wholly to the compensation of the county attorney in a city or cities having a population of more than 30,000 and less than 40,000 inhabitants, and is in aid of the enforcement of the law in such cities.

It is to be noticed that the statement of facts in this record contains no suggestion, nor is any issue made, as to whether notice had in fact been given, before the meeting

of the Legislature, of the purpose to introduce this bill as the Constitution requires. If, under the record, the act may be sustained as a local or special law, then it becomes unnecessary to inquire whether, if treated as a general law, it would be violative of the Constitution. If it may be assumed to be, or treated as, a local or special law, then we think it must be held, in the absence of any showing to the contrary, that we should and will presume that all the prerequisites to the passage of same as a local or special law had been complied with. It will be noted that section 56 of article 3 of the Constitution provides that the Legislature shall not, "except as otherwise provided in this Constitution, pass any local or special law" authorizing, among other things, such an act as that here complained of. It would, as we believe, undoubtedly be within the power of the Legislature, by special act, to prescribe the powers and duties of officers in cities and to fix their compensation. If this measure had in terms been framed as a local measure, the question would be free from difficulty. If in fact its application is local, does the form of the law change the rule?

In most of the cases where similar acts have been held unconstitutional, as being special legislation, it was because the Legislature was not authorized under any circumstances to pass a local law in respect thereto. Section 5 of article 11 of the Constitution provides as follows: "Cities having more than 10,000 inhabitants may have their charters granted or amended by special act of the Legislature"—and may levy taxes and do other things as in said section provided. We think the true test in considering such legislation as special is not the test of form merely, but by its substance, and that, if considered with reference to what is enacted, it is in its nature special, and such as might have been enacted on notice and by special law, it should, and must in a proper case, be sustained as a local measure, notwithstanding it is clothed with the vesture of a general law. It was held by our Supreme Court in the case of *City of Dallas v. Western Electric Co.*, 83 Tex. 243, 18 S. W. 552, that article 3, § 56, of the Constitution, prohibiting local or special legislation, does not apply to special city charters granted cities having more than 10,000 people. And it is further said that it was the purpose of the Constitution that the grant of power in the charter of a city having more than 10,000 inhabitants shall be complete without reference to any other law. Again, it was held in the case of *Texas Savings & Real Estate Investment Association v. Pierre's Heirs*, 10 Tex. Civ. App. 453, 31 S. W. 426, that Const. art. 3, § 56, prohibiting the Legislature from passing a local or special law regulating the practice or changing the rules of evidence in a judicial proceeding, does not apply to acts granting special charters to cities containing over 10,-

000 inhabitants; such charters being specially authorized by article 11, § 5.

Further, if it be conceded that the act complained of is a local or special law, and not a general law, then this court would and should presume conclusively, in the absence of proof to the contrary, that the Constitution was complied with as to publication of notice of the intention to apply for the passage of the act in question, as demanded by article 3, § 57, of the Constitution, and as also expressly arranged for in Rev. St. 1895, art. 3260. This question came before the Court of Civil Appeals of the First Judicial District in the case of *Moller v. City of Galveston*, 23 Tex. Civ. App. 693, 57 S. W. 1116. In that case, discussing this matter, the court say: "The Constitution prohibits the passage by the Legislature of any local or special law, unless notice of the intention to apply therefor shall have been published in the locality where the matter or thing to be affected is situated, which notice shall state the substance of the contemplated law, and shall be published at least 30 days prior to the introduction into the Legislature of such bill, and in the manner to be provided by law. The evidence of such notice having been published is required to be exhibited to the Legislature before such act shall be passed." Further discussing the matter, the court says: "But we are of the opinion that the passage of the act by the Legislature is conclusive of the fact that due notice was given. The Constitution requires evidence of such publication to be exhibited to the Legislature before such act shall be passed. This, we think, is for the purpose of authorizing that body to pass conclusively upon this question of fact. To hold otherwise would be to relegate to the courts the ascertainment of a jurisdictional fact for the Legislature, and to unsettle every special or local law that has been passed since the adoption of the Constitution."

It may be objected that this act purports, on its face, to be a general law. It, however, relates to a matter touching the municipal life of the people of Galveston, and regulating the enforcement of the law in the local court of that municipality, and is such a law as might properly have been included in a city charter. The fact that on its face it purports to be a general law would not deny its validity as a special law, if notice in fact were given, and if it were such an act as might have been passed as a special law and a legitimate amendment of their charter. We think, on full review of the subject, that the act can, and should, be sustained as a special law, and that certainly, in the absence of proof to the contrary, we should and must assume that proper notice was given.

It follows, of course, that the court did not err in overruling the motion, and its action in so doing is hereby affirmed.

JONES v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

1. LARCENY (§ 27*)—PARTIES TO OFFENSE—"PRINCIPAL."

If accused's son and grandson took possession of another's cow from the range, and drove her away, with the intention of appropriating her to their own use, and accused was not present, he would not be guilty of the theft as a "principal," though he may have agreed that the animal should be stolen and subsequently butchered, and that he would participate in the butchering and would conceal the meat.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 55-57; Dec. Dig. § 27.*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5552-5557; vol. 8, p. 7763.]

2. LARCENY (§ 70*)—INSTRUCTIONS—LIABILITY AS PRINCIPAL.

Where accused was prosecuted under an indictment charging the committing of cattle theft as a principal, he was entitled to a clear-cut charge that if he was not a principal under the statute he should be acquitted, and that the fact that he was an accomplice or a receiver of the stolen animal would not authorize his conviction.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 182; Dec. Dig. § 70.*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Henry Jones was convicted of cattle theft, and appeals. Reversed and remanded.

Stevens & Pickett, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of cattle theft. The alleged owner was named Swayne. The evidence is rather voluminous in minor details. The case is one purely of circumstantial evidence.

A witness named Holts testified: That on the evening of the 3d of July, 1907, he was on horseback, and passed where Ran Jones, son of appellant, and Miles Dark, grandson of appellant, were standing by their horses, and one of them had a rope in his hand. That he passed by without speaking to Ran, but Ran spoke to him. That about 50 or 60 yards from where the two were standing was a considerable bunch of cattle, about 30 or 40 in number. In this bunch was one belonging to Swayne, a red two year old heifer. This animal gave appearance of having been chased or run. Witness rode out to where the animal was, and identified it as Swayne's. That about that time Ran Jones rode away, and the witness saw nothing more of him. That witness and Miles Dark, the little grandson of appellant, rode away together. So far as this witness is concerned, there is nothing shown as to what became of Ran Jones or Miles Dark, except as stated. Miles Dark lived with appellant, and seems to have been raised by him up to that time, at which time he seems to have been something like 12 or 14 years of age. The evidence shows that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

Ran Jones lived in the town of Liberty, and appellant something like $2\frac{1}{2}$ miles northeast of Liberty. This was late in the evening of the 3d of July. Ran Jones was seen by another witness later that evening, perhaps along about dusk, riding towards the town of Liberty, where he lived. The cattle mentioned were about 300 or 400 yards from the house of appellant at the time witness Holts saw them, and Ran Jones and Miles Dark near them.

Sam Holloman testified that he lived in the same neighborhood in which the appellant lived, and beyond him from the town of Liberty; that early on the morning of the 4th of July he was going to town, and passed appellant's house, and in appellant's lot he saw a little heifer yearling, which he ultimately describes as being about two years of age as he thought. He says the animal had its head towards him, but he knew it was a heifer, and in answer to a question stated he knew because he could see clear through it. He gives no other description of the animal than that, and places no brand upon it or marks on its ears. It might be well enough to state in this connection that appellant was the owner of cattle. After passing beyond appellant's house, this witness Holloman met Ran Jones going in the direction of his father's, and asked him if he saw a little yearling at his father's, and, being answered in the affirmative, stated that he was going to butcher it.

An officer named Thornton, a constable, testified that on the 4th of July, in company with the sheriff, Cherry, he went to appellant's home, armed with a search warrant, and searched his premises; that he found a number of tracks in the lot, which he followed out of the lot gate into and through the field in three separate trails; that these trails were tracked to a log in a cypress brake, and off the log into the brake some 75 yards to a tree, in which he found concealed three sacks of meat. The following day he returned, and found another sack of meat about 50 yards from where he had discovered the meat the previous day in the tree. He could not tell the size of the shoe tracks, but said they were 7's, 8's, 9's, or 10's; but he did not measure them, nor could he say they were three separate sizes; nor did he pay any attention to what kind or character of shoes made the tracks, nor did he fit the feet of appellant, Ran and Ike Jones into these tracks, and regretted that he did not do so. He carried these three parties with him, trailing the tracks out to where he discovered the three sacks of meat in the tree; nor would he swear that the tracks were not made by the same person. He also testifies that the same party who made the track he followed on the second day could have made the three tracks he found the previous day. His statement is this: "The man that made the track out to the fourth sack, so far as I know, could have

made those three I found the first day. As to it being probably the same person and the same shoe, probably he could have made it." This witness disclosed expertness in tracing tracks. It is further disclosed by this witness that what he terms the "brake" was a muddy, boggy place of soft ground, and that in passing over it his feet would go deep into the mud and over the top of his laced boots. He also states that he did not notice whether appellant and his two sons, Ran and Ike, had any mud on their shoes or clothing, that they assisted him in tracing these tracks, and that he made them carry the three sacks of meat away from the tree where they were discovered. He also states that he saw no evidence of where a beef had been butchered about appellant's premises anywhere, except that in what he calls a "little hog pen" he saw some blue flies about some weeds, as if they scented or smelled something. These weeds had not been disturbed or mashed down. It may be stated from the evidence that appellant has a lot in which he kept his milch cows, horses, and a mule. Ike Jones, a son of appellant, milked the cows. There was a continued and very close search made for a place where the animal was butchered, as well as to discover the hide, which search proved fruitless. There was no blood, offal, or other evidence of a beef having been butchered in the lot or about appellant's premises. The above in substance is a fair statement of this witness' testimony.

The appellant introduced evidence to the effect that he had nothing to do with the killing of any animal, and that it was not killed at his place. Several witnesses were introduced to this effect. Ike Jones, appellant's son, testified for the appellant; it having been shown that he had been acquitted on a charge of theft of the animal. His evidence was in substance that there was no animal of any sort butchered at the place, and he knew nothing about the meat, or how it got to the tree, and that his father and brother Ran did not participate in the killing of any animal about the premises, and in fact had nothing to do with the killing of any animal, on the 4th of July. A woman by the name of Burnett, who was living at the home of appellant, testified in substance as did Ike Jones. All the witnesses for the state and defendant testifying on this point state that this witness was there, and was ironing on the morning of the 4th of July, and had a considerable fire in the yard, where she heated her smoothing irons. The state shows that appellant had a very small quantity of cooked beef in his safe or on a shelf, as well as a small quantity of cooked liver. This was a small amount. Some of the meat and liver, from the testimony of appellant's witnesses, had been eaten. Appellant accounted for the presence of this meat by the fact that Ike Jones had bought the meat in the town of Liberty on the 3d of July, and

appellant had bought the liver from a man named McAllister. The state denied this through testimony.

Holloman was arrested by the officer for the theft of the animal, and kept under arrest for a day or so, and then discharged. On the morning of the 4th of July the officer, Thornton, went to the house of Holloman and found the doors barred or fastened on the inside, but finally succeeded in kicking them open and found Holloman asleep. Holloman says he was drunk. The officer aroused him, and returned to appellant's house, and instituted the search above described. This, perhaps, without going further into the details, is a sufficient statement to review the questions.

The court gave a general charge, authorizing the jury to convict if they believed appellant guilty, and also instructed the jury in regard to the law of circumstantial evidence. Appellant asked several charges submitting the law of principals. Three of these were given by the court, and qualified in what appellant contends is an unauthorized manner. It is hardly necessary, we think, to reproduce each of these charges, as they in substance embody the same general principle. Two of the charges, however, were refused by the court, on the ground that he had previously given other charges asked by appellant covering the same question. The propositions involved may be illustrated by this requested instruction: "You are instructed that if the defendant, Henry Jones, was only an accomplice, and not as a principal, in the commission of the alleged crime, you will find the defendant not guilty; and the law as to accomplice and principals is as follows: The dividing line between the two is the commencement of the commission of the offense. Therefore, if Henry Jones, the defendant, and Ran Jones, agreed to steal the alleged stolen animal together, but did not act together in the original taking of the said head of cattle, then Henry Jones, under such circumstances, would not be a principal, and if you so believe you will find the defendant not guilty, and so say by your verdict. When the acts committed prior to the commission of the principal offense or subsequent thereto, and one party is not present when the offense itself is committed, such party is not guilty as a principal offender, but as an accomplice, or accessory in law. If you, therefore, believe from the evidence that the head of cattle was actually stolen by Ran Jones or Miles Dark, or by both said Ran Jones and Miles Dark, acting together, and you further believe that the defendant, Henry Jones, was not present when the animal was originally taken, but that he subsequently received some of the stolen meat, or assisted in butchering or disposing of the same, you will in such case find the defendant not guilty, and so say by your verdict. And if you believe from the evidence that the alleged stolen

animal was not originally taken by the defendant, Henry Jones, or that he was not present when the animal was originally taken, although the defendant may have agreed to assist in the theft and to help kill the alleged stolen animal, you will find the defendant not guilty, and so say by your verdict." This charge was given, with the following qualification by the court: "Given, with the remark that the foregoing special instruction is a correct exposition of the law; but you will consider the same with the following: All persons are principals who are guilty of acting together in the commission of the offense, and this includes not only those who are present at the commission of the offense, but those who, though absent, are doing their part in connection with and in furtherance of the common design; and all persons are principals who engage in procuring aid or means of any kind to assist in the commission of an offense, while others are executing the unlawful act."

Exception was reserved to the court qualifying the charge as qualified, and the contention is made that the qualification does not correctly state the law. It may be well to copy one of the other charges given by the court, which is as follows: "You are further instructed that, to constitute theft of cattle upon the range, the taking of the cattle is fully complete by the driving of such cattle with the intent to subsequently butcher the same; and if you therefore believe from the evidence that Ran Jones, on the 3d day of July, 1907, took possession of the head of cattle alleged to have been stolen, by driving the same from the range with the intent of killing the same, and that Henry Jones, the defendant, at the time of such taking of said cattle by the said Ran Jones was not present, you will find the defendant not guilty." The court gave this special charge with the following qualification: "Given, with this qualification: Add after the word 'guilty' in the last line of the above special instruction these words: 'Unless you find that the defendant was connected with the original taking by Ran Jones, if you find Ran Jones did drive the animal from the range.'" These two charges practically embody the thought contained in the other charges, one of which was given and two refused. The one given was qualified in the same manner as those herein copied.

We are of opinion that appellant's contention is correct. If Ran Jones and Miles Dark on the 3d of July took possession of Swayne's cow from the range, and drove her away with the intention of appropriating her to their own use and benefit, and appellant was not present, then under the facts of this case he would not be guilty as a principal. He may have agreed that the animal should be stolen and subsequently butchered, and that he would participate in butchering the animal and conceal the meat, still this would not make him a principal. It

might constitute him an accomplice to the taking and a receiver of the stolen property after it came into his possession, or when he became connected with the animal or the fraudulent acquisition of the meat after being slaughtered; but he could not be, under our statute, a principal. This question has been so often decided we deem it unnecessary to discuss it. All the later authorities are harmonious on this question. The old rule in *Smith's Case*, 21 Tex. App. 107, 17 S. W. 552, by the majority of the court, as well as in *Bean's Case*, 17 Tex. App. 60, has been overruled by a long line of decisions and held not to be the law. It is unnecessary to go into a review of this question and what led to the later doctrine. The overruling and qualifying decisions discuss all these matters and assign the reasons. *Sessions v. State*, 37 Tex. Cr. R. 53, 38 S. W. 605; *McIver v. State* (Tex. Cr. App.) 37 S. W. 745; *Criner v. State*, 41 Tex. Cr. R. 290, 53 S. W. 873; *Bell v. State*, 39 Tex. Cr. R. 677, 47 S. W. 1010; *Yates v. State* (Tex. Cr. App.) 42 S. W. 296; *Wright v. State*, 40 Tex. Cr. R. 45, 48 S. W. 191; *Joy v. State*, 41 Tex. Cr. R. 47, 51 S. W. 933; *Walton v. State*, 41 Tex. Cr. R. 454, 55 S. W. 566; *Barnett v. State*, 46 Tex. Cr. R. 450, 80 S. W. 1013; *McDonald v. State*, 46 Tex. Cr. R. 4, 79 S. W. 542; *Holmes v. State*, 49 Tex. Cr. R. 348, 91 S. W. 588; *Davis v. State* (Tex. Cr. App.) 117 S. W. 159. We have not undertaken to collate all the cases, but enough to show the unbroken line, down to and inclusive of *Davis v. State*, supra, a very recently decided case. Appellant was entitled to a clear-cut charge to the jury that, if he was not a principal under our statutory law, he should be acquitted, and the fact that he was an accomplice, or a receiver, or both, would not authorize his conviction as a principal under this indictment.

There are several bills of exceptions reserved to the introduction of testimony of acts and statements of other parties, in the absence of appellant, and in the absence of a conspiracy shown. We are of opinion that upon another trial, if the facts are the same, testimony of this character should not be admitted. We deem it hardly necessary to go into a discussion of these matters, as they will suggest themselves to the learned trial judge.

The judgment is reversed, and the cause remanded.

HANEY v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

1. INTOXICATING LIQUORS (§ 226*)—OFFENSES—EVIDENCE—ADMISSIBILITY.

In a prosecution for violating the local option law, where defendant was convicted upon the testimony of but one witness, evidence that

defendant, while upon the way to trial, upon being overtaken by a buggy in which the witness was riding, halted it, and pulled the witness out, and fought with him, was inadmissible.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 226.*]

2. CRIMINAL LAW (§ 364*)—EVIDENCE—INADMISSIBILITY—RES GESTÆ.

The evidence was not admissible as part of the res gestæ of the sale.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.*]

3. CRIMINAL LAW (§ 369*)—PREVIOUS CONVICTION.

In a prosecution for violating the local option law, it was error to require defendant to testify that he had previously been convicted of violations of the local option law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822-824; Dec. Dig. § 369.*]

4. CRIMINAL LAW (§ 1169*)—HARMLESS ERROR—PREJUDICE—ADMISSION OF EVIDENCE.

The evidence also tended to bring about a higher punishment than the minimum, as it placed defendant in a very bad light before the jury, to show that he was a common violator of the law, especially so because of the admission of evidence of the fight between defendant and the state's witness on the way to the trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3137; Dec. Dig. § 1169.*]

5. CRIMINAL LAW (§ 1169*)—TRIAL—CURE OF ERRORS—ADMISSION OF EVIDENCE—INSTRUCTIONS—EFFECT OF.

In a prosecution for violating the local option law, the error in requiring defendant to testify that he had previously been convicted of violating the local option law was not cured by an instruction, given at the request of the state, after the argument was over and the charge given, withdrawing this evidence from the consideration of the jury, as the state had already received the full benefit of the testimony and the argument.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 3141; Dec. Dig. § 1169.*]

Appeal from Montague County Court; A. W. Ritchie, Judge.

Jim Haney was convicted of violating the local option law, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for violating the local option law. The state proved by a witness named Paul that appellant sold him some whisky. Appellant testified that he did not sell him any whisky, but sent his brother-in-law, Smith, a bottle of whisky by the witness Paul. Appellant kept a livery and feed stable. His brother-in-law Smith, kept a hotel, and the reason he sent whisky to his brother-in-law, he states, was that his brother-in-law had been kind to him, threw a good deal of trade to his livery stable, and was in a sickly condition and needed the whisky. This was practically the testimony.

On the morning before the trial that day appellant was coming to the county seat for the purpose of attending the trial, bring-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing his wife and children with him in a surrey. A man named Moody and the alleged purchaser, Paul, who was in a buggy with him, overtook appellant, who was walking alongside of his surrey in company with one or more of his children, the remainder of his family being in the surrey, when appellant halted them, and pulled Paul out of the buggy, and had a fight with him. This evidence was introduced by the state over appellant's protest and objection. We are of opinion this was error. It in no way tended to prove appellant had sold the whisky to Paul. It might indicate his outraged feelings that Paul was testifying against him under what he believed was false testimony; but it was a different transaction and different offense, which, as we understand, did not throw any light on this transaction, either as to motive or identity. Nor was it a part of the *res gestæ*. The sale of whisky, if it occurred, had long passed. Appellant had been arrested previously, and was en route to the court to stand his trial. We think this testimony was inadmissible, and, in view of other matter set up in other bills of exception, tended to bring about a higher punishment than the minimum; the fine in this case being \$50 and 30 days' imprisonment. One of the bills recites the fact that there had been previous convictions in other cases against appellant, and that appellant had been placed in jail and suffered the punishment. It is also shown in the bills that on account of the fight excitement was rather high about the town and courthouse, and these matters tended to injure appellant and bring about a higher punishment.

A bill of exceptions recites that appellant himself was required to testify that he had previously been convicted for violations of the local option law. This went to the jury over the protest of appellant. It is made to appear by the bill of exception, after argument was over and after the charge had been given by the court, the state requested a charge withdrawing this evidence from the consideration of the jury. This charge the court gave, and instructed the jury not to consider it as evidence against the defendant. This evidence was clearly inadmissible and erroneous. Why it was introduced is not explained by the court, nor is any reason given. After the state had got the full benefit of the testimony and the argument, the state sought to withdraw the evil effect of it by the special charge. We do not believe this character of practice should be condoned. It has been found a matter of difficulty to always know, when illegitimate testimony has been introduced and withdrawn, whether the ill effects of the testimony could be also withdrawn from the jury; but this matter, it occurs to us, bears evidence of deliberate purpose in getting it before the jury and its effect upon them, and then in a special

charge to avoid the error. This it is insisted contributed to the higher punishment of appellant, especially viewed in the light of the testimony previously discussed. This character of testimony was evidently damaging, and seriously so. It placed the appellant in a very bad light before the jury to have it shown to them that he was a common violator of the law, and especially so in this case, where the difficulty occurring between the witness and appellant on the road en route to the county seat shortly before and on the morning of the trial was shown. We are of opinion, therefore, that the error in regard to introducing this testimony was not cured by the state's requested instruction withdrawing it. Appellant had done all he could to avoid it, and asked for a fair trial. Under the circumstances, we believe the error was of sufficient importance to require a reversal of the judgment.

The judgment is therefore reversed, and the cause remanded.

EUBANKS v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909.)

1. CRIMINAL LAW (§ 830*)—INSTRUCTIONS—REQUESTS—SUFFICIENCY.

Testimony for the state in a criminal case was sufficient to sustain a conviction under an indictment for theft and for fraudulently receiving stolen property. Defendant testified that he bought the property from or through another, and supported his evidence by another's testimony and by testimony as to his good reputation. The charge defined theft substantially in the terms of the statute, and submitted the offense of theft as such, as well as that of fraudulently receiving and concealing stolen property, and the issue of its voluntary return. Defendant requested a special instruction that, when a person takes property under a claim of title, he cannot be convicted of theft, and if the jury believed he took the property under a claim of title they must acquit. *Held*, that while the requested charge was not strictly accurate, nor its language wholly applicable to the case, it was sufficient to call the court's attention to its failure to submit the defense at all, and should, at least in substance, have been given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.*]

2. LARCENY (§ 73*)—INSTRUCTIONS—SUBMISSION OF ISSUES.

An indictment for theft must aver possession of the property stolen, and that it was taken from possession of the owner or person holding for him, and in submitting the issue of possession it should be substantially in the terms of the indictment.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 196; Dec. Dig. § 73.*]

3. LARCENY (§ 73*)—INSTRUCTIONS—POSSESSION AND OWNERSHIP.

A portion of a charge submitting the issue of the owner's possession of stolen sacks authorized a conviction if the jury were satisfied that defendant, at or about the time charged in the indictment, "fraudulently took from the possession of the sacks the property described in the indictment, and that they were the property of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

J. J. McQ., without the consent of said J. J. McQ., with intent to deprive the owner of the value of the same," etc. *Held*, that it was wholly meaningless and defective, in that the jury were not required to find that the property was taken from possession of the person as laid in the indictment.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 196; Dec. Dig. § 73.*]

4. LARCENY (§ 77*)—INSTRUCTIONS—SUBMISSION OF ISSUES.

Where the issue of theft was raised by the state's case, and defendant admitted the manual taking, but claimed it was done under circumstances not imputing crime to him, but in pursuance of purchase, it was error to submit the issue of voluntary return of stolen property, as that doctrine necessarily implies there has been, in the first place, a criminal taking, and this charge was calculated to create a belief in the minds of the jury that the original taking was wrongful.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 199-204; Dec. Dig. § 77.*]

Appeal from Ellis County Court; J. T. Spencer, Judge.

L. J. Eubanks was convicted on a trial on charges of theft and of receiving stolen property, and he appeals. Reversed.

Winn & Hancock, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted by the grand jury of Ellis county on November 28th of last year for the theft of 26 sacks, alleged to be the property of one J. J. McQuatters, of the value of \$2.60, and in another count with the offense of fraudulently receiving stolen property. The testimony of the state includes circumstances sufficient, perhaps, to sustain the conviction, if they stood alone. It was appellant's contention that he bought these sacks from or through one Parson Frierson, a negro driver. This contention he supported by his own testimony, as well as the evidence of Frank Tidwell. Appellant introduced testimony that he had borne and bore a good reputation as an honest and law-abiding citizen in the community in which he lived. The charge of the court defined theft substantially in the language of the statute, and submitted to the jury the offense of theft as such, as well as the offense of fraudulently receiving and concealing stolen property, as well as the issue of the voluntary return of stolen property.

1. In this state of record appellant requested the court to give in charge the following special instruction: "You are further instructed that, where a person takes property under a claim of title, he cannot be convicted of theft, and, if you believe that the defendant took the property under a claim of title, you must acquit him." This charge is not strictly accurate, nor is this language wholly applicable to the case at bar, but was sufficient, we think, to call the attention of the court to his utter failure to submit ap-

pellant's defense at all, and should, in substance at least, have been given.

2. By bill of exceptions appellant complains of the following portion of the court's charge: "Now, if from the evidence you are satisfied beyond a reasonable doubt that the defendant, L. J. Eubanks, in the county of Ellis and state of Texas, at or about the time charged in the indictment, fraudulently took from the possession of the sacks the property described in the indictment, and that the sacks were the property of J. J. McQuatters, without the consent of the said J. J. McQuatters, with intent to deprive the owner of the value of the same, and to appropriate it to the use or benefit of him, the said defendant, L. J. Eubanks, then you will find the defendant guilty," etc. Except for the bill of exceptions, which was taken at the time, there might be some contention that we could assume that the charge of the court as copied in the record was a mere lapse of the pen; but this portion of the court's charge was in terms excepted to, as the bill recites, before the jury had retired to consider their verdict, on the ground that same was meaningless, and that appellant could not take from the possession of the sacks, the theft of which he is charged, but the evidence must show that they were taken from the possession of some one, and the court gave the jury no opportunity to pass on the question as to whom the possession of the sacks was in, or as to whose possession they were taken from. In all indictments for theft, it is essential to aver the possession of the property stolen, and that it was taken from the possession of the owner, or person holding for the owner, and in submitting the issue to the jury it is indispensable that the matter of possession be submitted substantially in the terms charged in the indictment. The charge of the court here, of course, is wholly meaningless and defective, in that the jury are not required to find that the property, if taken, was taken from the possession of the person as laid in the indictment.

3. Again, appellant complains that the court erred in submitting the issue of voluntary return of stolen property. We think the court was in error in submitting this issue. Under the state's case, the issue raised was the fraudulent taking of the property, or, in other words, that appellant was guilty of theft. By his testimony he in substance admitted the manual taking of the sacks, but claimed that same was done under circumstances not imputing crime to him, but in pursuance of purchase. The doctrine of voluntary return of stolen property implies of necessity that there had been, in the first place, a criminal taking. This charge was calculated to create the belief in the minds of the jury that the original taking was wrongful, and must, of

necessity, have been prejudicial to appellant. From the verdict of the jury, which assessed a fine of \$1 against appellant, without imprisonment, it is obvious that they found appellant guilty with reference to this paragraph of the court's charge. On another trial the issues as here indicated should be clearly submitted to the jury, omitting any mention of voluntary return of stolen property under the evidence as here presented. See *Schultz v. State*, 30 Tex. App. 94, 16 S. W. 756.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

JOHNSON COUNTY SAVINGS BANK v. RENFRO.

(Court of Civil Appeals of Texas. Oct. 20, 1909.)

1. BILLS AND NOTES (§ 373*)—INNOCENT PURCHASER—EQUITABLE SET-OFF.

Where plaintiff was an innocent purchaser for value of acceptances given by defendant in payment for goods sold through fraud, but obtained knowledge of the fraud and of defendant's refusal to pay for them before maturity, defendant could set up the fraud as a defense in an action thereon by plaintiff only as to such drafts as matured when plaintiff had in its possession funds of the drawer sufficient to pay the acceptances, but not as to such drafts as were not matured when plaintiff held the drawer's funds, as the rule should not be applied when it would work injury to a bona fide purchaser.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 966; Dec. Dig. § 373.*]

2. SALES (§ 114*)—RESCISSION FOR FRAUD—RIGHT TO RESCIND.

The buyer of goods who has given drafts for the purchase price could rescind and cancel the contract for fraud in inducing him to purchase, notwithstanding a bond given to him indemnifying against loss under the contract.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 288; Dec. Dig. § 114.*]

3. BILLS AND NOTES (§ 373*)—ACTIONS—DEFENSES—FRAUD—ESTOPPEL.

Where the drawee when he paid drafts was not fully aware of the fraud inducing the sale of goods for which they were given, or, if so, was then trying to adjust his differences with the drawer, the payment by the drawee did not preclude him from urging the fraud as a defense against one holding the drafts at maturity, with knowledge of the fraud, acquired after transfer, who then had sufficient of the drawer's funds to pay them.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 966; Dec. Dig. § 373.*]

Appeal from Wilbarger County Court; J. A. Nabers, Judge.

Action by the Johnson County Savings Bank against J. R. Renfro. From a judgment for defendant, plaintiff appeals. Reversed and rendered in part, and affirmed in part.

F. P. McGhee, for appellant. Berry & Lucky, for appellee.

RICE, J. This was a suit by appellant against appellee to recover on three drafts,

a series of five, of date November 13, 1906, drawn by the American Jobbing Association on appellee and accepted by him, the last three being each for the sum of \$74, all of the same being due, respectively, four, six, eight, ten, and twelve months thereafter; the first two having been paid off at maturity. Appellee purchased from the American Jobbing Association an assortment of jewelry, for which these acceptances were given. Subsequent thereto, on the 14th of December, 1906, said association, for value, indorsed said drafts to appellant herein, who took same without notice of any of appellee's defenses thereto. The appellee defended on the ground, among other things, of the failure of consideration of said acceptances, in this: that he, not being a judge of jewelry, relied upon the representations of the agent, and was induced to purchase said jewelry by reason of said representations made by said association to the effect that the same were first-class goods, merchantable and of good quality, whereas, said jewelry proved to be worthless, and said representations were therefore fraudulent. He further pleaded that plaintiff was not an innocent holder for value without notice, and, further, that plaintiff after it had been informed before the maturity of the acceptances of the fraud that had been practiced upon him in the purchase of said jewelry, and that the consideration for said acceptances had failed, had paid the first two thereof, and that plaintiff had sufficient funds in its hands belonging to said American Jobbing Association before and at the time of the maturity of said last three acceptances to cover same, and which he contended should have been applied in payment thereof. Appellant, by supplemental petition, further pleaded that it was an innocent purchaser for value of said acceptances, without notice of the infirmity in said paper, and likewise pleaded that at the time of the purchase of said jewelry the said American Jobbing Association had executed to defendant a contract of guaranty as to the quality of said jewelry, etc., wherefore he was precluded from asserting any defense against the judgment sought against him. Upon trial before the court without a jury judgment was rendered in favor of the defendant, from which this appeal is prosecuted.

While there are a number of assignments assailing the correctness of the judgment of the court for several reasons, still we think it only necessary to notice the principal one, which in our judgment is decisive of the questions presented. Appellant insists that the defendant has no right in equity to set up as against it a failure of consideration of the acceptances, and to urge its failure to apply the funds of the association in its hands to the satisfaction of said ac-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ceptances as a defense to this action, since it contends that it was an innocent purchaser of said drafts for value before maturity without notice of any infirmity therein, and especially so since there were no funds in its hands belonging to the association at the time of the maturity of the last acceptance.

It is, however, urged on the part of appellee that the judgment should be sustained because of appellant's failure after notice of the fraud and failure of consideration therefor to apply the funds in its hands belonging to said association to the satisfaction thereof, and this is true notwithstanding he had paid the first two thereof without objection, asserting that it would be inequitable to do so, and cites in support of said insistence the cases of *Sperlin v. Peninsula Loan & Discount Co.* (Tex. Civ. App.) 103 S. W. 232; also the case of *Van Winkle Gin & Machinery Co. v. Citizens' Bank of Buffalo*, 89 Tex. 147, 33 S. W. 862. While the case first cited is in its facts very much like the present case, and in some respects seems to support appellee's contention, still in our judgment it is dissimilar to and distinguishable from the case at bar. In this: that in that case it was clearly shown by the proof that the bank, the holder of the acceptances sued upon, was not an innocent purchaser for value, and, further, the question was not raised in that case as to whether there was any deposit in the bank in favor of the drawer of the checks at the time of the maturity thereof. In the last case cited the record discloses that the bank not only had notice of the infirmity of the paper and the failure of consideration before maturity thereof and before suit was brought thereon, but likewise had at the time of its maturity, and at the time of the institution of the suit, a large amount of money in its hands belonging to the drawer of the drafts sued upon; wherefore it was held bound in equity and good conscience to protect the acceptor of the paper by the application of said funds of the indorser to the payment of said acceptances. So that in our judgment each of those cases presents a different state of facts from those under consideration here, and which, in our opinion, renders them inapplicable to the questions here presented, and therefore of no controlling effect.

It is said by Judge Denman in *Van Winkle Gin Co. v. Citizens' Bank*, supra: "The relation of the bank to its depositors is that of debtor and creditor, and its right to offset its indebtedness to the depositor against the indebtedness of the latter to it is of an equitable nature intended for its protection, and does not depend upon any statute in relation to offsets. It is generally said that it is optional with the bank whether it will avail itself of this right. *Citizens' Bank v. Carson*, 32 Mo. 191; *Jermain v. Denniston*, 6 N. Y. 276; *Marsh v. Oneida Cent. Bank*, 34

Barb. (N. Y.) 298; *Pitts v. Congdon*, 2 N. Y. 352, 51 Am. Dec. 290; *Beardsley v. Warner*, 6 Wend. (N. Y.) 610; *Ticonic Bank v. Johnson*, 21 Me. 426; *Shackamaxon Bank v. Kinsler*, 16 Wkly. Notes Oas. (Pa.) 509. The instances in which it has been held that the bank had the absolute right to determine whether it would or would not exercise its privilege were cases in which it was not appealing to the courts to apply any equitable principle in order to allow it to recover, as the *Citizens' Bank of Buffalo* is doing here, against an innocent party to the paper, who, but for the application of such principle, could not be held liable. If the *Buffalo Forge Company* had not transferred the bill before maturity, or if at the time of the indorsement the bank had known of the failure of consideration, it is clear that such failure would have been a complete defense. This is not disputed. *McDonald Manuf. Co. v. Moran*, 52 Wis. 203, 8 N. W. 864; *Mann v. Nat. Bank*, 30 Kan. 412, 1 Pac. 579. But although, in good conscience, plaintiff in error ought not as between it and the *Buffalo Forge Company*, or any one claiming under or through the latter with notice, to be held to pay the bill, nevertheless it will not be allowed to assert its defense to the prejudice of the indorsee bank because the latter has invoked the protection thrown round it by the law as an innocent purchaser. As between the acceptor and the innocent holder, the latter will be absolutely protected, because the former has carelessly launched upon the market its unqualified promise to pay, whereby the latter was induced to acquire same. But, while the law protects the innocent holder at the expense of the negligent but innocent acceptor, it does not permit the former to use his vantage ground for the purpose of going beyond his protection, and willfully inflicting on the latter a wrong, in order to favor the fraudulent endorser who in justice and good conscience ought to pay the bill."

It must be borne in mind, however, that in that case an entirely different set of facts from those here presented were before the court for consideration. Beside the fact that the bank had ample funds in its hands, both at the time of the maturity of the paper and at the institution of the suit, with which to have protected itself, and that both it and the drawer of the paper lived in a foreign state, it was further shown that the suit was brought at the instance of the drawer of the draft in that case, who had agreed to hold the bank harmless in the event of a failure of said suit. To show that the court evidently gave much weight to the fact that there was money in the hands of the bank belonging to the endorser at the time of maturity of the paper after notice of its dishonor, and with which it could have amply protected itself, we beg to further quote

from the opinion by Judge Denman in the same case, as follows: "The bank had the undoubted right to say to the Forge Company: 'You have indorsed us a paper which, as between you and the acceptor, the latter ought not to pay. We have money belonging to you in our hands sufficient to satisfy your contract of indorsement now due, and we elect to avail ourselves of our equitable right to apply the same as an off-set and in settlement of your contract and return to you the paper, rather than pursue the innocent acceptor in another jurisdiction, especially since such pursuit cannot possibly be necessary for our protection. We will not use the shield thrown round us by law solely for our protection as innocent purchasers as a subterfuge to aid you in enforcing through us an unjust demand.' Such a position would have been unassailable in morals and in law. The bank, however, elected the contrary. The case then comes to this: The indorser in good conscience should pay. The bank has its funds in its hands sufficient to satisfy the demand with a perfect right in equity to offset same in satisfaction of the bill. The pursuit of the acceptor in a foreign jurisdiction is clearly not necessary to the bank's protection, but can only serve to allow the indorser to avail himself of the protection given by law to an innocent purchaser in order to cut the acceptor off from a just defense, and compel it to pay a sum of money which in equity it should not pay." While the evidence shows that the defendant was induced to purchase the jewelry on account of fraudulent representations made with reference to its quality by said association, and that the same proved worthless, and there was a total failure of consideration for said acceptances, yet it also appears to our satisfaction that the appellant was an innocent holder for value, without notice, of the same; and, while subsequent to its purchase of said paper, and before maturity thereof, it had notice of said infirmity therein and defendant's refusal to pay the same, still it also appears that at the time of the maturity of the last acceptance there were no funds in its hands belonging to said association, but, on the contrary, there was an overdraft by said association, amounting to some \$800. We are of the opinion for these reasons that it would be inequitable, so far, at least, as the last acceptance is concerned, to apply the equitable doctrine invoked here, and thereby defeat the right of recovery on the part of appellant thereon. It appears, it is true, that, as to the other two acceptances sued on, there were funds in the hands of the bank after their maturity belonging to said association more than sufficient to have liquidated them, and as to them the defense urged, we think, is applicable, but we

do not believe that the bank, appellant in this case, would have any right to apply funds in its hands belonging to said association to the payment of said last acceptance before the maturity thereof. Certainly if the bank itself, as between it and its depositor the American Jobbing Association, in this case would have no right to set off its unmatured demand against said depositor, then it would be inequitable to hold that it should be compelled in this case to have applied any funds in its hands that may have been shown to belong to said association in payment of its unmatured claim in an effort to protect the innocent acceptor, because it could not be held it seems to us that it should be required to place itself at disadvantage for the benefit of the acceptor. The equitable doctrine invoked in our judgment should only be applied when it could work no injury to the bona fide purchaser of the paper, and in support of this doctrine we cite the following authorities: *Homer v. Nat. Bank of Commerce*, 140 Mo. 225, 41 S. W. 790; *Jordan v. Nat. Shoe & Leather Bank*, 74 N. Y. 467, 30 Am. Rep. 319; 1 *Morse on Banking* (3d Ed.) p. 563, § 329; 3 *Randolph on Commercial Paper*, § 1441; *Commercial Nat. Bank v. Proctor*, 98 Ill. 558; *First Nat. Bank v. Peltz*, 176 Pa. 513, 35 Atl. 218, 36 L. R. A. 832, 53 Am. St. Rep. 686.

Appellant likewise urges that since a guaranty bond was given by the jewelry association to the defendant, indemnifying him against loss under the contract, and, further, that since the payment of the first two acceptances without objection by him, he should be held to have waived the right of urging his equitable defense thereto. We think it only necessary to say in reply to this contention that the defendant had the right, on the ground of the fraud pleaded, to rescind and cancel the contract, and that, when the first two acceptances were paid by him, he was not fully aware of the worthlessness of said jewelry, or, if so, there was at that time an effort being made by him to adjust the dispute with the association, for which reasons in our judgment he was not precluded from urging said defense, and appellant's contention is therefore without merit.

Believing that the court erred in rendering judgment against appellant so far as the last acceptance is concerned, its judgment in this respect is now here reversed and rendered in favor of appellant for the sum of \$74, with 6 per cent. interest thereon from date of maturity thereof, the same being the amount due on said last acceptance; but the judgment in appellee's favor as to the other two acceptances will not be disturbed, but is affirmed.

Affirmed in part, and reversed and rendered in part.

FAMBRO v. KEITH.

(Court of Civil Appeals of Texas. Oct. 27, 1909.)

1. EVIDENCE (§ 441*)—PAROL EVIDENCE AFFECTING WRITINGS—NOTES.

An oral promise by the payee to the surety on a note, made when it is executed, not to enforce its payment against him, does not affect the surety's obligation, evidenced by the writing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2045; Dec. Dig. § 441.*]

2. PRINCIPAL AND SURETY (§ 104*)—DISCHARGE OF SURETY—EXTENSION OF TIME FOR PAYMENT.

An agreement between the maker and the payee of a matured note, without the surety's consent, to extend the time of payment for a definite period, on consideration that the maker will pay interest accruing thereon, releases the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 186; Dec. Dig. § 104.*]

Appeal from District Court, Shelby County; James I. Perkins, Judge.

Action by P. P. Keith against F. W. Fambro. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

D. M. Short & Sons, for appellant. Bryarly, Carter & Walker, for appellee.

NEILL, J. Appellee sued appellant on a promissory note, alleging that the note was made to him on February 21, 1903, by James T. Polley and F. W. Fambro for the sum of \$204.50, payable 30 days after date, with interest from date at the rate of 10 per cent. per annum; that, while the note was signed by each maker as a principal, as a matter of fact Polley was the principal and Fambro his surety thereon; that since the note matured, and before the institution of the suit, Polley died, leaving his estate insolvent. The defendant, Fambro, answered by a general denial, and pleaded specially: (1) That he signed the note as an accommodation surety at the request of Polley, and upon the representation, made him by plaintiff when such request was made, that the note would never be enforced against him, and that he relied upon and was induced by such representation to place his signature to the instrument; and (2) that after the note matured the plaintiff, without his consent, in consideration of an agreement made with him by Polley to pay the interest accruing thereon, extended time of payment of the note for 30 days, and that by reason of such agreement and extension defendant was discharged from further liability. Exceptions to both special pleas were sustained, the case was tried by jury, and judgment rendered against the defendant for the amount, principal and interest, due.

That the first special plea offered no defense to the action is too obvious for discussion. It involves the absurdity that an oral promise of the payee to the payor, made when a note is executed, not to enforce its

payment, destroys the obligation evidenced by a written instrument. But there is music for the appellant in the other special plea; for it is held in this state that the extension of an interest-bearing debt, upon an agreement of the parties, based on a consideration, for a definite period, is, in effect, a contract that the creditor will forbear suit during the time of extension, and that the debtor forego his right to pay before the expiration of that time; that such agreement is a contract based upon a valuable consideration, and binding upon the parties, because the debtor secures the benefit of forbearance, and the creditor an interest-bearing investment for a prolonged and definite period; and, hence, that a surety on the original contract of indebtedness, who has not assented to the agreement extending its time of payment, is released from his obligation, because of the impairment of his right to pay the debt at any time after it became due under the original contract and proceed against the principal for indemnity. *Benson v. Phipps*, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. Rep. 128; *Carter-Battle Grocer Co. v. Clark* (Tex. Civ. App.) 91 S. W. 882; *Kearby v. Hopkins*, 14 Tex. Civ. App. 166, 36 S. W. 515.

We conclude, therefore, that the court erred in sustaining the exception to said plea. Wherefore the judgment is reversed, and the cause remanded.

HOPE v. LONG et al.

(Court of Civil Appeals of Texas. Oct. 14, 1909.
Rehearing Denied Nov. 4, 1909.)

APPEAL AND ERROR (§ 78*)—ORDERS APPEALABLE—STATUTES.

Rev. St. 1895, art. 1383, authorizing appeals from final judgments of the district and county courts, does not authorize an appeal from an interlocutory order of the county court setting aside a default judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 478; Dec. Dig. § 78.*]

Appeal from Franklin County Court; G. E. Cowan, Judge.

Action by T. A. Hope against S. M. Long and another. From an order setting aside a default judgment in favor of plaintiff, he appeals. Dismissed.

S. D. Goswick, for appellant. R. T. Wilkinson, for appellees.

LEVY, J. The appellant sued appellee, and had entered on the appearance day of the county court judgment by default. On the third day after the default judgment was rendered, the appellee filed a motion to have same set aside and to be allowed to file an answer and have the cause proceed to trial on the merits. It appears from the motion, and the evidence submitted to the court on the hearing thereof, that on the first day of the court the attor-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

neys for the plaintiff and defendant had agreed that the case should be passed for trial until a specified day later in the term. The court after hearing the evidence granted the motion, and entered an order to set aside the judgment by default. The appellant excepted to the order setting aside the judgment by default, and gave notice of appeal to this court. The case was not tried on its merits at this term of the court, but seems to have been passed awaiting a determination of this appeal.

There is no provision of law authorizing an appeal to this court from an interlocutory order of the county court in this case setting aside the judgment by default entered at a previous day of the term. Rev. St. 1895, art. 1383; *Stewart v. Jones*, 9 Tex. 469; *Houston v. Starr*, 12 Tex. 425; *Dial v. Collins et al.*, 40 Tex. 368. The cases cited in appellant's brief have no application to the present appeal. They are cases where the court refused to grant a new trial and set aside the judgment, and consequently there was in the cases a final judgment which could be appealed from and the assignments reviewed by this court.

Because this court is without jurisdiction to entertain the appeal, the same was ordered dismissed.

GOODHUE v. WESTERN UNION TELEGRAPH CO.

(Court of Civil Appeals of Texas. Oct. 27, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 68*)—DELAY IN DELIVERY OF MESSAGE—DAMAGES RECOVERABLE.

In case of delay in delivering a message informing a daughter of her father's fatal illness, damages arising from distress and mental anguish arising from her great desire to reach her father at the earliest possible moment, and from separation from her family, cannot be recovered, as her anxiety was not produced thereby, but merely prolonged.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

2. DISMISSAL AND NONSUIT (§ 55*)—SUSTAINING EXCEPTIONS TO PETITION—JURISDICTION.

Where exceptions are sustained to parts of a petition setting up damages, and plaintiff declines to amend, the case is properly dismissed; the remaining amount in controversy not being sufficient to give jurisdiction.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. §§ 115, 116; Dec. Dig. § 55.*]

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Action by Augusta Goodhue against the Western Union Telegraph Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Ed. Haltom, for appellant. F. J. & R. C. Duff, for appellee.

FLY, J. Appellant instituted this suit to recover damages alleged to have accrued by the failure of appellee to promptly deliver a message informing her of the illness of her father. The material parts of the petition are as follows:

"And now, for cause of action, plaintiff avers: That on and for a short time before August 23, 1906, she was on a visit to the family of Mr. and Mrs. George Smith, in Warrenton, Va., and on the 23d day of August, 1906, John B. Goodhue, the father of plaintiff, was seriously ill in Beaumont, Jefferson county, Tex., and on said 23d day of August, at or about 12 o'clock midday, Mrs. Josie Goodhue, the mother of plaintiff, caused to be delivered to defendant at its office in Beaumont, Tex., a message to be sent to plaintiff at Warrenton, Va., notifying plaintiff to come home to Beaumont by first train; said message being in substance as follows: "Miss Augusta Goodhue, care Mrs. Geo. Smith, Warrenton, Va. Come home on first train, Papa ill. [Signed] Mama." And that the charges of defendant for transmission and delivery of said message were paid. And now plaintiff avers: That, within about one-half hour after said message was accepted for transmission and delivery by defendant at Beaumont, plaintiff's said mother caused the defendant at its office in Beaumont to be notified that the prompt and immediate transmission and delivery of said message was important, and then requested the agent or employé of said defendant to have said message hurried through to Warrenton, Va., so that plaintiff might receive the same as early as possible, and defendant's agent or employé was told that if there were any additional charge for hurrying said message through that such charges would be immediately paid, and so they would have been paid; and then the agent or employé replied, in substance, that the message had been sent, and would be hurried through to delivery without extra charge, and plaintiff further avers that said message upon its face, and by its wording, shows that it was important to plaintiff that she receive the same as early as possible, so that she could have an opportunity of taking the first possible railway train from Warrenton, Va., on her journey back home to Beaumont, Tex. That defendant's agents and employes, at Beaumont knew that he was seriously ill, and knew that said message was sent to plaintiff by plaintiff's mother.

"And now plaintiff represents: That through the gross negligence and carelessness of the defendant, its agents and servants, said message was not transmitted to Warrenton, Va., and delivered to plaintiff until after the expiration of nearly six hours after it had been received by defendant at Beaumont, Tex., for transmission, so that the same was not delivered to plaintiff until about the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

hour of 5 o'clock and 55 minutes on the evening of August 23, 1906. That at the time said message was delivered the banks and business houses in Warrenton had closed for the day, and plaintiff did not have sufficient funds to pay her passage back to Beaumont, and by reason of the banks and business houses being closed plaintiff could not get a draft on Beaumont cashed to raise the necessary funds which she could and would have done had said message been delivered even one hour earlier. That her host, Mr. Geo. Smith, did not have in his house sufficient money to pay plaintiff's passage back to Beaumont; but, almost immediately after said message was delivered, Mr. Geo. Smith went out among his friends, and borrowing a little from first one and then another he succeeded in getting for plaintiff sufficient funds to have paid her passage to Beaumont, Tex., but before he could get the money together the last train out of Warrenton, Va., that day, had left, which train left Warrenton at about 7:05 p. m. on the evening of August 23, 1906, and there would be no other train leaving Warrenton, which plaintiff could take on her journey home, until 6:15 p. m. next day, August 24, 1906. That being very anxious to get home as soon as possible, plaintiff went on the night of August 23, 1906, by wagon to Calverton, Va., a distance of about nine miles, with the intention of there taking a train to New Orleans, on her way home. That the plaintiff expended for team and driver from Warrenton to Calverton the sum of \$10, which was a reasonable charge, and which it became necessary for plaintiff to pay in order to reach her destination at the earliest possible time. That Calverton is a small town on the Southern Railway through which a train passed en route to New Orleans at about 12:30 a. m., but which did not usually stop for passengers at that station. That plaintiff, or friends for her, sent a telegraph message to the officials of said railway at Washington, D. C., requesting that the train stop at Calverton for plaintiff, but by reason of the fact that the message to plaintiff from Beaumont was not delivered to plaintiff until nearly 6 p. m. the message to said railway officials could not be delivered at the offices of said officials in Washington until after office hours, and said message was not received by said railway officials until it was too late for them to grant said request made by plaintiff, and although plaintiff reached Calverton in time to take said train it passed through without stopping. That if plaintiff had succeeded in her effort to take said train she would have reached Beaumont about 24 hours earlier than she did. Not being able to take the said train, she waited at Calverton until the hour of 1:30 a. m., August 24, 1906, when she took a train which carried her to Cincinnati, Ohio. That this was under the circumstances the best and quickest way for plaintiff to reach her home in Beau-

mont, or at least it so appeared to plaintiff. At Cincinnati, Ohio, plaintiff took the first train she could for New Orleans, La., which place it was expected plaintiff would reach in time to take a train from New Orleans to Beaumont, at about 9 p. m., August 25, 1906; but the train upon which plaintiff was going from Cincinnati to New Orleans was late or behind time, and plaintiff did not reach New Orleans until about 11 o'clock p. m. August 25, 1906, after the train from New Orleans to Beaumont had departed. That upon arriving at New Orleans plaintiff was met by friends who informed her that her father, John B. Goodhue, had died August 24, 1906, and that he would be buried on the evening of August 26, 1906. That there would be no train going from New Orleans to Beaumont, until about 9:30 o'clock on the morning of August 26, 1906, and which would not reach Beaumont until 6:30 or 9:30 o'clock August 26th, after the burial of the body of plaintiff's father. That in order to arrive at Beaumont before the funeral of her father it was necessary for plaintiff to hire a special train to carry her from New Orleans to Lafayette, La., and further it became necessary for plaintiff to again borrow money to pay for said special train, and she did borrow money, and did hire and pay for such special train the sum of \$185. Plaintiff was compelled to wait in New Orleans until 2 o'clock a. m., August 26th, before said special train was made up and ready to depart, and at which hour and day said train left New Orleans and arrived at Lafayette, La., at about the hour of 7 o'clock a. m., August 26th, at which place plaintiff took a train which arrived in Beaumont, Tex., at about 2 o'clock p. m., August 26, 1906, about two hours before the burial of the body of plaintiff's father.

"And now plaintiff avers: That in the journey from Warrenton to Calverton by wagon she was compelled to travel over a rough and muddy road in the dark, and although accompanied by friends, who did all in their power to render plaintiff comfortable, on said journey she suffered and endured great physical pain from being jolted and shaken by the wagon rolling over the rough and muddy road, and great anxiety, distress, and mental anguish on account of fearing she would not be able to take the first train passing through Calverton; and that, by reason of having to make the long journey from Cincinnati to New Orleans on a train behind time, she continuously on said journey suffered great anxiety, distress, and mental anguish in her desire to reach her father at the earliest possible time. And at New Orleans, where plaintiff first learned of her father's death, she suffered great mental anguish and distress in contemplating the long ride from New Orleans to Lafayette alone in a special train, and on said journey from New Orleans to Lafayette she suffered great distress and mental anguish from be-

ing alone in her great distress and grief, and from the fact that she was separated from her mother and other loved ones in their sorrow. All of which physical pain and mental anguish was directly and proximately caused by the gross negligence and carelessness of the defendant in failing to use ordinary care and diligence in transmitting and delivering said message. And plaintiff further shows: That she was required to pay and did pay for said special train the sum of about \$185, which sum of money she would not have had to pay had it not been for the gross negligence and carelessness of defendant in failing to use ordinary care and diligence in transmitting and delivering said message, and defendant is liable for said money. That plaintiff paid for the wagon and driver to carry her from Warrenton to Calverton the sum of \$10, which she would not have had to pay had it not been for the negligent failure of defendant to use reasonable care and diligence in transmitting and delivering said message.

"And plaintiff further says: That she was not in any way guilty of contributory negligence which in any way contributed to her injuries or mental anguish or damages; and the defendant, its agents and servants, had notice by the wording of said message that plaintiff was notified of her father's serious illness, and that it was urgent and necessary for plaintiff to take the first train possible in order to reach her father's bedside at the earliest possible moment; and they knew that if said message was not delivered with reasonable dispatch and promptness plaintiff would be put to extra expense and also delay in reaching her home to be with her relatives in their distress. And the defendant knew, or ought to have known, that plaintiff would expend any money necessary to be expended in her attempt to reach Beaumont at the earliest possible time. Plaintiff further avers: That, had it not been for the gross negligence and carelessness of defendant in failing to use ordinary care and diligence in the transmission and delivery of said message, the plaintiff could and would have taken a train at Warrenton, Va., at about 5:55 p. m. or 7:05 p. m. on August 23, 1906, and would have arrived at Charlottesville, Va., at about 8 o'clock p. m., where she would have taken a train direct to New Orleans, La., and would have arrived at New Orleans at about 9 a. m. on August 24th, and would have reached Beaumont at about 9 p. m. on the same day. That had defendant used ordinary care and diligence in transmitting and delivering said message plaintiff would have received the same at or before 2 o'clock p. m. on August 22, 1906, and could and would have obtained the necessary money for her journey in

time to have left Warrenton, Va., at 7:05 on that day, and could and would have arrived in Beaumont on August 24, 1906, at 9 o'clock p. m."

The sum of \$1,800 was alleged to have arisen for mental anguish and \$195 on account of \$10 paid for conveyance from Warrenton to Calverton and \$185 for a special train from New Orleans to Lafayette, La. The court sustained special exception to those parts of the petition that set up damages that were alleged to have arisen from the distress and mental anguish which arose from appellee's great desire to reach her father at the earliest possible moment and from the fact of her separation from her mother and loved ones and was alone in her distress and grief.

If the message had been delivered with such promptness that appellant would have left by the first train out of Warrenton, she would have been just as lonely and would have suffered the same mental anguish and grief on account of her desire "to reach her father at the earliest possible time" and "having to make the long journey from Cincinnati to New Orleans" as she did after being delayed. The delay of the message did not produce the anxiety of mind arising from those causes, but merely prolonged it. The Supreme Court has held that prolongation of anxiety caused by failure to promptly deliver a message cannot be made the basis of damages. *Rowell v. Telegraph Co.*, 75 Tex. 26, 12 S. W. 534; *Telegraph Co. v. Edmondson*, 91 Tex. 206, 42 S. W. 549; *Telegraph Co. v. Giffin*, 93 Tex. 590, 56 S. W. 744, 77 Am. St. Rep. 896. The delay of the message did not add a mile to the length of the journey from Cincinnati to New Orleans, and did not increase the desire on the part of appellant to reach her father at the earliest possible time, and was not the proximate cause of any anxiety resulting "from the fact that she was separated from her mother and other loved ones in their sorrow."

The court held that the damages set forth as arising from mental anguish could not be recovered, but granted leave to appellant to amend so as to meet the rulings; but this was declined and notice of appeal given. The court granted permission to appellant to amend her petition so as to bring the matters in dispute within the jurisdiction; but this was declined, and, the amount in controversy that remained after the exceptions had been sustained not being sufficient to give the court jurisdiction, the case was properly dismissed. *Haddock v. Taylor*, 74 Tex. 216, 11 S. W. 1063; *McFadin v. City of San Antonio*, 22 Tex. Civ. App. 140, 54 S. W. 48.

The judgment is affirmed.

GALVESTON, H. & S. A. RY. CO. v. SANCHEZ.†

(Court of Civil Appeals of Texas. Oct. 13, 1909. Rehearing Denied Nov. 10, 1909.)

1. NEW TRIAL (§ 71*)—GROUNDS—VERDICT CONTRARY TO EVIDENCE—CONFLICTING EVIDENCE.

As the jury may disregard the evidence of either party where it is conflicting a verdict for a servant should not be set aside because defendant's evidence tended to show contributory negligence and assumption of risk.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 144, 145; Dec. Dig. § 71.*]

2. MASTER AND SERVANT (§ 231*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—RELIANCE ON ASSURANCES BY FOREMAN.

Plaintiff, whose duty was to care for railroad yards and assist in the storage of oil cars in the yard, was ordered to unscrew the nipple under an oil tank car so as to attach a pipe thereto, to empty the tank. The valve in the tank, which was operated by a key from the top, had been left open, so that, when the nipple was unscrewed, the oil rushed out and injured plaintiff's eyes. Plaintiff's foreman, in charge of unloading the oil, whose duty it was to see that the valve was closed when the nipple was removed, went on top of the tank and told plaintiff everything was all right before ordering him to remove the nipple, and plaintiff did not know that the valve was open. *Held*, that plaintiff was not guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 676; Dec. Dig. § 231.*]

3. MASTER AND SERVANT (§ 205*)—INJURIES TO SERVANT—ASSUMPTION OF RISK—ASSURANCES BY MASTER.

Plaintiff did not assume the risk of injury from such cause.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 548; Dec. Dig. § 205.*]

4. MASTER AND SERVANT (§ 139*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

The negligence of plaintiff's foreman in operating the oil tank without closing the valve caused plaintiff's injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 275, 296; Dec. Dig. § 139.*]

5. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—PLEADING AND PROOF.

Where, in a servant's action for injuries by oil spouting from the bottom of a tank into plaintiff's eyes when he removed the nipple from the pipe, there was no allegation that the spouting was caused by gravel in the valve, defendant's theory being that plaintiff went under the car when he knew the oil was running, surmises of witnesses that gravel in the valve caused the oil to spout were properly rejected.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 865, 866; Dec. Dig. § 264.*]

6. MASTER AND SERVANT (§ 291*)—INJURIES TO SERVANT—INSTRUCTIONS.

In a servant's action for injuries by oil spouting from the bottom of an oil tank into his eyes, because the valve was open when he removed the nipple from the pipe at the bottom of the tank, allegations of the answer that the danger was open to plaintiff's observation when he went under the car authorized an instruction that defendant would be liable if the spouting oil was a latent danger incident to the work, known to defendant, but unknown to plaintiff,

and of which he could not have learned by exercising ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1138, 1139; Dec. Dig. § 291.*]

7. MASTER AND SERVANT (§ 149*)—INJURIES TO SERVANT—MASTER'S LIABILITY—ORDERING SERVANT INTO PLACE OF DANGER.

If defendant knew of the danger in sending an employé under an oil tank car to unscrew the nipple of the pipe when the valve was open, so as to permit the oil to rush out into his eyes when the nipple was removed, and the servant did not know the danger and could not have discovered it, defendant would be liable for resulting injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 291, 294; Dec. Dig. § 149.*]

8. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS—INSTRUCTIONS ALREADY GIVEN.

Where the defenses of contributory negligence and assumed risk were clearly presented in the court's instructions, it was unnecessary to repeat them at defendant's request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. § 260.*]

9. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

A requested charge, in a servant's injury action, to reject testimony as to the defective condition of machinery, was properly refused where there was no evidence of any defects in the machinery.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 602, 603; Dec. Dig. § 252.*]

10. TRIAL (§ 272*)—INSTRUCTIONS—EXCLUSION OF TESTIMONY—OBJECTION BY PARTY OFFERING TESTIMONY.

Defendant cannot object to the action of the court in refusing an instruction to reject testimony given by his own witness.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 678, 679; Dec. Dig. § 272.*]

11. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.

Where a servant's eyes were injured by oil so that he could not perform his duties or otherwise earn a living, and his condition was becoming worse, a verdict for \$3,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 385; Dec. Dig. § 132.*]

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Action by Felix Sanchez against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood and Lane, Jackson, Kelley & Wolters, for appellant. J. M. Gibson and Joe H. Eagle, for appellee.

FLY, J. This is a suit for damages instituted by appellee against appellant. After alleging that appellee was an employé of appellant, the petition proceeds as follows: "That upon said date the defendant caused one of its tank cars loaded with oil or crude petroleum to be run upon the switch at said place for filling the oil tank there situate for the storage of petroleum used as fuel by the defendant upon its engines operating on said road to San Antonio. That the plaintiff was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

instructed and commanded by the defendant agent then and there operating and controlling the operation and unloading of said car to go under the said oil car or tank filled with crude petroleum oil, and to unscrew the nipples of the two tubular apertures, pipes, or drains, under said car, and attach thereon the rubber tube or hose used to pump the oil from the tank car into the oil tank reservoir there situate; that plaintiff, not being aware that the top of said oil tank car was open, and that the key or appliance unlocking a valve in the bottom of said car was turned so as to leave open free egress of the oil from said car on removal of said nipples on the projecting tubes at the bottom thereof, went under said car, and on removing the nipple from one of the said tubes the oil, petroleum, gas, and tar acids and other poisonous substances in said car and petroleum fluid violently spouted out upon plaintiff's face and body, and, entering both of his eyes, wounded, poisoned, and burned the lids, balls, and pupils thereof so as to greatly hurt the plaintiff and to destroy the vision of both eyes, and deprive him of sight and render him blind, or nearly so, for life." It was further alleged: "That the direct and proximate cause of his injury was the negligence of the defendant and its agents operating its tank car in causing the top of said car to be left open and the key of said bottom valves to be turned and opened, when the plaintiff was directed and caused to go underneath the said car and to remove the nipples from the tubular apertures thereunder."

Appellee was engaged, as an employé of appellant, in taking care of its yard and tracks at Rosenberg, Tex., and he also assisted about the oil tanks and tank cars in the yard of appellant. His eyes were so badly damaged by oil spouting in his face, while he was assisting in putting the hose to an oil tank, that his sight is permanently impaired, and he was discharged from the service of appellant because he could not see to perform his duties. He thus describes the accident: "The oil tank car was switched out of the train and placed on the side track opposite the stationary tank, and I was told to get the hose and attach to the nipples at the bottom of the car. Mr. Naylor, an employé of the defendant, who had charge and the direction of the unloading of the cars, went on top of the oil tank car. There is a place on top of the car, which is an opening in the tank car, having a removable top to it, in which the oil is loaded into the car. There is a rod, or key, running from the top of the car down to the bottom and inside of the car, which turns the valve at the bottom of the car. Beneath these valves were two apertures, or tubes, which are closed on the outside by what I call 'taps,' or 'nipples,' being screwed on. Mr. Naylor went on top of the car. It was his business to see that the key worked all right, and that the

valve at the bottom was closed, so that when the nipples were taken off the tubes the oil would not spout out until the valves were turned. After he had gone on the car he called to me that it was all right, to go ahead and take off the nipples and put the hose upon the tubes underneath the car. At the time I was injured, I was taking the tap from underneath the oil car, so as to be able to connect the pipe to it and unload the oil, and while doing this the oil blew all over my face. I do not know whether there was anything wrong or the matter with the appliances or valves inside the car or not, because, as soon as I got the tap off the tubes underneath the car, the oil blew all over my face. The kind of oil tank car it was, was one of the kind usually used on this railroad; that is, it was a car with a tank situated on it. The tank was long and round. On the top of the car is a hole into which to load the oil into the car. It has a place up there which closes up when they are not taking the oil out. In order to unload the car in safety, it was necessary to turn the key on the top of the car, so as to close the holes or tubes at the bottom of the car. If the key had been turned, on top of the car, the oil would not have blown or spouted into my face when I moved the nipples at the bottom of the car. That car had two nipples at the bottom. The nipples at the bottom of the car were about one-quarter of a foot long. The one on this car was about that big, and the nipples screwed on the end of the tubes. I was under the car to fasten the hose. The pumpman, Mr. Naylor, told me to go under the car and take the screws off and attach the hose. He was on top of the tank car. I did not know that the tank car was open at the top when I went under it. The pumpingman, Mr. Naylor, told me to go and put the hose to the nipples, and he connected it with the hose, and said it was all right. When I did the oil blowed in my face."

That evidence was sharply contradicted by the witnesses of appellant, and the first, second, third, and fourth assignments of error seem to proceed upon the theory that, as its evidence tends to show contributory negligence and assumption of the risk, the verdict of the jury should have been set aside. This, however, is not the theory upon which trials by juries are conducted; but the power is lodged with the jury to disregard the evidence of appellant, which contradicted the testimony of appellee, and to accept such testimony as giving a true account of the affair. If the testimony of appellee be true, he was not guilty of contributory negligence, nor had he assumed the risk arising from the situation. He swore that there was a rod or key which turned the valve at the bottom, that the key was manipulated by the man who had charge of unloading the cars, that it was the business of that man to see that the key worked all right, and that the valve

was closed, so that when the nipples were taken off the oil would not spout. The man in charge told appellee everything was in proper condition and ordered him to take off the nipples and put the hose on the tubes under the car, and while executing that command the oil blew into his face, inflicting the injury. The jury credited that testimony, and it formed a sufficient basis for their verdict. Under that testimony the injuries must necessarily have resulted from the negligence of the foreman in operating or manipulating the oil tank.

There was no allegation that gravel or something else had in some manner gotten into the valve and caused the spouting of the oil, and the court properly rejected evidence of the surmises of witnesses that such a condition existed. There was nothing in the pleading nor the circumstance upon which to base the guesses made by the witnesses as to what caused the oil to spout, and it did not have a tendency to disprove the case of negligence made by the testimony of appellee. The theory of the defense was that appellee had voluntarily gone under the car when he knew that the oil was running, and the desired opinions of the witnesses had no connection whatever with that theory.

The sixth assignment of error is overruled. That part of the charge which instructed the jury that appellant would be liable if the spouting of the oil was a latent or secret danger incident to the work which was unknown to appellee, and could not be ascertained by him in the exercise of ordinary care, but was known to appellant, was permissible, as it presented an issue deducible from the pleadings of appellant, which alleged that the dangers of the situation were open to the observation of appellee. If the dangers were hidden so that appellee could not and did not discover them, and appellant knew of them, it would be liable for sending him into a place where such hidden dangers would be developed by the acts of its agents in opening the valves. The language used is wrested from its connections and criticised without reference to them. When read as a whole, the criticised section of the charge is not open to the attacks made upon it.

So far as the special charge, whose rejection is complained of in the seventh assignment of error, embodied the law and was applicable to the facts, it was given in the general charge of the court. There was no evidence tending to show that the spouting of the oil was a danger ordinarily incident to the work in which appellee was engaged, and, on the other hand, appellant sought to show that it was brought about by unusual conditions.

The court did not err in refusing to present the third special charge requested by appellant. The defenses of contributory negligence and assumed risk were clearly pre-

sented by the court, and it was unnecessary to repeat the instructions.

The ninth assignment of error complains of the rejection of a special charge which sought to instruct the jury to reject testimony as to the defective condition of the machinery. The charge was properly refused because there was no evidence whatever of any defects in the machinery. If it were true, as stated by appellant, that it had proved by its witness that there was a defect in the valve, to have given the requested charge would have been extending the privilege to appellant of demolishing and destroying a man of straw erected by itself.

If appellee's eyes were so badly damaged that appellant concluded he could not perform the duty of caring for its yard, and he was on that account discharged, as the testimony showed, it would not seem that a verdict for \$3,000 would be excessive. Appellee swore that his eyes were in such condition as to prevent him from earning a living, and that they were growing worse.

The judgment is affirmed.

SMITH et al. v. PITTS et al.

(Court of Civil Appeals of Texas. Oct. 14, 1909.)

1. ASSIGNMENTS (§ 19*)—PERSONAL CONTRACTS.—ASSIGNABILITY.

A purchaser in a contract of sale contracted in consideration of \$2,000 cash to sell to a third person an option on certain land of the vendor. The contract with the third person recited that it was contingent on the consummation of the contract of sale, and, in case the sale was not consummated, the \$2,000 should be returned to the third person, and provided that it was understood that the third person was appointed agent of the purchaser to sell the land described, and that the purchaser would make a warranty deed to the land sold by the third person, etc. *Held*, that the contract with the third person, whether construed as an employment of the third person, with power to sell land described, or as a purchase by him of an option on the land and the deposit of the \$2,000 as a payment of a part of the price, was a personal contract whereby the purchaser bound himself to make warranty deeds, and he could not shift his undertaking to others without the consent of the third person.

[*Ed. Note.*—For other cases, see Assignments, Cent. Dig. §§ 28-31; Dec. Dig. § 19.*]

2. ASSIGNMENTS (§ 19*)—PERSONAL CONTRACTS.—TRANSFERABILITY.

Rights growing out of contracts which involve relations of personal confidence cannot be transferred by one party without the consent of the other.

[*Ed. Note.*—For other cases, see Assignments, Cent. Dig. §§ 28-31; Dec. Dig. § 19.*]

3. COVENANTS (§ 74*)—DISCHARGE.

A contract of warranty contained in a deed of real estate involves a personal obligation on the part of the grantor to which the grantee has a right, and which cannot be denied him or switched to another without his consent.

[*Ed. Note.*—For other cases, see Covenants, Dec. Dig. § 74.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. VENDOR AND PURCHASER (§ 318*)—CONTRACTS—PARTIAL PAYMENTS—RECOVERY.

Where the purchaser in a contract of sale of real estate was bound to repay to a third person the sum deposited by him on his contract with the purchaser for an interest in a part of the real estate of the vendor, and there was evidence that the vendor did not know of the contract until after a settlement with the purchaser based on a report of sales by the purchaser from the vendor, and a payment of money by the purchaser to the vendor, the court, in directing the purchaser to repay to the third person, could not direct the vendor to pay the sum to the purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 318.*]

5. JUDGMENT (§ 256*)—ISSUES—FINDINGS.

The court may not pass on any issue of fact and render judgment thereon on which the jury has failed to return a finding, no matter how conclusive the evidence may be.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 447; Dec. Dig. § 256.*]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by O. A. Pitts against C. Hagelstein and others, in which R. K. Wylie and another were made parties. From a judgment for plaintiff against C. Hagelstein and another and in favor of C. Hagelstein and another against R. K. Wylie and others, Cicero Smith and others appeal. Affirmed in part, and reversed and remanded in part.

C. H. Willingham, Gross & Allen, J. T. Ransport, and Penix & Eberhart, for appellants. J. B. Hayner and Ramsey & Odell, for appellees.

HODGES, J. Appellee O. A. Pitts instituted this suit in the district court of Palo Pinto county against C. and G. Hagelstein and Cicero Smith, seeking to recover \$2,000 paid to them on the 30th day of January, 1907, under a contract of that date, by the terms of which Pitts was appointed an agent to sell certain lands under the control of the defendants in the suit. It is alleged that he agreed to sell for the defendants, within 12 months from that date, 2,000 acres of land known as a part of the Wylie ranch in Runnels county, Tex.; that he paid to the Hagelsteins and Smith the \$2,000 upon condition and with the understanding that, in the event he performed his part of said contract, the money was to be refunded. It is also alleged that the Hagelsteins and Smith were under contract to purchase this land from R. K. Wylie and wife, and that his contract with the Hagelsteins and Smith was made dependent upon the consummation of the sale of the Wylie ranch to the Hagelsteins and Smith. It is claimed that this sale was not consummated, and for that reason plaintiff is entitled to the return of the \$2,000. The defendants Hagelstein answered by general denial and in substance that the contract made with Pitts on January 30, 1907, granted to him an option to acquire and sell the lands described in this contract, and that the \$2,000 was paid

for that option; that the contract was contingent upon the consummation of the sale of the ranch by the Wylies to them, and, if not consummated, the \$2,000 was to be returned to Pitts; that Wylie and wife on April 13, 1907, by written instrument, revoked the contract of sale with them, the Hagelsteins, which said Wylies had no right to do. They further pleaded that Wylie and wife and Smith had entered into an agreement with them, by the terms of which Smith and the Wylies assumed to carry out the obligations of the Hagelsteins as contained in the contract with Pitts, and of which Pitts had full notice; and asked that Wylie and Smith be made parties to the suit, and, in the event judgment was recovered against them, the Hagelsteins, that they have judgment against the Wylies and Smith for the same amount. Cicero Smith answered by general denial, and, among other things, specially alleged that he was ready and willing to carry out the terms of his contract with Pitts, but that Pitts had never performed his contract or offered to do so in any way; that the contract of purchase of the Wylie ranch by him and the Hagelsteins was consummated, and the Wylies thereafter repurchased from the Hagelsteins their one-half undivided interest in the same; that thereafter he, Smith, owned an undivided one-half interest in the ranch, and the Wylies the other half; that in the repurchase from the Hagelsteins by the Wylies the latter acquired the interest of the Hagelsteins in all the contracts of sale of said land which had been made, among which was a contract with the plaintiff Pitts. Smith also pleaded that, in the event the plaintiff recovered a judgment against him, he had judgment over against the Wylies for one-half of the amount. The appellants R. K. Wylie and wife answered by general denial, and adopted all of Smith's original answer, except wherein he asks judgment against them, and also adopted that part of the answer of the Hagelsteins which sets up the contract of sale of the Wylie ranch to them and Smith, and that by the terms of the same the Wylies had no authority to revoke the contract. They pleaded that they contracted in writing to sell the Wylie ranch to Smith and the Hagelsteins, and that on the 6th day of April, 1905, they repurchased the interest of the Hagelsteins, taking their deed for the same, but Smith retained his half interest. They professed to be willing and able to carry out all the contracts of sale made by the Hagelsteins. They further alleged that, while negotiating with the Hagelsteins for the repurchase of their interest in the ranch, the latter represented to them that they had made a number of sales of the land to divers persons, a list of which was furnished at the time. In this was listed a contract for the sale of 2,000 acres of land to Pitts, the plaintiff in this suit. The Hagelsteins claimed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that they did not then have the Pitts contract with them, and fraudulently and falsely represented to them that the contract made with Pitts was a bona fide contract of sale, and that Pitts had placed in their hands a forfeit of \$2,000, which was to go to the owners of the land in the event he failed to comply with the terms of his purchase. They alleged that as a part of the consideration paid by them to the Hagelsteins for their deed back to said land and the transfer of the contracts of sale and commissions claimed by the Hagelsteins they allowed them a credit of \$2,000 for the alleged sale made to Pitts, and that, relying upon the representations made by the Hagelsteins that their contract with Pitts was a valid bona fide sale, they paid the Hagelsteins \$1,750 as a commission of 5 per cent. on the sale which the latter claimed to have made to Pitts. This they charge was a fraud perpetrated upon them by the Hagelsteins, and that they were thereby defrauded by said Hagelsteins out of the commission amounting to \$1,750; that said false representations were willfully and fraudulently made for the purpose of defrauding them of that sum; that the contract between the Hagelsteins and Smith and Pitts was secreted and kept from these defendants until some time after they had repurchased the interest of the Hagelsteins in said ranch. They further pleaded that an instrument of April 6, 1907, wherein it is stated that the contracts listed therein are received by them, the Wylies and Smith, did not speak the truth; that in truth and in fact at the time of the execution of that instrument they did not receive the Pitts contract nor did they receive the money mentioned in said contract, but the sum was retained by the Hagelsteins. The Wylies also allege that Smith owns a one-half interest in the lands and they the other half, and pray that Smith, the Hagelsteins, and the plaintiff take nothing against them, but, if judgment be rendered against them, that they have judgment against the defendants Hagelstein for \$1,750 and for costs of suit. At the conclusion of the testimony the trial court instructed the jury to return a verdict in favor of Pitts against the Hagelsteins and Smith for the full amount sued for, and in favor of the Hagelsteins against the Wylies and Smith for the same amount. Judgment was rendered for and against the respective parties in accordance with the verdict. The judgment also provided that, in the event Smith paid off the judgment, execution issue in his favor against the Wylies for one-half of the amount recovered by the plaintiff in the suit. Smith and the Wylies alone have appealed, and have filed separate appeal bonds, and presented separate assignments of error.

The testimony shows that R. K. Wylie and his wife originally owned a large body of land situated in Runnels county, known as the "Wylie pasture." On December 12, 1906, Wylie and wife entered into a written

contract with the Hagelsteins and Smith, by which, for a recited consideration, they agreed to sell and convey to the latter several thousand acres of that land. This contract was duly acknowledged and recorded. On January 30, 1907, the Hagelsteins and Smith, claiming to be a partnership firm, entered into a written contract with Pitts, the appellee, by the terms of which Pitts acquired certain rights from those parties as to the sale of 2,000 acres of the Wylie land, and deposited with the Hagelsteins and Smith the sum of \$2,000, to be forfeited in the event he failed to perform the conditions of the contract, and to be returned to him under certain other specified conditions. This suit is for the recovery of that sum, and is based upon the contention by Pitts that the conditions occurred which justified him in asking for its return. Inasmuch as his right to the recovery must depend upon the construction of the contract last above referred to, it is proper that we give such portions of that contract as bear upon the issues involved. Omitting those portions which are not material, the contract is as follows: "State of Texas, County of Tom Green. This agreement, made and entered into by and between the firm of Hagelstein and Smith, composed of Chris Hagelstein and George Hagelstein of San Angelo, Texas, and Cicero Smith of Mineral Wells, Texas, parties of the first part, and O. A. Pitts, of Grandview, Texas, party of the second part, witnesseth: That the parties of the first part, for and in consideration of the sum of \$2,000 cash in hand paid, have sold to second party an option on certain land hereinafter described, said option to last twelve months from the date hereof, and in the event that the conditions of this contract hereinafter set out are kept and fulfilled by second party, then said \$2,000 shall be returned to said second party, but not otherwise. The conditions of this contract are as follows, to wit: First. Whereas, the first parties hereto are under contract to purchase the R. K. Wylie ranch located in Runnels county, Texas, about 6 miles N. W. from Ballinger, Texas, on the Colorado River, it is understood and agreed by both parties to this contract, that this contract shall be contingent on the final consummation of the contract of sale of said R. K. Wylie ranch, and in the event that said sale is not consummated, then said \$2,000 is to be returned in full to said second party. Under this understanding and agreement the said parties hereto do agree that the said O. A. Pitts, party of the second part, is appointed agent of the parties of the first part under the following terms and conditions, to wit: The said O. A. Pitts, party of the second part, agrees to contract and sell to bona fide purchasers for the said parties of the first part, all of the land contained in the following tracts, according to the new subdivision of the said Wylie ranch, to wit:" Then follows a description of the

land. The second and third paragraphs fix the price to be paid and terms of sale. "First party agrees to make warranty deed and furnish abstract to each tract of land sold by second party, showing good and sufficient title to said land within 90 days after being notified by second party that sale has been made. If any other and different terms for sale of said land shall be made by the second party, it shall be by approval of the first parties. The parties of the first part are to have the benefit of the unfenced and unsold land above described until the completion of this contract, and they are to have all growing crops now on said land. In the event that any contract for the sale of any of said land above mentioned shall be made by the parties of the first part or the party of the second part, and the proposed purchaser shall have been required to put up a forfeit and that said amount of said forfeiture or liquidated damages shall be collected, then the same shall at once be equally divided between each party hereto. The power herein conferred upon the party of the second part shall cease on the 25th day of February, 1908, and after such date he shall no longer have power or authority to bind the parties of the first part for any contract of sale hereunder, and nothing shall hereinafter be done under this contract except by mutual consent, save the final settlement between the parties hereto."

On April 18, 1907, Wylie and wife executed an instrument called a "revocation of contract," in which it was recited that by reason of the fact that the Hagelsteins had failed and refused to carry out or complete their contract of December 12, 1906, but had made default as to the same, they, the Wylies, thereby "announced and declared said contract had not been complied with by said Hagelsteins in any particular, and that the same was at an end and of no further force and effect," and that the Hagelsteins had no further rights or claims upon the land referred to in the contract of December, 1906. This instrument was acknowledged and recorded in the deed records of Runnels county. On the 26th day of April, 1907, C. and G. Hagelstein executed a written instrument reciting the contract of December 12, 1906, with the Wylies, and that it had been "mutually agreed" between them and the Wylies that the same should be "forfeited, canceled, and held for naught." It is then stated that for and in consideration of the sum of \$10 and other good and valuable consideration paid by Wylie and wife to them, C. and G. Hagelstein, the latter "do release, remise, quitclaim, and acquit all their right, title, and interest in and to all the lands conveyed or agreed to be conveyed to them by Wylie and wife," and also releasing Wylie and wife from any obligation theretofore made to convey to them the lands before referred to. This instrument was acknowledged and recorded in the deed records of Runnels county.

All the appellants complain of the action of the trial court in instructing a verdict in favor of Pitts against the Hagelsteins and Smith. They contend that the contract of January 30, 1907, between the Hagelsteins and Smith on the one side and Pitts on the other, was the sale of an option to Pitts on the land described, and that when the Wylies, the real owners, stood ready to make to Pitts a conveyance, the latter was bound to take it or lose his forfeit of \$2,000 by the terms of his contract. We do not agree to this construction of the contract of January 30, 1907. While the instrument is not entirely free from ambiguity, a fair interpretation, considering all of its provisions, shows that the parties intended that Pitts should become a special agent with certain powers to sell the particular tracts of land referred to during the time specified, and that, in the event he failed to comply with his undertaking, he was to forfeit the deposit of \$2,000 made with the Hagelsteins and Smith. If this construction be correct, then it follows that the relations thereby created between the parties were of a personal nature, and that the Hagelsteins had no authority to transfer to Wylie and wife any of their duties and obligations in such a way as to compel Pitts to continue with the Wylies business relations commenced under the contract with the Hagelsteins. But we think it is immaterial whether we regard this contract in that light, or as the purchase by Pitts of an option on the 2,000 acres of the Wylie land, and the deposit of the \$2,000 as the payment of a part of the purchase money to be forfeited upon the failure to complete the purchase. It clearly appears from Pitts' contract that the Hagelsteins and Smith did not at that time own the land involved, but only had a contract with the owners by which they were to acquire the title at some time in the future; and it was expressly provided that this contract (the one with Pitts) should be contingent upon the consummation of that contract (the one between the Hagelsteins and Smith and the Wylies), and in the event that that sale was not consummated, then the \$2,000 deposited by Pitts was to be returned in full to him. The evidence is undisputed that this sale from the Wylies to the Hagelsteins and Smith was never consummated; that the contract by which the Wylies had bound themselves to make the sale had been canceled by agreement of all the parties concerned except Pitts. By their contract with Pitts the Hagelsteins also bound themselves to make warranty deeds and to furnish abstracts of title to the land when sold by Pitts. This was a personal undertaking upon their part to do something which they could not shift to others without the consent of Pitts. Their agreement to make a deed of conveyance with warranty was not fulfilled by tendering a deed from some one else. It may be that the purchaser, Pitts, had special reasons for

wanting the warranty of the Hagelsteins. Their contract with him, and the conditions upon which the deposit was to be retained by them, was that they should acquire the title and make the conveyances, and they had no right to substitute a conveyance from another without the consent of Pitts; neither was he bound to accept a deed from one from whom he had not purchased. Rights growing out of contracts which involve relations of personal confidence cannot be transferred by one party without the consent of the other. *Menger v. Ward*, 87 Tex. 622, 30 S. W. 853; *Burks v. Davies*, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213. The contract of warranty usually contained in deeds conveying real estate involves a personal obligation upon the part of the grantor to which the grantee has a right, and which cannot be denied him or shifted to another without his consent. If the Hagelsteins could fulfill their contract by tendering the deed of the Wylles, they might with equal propriety have fulfilled it by tendering the deeds from any remote purchaser from Wylie, however irresponsible he may have been, and however much Pitts may have been induced to make his contract by reason of the solvency of the Hagelsteins, from whom he contracted to obtain the conveyance. We think the court properly instructed the jury to return the verdict in favor of Pitts against Smith and the Hagelsteins.

Complaint is also made of the peremptory instruction to return a verdict in favor of the Hagelsteins against Smith and the Wylles. The testimony shows that in April, 1907, there was a settlement between the Hagelsteins and Smith and the Wylles, and that the Hagelsteins made a report showing sales of land belonging to the Wylles and Smith amounting in the aggregate to \$221,000, based upon contracts with prospective purchasers. At the same time the Hagelsteins turned over to the Wylles and Smith the contracts evidencing those sales, together with several thousand dollars of money which had been placed upon deposit with them as part payment of the purchase price of the land sold or as the purchase of options. In this report of sales was included the contract with Pitts, based upon the claim that it was a sale to him of 2,000 acres of land at \$17.50 per acre. The \$2,000 which had been deposited by him was also accounted for to Smith and Wylie, and they were charged up with a commission of 5 per cent., amounting to \$1,750 for making the alleged sale to Pitts. Wylie and his attorney and Smith testified, and they do not seem to have been contradicted, that the contract with Pitts was not among the list of those actually delivered to them at the time of the settlement, and they did not know its contents till some weeks later and after the settlement had been made. If this be true, Wylie and

Smith were not bound by an acceptance of that contract as one of a sale, and the Hagelsteins had no right to recover from Smith and Wylie any sum in excess of the difference between their commissions, \$1,750, and that which they paid or accounted for to the Wylles. We think the court erred, therefore, in giving the peremptory instruction to find against Smith and the Wylles in favor of the Hagelsteins for the sum of \$2,000. It may not be improper to remark in this connection that there is no basis in the finding of the jury for the judgment rendered by the courts in favor of Smith against the Wylles in the event Smith should pay off and discharge the judgment rendered against them jointly in favor of the Hagelsteins. The court has no right to pass upon any issue of fact upon which the jury has failed to return a finding, no matter how conclusive the evidence may be. *Moore v. Moore*, 67 Tex. 296, 3 S. W. 285; *Texas Brewing Ass'n v. Meyer* (Tex. Civ. App.) 38 S. W. 263.

That portion of the judgment wherein Pitts recovers for the amount sued for against Smith and the Hagelsteins is affirmed. In all other respects the judgment is reversed, and the cause remanded.

INTERNATIONAL & G. N. R. CO. et al. v. WYNNE.

(Court of Civil Appeals of Texas. Oct. 13, 1909.
Rehearing Denied Nov. 10, 1909.)

1. RECEIVERS (§ 174*)—ACTIONS AGAINST—AUTHORITY OF PLAINTIFF TO SUE.

Where the federal court appointing a receiver for a railroad expressly authorizing him to defend all actions theretofore brought, seeking to establish any claim against the property in his hands, including the demands of plaintiff for damages for personal injuries, such order was ample authority for the maintenance of plaintiff's action against the receiver regardless of whether Act Cong. March 3, 1887, c. 373, § 3, 24 Stat. 553, as amended by Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), providing that every receiver appointed by any United States court may be sued respecting any act of his in carrying on the business connected with the property without previous leave of court, authorizes such a suit without leave.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 338, 339; Dec. Dig. § 174.*]

2. PLEADING (§ 293*)—CAPACITY TO SUE.

Where, in an action against a railroad and its receiver, allegations in the petition as to plaintiff's right under an order of court to sue the receiver were not denied by the receiver under oath as required by Rev. St. 1895, art. 1265, it was not necessary for plaintiff to prove them.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 882-884; Dec. Dig. § 293.*]

3. MASTER AND SERVANT (§ 287*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

Where the evidence was conflicting as to whether it was the duty of defendant's servant in charge of a locomotive to ascertain the presence of plaintiff, another employe, under the tank of the locomotive or warn him of his intention to move the locomotive and tank, wheth-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

er failure so to do was negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1060; Dec. Dig. § 287.*]

4. APPEAL AND ERROR (§ 843*)—ACADEMIC QUESTIONS.

An academic question will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3341; Dec. Dig. § 843.*]

Appeal from District Court, Anderson County; B. H. Gardner, Judge.

Action by H. P. Wynne against the International & Great Northern Railroad Company and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

This suit was brought by the appellee against the appellant railroad company and Thos. J. Freeman in his official capacity as its receiver to recover damages against the company for personal injuries alleged to have been inflicted by the negligence of its servants. The defendant Freeman answered by a general demurrer and by special exception to the effect that it is apparent from the petition that the alleged cause of action accrued before he was appointed receiver of the company, and it does not appear from the allegations that plaintiff procured permission of the court in which the receivership is pending to sue him. Freeman then answered that the alleged cause of action arose before his appointment, and that plaintiff had not been granted authority to make him a party to this action. Each defendant pleaded a general denial. The general and special exceptions were overruled, and the trial resulted in a verdict and judgment in favor of the plaintiff for the sum of \$15,000. It was ordered that the judgment entered on the verdict be certified for classification and payment to the Circuit Court of the United States, wherein the receivership is pending.

King & Morris, for appellants. Campbell, Sewell & Strickland, for appellee.

NEILL, J. (after stating the facts as above). The first and second assignments of error complain of the court's overruling the general and special exceptions to plaintiff's petition, and the third that the verdict against the receiver is contrary to the evidence, in that it conclusively shows that the cause of action arose long before his appointment, and that the suit is not in respect to any act or transaction of the receiver in carrying on the business of the railroad company as its receiver; it not appearing that plaintiff had previously to filing the suit obtained an order of the court wherein the receivership was pending to sue the receiver.

In determining the two first assignments we deem it unnecessary to decide whether,

under Act Cong. March 3, 1887, c. 373, § 3, 24 Stat. 553, as corrected by Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510), a receiver can be sued without leave of the court for an alleged wrongful act committed in the operation of the road before he became receiver; for, if it should be conceded that leave in this case for the plaintiff to sue the receiver was essential, yet if, as is alleged in plaintiff's petition, the court appointing the receiver entered an order expressly authorizing and empowering him to defend any and all actions which had been theretofore brought, seeking to establish any claim or demand against the property in his hands as such receiver, including the demands of plaintiff, such order, regardless of the statute cited, was ample authority for the prosecution and maintenance of this suit against Freeman in his capacity of receiver of the railroad company. 1 Elliott on Railroads (2d Ed.) § 571. We therefore hold that the petition was good as against the exceptions referred to. In regard to the third assignment, we deem it sufficient to say that, as the allegations in plaintiff's petition respecting his right to prosecute his action against the receiver were not denied by the defendant Freeman under oath as required by statute (Rev. St. 1895, art. 1265), it was not necessary for plaintiff to prove them. Townes on Pleading, 299.

The fourth assignment of error complains of this paragraph of the court's charge: "The undisputed facts in the case show that H. P. Wynne, the plaintiff, an air brake machinist in the employ of the defendant railroad company, was at work in discharge of his duty as such air brake machinist under the tank of engine No. 258 when said engine and tank was caused to move and run over and crush plaintiff's hand, thereby causing amputation. Now you are charged that if you find from a preponderance of the evidence that said injury was caused by the failure of the employes so causing said engine to move to ascertain the presence of plaintiff under said tank or to warn him of the intention to move said engine and tank, and if you further find that such failure to ascertain the presence of plaintiff or to warn him of the intention to move, if there was such a failure, was the direct and proximate cause of the injury to plaintiff, then you will find for the plaintiff, otherwise you will find for the defendant." The evidence shows that the plaintiff went under the tank without the knowledge of defendant's servants, who moved or cause the movement of the engine to which it was attached, and that, from the time he went under it until the engine was moved, such servant did not know, or have any reason to suspect, he was there. As to whether it was the servant's duty to ascertain the presence of plaintiff

under the tank or warn him of his intention to move the engine and tank, the evidence is conflicting. If the uncontradicted evidence showed that such was the servant's duty his failure to discharge it would be negligence. But such is not the state of the evidence. Therefore the question of whether the failure of the servant who moved or caused the engine to move to ascertain the presence of plaintiff under the tank or to warn him of his intention to move the engine and tank was negligence was one of fact which should have been submitted to the jury. This the charge fails to do; but, in effect, assumes it was negligence as a matter of law. In this the charge is clearly erroneous.

The remaining assignment complains that the verdict is excessive. As the judgment will be reversed for reason of the error indicated, the question raised becomes purely academic, and will not be considered.

Reversed and remanded.

WASHAM v. HARRISON.

(Court of Civil Appeals of Texas. Oct. 20, 1900.)

1. ADVERSE POSSESSION (§ 96*)—POSSESSION OF PART OF TRACT.

Where the boundaries of a lot were clearly marked, it having been fenced at least a portion of the time, possession of plaintiff, through his tenants, of a part of the lot, perfected title by limitation to the well-defined limits of the whole lot.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 536; Dec. Dig. § 96.*]

2. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Where, in trespass to try title, an assignment of error complaining of the failure of a paragraph of a charge to state that to recover under 10 years' limitations there should be proof of adverse possession, and the statements connected with the assignment and propositions thereunder failed to disclose what the court charged on the subject, the Court of Civil Appeals could decline to consider the assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

3. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

In trespass to try title to land claimed by 10 years' adverse possession, where there was no question as to the character of plaintiff's possession, the only issue being as to the length thereof and the amount of the land possessed, and all the facts tended to show that, if plaintiff was in possession at all, the possession was peaceable and adverse, the court could assume that it was adverse to defendant, and it was not error to fail to state that to recover under 10 years' limitations there should be proof of adverse possession.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

4. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

In trespass to try title to land claimed by 10 years' adverse possession, where the undisputed evidence showed that plaintiff had improvements on, and held possession of, the rear

part of the lot, it was not error for the court to state such fact to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Trespass to try title by Henry Harrison against W. B. Washam. Judgment for plaintiff, and defendant appeals. Affirmed.

Lock McDaniel, for appellant. Sam, Bradley & Fogle, for appellee.

FLY, J. This is an action of trespass to try title to a certain parcel of land situated in the city of Houston, instituted by appellee against appellant. In the petition appellee pleaded title by limitation of 10 years. Appellant answered by general denial and plea of not guilty. A trial by jury resulted in a verdict and judgment in favor of appellee.

In deference to the verdict of the jury, we find that appellee had acquired a title by limitation in so far as appellant was concerned. He was placed in possession of the land by Cummins in 1890, under a verbal contract of sale. He built a house on the front part of the lot and a stable and barn in the rear next to a lot owned by his mother and step-father. He paid most of the purchase money, but did not obtain a deed to the land. In 1893 Cummins left the country, and the house on the front part of the lot was moved off, and appellee moved, but left his mother in possession of the stable on the rear end of the lot, as well as the whole lot. She held possession of the lot for more than 10 years for appellee. A fence was around the whole of the lot for a large portion of the 10 years. The evidence tended to show that appellee continuously claimed the whole of the lot through a period of more than 10 years before appellant entered possession of a part of it. There was evidence to the effect that the whole of the lot was inclosed from 1890 to 1900, a period of 10 years, when the fence was blown down by what was designated as the "Galveston storm." Appellant does not claim through or by the vendor of appellee.

Possession of a part of the lot with a claim to the whole was sufficient to perfect title by limitation to the whole of it. The boundaries of the land were clearly marked. It was fenced at least a portion of the time. Appellee at all times claimed the whole of the lot, and, even though his tenants were in possession of only a part of the lot, the possession extended to the well-defined limits of the whole lot. *Railway v. Broom* (Tex. Civ. App.) 114 S. W. 655.

The first assignment of error complains of the third paragraph of the charge, because it did not state that in order to recover under the 10 years' statute of limitation there should be proof of adverse possession. The statements connected with the assignment of error and propositions thereunder fail to

disclose what the court charged on the subject, and this court could with propriety decline to consider the assignment. However, it may be stated that there was no question whatever as to the character of appellee's possession; the only issue being as to the length of possession and the amount of the land possessed. All the facts tended to show that if appellee was in possession at all, as he claimed, the possession was peaceable and adverse to the claims of every one. The character of the possession not being attacked, the court could assume that it was adverse to the claims of appellant.

The court did not err in stating to the jury that appellee had improvements on, and held possession of, the rear part of the lot. Those facts were established by the undisputed evidence.

The judgment is affirmed.

INGALLS v. ORANGE LUMBER CO.

(Court of Civil Appeals of Texas. June 25, 1909. Rehearing Denied Oct. 21, 1909.)

1. JUDGMENT (§ 743*)—CONCLUSIVENESS—TITLE TO PROPERTY.

In trespass to try title, a judgment by agreement between heirs of a patentee and plaintiff's remote grantor in a suit for recovery of title and possession to the land, divesting the heirs' title and vesting it in the remote grantor, was admissible as a link in plaintiff's chain of title, vesting title in the grantor by estoppel and having the same prima facie effect in placing in him the title inherited by the heirs as their deed would have had.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1276; Dec. Dig. § 743.*]

2. APPEAL AND ERROR (§ 1033*)—REVIEW—ERROR FAVORABLE TO PARTY COMPLAINING.

In trespass to try title, defendant cannot object to the exclusion of evidence showing that the plaintiffs in a prior action against the remote grantor of the plaintiffs in the present suit, in which there was a judgment by agreement, vesting title to the land in the remote grantor, had not sold their interest in the land to the grantor or to any one else, since it would only strengthen the effect of the judgment as a link in the present plaintiff's title.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4055; Dec. Dig. § 1033.*]

3. PUBLIC LANDS (§ 178*)—CONVEYANCE BY HEIRS—BONA FIDE PURCHASER.

Title acquired under a transfer of a bounty warrant certificate could not be asserted against a purchaser for value, who acquired title of the heirs of the original owner of the certificate to whom the land was patented without any notice, actual or constructive, of the transfer of the certificate, the land being located under a certificate for the unlocated balance of the bounty warrant certificate.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 581; Dec. Dig. § 178.*]

4. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.

In trespass to try title, where the undisputed evidence shows that plaintiff purchased for value without notice of an outstanding claim of title, a charge that defendant, to defeat plaintiff's recovery, on the ground of the outstanding

claim, must connect himself with such title, if erroneous, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

Appeal from District Court, Newton County; W. B. Powell, Judge.

Trespass to try title by the Orange Lumber Company against James Ingalls. Judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Blake, for appellant.

PLEASANTS, C. J. This is an action of trespass to try title brought by appellee against appellant to recover a tract of 200 acres of land in Newton county granted to Elisha Spencer. Pending the suit appellee obtained a writ of injunction restraining appellant from cutting timber from the land. The defendant answered by general demurrer and plea of not guilty and by plea in reconvention for damages caused him by the injunction proceedings. To this answer plaintiff replied by supplemental petition in which it claimed title under the three, five, and ten years statutes of limitation, and also as innocent purchaser for value without notice of defendant's claim. The trial in the court below with a jury resulted in a verdict and judgment in favor of plaintiff for all of the land in controversy.

The land was patented on September 22, 1875, to Elisha Spencer. In a suit in the district court of Newton county brought by W. A. Shepherd and others, heirs of Elisha Spencer, against William Clark, a judgment by agreement was entered on March 28, 1900, in favor of said Clark for the title and possession of the land, divesting all right and title of plaintiff in said land, and vesting same in defendant. Appellee holds the title thus acquired by Clark by regular chain of conveyances. The land was located under a certificate issued to Elisha Spencer August 27, 1870, for the unlocated balance of a bounty warrant certificate for 1,280 acres, issued to said Spencer on January 31, 1838. This original bounty warrant certificate has the following indorsements thereon:

"The discharge upon which this Certificate was issued has been legally transferred from G. W. Mott assign Elisha Spencer to P. Halpin whis Transfer is now on file in this office. Feby. 2nd. 1838. Barnard E. Bee, Sec. War.

"1 File 1374. Bexar Bounty Warrant 1280 acres. Elisha Spencer. Filed Sept. 20/58. 1 7. 1858 by Jno. H. Herndon for Jno. James San Antonio.

"Registered and approved March 11, 1858. Edward Clark, Commr. of Claims. Certificate of unlocated Balance for five hundred and forty-two (542) acres issued and delivered to C. P. Johns & Co. Aug. 27, 1870."

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The original survey of the land in controversy was made by the surveyor of Newton county in 1873. The surveyor's records of said county show that the application for said survey was made by James Ingalls, the father of appellant, in his own name. The same records show that other applications made by said Ingalls at or about this time were made in the names of the grantees in the certificates. Appellant testified that his father, who was a civil engineer, always claimed to own this certificate, and always claimed the land located thereunder. Appellee purchased the land for a valuable consideration and without actual notice of appellant's claim thereto.

The first assignment of error and the propositions advanced thereunder are as follows: "The court erred in permitting the plaintiff to read in evidence before the jury, over the objection of defendant, a judgment of the district court of Newton county, in cause No. 540 on the docket of said court, styled, *W. A. Shepherd et al. v. Wm. Clark*, dated March 28, 1900, which judgment described the land in controversy, for the reasons assigned in bill of exceptions No. 1." Proposition under first assignment of error: "The judgment relied on, being a judgment by consent and between different parties, and not showing on its face that the title of Elisha Spencer or one emanating from him either by purchase or descent was involved in the controversy, could not constitute a link in the chain of title from the sovereignty. To recover in this cause, the same proof of superior title that enabled Clark to recover from the heirs of Elisha Spencer (if in fact they were the heirs, and the recovery was upon proof of title) must be presented here or the plaintiff fails to connect himself with the Spencer title, and cannot recover against a defendant in possession. Plaintiff in trespass to try title must recover on the strength of his own title, not upon weakness of defendant's title." Under this assignment it is very earnestly insisted by appellant that the judgment referred to in the assignment does not prima facie connect Clark and those holding under him with the Spencer title, even, if it be conceded that the plaintiffs in said judgment were the heirs of Elisha Spencer. We cannot agree with appellant in this contention. The judgment was by agreement and by its terms divested the title of plaintiffs in said land and vested said title in the defendant Clark. The evidence shows that the plaintiffs in the suit were the heirs of Elisha Spencer, and the agreed judgment divesting their title and vesting it in Clark was just as effectual in placing in him the title inherited by them from Elisha Spencer as their deed would have been. If the judgment had not been by agreement, and had not in terms divested the title of plaintiffs, the suit being one for recovery of the title as well as the possession of the land, a judgment in favor of defendant

would have passed the title of the plaintiffs by estoppel, and would have prima facie connected defendant with the title of Elisha Spencer. It goes without saying that neither the plaintiffs in that suit, nor any one claiming under them, could assert against Clark or those holding under him any title to the land which they had at the time said judgment was rendered, and, it being shown that they were the heirs of Elisha Spencer, it devolved upon defendant, in order to defeat the prima facie title by estoppel thus acquired by Clark, to show that at the time said judgment was rendered the plaintiffs in said suit did not hold the Spencer title. As before said, we think this judgment should be given the same prima facie effect as would be given to a deed from the heirs of Elisha Spencer. There is no firmer rule of decision than that which recognizes title by estoppel, and no character of estoppel is of higher dignity than estoppel by judgment.

The cases cited by appellant wholly fail to sustain his contention. The cases of *Colman v. Reavis* (Tex. Civ. App.) 34 S. W. 645, and *House v. Reavis* (Tex. Civ. App.) 34 S. W. 646, simply hold that a plaintiff in action of trespass to try title does not connect himself prima facie with the title of the original grantee of the land by showing that he holds under a foreclosure judgment and sale of the land had in a suit in which neither the original grantee nor his heirs, or any one holding title under him, was a party. The case of *Sebastian v. Martin Brown Co.*, 75 Tex. 292, 12 S. W. 986, holds that a plaintiff in suit of trespass cannot recover by simply showing that he purchased the land at a sheriff's sale under foreclosure proceedings and that the defendant in claiming under the defendant in said foreclosure proceedings, but, to authorize a recovery by showing a superior title from a common source, the plaintiff must show that the deed to the defendant from the common source is subsequent to that under which plaintiff claims. The case of *Barnes v. McArthur*, 4 Tex. Civ. App. 73, 22 S. W. 770, holds that a deed from the husband alone to land shown to be the separate property of the wife, notwithstanding the title was in the name of the husband, would not pass title to a vendee who paid no consideration for the land. It is apparent that these cases go no further than to recognize and enforce the fundamental rules that no one is bound by a judgment to which he is not a party, and that in an action of trespass to try title the plaintiff cannot recover without showing a prima facie title. The assignment cannot be sustained.

The second assignment complains of the refusal of the trial court to permit the defendant to read in evidence a part of the depositions of Mrs. Viana Spencer taken in the suit of *Shepherd v. Clark*, before mentioned. This evidence was offered, as stated by appellant's brief, for the purpose of showing that the

heirs of Elisha Spencer had not sold their interest in said land to William Clark, or to any one else, and therefore Clark could not have recovered in said suit upon the Spencer title and the judgment in his favor did not connect him with said title. The witness whose deposition in the former suit was offered was dead at the time said deposition was offered in this suit. The offered testimony was not material to defendant's case, and was therefore properly excluded, even if it were permissible in this suit to use the depositions taken in the former suit between persons not parties to this suit.

According to our view of the case, as before expressed, evidence showing title in the heirs of Spencer at the time the judgment in favor of Clark was rendered against him for the land, so far from destroying the prima facie effect of that judgment as a link connecting appellee with the Spencer title strengthens and confirms it, and appellant cannot object to the exclusion of such evidence.

We do not think the evidence is sufficient to show a transfer of the certificate by Elisha Spencer, but conceding, for the sake of argument, that it is, the title thus acquired could not be asserted against a purchaser for value who acquired the title of the heirs of Spencer to whom the land was patented without any notice, actual or constructive, of the transfer of the certificate, and the undisputed evidence in this case shows that both appellee and its immediate vendor was a purchaser for value without notice of appellant's claim. *Wimberly v. Pabst*, 55 Tex. 587; *Lewis v. Johnson*, 68 Tex. 448, 4 S. W. 644; *Bogart v. Moody*, 35 Tex. Civ. App. 1, 79 S. W. 633. Upon this state of the record it is unnecessary for us to determine whether the transfer of the certificate to P. Halpin, conceding, for the sake of argument, that the evidence shows such transfer is an outstanding title which appellant, without connecting himself therewith, can use to defeat appellee's title.

The third assignment of error, which complains of the charge of the court, which in effect instructs the jury that appellant in order to defeat appellee's recovery on the ground of outstanding title in Halpin must connect himself with such title, cannot be sustained because if the charge was erroneous, as contended, such error was harmless in view of the undisputed evidence showing appellee to have purchased for value without notice of such outstanding claim of title.

What we have said disposes of all the material questions presented by the appeal, and the remaining assignments of error need not be discussed. Each of them have been duly considered, and none of them should be sustained. We are of opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

THOURON v. SKIRVIN et al.

(Court of Civil Appeals of Texas. Oct. 15, 1909. Rehearing Denied Nov. 4, 1909.)

1. APPEAL AND ERROR (§ 663*)—RECORD—STATEMENT OF FACTS—CERTIFICATE.

A judge's certificate to the statement of facts is sufficient as against appellee's motion to strike out the statement on the ground that it does not show that the statement was submitted to him or his attorney, where it is shown that he is a nonresident, and it does not appear that he was present at the trial, and the certificate shows that he was not represented by any attorney.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2853; Dec. Dig. § 663.*]

2. FRAUD (§ 25*)—LIABILITY—INJURY FROM FRAUD.

A vendor fraudulently induced to accept a reconveyance in satisfaction of the vendor's lien notes cannot recover for the fraud in the absence of a showing that injury resulted.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 24; Dec. Dig. § 25.*]

3. FRAUD (§ 59*)—DAMAGES—AMOUNT RECOVERABLE.

A vendor fraudulently induced to accept a reconveyance in satisfaction of the vendor's lien notes cannot, where he keeps the property, recover the amount of the notes as damages for the fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 60; Dec. Dig. § 59.*]

4. FRAUD (§ 60*)—DAMAGES—ATTORNEY'S FEES.

Attorney's fees are not recoverable as actual damages in a suit for depriving one of his property by fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 65; Dec. Dig. § 60.*]

5. DAMAGES (§ 87*)—EXEMPLARY DAMAGES.

Exemplary damages cannot be recovered unless the plaintiff sustained actual damages.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 191; Dec. Dig. § 87.*]

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Action by Nicholas Thouron against William Skirvin and others. From a judgment for plaintiff without damages, he appeals. Affirmed.

Stewarts, Geo. T. Burgess, and J. Homer Jones, for appellant. James B. & Charles J. Stubbs, for appellees.

PLEASANTS, C. J. This action was brought by appellant against the appellees to recover the title and possession of certain lots or parcels of land on the Antonio Julia survey, in Galveston county, and to recover actual and exemplary damages for alleged wrongful, fraudulent, and malicious acts of defendants in attempting to acquire title to plaintiff's land by fraud and in thereby clouding the title thereto. In addition to the usual allegations to an action of trespass to try title, the petition alleges, in substance: That on November 3, 1893, the defendant, William Skirvin, induced the plaintiff, who was then the owner in fee simple of the Antonio Julia 320-acre survey, in Galveston county, to sub-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

divide same into lots of about 15 acres each, said lots being numbered 44 to 61, inclusive, and to sell all of said lots to said defendant. That plaintiff on said date conveyed all of said lots to said defendants, and in part consideration for such conveyance the defendant executed and delivered to plaintiff his certain several promissory notes for the aggregate sum of \$5,400, which said notes were secured by vendor's lien on the land, expressly retained in the deed conveying said lots. That thereafter, on December 3, 1893, Skirvin conveyed all of the lots to the Alto Loma Investment & Improvement Company, a corporation organized and controlled by Skirvin and M. S. Waller. That the deed conveying the property to the corporation recites a consideration of \$1,000 in cash, and further recites the fact that the conveyance is made subject to the incumbrance of \$5,400 due plaintiff, but that, in fact, no consideration was paid for said conveyance. "That at and prior to the time that this plaintiff was induced by William Skirvin to convey said real property to said Skirvin said William Skirvin had entered into an agreement and conspiracy with one M. S. Waller, whereby it was agreed between said William Skirvin and said M. S. Waller that they would defraud plaintiff out of the said Antonio Julia survey, but the fact of the said fraud and conspiracy was not known to this plaintiff at that time, and was not discovered by him until long subsequent. That the said Antonio Julia survey was inclosed together with various other surveys in a pasture by one Jacques Tacquard. That said Waller and said Skirvin, conspiring together, purchased from said Jacques Tacquard certain lands owned by him, and did fraudulently induce said Jacques Tacquard, he being a man unable to read or write, to execute to the said M. S. Waller a deed of conveyance for the said Antonio Julia survey, by which said deed apparently the Antonio Julia survey was by said Jacques Tacquard conveyed to said M. S. Waller, and which said deed bears date of June 6, 1892, which deed was not filed for record, however, until October 31, 1894, and of which deed plaintiff had no knowledge at the time he conveyed the property to said Skirvin."

It is further alleged that Waller at the instigation of Skirvin conveyed the Antonio Julia survey to Thomas C. Brown by deed of date November 24, 1894, and that thereafter, when said vendor's lien notes executed by Skirvin became due, he refused to pay the same on the ground that there was an outstanding title to the land in Brown, which he pretended to believe was superior to plaintiff's title, and proposed to plaintiff that, if he (plaintiff) would cancel and surrender said notes he (the said Skirvin) would procure a reconveyance of the lots to plaintiff; that plaintiff was led to believe by the representations of said defendant that his title

to the property was defective and agreed to accept the proposition to surrender said notes in consideration of a reconveyance of said property; that, in pursuance of his said proposition, the defendant Skirvin had the said Thomas C. Brown to reconvey the Antonio Julia survey to M. S. Waller, and had the said Waller to convey same to the Alto Loma Company; that thereafter said Skirvin, on May 4, 1898, tendered to plaintiff a deed from said company reconveying to him the lots theretofore conveyed by plaintiff to said defendant, and that plaintiff accepted said deed, and canceled and surrendered to defendant his said notes; that at the time plaintiff accepted said deed and surrendered the notes he was assured by Skirvin that the Alto Loma Company held the Tacquard title to said land, and plaintiff relied upon said representations, and would not otherwise have accepted said conveyance in satisfaction of said notes; "that the said Alto Loma Investment & Improvement Company was a corporation which was owned, controlled, and manipulated by said William Skirvin and M. S. Waller; that said William Skirvin did cause said Alto Loma Investment & Improvement Company to convey to one M. B. Gerry of Pueblo, Colo., lots 46 to 55, inclusive, in said Antonio Julia survey, said deed dated June 3, 1895, and reciting that said property was sold subject to vendor's lien; that the only vendor's lien outstanding against this property was said vendor's lien held by this plaintiff, and the lien of this plaintiff was the lien intended and referred to in said deed to said Gerry; that in truth and in fact said Gerry paid no consideration whatever to said Alto Loma Investment & Improvement Company, but took title to said property merely in trust for said William Skirvin in furtherance of the purpose of said William Skirvin to defraud this plaintiff; that said Skirvin, though having signed said deed from the Alto Loma Investment & Improvement Company in his capacity as secretary of said company and knowing full well of the existence thereof, did in truth and in fact state to this plaintiff that the Alto Loma Investment & Improvement Company had not conveyed said real property, but that same belonged to said Alto Loma Investment & Improvement Company at the time of the execution and delivery of the aforesaid deed from said company to this plaintiff; that this statement was made by William Skirvin for the purpose of defrauding this plaintiff and at the time same was made was known by said Skirvin to be false and fraudulent; that, to further carry out the purpose to defraud this plaintiff, said Skirvin did have M. B. Gerry execute a deed of conveyance to one J. H. Fesler of Pitkin county, Colo., which deed described the property therein attempted to be conveyed as lots numbered 46 to 55, inclusive, and being the same lots by like numbers described in the aforesaid deed from

the said Alto Loma Investment & Improvement Company to this plaintiff, and being the said property that had been by this plaintiff conveyed to William Skirvin; that said deed from Gerry to Fesler was made, executed, and delivered without any consideration whatsoever, and said Fesler had no real interest in said property, but took and held the same and still holds same of record for the use and benefit of said William Skirvin, who is claiming to own said real property; that the placing of the apparent title to said property in said Fesler was for the purpose of defrauding this plaintiff, and was conceived and carried out by said William Skirvin with that end in view; that both said Gerry and Fesler in all said matters were represented by William Skirvin and M. S. Waller and said Gerry and Fesler in truth and in fact had no interest in said transactions or said property, but merely permitted the use of their names by said William Skirvin in order that he might by the use of said names and apparent placing of title in said Gerry and Fesler, place said title again outstanding and in an innocent party, and thereby again defraud this plaintiff; that said Fesler in so taking title to said property and holding same in his name and said William Skirvin in having said Fesler take property in his name and placing deed of record are conspiring together to injure this plaintiff, and, so conspiring and so acting, have injured and damaged this plaintiff in the sum of \$7,500; that said Skirvin and said Fesler by their actions have cast a cloud upon title of plaintiff to said property; that said William Skirvin is now offering said property for sale and pretending to own same, though he knows that said real property belongs to plaintiff, and that this plaintiff took and accepted a deed of conveyance from the Alto Loma Investment & Improvement Company on the representation of said Skirvin that, by said conveyance from said Alto Loma Investment & Improvement Company to this plaintiff, this plaintiff would be revested with the title to said real property; that the action of said William Skirvin in so offering said property for sale and in claiming to own same casts a cloud on title of this plaintiff, and same is done maliciously and wrongfully, and for the sole and only purpose of injuring title of this plaintiff to said real property; that defendant R. S. Rowland did in June, 1908, file with the county clerk of Galveston county, Tex., two instruments; one purporting to be a deed from J. H. Fesler to J. R. Morse, and the other to be a deed from J. R. Morse to R. S. Rowland conveying portions of the hereinbefore described real property; that said deed from Fesler to Morse and said deed from Morse to Rowland were instigated and inspired by said William Skirvin and said R. S. Rowland, who conspiring together thereby sought to defraud this plaintiff of his property, and sought to cast a cloud on the

title thereof, and by the recording of said deeds did cast a cloud on the title of plaintiff to the said real property; that in truth and in fact said Fesler at no time had title to said real property, and the pretended deed from said Fesler to said Morse passed no title to Morse, and was not intended to vest title in Morse; that said deed from said Fesler to said Morse was prepared by said M. S. Waller, and no consideration whatever paid to said Fesler for said deed; that said pretended deed from said Morse to R. S. Rowland was inspired and a scheme concocted by defendant Skirvin and Rowland for the purpose of defrauding this plaintiff, and for the purpose of clouding title of this plaintiff to the said real estate, and same does operate as a cloud on the title of plaintiff; that in truth and in fact said Fesler knew nothing of said Morse, and said Morse had never seen said R. S. Rowland, but signed the deed in blank and said R. S. Rowland thereupon filled in said blank with his name, to wit, the name of R. S. Rowland; that said R. S. Rowland is confederating together with William Skirvin, J. H. Fesler, and J. R. Morse in his said acts and in holding title to said property in his name in furtherance of said wrongful acts, and said Skirvin and said Fesler and said J. H. Morse and said R. S. Rowland by their said acts are casting a cloud on title of this plaintiff; that said plaintiff by said wrongful acts of defendants is damaged in the sum of \$7,500; that said real property is of the value of \$25 per acre, and this plaintiff could sell said real property for \$25 per acre, but is prevented from doing so by the wrongful acts of said Skirvin, Morse, Rowland, and said Fesler as hereinbefore stated, as no one can be induced to purchase said property because of the said claim so being asserted by said Skirvin, Morse, Rowland, and Fesler; * * * that said action of said Skirvin and Morse and Rowland and said Fesler have necessitated the employment of attorneys to bring this suit to remove cloud from said title, and said acts are malicious and done for the purpose of injuring, harassing, and annoying said plaintiff, and because of the annoyance so caused to this plaintiff, and, because of said malicious acts, this plaintiff should recover of said defendants exemplary damages which plaintiff now alleges in the sum of \$10,000. Wherefore plaintiff prays that on trial hereof that he have judgment against said defendants for title and possession of and to said Antonio Julia survey, including each and every lot therein, and that the cloud cast on plaintiff's title by reason of claim of these defendants be removed, and that the aforesaid deed from the Alto Loma Investment & Improvement Company to M. B. Gerry and from said M. B. Gerry to J. H. Fesler and from J. H. Fesler to J. R. Morse and from said J. R. Morse and R. S. Rowland be declared null and void and of no effect, and.

further, that this plaintiff do have and recover of and from said J. H. Fesler and said William Skirvin and said J. R. Morse and said R. S. Rowland his actual damages as aforesaid in the sum of \$7,500; and, further, that plaintiff do have and recover of and from said Skirvin and of and from said Fesler and of and from said J. R. Morse and of and from said R. S. Rowland jointly and severally the sum of \$10,000 as exemplary damages by reason of the malicious and wrongful acts of said defendants as hereinbefore stated, and plaintiff further prays for such other, further, and general relief as he may be entitled to in law and equity."

The defendants Skirvin, Morse, and Rowland each filed an answer disclaiming any right, title, or interest in the land sued for. Plaintiff dismissed his suit as to defendant Fesler. Upon the trial in the court below judgment was rendered in favor of plaintiff for all of the land sued for and for removal of the cloud upon his title caused by the claims of the defendants, but no damages were adjudged in plaintiff's favor against any of the defendants. From that portion of the judgment refusing plaintiff's claim for damages he prosecutes this appeal.

Appellee Skirvin has filed a motion to strike from the record the statement of facts filed by appellant, on the ground that it does not appear from the certificate of the judge appended to said statement that the same was ever submitted to the defendant or his attorneys, or that any opportunity was given defendant or his attorneys to prepare and present a statement. The certificate of the judge is as follows: "Galveston, Texas, Decr. 11th., 1908. The within statement of facts having been presented to me by the plaintiff's attys., and no atty. for either of the defendants having been present at the trial and no statement being presented to me on behalf of the defendants, and having examined the statement herewith and finding the same in all things correct, the same is hereby approved as a true and correct statement of the facts given in evidence on the trial." In reply to this motion appellant has filed the affidavit of George T. Burgess, one of his attorneys, to the effect that after the statement was prepared and within the time prescribed by the statute he presented the statement to Mr. Charles J. Stubbs, one of the attorneys who filed the disclaimer for appellant, and requested to examine same, and, if he found it correct, to agree thereto; that Mr. Stubbs stated that neither he nor his firm represented the defendant in the matter of preparing such statement, and that he would have nothing to do with it. It is shown that the defendant Skirvin is a

nonresident of the state, and it does not appear that he was present at the trial, and the certificate of the judge shows that he was not represented by any attorney on said trial. Upon this showing we think the certificate is sufficient, and the motion should be overruled.

The first assignment of error is as follows: "The court erred in refusing to give judgment for plaintiff for actual damages because the evidence showed that by the acts of the defendants the plaintiff had been damaged in the sum of \$5,400, the face value of the purchase-money notes given by Skirvin in part payment of property in controversy." The statement under this assignment, which contains a summary of all the material facts shown in the statement of facts, does not sustain the assignment. There is no evidence that the plaintiff suffered any damage by reason of the fraudulent representations of the defendant Skirvin by which he was induced to cancel and surrender the notes due him by Skirvin. There is neither allegation nor proof that the property reconveyed to him in consideration of the surrender of the notes was not worth the amount of said notes, and, in any event plaintiff would not be entitled to keep the property and recover of defendants as actual damages the value of the consideration given therefor, it matters not how fraudulent the transaction may have been on the part of the defendant.

The second assignment complains of the refusal of the court to give plaintiff judgment for actual damages in the amount of the attorney's fees shown to have been paid by him in the necessary prosecution of this suit. It is well settled by the decisions of our Supreme Court that attorney's fees in suits of this character are not recoverable as actual damages. *Landa v. Obert*, 45 Tex. 539; *Salado College v. Davis*, 47 Tex. 135; *Harris v. Finberg*, 46 Tex. 79; *Ry. Co. v. Oram*, 49 Tex. 346; *Vance v. Lindsey*, 60 Tex. 290.

It is also well settled that exemplary damages cannot be recovered unless the plaintiff is shown to have sustained actual damages. *Flanagan v. Womack*, 54 Tex. 50; *Girard v. Moore*, 86 Tex. 675, 28 S. W. 945. No actual damages being shown in this case, plaintiff was not entitled to recover exemplary damages, and the third assignment of error, which complains of the refusal of the court to render judgment for plaintiff for exemplary damages, must be overruled.

This disposes of all the questions presented by appellant's brief, and, there being no error in the judgment of the court below, it is affirmed.

Affirmed.

INTERNATIONAL & G. N. R. CO. et al. v. BRADT et al.†

(Court of Civil Appeals of Texas. Oct. 13, 1909.
Rehearing Denied Nov. 10, 1909.)

1. RECEIVERS (§ 183*)—ACTION AGAINST—ALLEGATION OF LEAVE TO SUE—DENIAL—NECESSITY OF VERIFICATION.

In a suit against a railroad and its receiver, the allegation of the petition that permission to sue the receiver had been obtained from the court appointing him will be taken as true where not denied by plea under oath, as required by Rev. St. 1895, art. 1265.

[Ed. Note.—For other cases, see Receivers, Dec. Dig. § 183.*]

2. MASTER AND SERVANT (§ 264*)—INJURIES TO SERVANT—ACTION—PLEADING AND EVIDENCE.

In an action against a railroad for the death of an engineer by derailment of his engine at an open switch, where the petition alleged that defendant failed to inspect its track and switch, and negligently failed to discover the state of the switch and provide any warning to deceased of the dangerous condition thereof, evidence of defendant's failure to have colored lights at the switch at the time of the accident to show how the switch was set, as had been the custom, was admissible, especially in view of the answer alleging that it was deceased's duty to ascertain whether the switch was properly set, and that certain colored lights gave warning of the condition of the switch, and charging deceased with not heeding the warning.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.*]

3. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—NEGLIGENCE—INSTRUCTIONS.

In an action against a railroad for the death of an engineer by derailment of his engine at an open switch, where the evidence raised the issue as to the switch having been left open by some one in possession of a switch key, and it appeared that only employes had such keys, and the lock belonging to the switch, which was partly open, was found near it securely locked, and there was nothing to indicate the intervention of an outside party, it was not error to charge that negligence of a servant was negligence of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1161; Dec. Dig. § 293.*]

4. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—APPLIANCES—RAILROAD SWITCH—PRIMA FACIE CASE.

Proof that the death of deceased, an engineer, was caused by a displaced, unlocked switch made out a case of negligence against defendant railroad, since, as it was defendant's duty to furnish safe appliances, it had the burden of accounting for the unsafe condition of the switch.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-906; Dec. Dig. § 265.*]

Appeal from District Court, Anderson County; B. H. Gardner, Judge.

Action by Minnie Lou Bradt and others against the International & Great Northern Railroad Company and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

King & Morris, for appellants. Thos. B. Greenwood and A. G. Greenwood, for appellees.

FLY, J. This is a suit by the mother, widow, and minor children of Sam Bradt against the International & Great Northern Railroad Company and Thomas Freeman, receiver thereof, for damages resulting from his death. The cause was tried by jury and resulted in a verdict and judgment in favor of appellees for \$20,000, apportioned as follows: To the widow, Mrs. Minnie Lou Bradt, \$7,000; to the mother, Mrs. Jennie Bradt, \$3,000; and to each of the two minors, \$5,000. No complaint is made as to the amount of the verdict. The facts disclose that Sam Bradt, an engineer in the service of the railroad company, while in the faithful discharge of his duties, was so injured that he died; the injuries resulting from the derailment of the locomotive which he was running, through the negligence of the railroad company. Freeman was afterwards appointed receiver by a federal court.

The first, second, and third assignments of error attack the action of the trial court in overruling the general and certain special exceptions to the petition presented by the receiver. The position is taken that the receiver could not be sued without the consent of the federal court by which the receivership was created, and that, the cause of action having accrued prior to the appointment of the receiver, he was not a necessary or proper party. It was alleged in the petition that permission to sue the receiver had been obtained from the court appointing him, and there was no plea under oath denying the capacity or right of appellees to sue, and the allegation would be sufficient without proof. The exceptions attacked the power of the appellees to sue without an order from the federal court, and they were not verified by oath, and, in the absence of such verification, the allegation will be taken as true. Article 1265, Rev. St. 1895; Young v. Meredith, 38 Tex. Civ. App. 59, 85 S. W. 32.

The fifth assignment of error is overruled. The petition alleged, among other things, that the railroad company had failed to inspect its track and switch "and negligently and recklessly failed to discover the state of the switch and provide any warning to the said Sam Bradt of the fatally dangerous condition thereof." In connection therewith appellees were permitted to prove that colored lights had been used at switches by the railroad company to show how the switch was set, and that they were efficacious, but failed to have the switch in question so guarded. We think the allegation of a failure to give warning of the condition of the switch at night was sufficient to justify the admission of proof of a failure to have lights at the switch as had been the custom. In addition, appellants alleged that it was the duty of deceased engineer to ascertain whether the switch was properly set, and that certain targets, half red and half white, gave

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

warning of the condition of the switch and charged deceased with negligence in not heeding the warning, and appellees in answer to that charge had the right to prove the failure to have the proper signals at the switch, which at night would consist of red and white lights. The evidence was admissible.

The evidence raised the issue as to the switch having been left open by some one in possession of a switch key, and it appeared that no one but employes had such keys. There was no lock on the switch, the displacement of which caused the derailment; but the lock securely locked was found near the switch, and the switch was partly thrown. There was nothing to indicate the intervention of an outside party. Under such circumstances it was not error to charge that negligence of a servant was negligence of the master. Appellees had charged that the death of Sam Bradt had been caused by the negligence of the railroad company, and, if there was any evidence tending to show that the negligence was that of a servant of the company, the court was authorized to instruct the jury that such negligence was the negligence of the master.

The evidence showed that Sam Bradt was an engineer in the employment of the railroad company and came to his death by a derailment of his train which was caused by a misplaced, unlocked switch. He was not shown to have been guilty of negligence. It was about 2:30 o'clock in the morning when the wreck occurred. There is no dispute that the switch was unlocked. Whose business was it to keep it in a secure condition? Undoubtedly it was the duty of the railroad company. It was negligence to have the switch in such condition that employes in discharge of their duty of running trains would rush to destruction. When appellees proved that the death of Sam Bradt had been caused by a displaced, unlocked switch, they made a case of negligence against the railroad company, because the duty rested on it to furnish safe appliances with which its employes could perform their duties, and the burden rested on it to account for the unsafe condition of the switch. It failed to do so, and the jury were justified in finding it guilty of negligence.

The judgment is affirmed.

INTERNATIONAL & G. N. R. CO. v. SANDLIN.†

(Court of Civil Appeals of Texas. Oct. 20, 1909.
Rehearing Denied Nov. 4, 1909.)

1. TRIAL (§ 133*)—IMPROPER ARGUMENT OF COUNSEL—ACTION OF COURT.

Where counsel for plaintiff, in an action for injuries to a passenger by derailment of the train, admitted on objection by defendant that his argument to the jury to the effect that defendant was not discharging its duty to the pub-

lic, but was leaving that duty to a receiver, was improper, and requested the jury not to consider it, and the trial judge directed the jury not to consider it, the improper argument was not ground for reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 816; Dec. Dig. § 133.*]

2. TRIAL (§ 129*)—IMPROPER ARGUMENT OF COUNSEL—RETAILIATORY REMARKS.

Where, in an action for injuries to a passenger, the counsel for the railroad improperly argued to the jury that a railroad benefited a community through which it ran by haulings its people, buying their timber for ties, and by adding values to their land, the railroad could not complain of the improper argument of counsel for plaintiff that it was not discharging its duty to the public, but was leaving that duty to a receiver.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 810; Dec. Dig. § 129.*]

3. EVIDENCE (§ 477*)—OPINION EVIDENCE—NONEXPERT WITNESS—BODILY CONDITION.

Under the rule that a nonexpert witness may give his opinion on questions of apparent conditions of the body or mind, a husband suing for a personal injury to his wife may testify, though he is not an expert, that his wife suffers greatly, and that her lower limbs are in a paralyzed condition.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2237-2241; Dec. Dig. § 477.*]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.

In a personal injury action, the error, if any, in admitting the testimony of physicians that if the person injured was not in a position to have a change of scenery and the like to divert her mind her chances for recovery would be less than under more favorable circumstances, and that they would not say positively that she would ever get well, was not prejudicial, where there was no effort on the part of either party to show that she was or was not in a position to have a change of scenery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

5. DAMAGES (§ 163*)—INJURIES TO WIFE—ACTIONS BY HUSBAND—BURDEN OF PROOF.

In an action by the husband for personal injuries to his wife, defendant has the burden of proving that the husband could by proper care and attention avoid the damages sustained by reason of the wife's injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 457; Dec. Dig. § 163.*]

6. CARRIERS (§ 320*)—INJURIES TO PASSENGERS—NEGLECT—QUESTION FOR JURY.

Whether the prima facie case made by showing the derailment of a train and the consequent injury to a passenger was rebutted by the evidence of the railroad that a switch causing the derailment was not left open by one of its employes held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

7. TRIAL (§ 192*)—INSTRUCTIONS—ASSUMPTION OF FACT.

The court in its instruction may assume a fact conclusively established by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 432-434; Dec. Dig. § 192.*]

8. DAMAGES (§ 183*)—EXCESSIVE DAMAGES.

Where, in an action by the husband for injuries to the wife, the testimony showed that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

the wife was a nervous wreck, hopelessly paralyzed in her lower limbs, and an intense sufferer of both mental and physical pain as a direct result of the injuries, and there was other evidence that under proper conditions and with proper care she might recover in from three to five months from the time of the trial, a verdict for \$16,000 was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 368, 369, 386-395; Dec. Dig. § 133.*]

Appeal from District Court, Walker County; S. W. Dean, Judge.

Action by G. J. Sandlin against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

King & Morris, for appellant. Hill & Elkins and Lovejoy & Parker, for appellee.

McMEANS, J. Suit by appellee, G. J. Sandlin, against appellant, International & Great Northern Railroad Company, to recover damages for personal injuries received by appellee's wife, Mrs. Tilda Sandlin, while a passenger on appellant's train. Appellee alleged that the engine and some of the cars of the train, including the car in which his wife was riding, were derailed and were brought to a standstill by a sudden and violent stop, and that she was thrown violently down in the car, and thereby received the injuries complained of. Appellant's pleadings consisted of a general demurrer and general denial. A trial before a jury resulted in a verdict and judgment for appellee for \$16,000. The railroad company has appealed.

By its first assignment of error appellant complains of the following language used by appellee's attorney in the closing argument: "Gentlemen of the Jury: Who is operating this railroad now? The defendant company is not discharging its duty to the public. It is not keeping up its track for the purpose of preventing wrecks of the character of that in which plaintiff was injured, but is leaving that duty to a receiver." The language was objected to at the time, and a bill of exceptions saved. The attorney for appellee at once, upon objection being made, withdrew the remarks, stating to the jury that they were improper, and asked the jury not to consider them, and requested the court to instruct the jury to disregard them, which the court did. It appears from the bill of exceptions that the language above quoted was made in reply to the argument made by one of the appellant's attorneys to the effect that railroads are valuable to "your county and to your community. You seek to get railroads to your town, procuring for them rights of way, making to them donations, and in return they haul your people, buy your timber for ties, add value to your lands, and are of great use to you and should not be stricken down; and that defendant in this case should not be dealt a blow in doing so

much for a community." It is conceded that the language complained of was improper. The jury was so told by the attorney who used it, and he also in that connection requested the jury not to consider his remarks, and at the same time the trial judge, by the request of the attorney, so admonished the jury. The attorney and the judge did all that could be done to avoid any injury to the defendant by the improper language used. As said in *Brown v. Perez*, 89 Tex. 286, 34 S. W. 727: "The district judge was in a position to observe the jury during the course of the argument, and could determine whether any injurious effect was produced upon their minds much better than we can by examination of the record, and we presume that if, in the opinion of the trial judge, injury had resulted, * * * he would have granted a new trial. We do not think, from the record as presented to us, that the error is such as to require a reversal of the judgment." Another reason that may be given for holding that the remarks, although improper, do not require a reversal, is that they were made in response to language used by appellant's attorney which were but little less, if not fully, as objectionable as that complained of. It certainly was no defense to plaintiff's suit that a railroad benefits a community through which it runs, by hauling its people, buying their timber for ties, and by adding values to their land; and it is equally certain that if such facts constituted a defense no such facts were proven. In making such an argument appellant's attorney urged before the jury matters which were improper for their consideration. "If counsel for one party pursues a line of argument not called for by the facts of the case, and in itself improper, and thereby invites a reply, the party so through counsel violating a proper course of procedure and the rules intended to secure the proper presentation of causes ought not to be heard to complain of the reply, and in such cases this court will not reverse a judgment on an assignment of error based on such facts." *Railway Co. v. Garcia*, 62 Tex. 289; *Hogan v. Railway Co.*, 88 Tex. 683, 32 S. W. 1035; *Jones v. Wright* (Tex. Civ. App.) 92 S. W. 1011; *Railway Co. v. Alleman* (Tex. Civ. App.) 115 S. W. 74.

While testifying in his own behalf, the plaintiff was asked the following question: "What is the condition of your wife's lower limbs now?" To which he replied: "She suffers a great deal now. She is crippled and cannot walk. She has been in bed or either in the rolling chair, and suffering all the time since that accident. Her lower limbs are in a paralyzed condition now, and she hasn't any use of them and has no feeling in them." The question and answer were objected to on the grounds that the witness was not a physician, had not qualified as an

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

expert, and therefore was not competent to speak on the subject, and that the testimony was immaterial, irrelevant, and prejudicial to defendant, and, the objection being overruled by the court, the ruling is made the basis of appellant's second assignment of error. The proposition following the assignment is: "It was error to permit appellee to testify that his wife was paralyzed without qualifying as a medical expert." The assignment is without merit and is overruled. The question did not call for the opinion of the witness, and the answer appears to be a statement of facts, and not an expression of an opinion or a conclusion. However that may be, it now appears to be well recognized that a nonexpert witness may give his opinion on questions of apparent conditions of the body or mind, intoxication, insanity, sickness, health, etc. Such testimony is received in the particular cases or instances mentioned because a mere description, without the witness' opinion, would convey an imperfect idea of the force, meaning, and inherent character of the thing described. *Railway v. Flory* (Tex. Civ. App.) 100 S. W. 222; *Railway v. Clippenger* (Tex. Civ. App.) 106 S. W. 158; *Railway v. Smith* (Tex. Civ. App.) 90 S. W. 926.

By its third assignment appellant complains of the action of the court in admitting, over its objection, the testimony of Drs. Bush, Angier, Fowler, and Hendricks to the effect that, if plaintiff's wife was not in a situation to have a change of scenery and the like to divert her mind, her chances of recovery would be less than it would be under more favorable circumstances, and that, if she were not in such a situation as to have a change of scenery and the like to divert her mind, they would not say positively that she would ever get well. The proposition asserted under this assignment is that appellee could not recover damages which could be reasonably avoided by proper care and attention, and it was error for the court to permit evidence tending to show what would be the damages if appellee should fail to use reasonable efforts for the restoration of his wife's health, and that the admission of such testimony was prejudicial to appellant. It is manifest that the physicians had indicated that a change of scenery, or a diversion of her mind otherwise, would be beneficial to Mrs. Sandlin, and the question merely suggested what was self-evident, namely, that if she was not in a situation to have such a change she could not receive a benefit in that way. The only way the question could have become material would have been for appellee to have offered to show that his wife was not in a situation to have a change of scenery, or for appellant to have offered to show that she was; but neither did this. The evidence clearly was harmless and could not have affected the jury. If appellant desired to show that appellee could have, by proper care and attention, avoided the damages he

sustained by reason of his wife's injury, it was incumbent on it to make such proof. *Belcher v. Railway*, 92 Tex. 597, 50 S. W. 559. The assignment is overruled.

Appellant's fourth assignment assails the third paragraph of the court's general charge to the jury, which is as follows: "Now, therefore, if you believe from a preponderance of the evidence that an employé of the defendant company, intrusted with the duty in that regard, and in furtherance of the company's business, opened, or caused to be opened, a switch connecting the spur track and the main track at West Davidson Mill, and thereafter failed to close the same, and thus failing to close the same, if he did, he was guilty of negligence, and that such negligence, if any, was the proximate cause of the derailment of the train and injury to plaintiff's wife therein, if she was so injured, you will find a verdict for plaintiff." By its second proposition under this assignment appellant contends that, there being no evidence showing, or tending to show, that an employé of the company opened, or caused to be opened, the switch in question, and thereafter failed to close the same, it was error for the court to submit that issue to the jury. It is urged by the first proposition that it was reversible error for the court to submit an issue to the jury unless it is raised by both the pleadings and evidence. This brings us to a consideration of the evidence having a bearing on this issue.

The wreck occurred some time after 1 o'clock in the morning, and was manifestly caused by the switch at West Davidson Mill being so displaced as to be out of alignment for the main line and not far enough to connect with the spur track, thereby causing what is known as a "cocked" or "split" switch. Appellee having proved the derailment and consequent injury to his wife, it devolved upon appellant to negative every act or omission amounting to the want of care incumbent upon a carrier of passengers that could have been an efficient cause of the derailment, and this it attempted to do by offering testimony to prove that for the 17 hours next preceding the wreck the switch had not been opened or left opened by any of its employés intrusted with that duty, and in furtherance of the company's business. By its train dispatcher, Caldwell, was shown the times, that various trains passed West Davidson spur between 9 o'clock on the morning of December 27th and the time of derailment, as follows: A passenger train at 11 a. m., north-bound; a freight train at 11:30 a. m., south-bound; a passenger train at 1:50 p. m., south-bound; a freight train at 5:40 p. m., north-bound; an extra freight train at 6 p. m., north-bound; passenger train at 7:40 p. m., north-bound. The next train was the passenger train which derailed, which was south-bound. Employés on each of these trains, except the one derailed, testified that the

switch was not thrown or used by any of the operatives of the respective trains, and at the time of the passing of their trains the switch was properly set and showed clear. All the crew of the north-bound freight train which passed the switch at 5:40 p. m. testified that they had orders to pick up a car off the spur track, but that they did not do so because the car was not properly loaded, and that while the train slowed down it did not come to a stop. Holland, the swing brakeman on this train, testified: That he got off the train at a point about 100 feet south of the gate across the spur track, where he expected to "cut" the train; that at the time he got off the train had not stopped; that it did not stop, but was running slowly; that the engineer whistled off-brakes; that he at once got back on the train; that only one other member of the crew got off on the ground, and he was the rear brakeman (Doyle) who got off the caboose to flag the train behind them. Dr. Rayburn and Miss Rich, who were at the switch when this train passed, testified that it passed without stopping and without any one getting off that they saw. It was shown by the sectionmen working that day near the spur that when they quit work at 5:30 p. m. they got on their hand car and went south to Lovelady, passing the switch at about 5:40, and passed it again, returning, at about 6:30. These witnesses testified that they did not notice anything wrong with the switch at either time. The testimony justifies the conclusion that the cocked switch would not have derailed a north-bound train, but would have derailed a train bound south. A hand car, being lighter, would be more easily derailed by a split switch. W. F. Morris, a passenger on the derailed train, testified: That he examined the switch immediately after the accident and found it in a half-thrown position, and he judged it was in that position when the train struck it; that he noticed the lock was not in the switch, but that he did not look for it; that later he saw one of the men who was looking for the cause of the accident pick the lock up from under the long tie on which the switch stand rested; that it was locked when picked up; that the switch stand showed no signs of having had any force applied to it; that the lock was found in the neighborhood of the stand; that it seemed to be in good condition, and saw no indication of its having been tampered with; that he noticed the switch staple into which the lock fastened, and its condition appeared to be normal, just about like all of them he had ever seen; that the switch lever was about halfway between the two slots on the switch plate and was not in a proper position to turn the train on either side.

We have not set out in detail the testimony bearing upon the issue, but enough, we think, to demonstrate that it was for the jury to say whether the *prima facie* case

made by plaintiff, by showing the derailment and consequent injury to his wife, was rebutted by the testimony adduced by defendant to show that the switch was not left open by one of its employes. That the testimony referred to was sufficient to justify the charge complained of we think there is no doubt. With other evidence introduced the jury had before it testimony that there was to be moved a loaded car which was upon the spur track, which was connected by the switch with the main track; that a freight train crew had orders to pick this car up; that when the train reached the spur the swing brakeman, in the performance of his duties in connection with the picking up of said car, got off the train near the switch, and the rear brakeman also got off for the purpose of flagging a train that was following. It is true that the employes on this train testified they did not stop, and that none of them threw the switch; but whether they did or not was a question for the jury. *Railway v. Runnels*, 92 Tex. 306, 47 S. W. 971.

Or the jury may have believed that the section crew left the switch open. It was shown that they quit work at 5:30 p. m., passed the spur on a hand car going south at about 5:40, and returned about 6:30. The importance of this testimony becomes reasonably apparent when it is considered that three trains passed the switch near enough to the time the sectionmen said they passed it for it to have been necessary for them to have taken the spur track, or to have removed the hand car from the main line, in order to have gotten out of the way. One train passed at 5:40 going north; another going in the same direction passed at 6:00, and still another, going in the same direction, passed at 7:47. The time the sectionmen said they passed was 5:40. This was the very time that the evidence showed a train went by; the hand car going south, and the train north. Only 20 minutes later another train passed. It is true that they testified that they did not open the switch or leave it open; but if they did they would be actuated by the most powerful considerations to deny it, and this was a matter which the jury might properly consider. And the jury had before them the further fact that no violence appeared to have been done to the switch or any of the appliances, and the lock had no appearance of having been tampered with. It is pure speculation to suppose that a malicious person opened the switch. We think the testimony was clearly sufficient to justify the submission of the issue in the charge complained of. *Railway v. Thompson* (Tex. Civ. App.) 116 S. W. 109; *Railway v. Coffman* (Tex. Civ. App.) 121 S. W. 221; *Railway v. Shapard* (Tex. Civ. App.) 118 S. W. 599; *Railway v. Lytle* (Tex. Civ. App.) 106 S. W. 900.

There is no merit in the third proposition under this assignment, that the charge com-

plained of is upon the weight of the evidence, in that it assumes that the switch connecting the spur track and the main track was open. The testimony was so conclusive upon that point the court could well assume it as a fact. The assignment is overruled.

The remaining assignment of error complains that the verdict is excessive. There was testimony that appellee's wife is a nervous wreck, hopelessly paralyzed in her lower limbs, and an intense sufferer of both mental and physical pain, as a direct result of the injuries inflicted upon her in the wreck. There was other testimony indicating that under proper conditions and environment and with proper care she might recover in from three to five months from the time of trial. The verdict is large; but we cannot say from the evidence that it is so excessive as to indicate that the jury was actuated by passion, prejudice, sympathy, or other improper motive in fixing their award.

We find no reversible error in the record, and the judgment of the court below is affirmed.

Affirmed.

TEXARKANA & FT. S. RY. CO. v. NECHES IRON WORKS et al.

(Court of Civil Appeals of Texas. Oct. 23, 1909.)

1. CARRIERS (§ 105*)—FAILURE TO DELIVER—NOTICE OF SPECIAL DAMAGES.

When a consignee paid the freight on a car of coke in the carrier's yards at its destination, he informed the carrier that the consignee's supply of coke was running short, and that, unless it received the coke promptly, its plant would likely be shut down, as coke was necessary to run it. *Held* sufficient to charge the carrier with notice of special damages by loss of business.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 452½; Dec. Dig. § 105.*]

2. TROVER AND CONVERSION (§ 44*)—DAMAGES—VALUE OF PROPERTY.

The general measure of damages for conversion of property is its market value at the time and place of conversion, with legal interest.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 260; Dec. Dig. § 44.*]

3. EVIDENCE (§ 113*)—RELEVANCY—MARKET VALUE.

Evidence of the price paid for property is not evidence of its market value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 271; Dec. Dig. § 113.*]

4. TROVER AND CONVERSION (§ 40*)—EVIDENCE—SUFFICIENCY—VALUE OF PROPERTY.

Evidence as to the value of a car of coke at the time of its conversion *held* insufficient to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 242; Dec. Dig. § 40.*]

5. TROVER AND CONVERSION (§ 54*)—RECOVERY OF SPECIAL DAMAGES.

In a suit for a carrier's conversion of a car of coke, plaintiff, a manufacturing company,

was not entitled to recover for loss of an order for work, where it appeared that the order was subsequently filled, and that all the profit was made out of it that would have been made if filled promptly.

[Ed. Note.—For other cases, see Trover and Conversion, Dec. Dig. § 54.*]

Appeal from Jefferson County Court; Jas. A. Harrison, Judge.

Suit by the Neches Iron Works against the Texarkana & Ft. Smith Railway Company and another. There was a judgment for plaintiff against the defendant named, and it appeals. Affirmed in part, and reversed in part.

Hiram Glass and H. M. Whitaker, for appellant. Terry, Cavin & Mills and F. J. & R. C. Duff, for appellee G. C. & S. F. Ry. Co. W. W. Cruse, for appellee Neches Iron Works.

PLEASANTS, C. J. This suit was brought by the Neches Iron Works against the appellant and the Gulf, Colorado & Santa Fé Railway Company to recover the value of a car load of coke alleged to have been converted by the defendants, and to recover special damages alleged to have been sustained by the plaintiff by reason of said conversion. The cause of action is thus stated in the petition: "That heretofore, to wit, on or about September 3, 1907, defendants owned, operated, and controlled each its certain line of railroad, extending into and about the city of Beaumont, Jefferson county, Tex., and was then and there and still is engaged in the business of running and operating a line of railroad and transporting freight on and over their said lines of road as common carriers for hire, and that on or about September 6, 1907, in consideration of the sum of \$88 then and there paid defendants by plaintiff, which was freight charges demanded by the defendants upon one car of Milwaukee Salvoy coke, at which time the defendants promised and agreed to carry and deliver to the plaintiff promptly at its machine shops, in the city of Beaumont, Tex., its place of business, said one car of Milwaukee Salvoy coke, which was then and there in their possession in their yards in the city of Beaumont, Tex., having been shipped over their said line of railroad, and was then and there the property of this plaintiff, and was of the reasonable value of \$199.04, and that at the time of the payment of said freight charges, as aforesaid, plaintiff told and informed defendants that its supply of coke was running short, and it was in immediate need of the delivery of this car of coke, and unless same was delivered to them promptly, which it requested to be done, that its supply would run out, and they would be delayed in their work, and would cause them damage, and that repeatedly thereafter, for the next 10 or 15 days, plaintiff did call defendants up over the phone and requested and insisted up-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the immediate delivery of the said car of coke to them, each time informing them of the importance of having the same delivered at once, stating to them, unless they received same at once, they would have to close the shops, and would be damaged, and that they would hold them for it. But that afterwards, on or about September 6, 1907, defendants knowingly, unlawfully, and willfully took possession of said property, and knowingly and unlawfully converted the same to their own use and benefit. Plaintiff further charges that it was some 20 days after the payment of said freight charges before it learned that its said car of coke had been used, and that defendant could not deliver same, but that during all this time which intervened defendants negligently and fraudulently misinformed plaintiff and kept it believing that its car of coke would be delivered by telling it that they would trace it up and have it put over to him, when as a matter of fact it had been appropriated and could not be delivered." Other allegations of the petition claim that the special damages sustained by the plaintiff by reason of loss of business caused by the failure of the defendants to deliver the coke amounted to the sum of \$250.

The defendants answered by general demurrer and general denial, and specially excepted to the petition on the ground that the allegations of special damages were insufficient, in that there is no allegation that the defendants at the time they accepted the shipment of the coke had notice that such special damage would likely accrue if there should be a failure to deliver the coke. Defendants also excepted or pleaded to the jurisdiction of the court on the ground that the claim for special damages being insufficient, for the reason above stated, and the amount sued for as general damages being less than \$200, the court was without jurisdiction to hear and determine the case. The trial in the court below with a jury resulted in a verdict and judgment in favor of the plaintiff against the appellant for the sum of \$208, the alleged value of the coke with interest thereon from the date of its conversion, and the further sum of \$140 special damages. No judgment was rendered against the Gulf, Colorado & Santa Fé Railway Company. From this judgment the Texarkana & Ft. Smith Railway Company has appealed against plaintiff and its codefendant.

The court did not err in overruling the special exception to the petition and the plea of its jurisdiction. The petition alleged that at the time the defendants were notified that special damages would accrue if the coke was not delivered the car of coke was in possession of the defendants in their yards in the city of Beaumont. The general rule requiring notice at the time of making a contract for the delivery of property of the existence of peculiar conditions under which special damages are likely to accrue from its breach as essential to create liability of the

promisor for such damages is not universal nor applicable to all cases, and it has been expressly held in a case similar to this case in all respects that notice given after the property reached its destination and is in the possession and control of the carrier charged with its delivery is sufficient. *Bourland v. Railway Co.*, 99 Tex. 407, 90 S. W. 483, 3 L. R. A. (N. S.) 1111, 122 Am. St. Rep. 647. The evidence shows that at the time plaintiff's agent paid the freight on the shipment, and appellant agreed to deliver the coke at once, he informed the appellant that plaintiff's supply of coke was running short, and that, unless they received the coke promptly, the plaintiff's plant would likely be shut down, as coke was necessary for running the plant. At this time the car was in possession of appellant at Beaumont. This was sufficient to charge appellant with notice of the special damages claimed by plaintiff, and the court did not err in submitting that issue to the jury.

The only testimony as to the value of the car of coke at Beaumont at the time of its conversion is that of the witnesses Meagher and Wills. The witness Meagher after stating the value of the car of coke to be \$199.04, which he fixed by the market and the invoice, on cross-examination stated that he got the value "entirely by the figures I took from my invoice, and the papers in my office. I never saw the coke. There is good coke and bad coke. I don't know whether that car was good coke or bad coke. I never saw it. The only thing I can tell about its nature and condition is the reputation of the house. I never saw that particular car of coke, and I don't know whether it was good or bad." And in answer to a further inquiry stated that he fixed the whole thing as to the class and amount of the coke by the invoices and his books. The witness Wills stated that the contract price of this coke with the concern from whom he purchased was \$9.55 a ton. There was no other evidence as to the amount or value. It is well settled that the general measure of damages for the conversion of property is the market value of the property at the time and place of the conversion, with legal interest thereon. It is also settled that evidence of the price paid for property is not evidence of its market value. Under these rules, if the witnesses had testified that a car of coke of the quantity, class, and condition of that converted by the defendants cost the sum named by them, and from the fact that such was its cost in the open market they would swear that such was its market value, such evidence would clearly be inadmissible, and, if admitted without objection, we are not inclined to think it would be sufficient to sustain a finding as to the market value of coke. But, be this as it may, the evidence in this case is we think clearly insufficient because the witness does not testify as to the cost of a car of coke of the kind and quantity converted by

the defendants, but says he does not know how much or what kind of coke was taken, and he only testifies that coke of this kind and quantity named in the invoice sent plaintiff would cost the amount named. We think this evidence is insufficient to sustain the verdict, and the assignment complaining of the judgment on this ground should be sustained. This testimony in effect amounted to nothing more than the production of the invoice.

The evidence is also insufficient to sustain the verdict for \$140 special damages for loss on an order for work to be done for the Gulf Refining Company. The evidence shows that this order was delayed by the failure to receive the coke, but that it was finally filled by the plaintiff, and plaintiff's manager testified: "When we did get it out, we made whatever profit we were going to make on that particular work. We did not lose that work." It is clear that plaintiff was not entitled to recover damages for loss of this order when the testimony shows that it was subsequently filled and all the profit made out of it that would have been made if it had been filled promptly.

None of the assignments presented in the brief show any error against the appellant in the trial of the case as between it and its codefendant, the Gulf, Colorado & Santa Fé Railway Company, and the judgment in favor of said company should be affirmed. In announcing our decision and making the entry upon our trial docket, we inadvertently stated that the judgment of the court below was reversed and the cause remanded, when the entry and announcement should have been reversed and remanded as to appellee Neches Iron Works and affirmed as to the Gulf, Colorado & Santa Fé Railway Company. This entry will be corrected and judgment entered as indicated, and it is so ordered.

Affirmed in part. Reversed and remanded in part.

BLACKWELL DURHAM TOBACCO CO. v. JACOBS.

(Court of Civil Appeals of Texas. Oct. 27, 1909.)

1. ACCOUNT, ACTION ON (§ 12*)—VERIFIED ACCOUNT—EFFECT OF VERIFICATION—BURDEN OF PROOF.

In an action on a sworn account for goods sold and delivered, defendant's sworn plea, by admitting the correctness of the item of the account, made a prima facie case for plaintiff, when put in evidence, though the plea also alleged that defendant was entitled to certain credits from the amount claimed as due, and the burden was upon defendant to establish such credits by other proof.

[Ed. Note.—For other cases, see Account, Action on, Cent. Dig. § 37; Dec. Dig. § 12.*]

2. APPEAL AND ERROR (§ 1175*)—DISPOSITION—REVERSAL AND RENDITION.

Where the evidence on appeal, which consisted of the pleadings and admissions therein, shows that plaintiff was entitled to a larger judgment than that rendered, the Court of Civil Appeals will reverse and render such judgment as the trial court should have rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573, 4580; Dec. Dig. § 1175.*]

Appeal from Grimes County Court; T. P. Buffington, Judge.

Action by the Blackwell Durham Tobacco Company against L. A. Jacobs. From a judgment for plaintiff for a less amount than claimed, it appeals. Reversed and rendered.

Geo. D. Neal, for appellant. Hood Boone, for appellee.

JAMES, C. J. This is an action on a sworn account for goods sold and delivered to Jacobs; the account showing 4,850 pounds of tobacco sold at various dates for \$3,055.50 as the debit and various items of credits amounting to \$2,798.96, leaving a balance of debit of \$256.04. The answer was a general denial, and a sworn plea, as follows: "That said itemized account aforesaid shows a balance of \$256.04, when in truth and in fact the balance due and owing plaintiff by this defendant is only the sum of \$13.54, which this defendant is ready and willing to pay. That plaintiff (defendant) admits that he bought the quantities of tobacco as set forth in said itemized account aforesaid at the price set out therein, to wit, 4,850 pounds, but that this defendant was entitled to a discount and rebate of five cents per pound on said 4,850 pounds tobacco. That said discount or rebate amounts in the aggregate to the sum of \$242.50, which defendant alleges and says should have been credited to him on said itemized account aforesaid, for which reason defendant says that said account is not just and is untrue, and that there is only due plaintiff the sum of \$13.54, which sum defendant is ready and willing to pay, as before alleged." The judge's findings of fact were that plaintiff's testimony consisted of the verified account, that defendant's evidence consisted of the sworn plea, and from this the conclusion of law: "Defendant having pleaded under oath that the account was unjust and untrue, the burden of proof was upon plaintiff to establish its case by other evidence; the prima facie character of the sworn account having been lost." The judgment was that plaintiff should recover on defendant's answer the sum of \$13.54.

This judgment, we conclude, is erroneous. If the sworn denial of the account had been in the general terms of the statute, plaintiff unquestionably would have had to prove his account by independent testimony; but the sworn plea admitted that the goods were purchased by the defendant of plaintiff, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

at the price which was stated in the account. The only respect in which the account was questioned was the omission therefrom of a certain credit that defendant claimed he was entitled to. Now, the very plea which was relied on to destroy the account as evidence in doing so admitted and established its correctness as far as it went. This admission made a prima facie case for plaintiff, and we are of opinion that it devolved upon defendant to show by testimony the existence of the credit he set up. This he did not do. The items of the account not having been controverted, but admitted by the plea itself, which was introduced as evidence, was sufficient proof of them. *Shuford v. Chinski* (Tex. Civ. App.) 26 S. W. 141.

The cause was tried by the court, and it becomes our duty, according to the law as we think it applicable to the evidence, to render such judgment as the trial judge should have rendered, which is that plaintiff have judgment for the balance claimed.

Reversed and rendered.

MISSOURI, K. & T. RY. CO. OF TEXAS v. COUCH.

(Court of Civil Appeals of Texas. Oct. 23, 1909.)

1. DAMAGES (§ 112*)—MEASURE—BURNING PASTURE LAND.

The measure of damages for burning grass from pasture land is its rental value for pasturage, and the value of the grass burned cannot be based on the value of hay fed to stock because of the destruction of such grass.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

2. APPEAL AND ERROR (§ 549*)—PRESENTATION AND RESERVATION OF ERROR—BILL OF EXCEPTIONS.

Where the statement of facts prepared by the trial judge, the parties having failed to agree, shows the proceedings on the trial, the questions and answers, and the exceptions made, and is filed within the time allowed for filing bills of exceptions, exceptions to the introduction of evidence so presented will be considered on appeal, and an objection that no proper bill of exceptions was reserved cannot be sustained.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 549.*]

3. RAILROADS (§ 485*)—FIRES—ACTIONS—INSTRUCTIONS.

In an action against a railroad for grass and fruit trees burned, the evidence showed that plaintiff owned the premises, but that another was in possession "cropping on shares" and was authorized to use the fruit and let his stock graze upon the grass. The court charged that plaintiff would be entitled to recover for all damage sustained by the burning of the grass. *Held*, that the charge ignored the rights of the cropper, and entitled plaintiff to recover therefor, and should have confined recovery to the loss sustained by plaintiff only.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 485.*]

Appeal from Ellis County Court; J. T. Spencer, Judge.

Action by R. N. Couch against the Mis-

souri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and the railway company appeals. Affirmed on the original hearing, without opinion; but, on motion for a rehearing, reversed and remanded.

Coke, Miller & Coke and G. C. Grace, for appellant. Tom Whipple, for appellee.

RAINEY, C. J. Appellee brought this suit to recover damages for grass, fence, posts, and fruit trees destroyed by fire set by one of appellant's engines. The damages claimed were \$390. A trial before a jury resulted in a verdict and judgment for plaintiff in the sum of \$250, from which the railway company appeals.

On the trial the plaintiff testified the value of the grass burned was \$2.50 per acre. On cross-examination he testified that he did not know the rental value of pasture land such as his, and that his estimate of the value of the grass burned was based on the value of hay he fed to his stock because of the burning of the grass on his pasture. Appellant moved to exclude this testimony of the witness, which was overruled. This was error. The measure of damages for growing grass burned is its value at the time and place of burning, and its value cannot be determined by the value of hay necessarily fed to stock because of the destruction of such grass. The proof does not show the quantity of grass that was standing on the land when it was destroyed, nor whether it was more or less than the amount that was necessarily fed to the stock because of the burning, nor was the expense of cutting, etc., which is necessary in arriving at the value of hay that has been severed from the soil, shown. The land on which the grass was destroyed being used for pasturage, the damages were the value of such land for that purpose.

Counsel for appellee contend that we ought not to consider this assignment, as there was no proper bill of exceptions shown to have been reserved as required by law. The exception is shown in the statement of facts which was prepared by the judge trying the case—the parties having failed to agree—to which statement of facts the judge affixed the following certificate: "Counsel having failed to agree upon a statement of facts in the above-styled cause, I submit the foregoing as a correct statement of the material evidence, and of the exceptions reserved and approve and allow such statement and exceptions, and order the same filed as a part of the record in said cause." It has been the practice of the appellate courts of this state, which practice is upheld by various decisions, to consider exceptions to the introduction of evidence when presented as done in this case. The statement of facts shows the proceedings on the trial, the questions asked and

answers given as to part of the evidence, and the exceptions made to the rulings of the court in relation thereto. There is no objection that said statement of facts was not filed within the time allowed for filing bills of exceptions. We are of the opinion that appellee's objection to the consideration of said exception should not be sustained.

The evidence shows that plaintiff owned the premises, but that one Owens was in possession "cropping on the shares." He was authorized to use the fruit that grew on the premises and to let his stock graze upon the grass that was destroyed. The court instructed the jury, in effect that plaintiff would be entitled to recover for all the damages sustained by the burning of the grass. While it appears that Owens' damages were small, yet he had substantial rights, which were ignored, and for which, under the charge, the plaintiff was entitled to recover. We think the charge should have confined a recovery to the loss sustained by plaintiff only, and not authorized a recovery for all the damages sustained.

Near the close of last term of this court we affirmed this case, believing no substantial error had been committed; but upon reconsideration of the case on motion for rehearing our minds have undergone a change, and we are now convinced that the failure to exclude the testimony stated was material error, and that substantial justice had not been reached.

Therefore the motion for rehearing will be granted, and the judgment of the lower court reversed, and cause remanded.

KOPPE et al. v. KOPPE.

(Court of Civil Appeals of Texas. Oct. 22, 1909.)

1. CANCELLATION OF INSTRUMENTS (§ 51*)—INSTRUCTIONS—BURDEN OF PROOF—FRAUD.

In an action to set aside a deed from plaintiff to his stepmother, being part of a transaction involving an exchange of land between them, for alleged advantage taken of him by her while occupying a relation of trust and confidence towards plaintiff, in order to recover, plaintiff must establish his cause of action by a preponderance of evidence; and, where the trust relation is shown, and evidence has been introduced by defendant, tending to show that the transaction in question was on an adequate consideration, it was error to charge that the burden of proof was upon defendant to prove by a preponderance of the evidence that the transaction was fair, and that no advantage was taken by defendant, and that the consideration paid was fair and adequate, since thereunder, if the jury was unable to determine, from the evidence, whether or not the consideration was adequate, they could find for plaintiff.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 108; Dec. Dig. § 51.*]

2. EXCHANGE OF PROPERTY (§ 8*)—VALIDITY OF TRANSACTION—BURDEN OF PROOF—RATIFICATION.

Defendant, in addition to the general denial, having specially pleaded that plaintiff, with full

knowledge of all the facts, ratified the trade by executing a mortgage on the property conveyed to him in exchange, the burden was upon defendant to establish by a preponderance of evidence all the facts necessary to show the ratification.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 17; Dec. Dig. § 8.*]

3. APPEAL AND ERROR (§ 1064*)—REVIEW—HARMLESS ERROR—ERRONEOUS CHARGE.

That the consideration paid to plaintiff was so inadequate as to make the transaction fraudulent not being shown by undisputed evidence, the erroneous charge was not harmless, since it could only be so if there were no conflict in the evidence upon the issue so submitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4219; Dec. Dig. § 1064.*]

4. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—SUFFICIENCY—STATEMENT.

If plaintiff, alleged to have been defrauded by defendant into conveying land to defendant in exchange for other land, subsequently mortgaged the land given to him in exchange, and had no knowledge of the fraud when he executed the mortgage, the act could not be a ratification of the alleged fraudulent transaction, and hence an assignment of error complaining of an erroneous charge on such ratification, which did not show in the statement thereunder that plaintiff knew of the fraud, if any, when he executed the mortgage, did not raise the issue of ratification, and upon the state of the record any error in the charge on that issue would be harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

5. EXCHANGE OF PROPERTY (§ 3*)—FRAUD—RATIFICATION.

If plaintiff, alleged to have been defrauded by defendant into conveying land to defendant in exchange for other land, with a full knowledge and understanding of all the facts, treated the property received by him as his own, appropriated it to his use by executing a mortgage thereon, his acts would constitute a ratification, regardless whether he knew specifically what his legal remedies were, and whether he knew that the execution of the mortgage would be a ratification of the transaction, it not being contended that he was of insufficient mental capacity to understand the nature and consequence of his acts, but only that his mind was wanting in intelligence, judgment, and experience, qualifying him to conduct a business transaction, and that he was wanting in shrewdness or capacity to form a correct idea of the value of money or property; this not amounting to such deficiency as to release him from the operation of the general rule that ignorance of the law excuses no one.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 5, 7; Dec. Dig. § 3.*]

6. EXCHANGE OF PROPERTY (§ 8*)—FRAUD—EVIDENCE—VALUE OF LAND EXCHANGED.

In ascertaining the value of land exchanged with plaintiff to determine whether he had been defrauded by defendant only the market value of the property at the time of the transaction, if it had a market value at that time, could be considered, especially where plaintiff's property at the time of the exchange was largely indebted, making it necessary to ascertain the value of plaintiff's equity therein and find the excess, if any, in the market value of the property over and above its indebtedness.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 17; Dec. Dig. § 8.*]

7. EVIDENCE (§ 142*)—RELEVANCY—VALUE OF LAND.

In ascertaining the value of land, evidence of the value of other lands belonging to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

same tract is inadmissible, unless such lands are shown to be of the same character and in the same immediate neighborhood, and the surroundings and conditions of both are substantially identical, and the testimony as to the value of land situated 18 or 20 miles away, not shown to be of the same character, is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 416-421; Dec. Dig. § 142.*]

8. EVIDENCE (§ 478*)—OPINIONS—NONEXPERTS—MENTAL CAPACITY.

In an action to set aside a deed from plaintiff to his stepmother for alleged advantage taken of him by her, while she was occupying a relation of trust, where it was not sought to avoid the contract upon the grounds of mental incapacity, but allegations in the petition of mental weakness, ignorance, and want of business capacity were only auxiliary to the allegation that he trusted his stepmother to protect his interests, which trust was largely superinduced by his mental unfitness for the conduct of large business transactions, and that the trust had been taken advantage of by his stepmother in the transaction complained of, testimony of witnesses that they had known plaintiff for a long time, had often seen him and conversed with him, and that some of them had known of trades made by him, and that from their knowledge, thus obtained, he was in their opinion weak-minded, and had no appreciation of the value of money or property, was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2242-2244; Dec. Dig. § 478.*]

9. EVIDENCE (§ 501*)—OPINION EVIDENCE—MENTAL CAPACITY—EXAMINATION OF NON-EXPERT.

The testimony was not incompetent because the witnesses failed to state specifically the acts of plaintiff and conversations had with him, on which their opinions were based.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2297; Dec. Dig. § 501.*]

10. EVIDENCE (§ 471*)—OPINION EVIDENCE—MENTAL CAPACITY—CONCLUSIONS.

The testimony was not objectionable as being opinions involving a legal conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2168, 2170; Dec. Dig. § 471.*]

11. EVIDENCE (§ 471*)—OPINION EVIDENCE—MENTAL CAPACITY—LEGAL CONCLUSIONS.

Testimony of witnesses that plaintiff did not in their opinion have sufficient mental capacity to fully understand the transaction was inadmissible as involving a legal conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2168, 2170; Dec. Dig. § 471.*]

12. EXCHANGE OF PROPERTY (§ 3*)—VALIDITY—FRAUD—AVOIDANCE.

Fraud of one standing in a confidential relation in a transaction involving an exchange of land does not depend upon the defrauded party's sole reliance on the representations, and avoidance of the exchange is not precluded by the fact that he consulted a friend, and was also influenced by the friend to make the trade.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. §§ 3, 5; Dec. Dig. § 3.*]

Appeal from District Court, Brazos County; J. C. Scott, Judge.

Action by William Koppe against Laura Koppe and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Doremus & Butler, for appellants. T. R. Batts, V. B. Hudson, and Hutcheson, Campbell & Hutcheson, for appellee.

PLEASANTS, C. J. This suit was brought by the appellee against the appellants, Laura Koppe, J. F. Robinson, and Augusta Kurten, to recover an undivided one-half interest in the estate of William Koppe, deceased. As preliminary to such recovery, it was sought to cancel a deed executed by the plaintiff to Laura Koppe on February 26, 1906, whereby plaintiff conveyed his interest in said estate to said defendant. It was further sought to cancel certain deeds from Laura Koppe to the defendants Robinson and Kurten, conveying to them, respectively, certain portions of the lands belonging to said estate. The following paragraphs of the petition sufficiently show the grounds upon which plaintiff sought to set aside the deed by which he conveyed his interest in the estate to the defendant Laura Koppe: "Plaintiff avers that the defendant Laura Koppe is the surviving widow of William Koppe, deceased, plaintiff's father, and that plaintiff is the child of William Koppe deceased by a former marriage, and is the only child descendant of the said William Koppe, deceased. Plaintiff avers that the defendant Laura Koppe is a shrewd, designing, far-seeing, calculating person, and she exercised over plaintiff's father a great and overwhelming influence, and plaintiff's father being conscious of the fact that plaintiff was a green, inexperienced, ignorant, and uneducated fellow, whose mind was wholly undeveloped, and he knew that plaintiff was wholly incapable of protecting and taking care of the large estate to which he would be entitled upon the death of his father, and plaintiff's father being desirous of providing for and leaving him in comfortable and easy circumstances, he did often, prior to his death, communicate his said wishes to the defendant Laura Koppe, and she did then and there set about and did induce plaintiff's father to give her an equal interest in said estate with this plaintiff, and, in order to secure said interest, promised plaintiff's father that she would diligently and faithfully guard and protect plaintiff's every interest, and would look after his welfare generally, and plaintiff's father, relying upon said promise made to him by defendant Laura Koppe, and believing that she would perform the services promised conscientiously and faithfully, and for the purpose of securing for plaintiff the assistance, protection, and help of the said Laura Koppe in looking after and taking care of his property, plaintiff's father did on the 11th day of November, 1902, make and publish his last will and testament, by the terms of which he bequeathed to Laura Koppe and this plaintiff an equal one-half interest each in his estate; that said will was after the death of

said William Koppe, which occurred on the — day of —, 1902, duly probated by the probate court of Brazos county, and by terms of said will, and in the manner hereinbefore alleged, the said Laura Koppe acquired an undivided one-half interest in all of the property of the said William Koppe, deceased, plaintiff's father. Plaintiff avers that all of the property, both real, personal, and mixed, of which his father died seised and possessed, was community property between his father and this plaintiff's mother, or was the separate property of plaintiff's father, made and acquired long prior to his marriage to the defendant Laura Koppe, and no part of said property was community property between plaintiff's father and the defendant Laura Koppe. Plaintiff avers that immediately after the death of his father defendant Laura Koppe, in connection with Mr. Milton Parker of Brazos county, Tex., took charge of all of the estate, both real, personal, and mixed, belonging to his said father's estate and administered the same independent of the probate court, as by said will provided, and the said Laura Koppe being extremely avaricious and grasping in her disposition, and so unpleasant in her manner of the management of said estate, by desiring to acquire for herself the entire and absolute control and possession of said estate, did thereafter commence a course of conduct towards the said Milton Parker in the matter of the management and conduct of said estate and the spending of money belonging thereto which was so objectionable and annoying to the said Parker that he did thereafter file his application in the probate court of Brazos county, Tex., and did resign his trust as executor of said estate, which said application and resignation were filed on January 12, 1905, and plaintiff avers that, after said resignation of the said Parker aforesaid, the defendant Laura Koppe had absolute and entire and unqualified control of all of the property belonging to the estate of William Koppe, deceased, both real, personal, and mixed; and she did thereafter manage, control, and dispose of said property as she saw fit, without consulting this plaintiff, and without regard to his interest and welfare, and plaintiff, relying all the while upon her to look after his interest, believing that she was so doing. * * * Plaintiff, though of adult age, is wholly wanting in intelligence, judgment, and experience qualifying him to conduct a business transaction. His mind is naturally weak and wanting in shrewdness or capacity to form a correct idea of the value of money or property or to protect himself in a trade. He has never engaged in a business transaction of any size or magnitude. That he has lived since becoming of age on his father's plantation in Burleson county, Tex., working as a common laborer, receiving pay of \$25 per month for his services, and, in addition to his lack of experience, his mind is dwarfed and undeveloped,

all of which was fully known to the defendants Laura Koppe and J. F. Robinson. The said defendants Laura Koppe and J. F. Robinson, knowing of plaintiff's said condition, undertook to buy from him his interest in his father's estate and the land held in common between plaintiff and Laura Koppe, and finally persuaded and procured him to make to Laura Koppe the deed hereinbefore described on the 26th day of February, 1906, a copy of which has been here filed in this cause, marked 'Exhibit B,' paying the plaintiff for said property the sum of \$2,500 in money, and giving him a deed to a tract of land belonging to said estate worth not exceeding \$5,000, and plaintiff is informed, and so believes and so charges, the fact to be that the price paid to him for his interest in said property is grossly inadequate, for that his interest in said estate was at that time easily worth the sum of \$75,000 over and above all debts, but so it is he alleges that he being ignorant of the matters, and having had no experience with large sums of money or trades of any magnitude, supposed at the time of the purchase that he was being paid a fair value, and especially supposed that he would not be overreached or mistreated in said trade by his stepmother, Laura Koppe, but he alleges that he was by said Laura Koppe aided and assisted by J. F. Robinson, grossly overreached, and his property sought to be taken from him by them for a grossly inadequate consideration, therefore he avers that no title passed by said deed, and same should be set aside and canceled and held for naught." Other paragraphs of the petition set out specifically and fully many acts and representations of the defendants Laura Koppe and J. F. Robinson, by which it is alleged they knowingly and fraudulently deceived plaintiff, and thereby fraudulently obtained from him the conveyance of his interest in the estate of his father. The defendants answered by general and special exceptions and general denial and by special pleas, the nature of which it is unnecessary to state here. The trial in the court below by a jury resulted in a verdict and judgment in favor of plaintiff.

The conclusion we have reached as to the proper disposition of this appeal renders a full statement of the facts shown by the evidence unnecessary and inappropriate. It is sufficient to say that the evidence was conflicting upon the issue of fraud raised by the pleadings, and, while there was ample evidence to sustain the verdict of the jury, there was also evidence sufficient to sustain a finding that defendant Laura Koppe acted in good faith in making the trade with plaintiff. Upon this state of the evidence the trial court gave the jury the following instruction: "If you believe from a preponderance of the evidence that at and prior to February 26, 1906, the defendant Laura Koppe occupied a position of advantage over the plaintiff, either because of the weakness of

his mind or judgment, which prevented him from understanding his rights, or the nature and extent of the transaction in which the deeds were exchanged, if you find from a preponderance of the testimony that such a condition of mind or judgment existed, or if you believe from a preponderance of the evidence that prior to and at said date the said Laura Koppe occupied a position of advantage over the plaintiff because of his confidence and reliance upon her, if you find that such relation of trust and confidence existed, and that at the time said deed was executed she did occupy a position of advantage over the plaintiff on account of the existence of said conditions or either of them, then you are instructed that the burden of proof is on the defendant Laura Koppe to establish by a preponderance of the evidence that the transaction of date February 26, 1906, in which the plaintiff executed his deed to her in exchange for her deed to him and the \$2,500 in money, was fair and open, that no advantage was taken in the course of said trade by her, that the plaintiff understood the nature and value of his rights in the property conveyed to her, and that the consideration paid to the plaintiff was fair and adequate—that is, reasonably of the same value as the land conveyed to her—and if you have found that the conditions, or either of them above set out, conferring a position of advantage on the said Laura Koppe, existed, unless you so find the facts to be in regard to said transaction as submitted to you herein as to fairness and adequacy, then you will return a verdict for the plaintiff for the cancellation of said deeds of February 26, 1906." Under an appropriate assignment of error appellant assails this charge upon the ground among others, that it erroneously places the burden of proof on the defendant upon the issue of whether the consideration paid plaintiff for the conveyance of his interest in the Koppe estate was fair and adequate. We think the assignment should be sustained. Unless plaintiff was injured by the transaction of which he complains, he is not entitled to have it set aside.

The allegation that the consideration received by him for his conveyance of the property to the defendant was inadequate was an essential part of plaintiff's position, and proof of this allegation was necessary to his right to relief. Such inadequacy of consideration being an essential part of his case, the burden rested upon him to establish such fact by a preponderance of the evidence, and the burden of proof upon this issue could not be shifted to the defendant at any stage of the proceedings. The authorities cited by appellee do not sustain his contention that the charge was correct. The statement of Judge Niell in the opinion in the case of *Wells v. Houston*, 29 Tex. Civ. App. 619, 69 S. W. 183, that "there are certain relations of trust, such as parent and child, guardian and ward, trustee and cestui que trust, attorney and

client, where the danger of allowing persons holding such relations with other to deal with them is so great that the presumption ought to be and is against the transaction; and the person holding the trust or influence ought to be and are required to vindicate it from all fraud," cannot be taken as holding that in a case of this character, when the trust relation is shown and evidence has been introduced by the defendant tending to show that the transaction sought to be set aside was based on an adequate consideration, it would be proper to instruct the jury that the burden was upon the defendant to show the adequacy of the consideration. No such question was before the court in the case cited, and the learned judge who wrote that opinion only announced the rule which is well settled by authority that proof of a trust relation of this character is *prima facie* evidence of fraud in the transaction, and from which the existence of such relationship the necessary and essential fact of inadequacy of consideration might be presumed. This is but a rule of evidence under which the existence of one fact may be presumed upon proof of another, and is not in conflict with the settled rule that the burden is upon the plaintiff to make out his case by a preponderance of the evidence, and that, while the weight of the evidence may shift from side to side during the progress of a trial, a plaintiff is never relieved of this burden, and, when all the evidence is in, unless the jury find that the plaintiff has made out his case by a preponderance of the evidence, their verdict should be for the defendant. Under the charge given by the court, above set out, if the jury were unable to determine from the evidence whether or not the consideration given plaintiff was adequate and fair, they were told to find a verdict for plaintiff, when the law is that, unless the plaintiff establishes the cause of action asserted by him by a preponderance of the evidence, the verdict should be for the defendant. If the defendant seeks to defeat a *prima facie* case made by the plaintiff by proof of an independent fact, in avoidance of the right of recovery, of course, the burden is upon him to establish such fact, and the jury be so instructed. This distinction is aptly illustrated in the present case. In addition to the general denial, the defendant specially pleaded that plaintiff with full knowledge of all the facts ratified and affirmed the trade by executing a deed of trust upon the property conveyed him by defendant Laura Koppe in consideration of his conveyance to her of his interest in the estate. Upon this issue the burden was upon the defendant to establish by a preponderance of the evidence all of the facts necessary to show the ratification, and the court properly so charged the jury. The rule that, when the defendant seeks to defeat the *prima facie* case made by the plaintiff by evidence tending to show that some fact necessary to establish such *prima facie* case is not true, the burden does not

rest upon him to establish the nonexistence of such fact by a preponderance of the evidence, but in such case, unless the jury find from a preponderance of all the evidence that the facts necessary to establish plaintiff's right to recover are true, they should find for the defendant, is firmly fixed by the decisions of our Supreme Court, and it is therefore unnecessary to ascertain what the rule is in other jurisdictions.

The leading case upon this subject is that of *Clark v. Hills et al.*, 67 Tex. 141, 2 S. W. 356. This case has been uniformly followed and approved by the Supreme Court. *Railway Co. v. Burns*, 71 Tex. 481, 9 S. W. 467; *Scott v. Pettigrew*, 72 Tex. 329, 12 S. W. 161; *Jester v. Steiner*, 86 Tex. 419, 25 S. W. 411. The case of *Railway Co. v. Johnson*, 92 Tex. 591, 50 S. W. 563, is not in conflict with the views above expressed. While the charge approved in that case instructed the jury that, if they found certain facts alleged by the plaintiff to be true, they constituted a prima facie case of negligence against the railroad, "and, in the absence of rebutting evidence sufficient to overcome such prima facie case," the defendant would be liable, the jury were further told, in effect, that to find for the plaintiff they must find from the evidence that the rebuttal testimony offered by the defendant was not true. The court in approving this charge expressly holds that it did not shift the burden of proof from the plaintiff to the defendant. This certainly cannot be said of the charge complained of in this case. This error in the charge would only be harmless in a case in which there was no conflict in the evidence upon the issue so erroneously submitted, and we cannot say that the undisputed evidence in this case shows that the consideration paid plaintiff by the defendant was so inadequate as to make the transaction fraudulent, and the appellee does not so contend.

Upon the issue of ratification pleaded by the defendants the court instructed the jury as follows: "Upon the defendant's plea of ratification, you are instructed that if you believe from the evidence that at the time and under the circumstances when plaintiff made and executed his deed of trust to A. G. Board plaintiff was fully advised of his interest which he had sold by deed of February 26, 1906, and was fully advised of the existence of the fraud perpetrated by defendants, or either of them, upon him, if any such you have found under any preceding paragraph of this charge, and knew and had sufficient capacity to understand the wrong done him, if he had been wronged, and he knew he was entitled to relief, and the relief to which he was entitled, you will find your verdict in this case for the defendants against the cancellation of the deed, even though you should find that they had originally defrauded plaintiff; and, unless you so find that said mortgage was executed with full knowledge of all the facts and circumstances affecting

plaintiff's rights in his deed of February 26, 1906, and that he knew that in executing his said mortgage he was ratifying the previous transaction, you will disregard the evidence as to the execution of the said mortgage, and the circumstances connected therewith, and if you have found under the other paragraphs of this charge that the deeds of February 26, 1906, should be canceled and said transaction set aside, you will return your verdict for the plaintiff accordingly." This charge is assailed upon the following grounds: "(a) It requires the jury to believe that the plaintiff knew the value of the interest that he sold and the existence of the fraud perpetrated upon him, and also the relief to which he was entitled. (b) Said charge also required the jury to believe the plaintiff knew by the execution of the mortgage he was ratifying the transaction with Mrs. Koppe; whereas, the relief to which the plaintiff was entitled, and whether his acts amounted to a ratification or not, were questions of law, and did not depend upon plaintiff's knowledge or intention." The assignment complaining of this error in the charge cannot be sustained, because it does not appear from the statement thereunder that the defendant knew of the fraud, if any was perpetrated upon him, at the time he executed the mortgage. The statement made by appellee in answer to the assignment tends to show that he had no such knowledge at the time the mortgage was executed. Upon this state of the record the issue of ratification is not raised and any error in the charge on that issue would not be prejudicial to the defendants.

In view of another trial, it is necessary that we pass upon the questions presented by the assignment. We think each of the objections to the charge urged by appellant is valid. If, with a full knowledge and understanding of all the facts, appellant treated the property received by him as his own and appropriated it to his use and benefit by executing a mortgage or deed of trust thereon, such acts would constitute a ratification regardless of whether he knew specifically what his legal remedies were, and regardless of whether he knew that the execution of the mortgage was to be a ratification of the transaction. It is not alleged that appellant was of insufficient mental capacity to understand the nature and consequence of his acts. All that is claimed in the petition is that his mind was wanting in "intelligence, judgment, and experience qualifying him to conduct a business transaction, that he is wanting in shrewdness or capacity required to form a correct idea of the value of money or property, and that his mind is dwarfed and undeveloped." Neither the pleading nor evidence show plaintiff to be so deficient in mental capacity as to relieve him from the operation of the general rule that ignorance of the law excuses no one. The doctrine of ratification of a contract obtained by fraud is thus stated by

Mr. Pomeroy: "Where a party originally had a right of defense or of action to defeat or set aside a transaction on the ground of actual or constructive fraud, he may lose such remedial right by a subsequent confirmation, by acquiescence, and even by mere delay or laches." 2 Pom. Eq. Juris. p. 964. Treating of this subject of ratification by acquiescence, the author says: "A second mode by which the remedial right may be destroyed, and the transaction rendered unimpeachable, is acquiescence. The term 'acquiescence' is sometimes used improperly. It differs from confirmation on one side, and from mere delay on the other. While confirmation implies a deliberate act, intended to renew and ratify a transaction known to be voidable, acquiescence is some act, not deliberately intended to ratify a former transaction known to be voidable, but recognizing the transaction as existing, and intended, to some extent at least, to carry it into effect, and to obtain or claim the benefits resulting from it. The theory of the doctrine is that a party having thus recognized a contract as existing, and having done something to carry it into effect and to obtain or claim its benefits, although perhaps only to a partial extent, and having thus taken his chances, cannot afterwards be suffered to repudiate the transaction and allege its voidable nature. It follows that mere delay, mere suffering time to elapse without doing anything, is not acquiescence, although it may be, and often is, strong evidence of an acquiescence; and it may be, and often is, a distinct ground for refusing equitable relief, either affirmative or defensive. An acquiescence is thus a recognition of and consent to the contract or other transaction as existing, the requisites to its being effective as a bar are knowledge or notice of the transaction itself, knowledge of the party's own rights, absence of all undue influence or restraint, and consequent freedom of action. A conscious intention to ratify the transaction, however, is not an essential element. When a party with full knowledge, or at least with sufficient notice or means of knowledge, of his rights, and of all the material facts, freely does what amounts to a recognition of the transaction as existing, or acts in a manner inconsistent with its repudiation, or lies by for a considerable time, and knowingly permits the other party to deal with the subject under the belief that the transaction has been recognized, or freely abstains for a considerable length of time from impeaching it, so that the other party is thereby reasonably induced to suppose that it is recognized, there is acquiescence, and the transaction, although originally impeachable, becomes unimpeachable in equity." 2 Pom. Eq. Juris. par. 905.

The question as to whether the plaintiff was defrauded in the transaction which he seeks to set aside could only be determined

by an ascertainment of the value of the property conveyed and of that received by him, and in the ascertainment of this only the market value of the property at the time of the transaction, if it had a market value at that time, should be considered. This would be the rule in all cases of this character, but it is specially necessary that this rule should be applied in this case, because the undisputed evidence shows that at the time the transaction occurred the Koppe estate was largely indebted to various persons, and the only fair method of ascertaining the value of plaintiff's equity in said estate would be to find the excess, if any, in the market value of the estate over and above its indebtedness. This rule was generally recognized and enforced upon the trial of the case, and both parties introduced a number of witnesses who testified as to what was the market value of the property of the estate at the time the transaction complained of occurred. The fact that the property had a market value at that time was fully established by the testimony of numerous witnesses introduced by both sides. Such being the state of the evidence upon this issue, the trial court, over the objection of the defendants that testimony as to the intrinsic value of the property was not admissible, permitted the plaintiff's attorney to introduce the following testimony: "Q. Now, what was the intrinsic value in February, 1906, of that Koppe plantation in Burleson county?" To this question defendants thereupon in open court objected, on the ground that any evidence as to the intrinsic value was immaterial and irrelevant to any of the issues in the case, and because plaintiff, having established that there was a market value for said land, was limited to proof of market value, which objections were overruled; and the following testimony was by the court allowed to be introduced: "Q. What was the intrinsic value of it—not with reference to your knowing of any sales. Just state what it was worth according to your idea. A. About \$30 per acre." The court erred in overruling the objection to this testimony, and the assignment complaining of such ruling should be sustained.

It was also error to admit testimony as to the value of other Brazos river lands not belonging to the Koppe estate, unless such lands were shown to be of the same character and were in the same immediate neighborhood and the surroundings and conditions of both were substantially identical, and the testimony of the witness Kennedy as to the value of land situated 18 or 20 miles from the lands of the Koppe estate, and not shown to have been substantially identical in class, conditions, and surroundings, should not have been admitted. Upon this issue as to the value of the property, the question to be determined was its value at the very time of the transaction, and the charge re-

quested by the defendants so instructing the jury should have been given.

In support of the allegations of plaintiff's mental weakness, ignorance, and want of business capacity before set out, he introduced a number of witnesses who testified, in substance, that they had known him for a long time, had been with him often, conversed with him on many subjects, and some of them had known of trades made by him, and that from their knowledge of plaintiff thus obtained in their opinion he was weak-minded, wanting in business capacity, and had no appreciation of the value of money or property. All this testimony was objected to by the defendant on the grounds that the witnesses had not stated sufficient facts upon which their opinion was based to authorize them to express an opinion upon plaintiff's mental capacity, and that, even if the facts stated were a sufficient basis of their opinion, such opinion was a conclusion of law and fact and was therefore inadmissible. We do not think these objections to the testimony should be sustained. The plaintiff does not seek to avoid the contract upon the grounds of mental incapacity, and, as we understand the petition, the allegations of mental weakness, ignorance, and want of business capacity are only auxiliary to the allegation that he entirely trusted and relied upon the defendant, Laura Koppe, to look after and protect his interest in his father's estate, and that this trust and confidence, which was largely superinduced by plaintiff's mental unfitness for the conduct of large business transactions such as the management of his father's estate, was abused and taken advantage of by the defendant in the transaction complained of in the petition. We think that in support of these allegations the evidence objected to was admissible. The condition of mind alleged in the petition could best be shown by the opinion of those whose intimacy with plaintiff, with his habits of life, thought, and conversation would enable them to form a correct opinion of the degree of his intelligence and his mental powers, and the opinion of such witnesses is not inadmissible because they fail to state specifically and in detail the acts of the plaintiff and conversations had with him upon which their opinions are based. That a nonexpert witness may give his opinion upon a question of this character when the facts upon which he bases his opinion are stated is well settled. *Garrison v. Blanton*, 48 Tex. 299; *Cockrill v. Cox*, 65 Tex. 669; *Field v. Field*, 39 Tex. Civ. App. 1, 87 S. W. 726; *Wells v. Houston*, 29 Tex. Civ. App. 619, 69 S. W. 183; *Brown v. Mitchell*, 88 Tex. 350, 31 S. W. 621, 36 L. R. A. 64; *Railway Co. v. Roberts* (Tex.) 108 S. W. 808. In the two cases last cited, the distinction is shown between the opinion of a witness involving a conclusion of law and one which is only a fact conclusion, and it is held that it

is not competent for a witness to give his opinion when such opinion involves a legal conclusion, such as the capacity to make a will or a contract, or as to what would be a reasonable time for a railroad company to transport stock from the place of shipment to the place of destination, because such question is a mixed question of law and fact, and the very question for the jury to be determined by them under the instruction of the court. The evidence before mentioned does not come under the rule announced in these cases, and is not subject to the objection that the opinion of the witness involves a legal conclusion. There was testimony introduced, however, which is obnoxious to this rule. One or two of the witnesses were permitted to state that the plaintiff did not in their opinion have sufficient mental capacity to fully understand the transaction complained of. This testimony was, we think, inadmissible under rule announced in the cases last cited.

The trial court did not err in refusing to instruct the jury that if plaintiff in making the trade with the defendant was influenced by and acted on the advice of his friend, Mr. Milton Parker, with whom he consulted before concluding the transaction, they should find for the defendants.

If the plaintiff trusted and relied upon the defendant as claimed by him, the fact that he consulted his friend, Mr. Parker, before concluding the trade, and was also influenced by him in accepting defendant's offer, would not defeat his right to recover. He is not required to show that he relied entirely and solely upon the representations of the defendant. If the relations of trust and confidence existed between him and defendant as alleged, and that confidence was abused and plaintiff defrauded, it is no defense to this suit to say that plaintiff consulted others as to the advisability of the trade and was to some extent influenced by their advice. In order to relieve the defendant, the proof must show the relation of trust and confidence did not exist between plaintiff and herself, and that plaintiff did not rely upon her representations. We think the charge given by the court upon this issue was correct and the requested charge was properly refused.

We have not discussed all of the assignments of error because to do so would serve no useful purpose, and would greatly add to the length of this opinion. What we have said disposes of all the material questions presented. If any error is shown which has not been discussed in this opinion, it is immaterial, and not such as is likely to occur upon another trial.

For the error before pointed out, the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

SAXTON et al. v. CORBETT et al.†.

(Court of Civil Appeals of Texas. Oct. 20, 1909.
On Motion for Rehearing. Nov. 10, 1909.)

1. TRESPASS TO TRY TITLE (§ 41*)—PRIOR POSSESSION—EVIDENCE—DEFECT IN DEFENDANTS' TITLE.

Where, in trespass to try title, plaintiff showed a superior right to defendants by prior possession, and defendants undertook to defeat plaintiff's prima facie title, or to substantiate their own title by proving a chain of title from the state, plaintiff was entitled to show that one of the links in defendants' chain was insufficient without defeating his own prima facie right.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 41.*]

2. TRESPASS TO TRY TITLE (§ 41*)—PATENT TO THIRD PERSON—EVIDENCE.

Mere proof of a patent to a third person to the land in controversy did not show an outstanding title in such patentee sufficient to bar plaintiff's recovery based on possession.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 62; Dec. Dig. § 41.*]

3. TRESPASS TO TRY TITLE (§ 45*)—INSTRUCTIONS.

In trespass to try title to 640 acres of land, defendants, other than M. and G., disclaimed as to the west half of the tract, and defended, by pleas of not guilty and limitations, as to the east half. M. disclaimed except as to the west half of the 640 acres to which he claimed title, and G. claimed as tenant of the whole tract for the other defendants. *Held*, that an instruction that all of the defendants except M. had been in possession under color of title for three years, and that the jury should find that all of the defendants except M. had been in possession of the east half of the tract, was not objectionable as a charge that defendants were entitled to judgment for the 320 acres claimed by them as matter of law, since the charge only applied to the east half of the tract which was not claimed by M.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 67; Dec. Dig. § 45.*]

4. APPEAL AND ERROR (§ 216*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—INSTRUCTIONS—THEORY OF CAUSE.

Where, in trespass to try title, an issue was tried on the theory of a reconveyance to the patentee of the whole tract, but there was no request to submit the question whether the reconveyance was one of a part of the land, defendants could not object on appeal that the submission of the issue on the assumption that the reconveyance, if made, governed the entire tract, was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216;* Trial, Cent. Dig. § 630.]

5. JUDGMENT (§ 272*)—ENTRY—TIME.

District court rule 66, prohibiting the entry of judgment over objection within two days of the adjournment of the court for the term, does not apply to judgments entered by the court on verdicts.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 512, 513; Dec. Dig. § 272.*]

6. ADVERSE POSSESSION (§ 71*)—COLOR OF TITLE—OUTSTANDING TITLE.

Where a patentee of certain land conveyed to a third person before conveying to defendant's prior grantors, and it was not shown that there had been any reconveyance of such outstanding title, defendants had not color of title from the

sovereignty of the soil and could not therefore claim under the three-year statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 422; Dec. Dig. § 71.*]

7. NEW TRIAL (§ 103*)—NEWLY DISCOVERED EVIDENCE—MATERIALITY.

A new trial will not be granted for newly discovered evidence which is immaterial and would not affect the result.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 215, 216; Dec. Dig. § 103.*]

8. TRESPASS TO TRY TITLE (§ 35*)—PLEADING—EVICTION—DATE.

Where plaintiff alleged that on or about January 1, 1905, he was lawfully seised and in peaceable possession of the land in fee, and that on that date defendants unlawfully entered on the premises and with force and arms ejected plaintiff therefrom and unlawfully withheld; and still withholds, from plaintiff the rightful possession, plaintiff was not confined to the dates of the possession and eviction pleaded, but was entitled to prove that the eviction occurred in 1901.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 50; Dec. Dig. § 35.*]

9. ADVERSE POSSESSION (§ 53*)—POSSESSION BY TENANT—ABANDONMENT—NOTICE.

Where plaintiffs had possession of certain land in controversy through tenants, a hiatus during which no one was in possession, between the abandonment of the property by the tenants and defendants' entry, was insufficient to establish plaintiffs' abandonment or a surrender of their possessory rights; neither plaintiffs nor their agent having had notice that the tenants had departed.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 266, 267; Dec. Dig. § 53.*]

10. ADVERSE POSSESSION (§ 50*)—POSSESSION BY TENANT—ATTORNMEN TO STRANGER.

Where a landlord is in adverse possession by means of tenants, the tenants' attornment to a third person without the knowledge or consent of the landlord will not destroy the landlord's possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 255, 256, 261; Dec. Dig. § 50.*]

11. TRESPASS TO TRY TITLE (§ 25*)—PRIOR POSSESSION—ACTION—TIME.

It is not essential to a recovery of land by force of a prior possession that the action be brought within a reasonable time after eviction; a delay of five years not being sufficient to bar the right as a matter of law.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 30; Dec. Dig. § 25.*]

12. TRESPASS TO TRY TITLE (§ 25*)—ACTION—DELAY—EFFECT.

Delay in bringing an action to try title to land based on plaintiff's prior possession operates merely as evidence that plaintiff had in fact abandoned his prior possession without animus revertendi, in cases where the possession was not continued when the adverse entry took place, in which the question of intent to return becomes important; unreasonable delay in itself not being a bar to the action.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 30; Dec. Dig. § 25.*]

13. APPEAL AND ERROR (§ 832*)—REHEARING—NEW ISSUES.

An issue not relied on nor asked to be submitted in the trial court, nor assigned as error in the Court of Civil Appeals, cannot be introduced on motion for rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3218; Dec. Dig. § 832.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

14. APPEAL AND ERROR (§ 659*)—AMPLIFICATION OF RECORD—CERTIORARI.

Certiorari will not be granted to amplify the record in support of an issue raised for the first time on an application for rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2834, 2840; Dec. Dig. § 659.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Trespass to try title by W. C. Corbett and others against Fannie Burr Saxton and others, in which certain of the defendants filed a cross-complaint. Judgment for plaintiff Corbett on special issues, and defendants appeal. Affirmed.

Hunt, Myer & Townes and B. F. Louis, for appellants. Rowe, Lewis, Boyd & Norton, T. C. Rowe, and Fisher, Sears & Campbell, for appellees.

JAMES, C. J. An action of trespass to try title, brought by W. C. Corbett against appellants, involving the title to 640 acres of land, the east half of the Malcolm McAuley 1,280-acre survey in Harris county. The defendants, except M. McCollum and John Gant, disclaimed as to the west half of said 640 acres, and defended, by the pleas of not guilty and the statutes of three and five years' limitations, the east half thereof; and they pleaded, also, by a cross-action against plaintiff and their codefendant, McCollum, alleging fee-simple title in themselves to said east half of the 640 acres; also alleging title in themselves by virtue of the three and five years' statute by limitations; and further alleging that plaintiff and McCollum assert some pretended title thereto which constitutes a cloud on plaintiffs' title, which they pray to have removed. McCollum pleaded similarly, except that he claimed only the west half of the 640 acres. John Gant answered, in substance, that he had been in possession of the 640 acres since December 30, 1904, not claiming any interest therein for himself, but as tenant of the other defendants. Plaintiff pleaded not guilty to the said cross-action. The court rendered judgment for plaintiff Corbett upon a verdict deciding special issues.

Conclusions of Fact.

The evidence developed the following facts: The land (1,280 acres) was patented to Malcolm McAuley. Plaintiff Corbett did not connect himself with this title; but the evidence showed such prior possession of the land by him and invasion of this possession by defendants as in our opinion would warrant a recovery by him, in the absence of any title in the defendants. Defendants showed a chain of title in themselves from and under Malcolm McAuley through sundry mesne conveyances. In this chain of title a vital question of fact arose whether or not

the deed from McAuley to B. A. Noland and H. G. Pannell dated July 4, 1842, passed any title, upon the following testimony: There was testimony to show that prior to said conveyance McAuley had conveyed the east half of the survey to one Wm. Young, and there was testimony by circumstances which in our opinion was sufficient to make it an issue of fact whether or not the title so conveyed to Young was reacquired by McAuley, so that we conclude that there was evidence which supports the finding by the jury that such title was not resumed or reacquired by him. Upon the issue of title in defendants by limitations, the jury, by the court's direction, found for the defendants, except McCollum, on title by the three years' statute as to the east half of the 640 acres. This finding, we may here note, was not given any effect, evidently upon the theory that it was nullified by the finding that McAuley had already conveyed this land, when he made the deed to Noland and Pannell. Other facts will be stated where necessary in the course of the opinion, which follows.

Conclusions of Law.

The first, second, and third assignments of error are, in substance, that the circumstantial evidence upon the issue of a reconveyance or surrender of this land by Young to McAuley was such as compelled the conclusion that it was in fact so reconveyed or relinquished. These assignments are disposed of by the conclusions of fact we have expressed on this subject.

The fourth, fifth, and sixth assignments of error present the question embodied in this proposition: Where plaintiff relies solely on prior possession, and proves a conveyance by the patentee to that of the remote grantor of defendants, but fails to connect himself with it for the purpose of showing a superior outstanding title, he thereby refutes or abandons his presumption of title by prior possession. Our views are against the proposition. Without trying to reconcile or explain what has been written in the various opinions of our courts on this subject, we shall state what our view is.

The plaintiff in this case showed a superior right to defendants to this land, by reason of his prior possession. The fact of his prior possession, and the fact that it had not been abandoned when defendants entered, has been determined by a verdict, on evidence we regard as sufficient. Now defendants say that this does not entitle him to a recovery by superior right, because the patent to McAuley and the conveyance by McAuley to Young, which plaintiff himself proved, would establish that the title to the land is outstanding and not vested in plaintiff, and therefore the presumption of title which goes with his prior possession, is repelled. It has been expressly held that the mere proof of a patent

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to a third person does not have this effect. As stated in *House v. Reavis*, 89 Tex. 626, 35 S. W. 1003: "The presumption which is raised in favor of the title of the possessor of land necessarily includes the presumption that the state has parted with the title to the land to some one, and that the possessor has acquired that title; otherwise the presumption of title in fee could not exist. It therefore follows as a necessary and logical conclusion that to prove that such title had passed out of the state establishes no fact which is not included in the presumption of title in the plaintiff; that is, that some person had acquired title from the state prior to that of the plaintiffs." We are of opinion that no reason is apparent why the rule should be otherwise when it is shown that the patentee in turn conveyed it to some third person. If the presumptions are not disturbed by proof of a patent to some one not appearing to be connected with the parties to the litigation, there is no sound reason for holding that they are disturbed when the patented title is shown to have passed one or more steps further, but not connecting with the parties. We think also that it is immaterial by whom such proof is introduced. This does not change its effect. Especially do these principles seem to be applicable in this case. Defendants undertook to defeat plaintiffs' prima facie title from prior possession or to substantiate their own title set up by their cross-petition, by proving a chain of title, if admitted, as it was, had the effect of defeating plaintiff. Plaintiff naturally and with perfect right was entitled to show, if he could, that one of the links in this chain was not effective to pass title, which he did successfully, thereby defeating the claim of title in defendants, both documentary and by limitations. To hold that, by making such necessary proof to negative the claims of title in his adversary, he defeated his own prima facie right based on the independent fact of their prior possession, would be unreasonable, if not preposterous. Plaintiff had no occasion in this purpose to go any further than to show the conveyance by McAuley to Young. Neither plaintiff nor defendant offered any proof that went to show that plaintiff was not in privity with said title.

The eighth assignment asserts that the following instruction, in view of another instruction to find for the defendants except McCollum, misled the jury into assuming that the rights of defendants had been disposed of in their favor, and that the instruction, which is as follows, applied only to McCollum, who had shown no record title: "You are further instructed, as a matter of law, that all of the defendants except McCollum had been in possession of the property under what the law terms color of title for three years next before the beginning of this suit, and you will say: 'We, the jury, find under instruction of the court that all

the defendants except McCollum had been in possession by tenant of the east half of the east half of the McAuley survey under color of title for three years next before this suit was brought.'" It is urged that the jury could not have arrived at any other conclusion than that said defendants were to have a judgment for their 320 acres, and that the above special issue was intended to apply only to the 320 acres claimed by McCollum. We see no reasonable basis for this contention. The charge expressly applied only to the east half of the east half of the survey, which was not claimed by McCollum, and, unless we credit the jury with want of ordinary intelligence, they could not have been misled.

The ninth assignment complains of the following submission to the jury: "Do you or do you not find as a fact established from all the facts and circumstances in evidence that William Young, at some later date, reconveyed said land to Malcolm McAuley?" Inasmuch as the evidence showed that Young had paid McAuley half of the purchase price and gave notes for one-half, and McAuley afterwards conveyed one-half (the east half of the 640 acres) to Noland and Pannell, and died without having conveyed the other one-half, appellants say the jury might have found that Young had reconveyed only one-half of the land, and kept the other half, and that therefore the submission, which contemplated that the jury should find a reconveyance of all or nothing, was error. It appears that the theory upon which the issue was tried was that the reconveyance, if any, affected the whole, else some indication of a trial on the opposite theory would have appeared upon the record. Nothing so appears, not even a request to submit a question in accordance with this assignment.

The tenth assignment presents the following proposition: "Where a cause is taken under advisement by the court more than three days before the end of the term, the court is not authorized under rule 86 to enter judgment therein, over objection of a party to the suit before judgment, within two days of its adjournment, and such a judgment is reversible error, whether the party objecting is injured thereby or not." These facts appear from the bill of exceptions: The verdict was rendered on May 9, 1908, and the court took time to deliberate on what judgment to evolve therefrom. Arguments on this subject were had at various times until June 10th, when the judge announced that he had decided to enter judgment in favor of defendants (except McCollum) for the 320 acres claimed by them, but that if he changed his views he would notify defendants' counsel. The term ended on June 13th by operation of law. The judge on the morning of the 12th announced to counsel for plaintiff his decision against said defendants, but the judge was in doubt whether or not he also at same time announced same to said defend-

ants' counsel, but he certifies with positiveness that he had reached and made the final conclusion prior to any motion by defendants' counsel to not enter any judgment, thereby invoking said rule. Without regard to the question of appellants' diligence in making the motion or objection, we hold that the rule was not intended to apply to judgments entered by the court upon verdicts.

The eleventh is that the court erred in not rendering judgment upon that portion of their cross-action which relied on adverse, peaceable, and continuous possession of the 320 acres under title and color of title from the sovereignty for three years. We are of opinion, as already stated, that if said defendants' remote grantor, McAuley, had conveyed the land prior to the conveyance from him that appears in defendants' chain of title, the statute of three years was not available. In view of the finding that such prior conveyance of the land was in fact made, the court properly ignored that feature of the case.

The twelfth assignment contends that said defendants should have had a new trial because D. F. Rowe testified, on the issue of abandonment of prior possession on which plaintiff relied, that he had a serious spell of sickness in the fall of 1900 and was away at Hot Springs until after the 1st day of January, and that he was sick at home a month before he left, and defendants did not discover until after the trial certain record evidence which showed conclusively that the testimony was not true. Assuming that defendants were in a position to avail themselves of this as newly discovered evidence in reference to a new trial, still we are of opinion that no error was committed in refusing a new trial for the reason that it was immaterial in view of the clear evidence that the tenants did not leave the premises until later in January. As in appellees' brief, proof that Mr. Rowe was actually in Houston during the fall of 1900 could not possibly have affected the question of plaintiffs' abandonment of the premises, and that suit was brought in a reasonable time if a new trial had been granted, because of the fact that plaintiffs were actually in possession by tenants during that time.

The thirteenth assignment we overrule because we conclude that the evidence was such as made it a proper issue for the jury whether or not the prior possession had been in fact abandoned by plaintiff when defendants entered upon it through their tenant Mabry. Furthermore, while the motion for new trial asked that the particular finding be set aside, it was not for the reasons specified in this assignment.

Appellants' proposition under the fourteenth and fifteenth assignments is as follows: "Where plaintiff relies upon title by presumption from prior possession alone, the pleading of the date of such possession and eviction being in effect the pleading of plaintiff's title specially, he should be held

to prove the same at the time alleged in his petition, and proof of any other date will constitute a variance." Plaintiff alleged: That upon or about the 1st day of January, 1905, he was lawfully seised and in peaceable possession of the land holding the same in fee simple; that on or about said last-mentioned date the defendants unlawfully entered upon said premises and with force and arms ejected plaintiff therefrom and unlawfully withheld, and still withhold, from plaintiff the rightful possession thereof. In this case the eviction was proved to have occurred in 1901. We think plaintiff was not confined to the dates of the possession and eviction as stated in the petition. *Travis v. Hall*, 27 Tex. Civ. App. 95, 65 S. W. 1077.

The foregoing portion of this opinion deals with the assignment of error made by the defendants except McCollum. We now direct our attention to his brief.

What has been said disposes of McCollum's first, second, fourth, eighth, and ninth assignments.

His third, fifth, sixth, and seventh assignments assert these propositions: "(1) In order for the plaintiff to recover upon the presumption of title from prior possession, it is essential that such possession shall extend to the time when adverse possession is taken by the defendant, and be not abandoned, and if there is any lapse of time between the taking of possession by the adverse parties and the possession of the parties relying thereon for recovery, and such lapse is not accounted for, plaintiff cannot recover. (2) In a case where the question to be determined is whether or not the prior possession claimed by the plaintiff has been abandoned, it is error for the court to require as a prerequisite to such abandonment that the lessor should have notice or knowledge that his tenant had left the land. (3) Where one relies upon prior possession as presumptive evidence of title, and such prior possession has been lost, in order for a party to recover upon the strength of such prior possession, an action must be brought within a reasonable time after losing such possession to regain it. In this case the uncontradicted evidence showing that no action was brought to recover possession prior to the filing of the suit for title, and a period of nearly five years having elapsed from the time such possession was lost until such suit was filed, and such delay not being accounted for in any way, the plaintiff will be deemed to have abandoned his claim to such possession."

The first and second of the above propositions relate to the first question propounded to the jury, which was as follows: "Do you, or do you not, find as a fact established by the evidence that at the time Mabry went into possession of the land in controversy the plaintiff, with knowledge or notice that his tenant had left the place, had

abandoned the prior possession of said property? You will answer this question by saying, if you find that the prior possession of said place had been abandoned, 'We find that plaintiff had abandoned his possession when Mabry took possession'; but if you find that it had not been abandoned as above explained, you will say, 'We find that plaintiff had not abandoned his possession when Mabry went into possession.'" It appears from testimony that plaintiff had possession in 1898 by tenant, and this occupancy by the tenant until he died and by members of his family continued until near March 1, 1901, when they, without notifying anybody, left the place, but left some household effects in the house, and that Mabry went into possession for the defendants in the latter part of the same month. By this time plaintiff did not become informed of the vacancy or of this entry. There was evidence that plaintiff claimed the property and had no intention of abandoning the possession. The lapse of time between the going out of plaintiffs' tenant and the entry by defendants was brief, and the testimony is in accord with the idea that such going out was unknown and unexpected by plaintiff, and that he and his agent were not aware but that his tenants were still there, when defendants entered and took possession. It seems to us that notice to plaintiff was essential to the question of his abandonment, whether the vacancy was for the period mentioned, or for a somewhat longer period, as might have been found from some of the testimony. Of course, his intention to abandon might have concurred in point of time with the abandonment by his tenant, or the tenant's abandonment might have become his at some intermediate time; but it is difficult to see how this could have been the case, unless he knew of the tenant's act. *Jackson v. Denn*, 5 Cow. (N. Y.) 200. In *Cobb v. Robertson*, 99 Tex. 138, 86 S. W. 748, 87 S. W. 1148, 122 Am. St. Rep. 609, the same principle is stated: "Had the tenants in this case, without knowledge or consent of the landlord, actually attorned to plaintiffs, this, under the law, would not have destroyed the landlord's possession."

The third of the above propositions is also overruled. Appellants rely on a declaration in the opinion in *Burroughs v. Falmer* (Tex. Civ. App.) 45 S. W. 846, which they quote: "It is true that possession of land under a claim of right is *prima facie* evidence of title in the possessor. This rule of evidence is usually applied in cases where the possessor is ousted and seeks, within a reasonable time, to recover the possession of which he has been deprived." Also quoting from *Sabariego v. Maverick*, 124 U. S. 261, 8 Sup. Ct. 461, 31 L. Ed. 430: "It therefore appears that prior possession is sufficient to entitle a party to recover in an action of ejectment only against a mere intruder or wrongdoer, or a person subse-

quently entering without right. Another qualification of the rule is that the action to regain the prior possession must be brought within a reasonable time after it has been lost. If there had been delay in bringing the suit, the *animus revertendi* must be shown and the delay satisfactorily accounted for, or the prior possessor will be deemed to have abandoned his claim to the possession." We are not aware of any decision in this state which holds authoritatively that the right to recover by force of a prior possession does not exist unless action is brought in a reasonable time after the eviction. It would seem that, if such possession presumes title as against one having no title, it ought to be available so long as title has not been adversely acquired by limitations. However, what is or is not a reasonable time is ordinarily a question of fact, and a delay of five years in bringing the action is not a bar as a matter of law. The quotation from *Sabariego v. Maverick* is followed by this: "Thus in *Whitney v. Wright*, 15 Wend. (N. Y.) 171, it was held that where there was a prior possession of 11 years, and then an entry by the defendants under a title adverse to such possessory title, the omission to bring a suit for 13 years with knowledge of the adverse entry and continuance of possession under it, would authorize a jury to find an abandonment of claim by the prior possessor." Again, further on in the same opinion, and as a conclusion, the Supreme Court states: "It follows that in cases where the proof on the part of the plaintiff does not show a possession continuous until actual possession by the defendant, or those under whom he claims, the burden of proof is upon the plaintiff to show that his prior possession had not been abandoned."

Thus it would appear that delay in bringing an action operates merely as evidence that a plaintiff had in fact abandoned his prior possession without the *animus revertendi*, in cases where his possession was not continued when the adverse entry took place, in which cases the question of *animus revertendi* becomes important. We do not believe it was ever intended that the fact of unreasonable delay should of itself be a bar to the action, but that it is a circumstance for the jury to consider on said question. We overrule the said assignments.

The judgment is affirmed.

On Motion for Rehearing.

The case of *Bates v. Bacon*, 66 Tex. 348, 1 S. W. 256, is discussed in *House v. Reavis*, 89 Tex. 626, 35 S. W. 1063, and explained thus: "In *Bates v. Bacon* the plaintiff showed by his evidence that he had no title, and that his possession was under a title that was absolutely void, and therefore no presumption of title could arise out of his possession under a void title." We do not consider the case of *Mann v. Hossack* (Tex. Civ.

App.) 96 S. W. 709, as in conflict with our opinion.

The motion, with increased vigor, contends that the testimony showed conclusively that the land was in some manner reconveyed by Young to McAuley. It may be that circumstances might so unerringly point to such a conclusion that no other result would be sustained. There were no acts disclosed on the part of Young which might be taken to mean a disclaimer. There was no possession of the land until in recent years. There was nothing to show that Young ever knew of the resumption of ownership by McAuley. We do not question that there was evidence that would have warranted the jury in finding that Young reconveyed to McAuley as the most reasonable and probable result of the circumstances and difficulties surrounding the matter; but that this result is what the law will declare from them we clearly cannot hold, in view of what is said by the Supreme Court in *Herndon v. Vick*, 89 Tex. on page 475, 35 S. W. 141, in reference to a combination of circumstances much stronger in favor of the presumption than what we have in this case.

An effort is made in this motion for rehearing to introduce an issue not relied on nor asked to be submitted in the trial court and not assigned as error in this court. The point sought to be made is that the testimony shows, as a matter of law, that appellants, or those under whom they hold from McAuley, are entitled to a judgment for the land as innocent purchasers for value. This issue, if it had been relied on, was dependent for its solution upon circumstances, and whatever presumption may have attached to the circumstances was a presumption of fact, to be considered and passed on by the jury. It could not, as a matter of law, be held that Noland & Pannell and subsequent assignees were innocent purchasers. The deed to Noland & Pannell was executed in 1842 after the act of 1840 (Hartley's Dig. arts. 2765, 2767), which was construed by the Supreme Court in *Kimball v. Houston Oil Co.*, 100 Tex. 336, 99 S. W. 852, as at that time imposing the burden of proof of such an issue on appellants. The issue, however, was not relied on by appellants in the trial court, and it is too late to seek to rely on it here.

A motion is made for a writ of certiorari to require the clerk of the district court to send up the originals or copies of certain papers on file there, which papers are described in a general way, but not copied, in the statement of facts. The papers have not been ordered by the district judge to be sent here with the record, and we therefore doubt our power to require them sent up, and doubt our right under the circumstances to consider anything on this appeal except the statement of facts as made up and approved by the judge; but, in any

event, we should deny the certiorari for the reason that its purpose is in aid of the issue of innocent purchaser, which, as before stated, is a matter not properly before us.

The motion for rehearing, the motion to certify a question to the Supreme Court, and the motion for certiorari are overruled.

SMITH BROS. v. FLANDERS.

(Court of Civil Appeals of Texas. Oct. 27, 1909.)

1. APPEAL AND ERROR (§ 935*)—TRIAL COURT—DENYING MOTION TO VACATE JUDGMENT.

Where a record on appeal does not contain the testimony upon which the trial court overruled a motion to vacate the judgment, made upon the ground that the case was tried on appeal from justice's court without notice that an appeal had been perfected and in absence of defendants, it cannot be said by the Supreme Court that there was error in overruling the motion.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3784; Dec. Dig. § 935.*]

2. BILLS AND NOTES (§ 370*)—BONA FIDE PURCHASER—DEFENSES—FAILURE OF CONSIDERATION.

A failure of the consideration for drafts as between the drawer and drawee would not affect the right of a bona fide purchaser of the drafts for value before maturity, without notice thereof, to recover thereon against the drawee.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 963; Dec. Dig. § 370.*]

Appeal from District Court, Shelby County; James I. Perkins, Judge.

Action by Lewis Flanders against Smith Bros. From a judgment for plaintiff, defendants appeal. Affirmed.

Hugh B. Short, for appellants. Bryarley, Carter & Walker, for appellee.

FLY, J. This is a suit instituted by appellee in the justice's court on five drafts drawn by the American Standard Jewelry Company of Detroit, Mich., on appellants, and by them accepted; each of the drafts being for \$30. They were drawn on June 16, 1905, and were due, respectively, in 3, 5, 7, 9, and 10 months after date. In the justice's court judgment was rendered in favor of appellants, and the cause was appealed to the district court, where judgment was rendered in favor of appellee for \$210 and all costs of suit. Appellants pleaded failure of consideration, but did not attempt to establish the plea by the evidence, and the uncontroverted evidence showed that the drafts were accepted by appellants, and were purchased for value by appellee, in due course of business, before their maturity.

The only assignment of error is as follows: "First. The trial court erred in failing to sustain the defendants' motion to set aside the judgment rendered against them and to grant them a new trial upon the grounds that said case was tried in the district court after having been tried in the justice court, where-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in a judgment was rendered for appellants for costs, without appellants having been notified that any appeal had been perfected from said judgment by appellee, and in the absence of appellants or any one authorized to represent them, and without any knowledge upon the part of appellants the said appeal had been perfected, when said motion and the record shows that appellants have a good ground of defense to appellee's demand, and upon the trial in the justice court before a jury sustained said defense by testimony, after having pleaded a good defense to said demand—that is to say, fraud and failure of consideration—whereby the pretended contract is vitiated, and the statement of facts shows that no testimony whatever was introduced in support of either of these pleas, but that the only testimony was that of the plaintiff in his behalf." Appellants had in some way found out that the cause had been appealed to the district court, whether they were given formal notice or not, for the judgment recites that they appeared and announced ready for trial, and the statement of facts filed in this court was agreed to by their attorneys. It is true that one of the appellants swore to a motion to set aside the judgment, in which it was recited that their senior counsel, C. B. Short, died pending the appeal to the district court, and that Hugh B. Short had represented them without authority, but the court that heard the matter was satisfied that there was no merit in the motion; and, in the absence of the testimony on the subject, it cannot be held that there was error in overruling the motion.

The evidence, showing that appellee was a purchaser, in good faith, without notice and for value, of the acceptances before maturity, cannot be affected by a failure of consideration as between the drawer of the bills and the acceptors.

The judgment is affirmed.

BELL v. NOE.

(Supreme Court of Tennessee. Sept. Term, 1909.)

COURTS (§ 246*)—INTERMEDIATE COURTS—JURISDICTION—HOMESTEAD.

Under Acts 1907, p. 233, c. 82, § 7, providing that the jurisdiction of the Court of Civil Appeals shall extend to all cases, except where the amount exceeds \$1,000 and ejectment suits, etc., the Supreme Court has no jurisdiction of an appeal in an action asserting rights in a homestead, which is not an action of ejectment, since a homestead cannot exceed \$1,000 in value.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 246.*]

Appeal from Chancery Court, Hamblen County; Hugh G. Kyle, Chancellor.

Action by Mrs. Catherine Bell against J. C. Noe to establish certain homestead rights in certain lands. On appeal to the Supreme Court, the case is transferred to the Civil

Appeals, as being without the jurisdiction of the Supreme Court.

Park & Park, for complainant. McCanless & Tate, for defendant.

NEIL, J. The bill in this case, as finally amended, seeks only to assert complainant's right to a homestead in certain land described. This estate cannot exceed \$1,000 in value. The appellate jurisdiction is therefore exclusively in the Court of Civil Appeals. Acts 1907, p. 233, c. 82, § 7. This is not an ejectment suit.

An order will be entered directing the transfer of the cause.

STATE ex rel. DAVIS v. EVANS.

(Supreme Court of Tennessee. Sept. Term, 1909.)

1. QUO WARRANTO (§ 57*)—OFFICE—MATTERS CONSIDERED.

In a proceeding in the nature of quo warranto to test the right of defendant to hold over the office of county superintendent of public schools, in which relator claimed that he was duly elected to the office, but defendant claimed that relator did not have the certificate of the board of education required by Acts 1895, p. 70, c. 54, which rendered him ineligible, the court could not consider relator's contention that his failure to have a certificate was due to a mistake in an examination question presented to him, which, if it had been correctly stated, he would have answered correctly, and received a certificate.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 68; Dec. Dig. § 57.*]

2. CONSTITUTIONAL LAW (§ 62*)—DELEGATION OF LEGISLATIVE POWER—INELIGIBILITY OF OFFICERS—BOARD OF EDUCATION.

School Law (Acts 1873, p. 41, c. 25) § 8, creates the office of county superintendent of public schools, and provides that he shall be a person of literary and scientific attainments. Acts 1895, p. 70, c. 54, amendatory thereof, prescribes the same qualification, and also provides that applicants for the office shall before election be examined by the board of education and receive a certificate of qualification as a condition to eligibility. Held, that the amendatory act was not unconstitutional, as delegating legislative power to the board, in that the act stated the qualifications so generally that the board must practically make the qualifications, where by the amended act the subjects to be taught in the public schools were laid down, and section 8 necessarily refers thereto.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 99; Dec. Dig. § 62.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 46*)—SUPERINTENDENT OF SCHOOLS—QUALIFICATIONS—CONSTRUCTION OF STATUTE.

Such amendatory act is mandatory, and not directory, as shown by the clear intention of the Legislature, especially since the provision of the original act gave the county court power to remove the superintendent for inefficiency.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 46.*]

4. ESTOPPEL (§ 68*)—POSITION IN JUDICIAL PROCEEDINGS—QUO WARRANTO.

Where relator, in quo warranto to test the right of defendant to hold over the office of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

superintendent of public schools, submits to the determination of the court his eligibility to the office to which he had been elected, he cannot thereafter contend that, because he had been elected and taken oath of office, etc., defendant should test his right to office by some independent proceeding.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.*]

5. QUO WARRANTO (§ 55*)—EVIDENCE—QUALIFICATION OF CLAIMANT OF OFFICE.

In quo warranto to test defendant's right to hold over the office of superintendent of public schools, relator cannot contend that defendant was a usurper, in that he did not take an oath to support the Constitution, where it does not affirmatively appear that such oath was not taken.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 63; Dec. Dig. § 55.*]

Appeal from Chancery Court, Claiborne County; T. A. R. Nelson, Chancellor.

Proceedings in the nature of quo warranto by the State of Tennessee, on relation of John P. Davis, against Frank Evans. From a decree for defendant, relator appeals. Affirmed.

Jourolmon, Welcker & Smith, for appellant. Carr & Jones, for appellee.

NEIL, J. This is a proceeding in the nature of a quo warranto, to test the right of the defendant to hold the office of county superintendent of public schools for Claiborne county, holding over at the expiration of his regular term, which ended on the first Monday in January, 1909. The relator charges that on the day last mentioned he was regularly elected by the county court, the constituent body, to the office, by a vote of 12 in his favor to 7 in favor of the defendant, only 19 justices being present and voting. He alleges that he was declared duly elected; that he gave the bond required by law, and took the oath of office, but the defendant refused to turn over to him the books and papers appertaining thereto, alleging, as ground for such action on his part, that the relator was not eligible to the office, and therefore that his election was void. The point of ineligibility in controversy, as appears from the bill, is that the relator was not in possession of the certificate from the State Board of Education, required by chapter 54, p. 70, Acts 1895. It is alleged that the relator really possessed the qualifications required by the act, and that he was entitled to the certificate which it is the business of the board to issue, and that his failure to receive it arose out of a mistake on the part of the board in stating one of the questions submitted for his examination. It is alleged that the question—one in mathematics—was improperly stated by the board, and if properly stated he could, and would, have given a correct answer, and would then have received the certificate. These are matters, of course, with which we can have no concern in the present proceed-

ing. Aside from all this, however, it is insisted that the act in question is unconstitutional, and for that reason, if for no other, the relator was duly elected, and was entitled to the office. The purpose of the bill is to question the right of the defendant to hold over, the charge being that he is a usurper of the office in his attempt to hold over, and, incidentally thereto, it is alleged that the relator is the person entitled to administer the duties of the office, because of his said election.

There is no controversy in the record that the relator was elected in the manner above stated, and that, if he was eligible to the office, the defendant is a usurper, and should be restrained from further interference.

The case turns upon the constitutionality of the act above referred to. This act purports to amend section 8 of the general school law, which is chapter 25, p. 41, of the Acts of 1873.

Section 8, as it appears in the original act, reads as follows:

"Sec. 8. Be it further enacted, there shall be a county superintendent for each county, who shall be elected by the county court at its April or July term, 1873, and after 1874 he shall be elected biennially in January, and no member of the county court shall be eligible to said office. *He shall be a person of literary and scientific attainments, and, when practicable, of skill and experience in the art of teaching,* shall hold his office for two years, and shall receive such pay for his services as may be allowed him by the county court, to be paid upon the order of the chairman or judge of the county court by the county trustee. He shall be subject to removal from office for misbehavior or inefficiency at any time, by the county court: Provided, that the causes for such removal shall be communicated to him in writing."

We have written in italics the part of this section which was amended by chapter 54 of the Acts of 1895. In this act the language above italicized is stricken out and the following substituted:

"Said county superintendent shall be a person of literary and scientific attainments, and of skill in the theory and practice of teaching: Provided, that preceding each biennial election, or any election to fill a vacancy for county superintendent of schools, each applicant shall file with the chairman of the county court a certificate of qualification given by the State Board of Education: Provided, that on the first Monday in October preceding each biennial election for county superintendent of schools, each applicant for said office shall undergo a public examination at the county seat of the county in which he or she is an applicant, by and before a commission of three residents of the county, said commission to be previously appointed by the chairman of the county court,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and to be citizens who, by education and experience, are most eminently qualified to hold said examination, the same to be held under such rules and regulations as may be prescribed by the State Board of Education: Provided, that if qualified as attested by said examination, said applicant shall receive a certificate of qualification by the State Board of Education."

It is insisted in behalf of relator that this amendment devolves legislative power upon the State Board of Education, because it is a legislative function to prescribe the qualifications of public officers. It is argued that the language of the Legislature in stating the qualifications required, that he "shall be a person of literary and scientific attainments, and of skill in the theory and practice of teaching," is so general as to leave it practically within the power of the State Board to declare the qualifications necessary for the office, since they can exact a very high grade of attainments, or may be content with a very low grade, and they may indicate the different subjects upon which proficiency may be required within the wide range covered by the words "literary and scientific attainments."

There is plausibility in the objection, but no real force. The act of 1873, which is amended, laid down, in section 31, the subjects to be taught in the public schools. It was with reference to these, of course, that the provisions of section 8 were enacted. It is noted that section 8, as originally written, prescribed, in substance, the same general qualifications. They meant, of course, a reasonable degree of attainment in literature and science, in respect of the subjects that were to be taught, to the end that the county superintendents might be able to exercise proper judgment in the selection of teachers and in the oversight of their work. Before section 8 was amended, the duty was devolved upon the county court of judging the qualifications of the county superintendent to be elected. Under the amendment means were provided, through boards composed of skilled persons, of ascertaining whether a candidate could come within the description, or list of qualifications, indicated by the act. There was in this no delegation of legislative power, but simply the provision of administrative agencies for the purpose of aiding in the execution of the purpose of the Legislature. The Legislature itself prescribed the necessary qualifications, and the boards created and referred to simply determined whether given persons came within those requirements, or were possessed of those qualifications. It was impracticable for the Legislature itself to lay down, with precision, the degree of efficiency in literature and science that the county superintendents should possess. In the nature of things, this must be left somewhat indeterminate, and it was highly proper that the ascertainment of the exact degree of learning necessary to carry

carry out the purpose of the act should be left for the action of competent boards. See, on the general principle, the following authorities: *Leeper v. State*, 103 Tenn. 500, 523, 526, 53 S. W. 962, 48 L. R. A. 167; *People ex rel. v. Kipley*, 171 Ill. 44, 49 N. E. 229, 41 L. R. A. 775, 782, 783; *Ex parte Bassitt*, 90 Va. 679, 19 S. E. 453; *People v. Dunn*, 80 Cal. 211, 22 Pac. 140, 13 Am. St. Rep. 118; *Pueblo County Com'rs v. Smith*, 22 Colo. 534, 45 Pac. 357, 33 L. R. A. 465; *Blue v. Beach*, 155 Ind. 121, 56 N. E. 64, 50 L. R. A. 64, 69, 70, 80 Am. St. Rep. 195; *Scholle v. State*, 90 Md. 729, 46 Atl. 326, 50 L. R. A. 411, 414; *State v. Thompson*, 160 Mo. 333, 60 S. W. 1077, 54 L. R. A. 950, 952-953, 83 Am. St. Rep. 468; *Hurst v. Warner*, 102 Mich. 238, 26 L. R. A. 484, 491, 47 Am. St. Rep. 525; *State of Wisconsin ex rel. v. Stewart*, 74 Wis. 620, 43 N. W. 947, 6 L. R. A. 394; *Comm. v. Sisson*, 189 Mass. 247, 75 N. E. 619, 1 L. R. A. (N. S.) 752-755, 109 Am. St. Rep. 630. And see the full discussion of the general subject by Cullen, C. J., in *Trustees of Saratoga Springs v. Saratoga, etc., Gas Co.*, 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713, 718, et seq. The case of *Wright v. Cunningham*, 115 Tenn. 445, 91 S. W. 293, cited by complainant's counsel, is not at all in conflict with the principle we have invoked as the basis of the present decision.

We need not pursue the subject. We are of the opinion that the amendment is clearly constitutional.

It is insisted that the terms of the amendment are not mandatory, but only directory. We think this is a mistaken view. It was the clear purpose of the Legislature to make eligible for election only such persons as could comply with the conditions indicated. This general purpose is emphasized by the provisions of the original section giving the county court power to remove the county superintendent for inefficiency.

There are some points of alleged unconstitutionality insisted upon other than the one above referred to, but we do not think they deserve special consideration in this opinion. Suffice it to say that we have examined them, and find no merit in them.

It is insisted that since the relator was elected by the county court, and had executed bond, and had taken the oath, he should be permitted to take and administer the office, and the burden of establishing his ineligibility should be cast upon the defendant, and be presented by him in some independent litigation. Whatever force might be in this, as an original suggestion, it cannot be considered here, because the relator himself submitted in his bill, to the determination of the court, the question of eligibility.

It is insisted that, at all events, the defendant should be declared a usurper because, when he was inducted into office, in 1907, he did not take the oath to support the Constitution of the United States, and

of the state of Tennessee, but that he took only the oath of office. We do not think there is any sufficient allegation in the bill upon this subject (Gibson's Suits in Chancery, § 455), and, if there was, it does not affirmatively appear that he did not take the oath referred to, and for these reasons the point suggested is not well taken (*State v. Allen* [Tenn. Ch. App.] 57 S. W. 189; *Staggs v. State*, 3 Humph. 372). In saying this, we are not to be understood as holding that the inadvertent omission to take the oath referred to would result in a deprivation ipso facto of the defendant's official character.

On the grounds stated, we are of the opinion that the decree of the chancellor, in favor of the defendant, must be sustained.

BROWN v. CRYSTAL ICE CO.

(Supreme Court of Tennessee. Sept. Term, 1909.)

1. MANDAMUS (§ 3*)—COMPELLING INSPECTION OF CORPORATE BOOKS—EXISTENCE OF OTHER REMEDY.

The remedy of a stockholder, denied permission to inspect the corporate books, is by mandamus, though a mandatory injunction may be made effectual, as mandamus is a more direct remedy, and can be conditioned by such restrictions as the court may deem necessary.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 8, 9, 34; Dec. Dig. § 3.*]

2. MANDAMUS (§ 3*)—COMPELLING INSPECTION OF CORPORATE BOOKS—EXISTENCE OF OTHER REMEDY.

The remedy by mandatory injunction to compel a corporation to permit a stockholder to inspect the corporate books is not concurrent with the remedy by mandamus, notwithstanding the act of 1877 (Acts 1877, p. 119, c. 97), giving the chancery court jurisdiction of all cases at law, except actions for unliquidated damages to persons, property, or character, as the remedy by mandamus is in the nature of a prerogative writ, to be granted only in the high discretion of the court, and to be applied to those cases as to which no other remedy exists.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 8, 9, 34; Dec. Dig. § 3.*]

3. MANDAMUS (§ 146*)—PETITION IN NAME OF STATE—AMENDMENTS.

Where, in mandamus, objection is made on the ground that the name of the state is not used, the court may, on application, allow an amendment inserting the name of the state.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 287; Dec. Dig. § 146.*]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Suit by Bowdre Brown against the Crystal Ice Company. There was a decree of the Court of Civil Appeals, reversing a decree of the chancellor, dismissing the bill, and remanding the cause for answer, and defendant brings certiorari. Judgment of the chancellor, dismissing the bill, affirmed, and the judgment of the Court of Civil Appeals reversed.

See 113 S. W. 360.

R. B. Cooke, for plaintiff. Pritchard & Sizer, for defendant.

PER CURIAM. The bill in this case was filed by a stockholder of the defendant corporation to obtain an inspection of the books. After alleging his character of stockholder, the complainant avers the president assured him that the dividend for the current year would be "eight times the amount of the fixed charges," while in fact only a 5 per cent. dividend was declared; that, being greatly desirous of finding the cause of the disparity, he applied to the officers of the corporation for leave to inspect the books; that this was granted him, in a gingerly way, but, when he took from his pocket a small memorandum book and attempted to make some memoranda, the corporation books were taken from him, and he was not permitted to proceed further. The bill thereupon closed with the following prayer: "Let a mandatory injunction be served on the defendant, its officers and agents, requiring them to allow complainant to examine the books of said company, and to make such notations as he chooses to make thereof. Let the defendant, its officers and employees, be enjoined from interfering with complainant in his examination of said books, and on the hearing let said injunction be made perpetual. Grant general relief."

The defendant demurred to the bill on the ground that complainant's remedy for the case stated therein was a petition for mandamus, and that the court had no jurisdiction to grant the injunctive relief sought.

The demurrer was sustained by the chancellor; but, on appeal to the Court of Civil Appeals, the decree of the chancellor was reversed, and the cause remanded for answer and further proceedings. The case was then brought to this court by certiorari.

We are of the opinion that the Court of Civil Appeals was in error. By the great weight of authority the relief sought must be obtained through mandamus proceedings. *State ex rel. v. Williams*, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418; *Clark on Corporations*, § 135; *Clark & Marshall on Corporations*, pp. 1653-1655; *High on Extraordinary Legal Remedies*, § 308; *Cook on Corporations*, §§ 513, 514; *Thompson on Corp.* § 4431; note to *Weihermayer v. Bitner*, 45 L. R. A., at page 457, and cases cited; 26 Am. & Eng. Enc. (2d Ed.) p. 955; 26 Cyc. 349.

It is insisted that the remedy sought in the bill is concurrent with the remedy by mandamus; that since the act of 1877 (Acts 1877, p. 119, c. 97), giving the chancery court jurisdiction of all cases at law, except actions for unliquidated damages to persons, property, or character, no distinction should be made, but that any remedy under the control of the chancery court, proper to effectuate the purpose, may be used; and that a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

mandatory injunction is specially adapted to the purpose. We do not think that this suggestion is a sound one. The remedy by mandamus is a peculiar one, and, although the court of chancery has been given concurrent jurisdiction with the court of law, yet the remedy by mandamus has remained substantially the same in both courts as to the practice and the class of cases to which it applies. It is true that in a court of law the complaining party comes in by petition, while in the court of chancery this pleading is called a bill, yet in substance and in language they are the same. Likewise, in the court of chancery, as well as at law, an alternative writ issues and a return is made as at law, and the subsequent proceedings are about the same. Likewise, in its inherent nature, this remedy has preserved, in the court of chancery, the same marks it had in the court of law. It is regarded in both courts as in the nature of a prerogative writ, to be granted only in the high discretion of the court, and to be applied only to those cases as to which no other remedy exists.

We have in this state quite a large number of cases upon the subject, showing a variety of applications. It is frequently used to effectuate the jurisdiction of this court over inferior courts. The cases upon this subject are: *State v. Cooper*, 107 Tenn. 202, 64 S. W. 50; *State v. Sneed*, 105 Tenn. 711, 58 S. W. 1070; *Vanvaby v. Staton*, 88 Tenn. 334, 12 S. W. 786; *State v. Brockwell*, 16 Lea, 683; *Alexander v. State*, 14 Lea, 88; *Ing v. Davey*, 2 Lea, 276; *Newman v. Justices of Scott County*, 1 Helsk. 787; *State v. Hall*, 6 Baxt. 3; *Whitfield v. Greer*, 3 Baxt. 78; *Galloway v. Fleing*, 2 Tenn. Cas. 615; *State v. Elmore*, 6 Cold. 528.

Other cases, showing together quite a range of subjects, are: *State ex rel. v. Enloe*, 121 Tenn. 347, 117 S. W. 223; *Cantrell v. Golden*, 120 Tenn. 204, 109 S. W. 1154; *State ex rel. v. Taylor*, 119 Tenn. 229, 104 S. W. 242; *State v. Thompson*, 118 Tenn. 571, 102 S. W. 349, 20 L. R. A. (N. S.) 1; *Marler v. Wear*, 117 Tenn. 244, 96 S. W. 447; *State v. Willett*, 117 Tenn. 334, 97 S. W. 299; *State v. Alexander*, 115 Tenn. 156, 90 S. W. 20; *State v. Board of Inspectors*, 114 Tenn. 516, 86 S. W. 319; *State v. Williams*, 110 Tenn. 549, 75 S. W. 948, 64 L. R. A. 418; *State v. Justices of Wayne County*, 108 Tenn. 259, 67 S. W. 72; *State v. Hart*, 106 Tenn. 260, 61 S. W. 780; *State v. Wilbur*, 101 Tenn. 211, 47 S. W. 411; *Donaldson v. Walker*, 101 Tenn. 236, 47 S. W. 417; *Harris v. State*, 96 Tenn. 496, 34 S. W. 1017; *Williams v. Dental Examiners*, 93 Tenn. 620, 27 S. W. 1019; *Whitesides v. Stuart*, 91 Tenn. 710, 20 S. W. 245; *Insurance Co. v. House*, 89 Tenn. 438, 14 S. W. 927; *Iron Companies v. Pace*, 89 Tenn. 707, 15 S. W. 1077; *Bates v. Taylor*, 87 Tenn. 319, 11 S. W. 266, 3 L. R. A. 316; *Morgan v. Pickard*, 86 Tenn. 208, 9 S. W. 690; *State v. Mayor, etc., of Nashville*, 15 Lea, 667, 54 Am. Rep. 427; *Robi-*

son v. Hawkins, 12 Lea, 450; *Meadows v. Nesbit*, 12 Lea, 486; *Hawkins v. Kercheval*, 10 Lea, 535; *Yost v. Gaines*, 10 Lea, 576; *State v. Whitworth*, 8 Lea, 594; *State v. Puckett*, 7 Lea, 709; *State v. Nashville, Chattanooga & St. L. R. Co.*, 7 Lea, 15; *State v. Marks*, 6 Lea, 12; *Morley v. Power*, 5 Lea, 691; *State v. Miller*, 1 Lea, 596; *Beasley v. Ferriss*, 1 Lea, 461; *Memphis Appeal Publishing Co. v. Pike*, 9 Helsk. 697; *Puckett v. Hyde*, 6 Helsk. 194; *Mobile & O. R. Co. v. Wisdom*, 5 Helsk. 125, 153, 157; *Rainey v. Aydelette*, 4 Helsk. 122; *Jonesboro, Fall Branch & Blair's Gap Turnpike Co. v. Brown*, 8 Baxt. 490, 35 Am. Rep. 713; *State v. Anderson County*, 8 Baxt. 249; *White's Creek Turnpike Co. v. Marshall*, 2 Baxt. 104, 121, 124; *City of Memphis v. Bethel*, 3 Tenn. Cas. 205; *Loague, Mayor, etc., v. Coward*, 3 Tenn. Cas. 693; *State v. City of Memphis*, 2 Tenn. Cas. 185; *Beck v. Puckett*, 2 Tenn. Cas. 490; *State v. Sinking Fund Commissioners*, 1 Tenn. Cas. 490, 503; *Winters & Cross v. Burford's Heirs*, 6 Cold. 328; *Williams v. Saunders*, 5 Cold. 60, 80, 81; *State v. Hall*, 3 Cold. 255; *Saffrons v. Ericson*, 3 Cold. 1; *Nelson v. Justices of Carter County*, 1 Cold. 207; *Justices of Williamson County v. Jefferson*, 1 Cold. 420; *Felts, Sheriff, etc., v. Mayor, etc., of Memphis*, 2 Head. 650; *Battle v. Rawles*, 2 Sneed, 576; *Johnson v. Lucas & Gaither*, 11 Humph. 306; *Hess v. Crawford*, 8 Humph. 609; *Justices of Cannon County v. Hoodenpytle*, 7 Humph. 145; *Caldwell v. Watson*, 6 Humph. 498; *Barnhart v. Neisler*, 6 Humph. 493; *Lacy v. Anderson*, 6 Humph. 495; *Gillespie v. Wood & Douglass*, 4 Humph. 437; *Thomason v. Justices, etc.*, 3 Humph. 233; *Copeland v. Woods*, 2 Humph. 330; *Dunlap v. Smith*, 4 Yerg. 509; *Hardin County Court v. Hardin, Peck*, 291; *Bradford v. Treasurer of East Tennessee*, Peck, 425; *King v. Hampton*, 3 Hayw. 50, 60; *Kennedy v. Woolfolk*, 1 Overt. 453.

In none of these cases is there an intimation of any similarity between this remedy and that by injunction, or that they are at all interchangeable. In two of them the injunction was united with the mandamus to hold matters in statu quo until the mandamus could be made operative. *Iron Companies v. Pace*, *supra*, and *Bates v. Taylor*, 87 Tenn. 319, 11 S. W. 266, 3 L. R. A. 316. And such practice is no doubt useful and proper in some cases. It is true that the mandatory injunction might be made effectual in securing for a stockholder an examination of the books, by forbidding the officers and agents of the corporation from interfering with him in such examination; but the mandamus is a much more direct remedy, and can be conditioned by such restrictions as the court may deem necessary or proper to prevent injury to the books or undue inconvenience to the officers and agents of the corporation in the discharge of their duties (*State ex rel*

v. Williams, supra), and we deem it best to adhere to the recognized practice.

It is insisted that in *Hawkins v. Kercheval*, 78 Tenn. 535, the remedy administered was a mandatory injunction. This is a mistaken view. The court held in that case that the relief sought under the original bill by injunction could not be granted. The relief that was granted was under the amended bill, which the court construed to be an application for the writ of mandamus.

A question has been made as to whether it is necessary to present the bill in the name of the state. It was so held in *Whitesides v. Stuart*, 91 Tenn. 710, 20 S. W. 245. This seems the more logical rule, since the writ is in the nature of a prerogative writ (State ex rel. *Weinberg v. Pacific Brewing & Malting Co.*, 21 Wash. 451, 58 Pac. 584, 47 L. R. A. 208-212, and authorities cited); but in most of our cases, prior to *Whitesides v. Stuart*, the name of the state was not used, and the same is true of some of the subsequent cases. No doubt the court would lend an easy ear to an application for amendment, so as to insert the name of the state in any case where objection is made on that ground.

On the grounds stated, the judgment of the Court of Civil Appeals must be reversed, and the judgment of the chancellor, dismissing the bill, must be affirmed, with costs.

J. I. CASE THRESHING MACH. CO. v. WATSON et al.†

(Supreme Court of Tennessee. Sept. Term, 1909.)

1. SALES (§ 479*)—CONDITIONAL SALES—REMEDY OF SELLER—SALE OF PROPERTY—FAILURE TO COMPLY WITH STATUTES—EFFECT.

The duty imposed on a conditional seller by Acts 1889, p. 117, c. 81, § 1, to advertise the property for sale upon regaining possession on the buyer's default, is absolute, and the failure by a nonresident seller to advertise by printed handbills invalidates a sale, and in effect rescinds the contract, so that the seller cannot recover the price, especially in view of section 4, authorizing recovery by the purchaser from the seller of the part of the consideration paid, if the seller fails to advertise the sale as provided.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1435; Dec. Dig. § 479.*]

2. SALES (§ 479*)—CONDITIONAL SALES—REMEDY OF SELLER—SALE OF PROPERTY—MANNER OF SALE—SALE BY NONRESIDENT SELLER.

Acts 1889, p. 117, c. 81, § 1, provides that a conditional seller, upon regaining possession of the property on the buyer's default, shall, within 10 days thereafter, advertise it for sale by printed handbills, or written or printed notices posted on the door of the courthouse in the county in which the seller resides, and also at two public places in the civil district in which the purchaser resides. *Held*, that the statute provides two methods of giving notice of sale—one by printed handbills, applicable where the seller resides in another state or in another county than the buyer, and the other by posting notice on the courthouse door, etc., applicable where the parties live in the same county in the

state; and a nonresident seller cannot give notice of a sale in the buyer's county in this state by posting notices, but must give notice by printed handbills.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1435; Dec. Dig. § 479.*]

Appeal from Chancery Court, Monroe County; T. M. McConnell, Chancellor.

Bill by the J. I. Case Threshing Machine Company against Pryer L. Watson, administrator, and others. From a judgment for plaintiff, defendants appeal. Reversed and bill dismissed.

McCroskey & Pease, for appellants. Young & Young, for appellee.

BEARD, C. J. The bill in this cause was filed to recover a balance alleged to be due on notes executed by one William Donahoo to the complainant company as the purchase price of machinery contracted and delivered by the complainant to him. To secure the payment of these notes the title to the machinery was retained by the vendor. The purchaser having died, the defendant P. L. Watson was appointed administrator of his estate. Upon the ground that his intestate, for just reasons, had abandoned the contract, he declined to recognize these notes as claims against the estate. Thereupon the complainant took possession of the machinery and made sale of the same. Failing to realize the full amount of the purchase-money notes at this sale, which, it is alleged, was made "under and in accordance with the act of the state of Tennessee of the year 1890, chapter 81, regulating conditional sales of personalty," this suit was instituted for the purpose stated above.

A number of defenses were set up in the answer of the administrator, among them being a denial that complainant had complied with the statute in question.

On this point the record shows that, immediately after taking possession of the property, it was advertised by the complainant for sale by printed posters that were put up in the civil district within which Donahoo lived and died, and where, also, his administrator lived; one of them being placed on the courthouse door in the town of Madisonville, located within that civil district, and others in public places in other parts of Monroe county, where the machinery was. It is insisted that in this there was a failure to comply with the requirement of the statute referred to.

Upon regaining possession of property by a vendor in a conditional sale, because of the failure of the vendee to pay the full purchase money, as provided in the contract of sale, "the statutory duty of within 10 days thereafter advertising the same for sale in the manner prescribed by the act is imperative, and a failure to discharge this duty in any important particular makes the vendor

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† For opinion on rehearing, see 123 S. W. 974.

so reclaiming liable to the original purchaser for the part of the consideration theretofore paid." *Whitelaw Furniture Co. v. Boon*, 102 Tenn. 719, 52 S. W. 155. It is true that no part of the purchase money in the case at bar was paid, and the particular question presented in this case just cited does not arise here; but the principle there announced is equally controlling.

The insistence of the defendant on the point at issue is that no "notice of this sale was posted on the door of the courthouse of the county" where the "seller" resided, and that, this being so, the sale was ineffectual to place any liability upon the estate of Donahoo, the deceased.

The conditional vendor in the present case is a corporation, with its situs at Racine, Wis. To have posted notice of this sale on the courthouse door at that point would have been an idle ceremony. We are confident that the Legislature never contemplated that where a nonresident vendor made a conditional sale of personalty to a conditional vendee in this state, and then reclaimed the property because of the failure of the latter to comply with the terms of the purchase, in order to make a perfect sale under the act of 1889, notice of the same should be posted at the courthouse of the vendor. Such a requirement would be absurd. The provision as to the duty of the reclaiming vendor is found in section 1 of this act, which is in words as follows:

"That, hereafter, when any personal property is sold upon condition that the title remain in the seller until that part of the consideration remaining unpaid is paid, it shall be the duty of said seller, having regained possession of said property, because of the consideration remaining unpaid at maturity, to, within ten days after regaining said possession, advertise said property for sale, for cash to the highest bidder, by printed handbills, or written or printed notices, posted on the door of the courthouse of the county of which said seller resides; and also at two public places in the civil district in which said original purchaser resides (said notice to be posted at least ten days before the day of sale, and to contain a description of the property to be sold and time and place of said sale), unless the debt is satisfied before the day of sale, then it shall be the duty of said original seller, or his agent, at the time and place, as stated in said notices, to offer for sale said property, as provided above. * * *

This statute, though inartificially drawn, provides for two modes of giving notice by a reclaiming vendor, one by "printed handbills" and the other by posted notices, and we are satisfied contemplates two distinctly different cases, one that of a nonresident seller with a purchaser residing in this state, or a seller resident in a county in this state other than that in which the purchaser re-

sides, and the other where the conditional vendor lives in the same county in this state with the conditional vendee. In the first of these cases, as has been indicated above, the posting of a notice at the courthouse door of the county of the vendor, residing in another state, or, in a county in this state other than that of the residence of the conditional vendee, would be idle and of no effect, so far as giving notice of the sale was concerned. To meet such case it therefore provides that notice of the sale may be given by "printed handbills." It is a matter of common knowledge what these are and the purpose they are to serve in the matter of a public sale. They are printed notices of such a sale, giving the time, place, and terms thereof, with a description of the property to be sold, distributed by hand, and it was the evident purpose of the Legislature that this should be done with reasonable diligence and good faith among persons living in the neighborhood where the property is and the sale is to take place. When this is done, all opportunity for unfair dealing, as regards the purchaser, and unjust advantage of him, is avoided.

The other class embraces the case of the conditional vendor who lives in the same county in this state with the conditional vendee, and the former chooses to make his sale in that county. In such a case the statute provides for the posting at the courthouse of the county, and also two public places in the civil district in which the purchaser lives. This method secures, not only notice to the vendee of the sale which was to take place, but gives publicity to his neighbors, so as to insure the utmost fairness in the sale advertised.

This section bears this construction, and it is only by adopting it that the Legislature can be relieved of the charge of having required of the nonresident vendor, as in the present case, a foolish and unnecessary act. In either case, we are satisfied that the non-compliance upon the part of the reclaiming vendor, in any respect, with the requirements of the statute would be ineffectual to convey the property sold, and equally ineffectual to place any other or further burden upon the conditional vendee.

In the present case the provision of the statute, for the benefit of the class to which the complainant belongs, was not availed of; but it saw proper to make advertisement under the other provision, with the result that, as a matter of law, no valid sale was made. In legal effect it was, as section 4 of the act has been construed, a rescission of the contract. This being so, the complainant was not entitled to maintain the present bill as against the administrator of the delinquent vendee.

It follows that the decree of the chancellor, in so far as it grants relief to the complainant, is reversed, and the bill is dismissed.

McDONALD et al. v. RANKIN.

(Supreme Court of Arkansas. June 28, 1909.)

1. IMPROVEMENTS (§ 4*)—SET-OFF AGAINST RENTS—RECOVERY.

At common law, the true owner of land had a right to the land, and the right to enter on it when the possession was withheld, and to own the improvements placed thereon by any one, including a bona fide possessor, but equity adopted the doctrine requiring the value of the permanent improvements placed by a bona fide possessor to be offset against the rents and profits, whenever the true owner applied to equity for an accounting by the possessor of the rents and profits.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. §§ 4, 8; Dec. Dig. § 4.*]

2. IMPROVEMENTS (§ 4*) — COMPENSATION — "POSSESSOR IN GOOD FAITH."

Under the betterment act (Kirby's Dig. §§ 2754-2757), providing that any person, believing himself to be the owner at law or in equity under color of title, shall be entitled to compensation for improvements placed on the land, in order to recover for the improvements placed on the land of another, one must occupy the land in good faith under color of title, and in ignorance of his title being questioned by another claiming a better title, and though he knows the facts which prove the invalidity of his title, yet, if through mistake of law he believes his title good, he is a "possessor in good faith" within the act.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. § 7; Dec. Dig. § 4.*]

For other definitions, see Words and Phrases, vol. 1, pp. 824-825.]

3. LIS PENDENS (§ 24*)—PURCHASERS PENDING SUIT—TITLE ACQUIRED.

The doctrine of lis pendens applies to purchasers or others acquiring title from a party to a pending action, and generally does not apply to strangers to the suit.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 38; Dec. Dig. § 24.*]

4. JUDICIAL SALES (§ 53*)—VOID DECREE—TITLE OF PURCHASER.

A sale under a void decree confers no title, and the purchaser, though a stranger to the suit, is not an innocent purchaser so as to acquire title.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 105; Dec. Dig. § 53.*]

5. JUDICIAL SALES (§ 55*)—VOID DECREE—RIGHT OF PURCHASER—IMPROVEMENTS.

The rule that a purchaser at a void judicial sale is not an innocent purchaser so as to acquire title applies only to the title itself, and does not apply to the rights, given to a party by the betterment act (Kirby's Dig. §§ 2754-2757), to compensation for improvements placed on land of another, and a purchaser obtaining the title in good faith, and holding possession, without actual notice that his title is assailed by one claiming a better title, is entitled to compensation for the improvements.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 110; Dec. Dig. § 55.*]

6. LIS PENDENS (§ 26*)—COMPENSATION FOR IMPROVEMENTS PENDING ACTION.

The provisions of the betterment act (Kirby's Dig. §§ 2754-2757), granting to a bona fide possessor of the land of another a recovery for the value of the improvements made thereon by him, are based on public policy, and the doctrine of lis pendens cannot be applied to an oc-

cupying claimant of land who otherwise would be entitled to the benefits of the act.

[Ed. Note.—For other cases, see Lis Pendens, Cent. Dig. § 60; Dec. Dig. § 29.*]

7. JUDICIAL SALES (§ 55*)—VOID SALE—COMPENSATION FOR IMPROVEMENTS.

A purchaser at a sale under a judicial decree, void because entered by consent in a cause in which an infant was a party, entered into possession under color of title, which was first adjudged valid, and he believed in the strength of his title, and he and his grantees under him had no knowledge of any one asserting a better title. The purchaser and his grantees made improvements on the land in good faith. Held, that he and his grantees occupied the land under color of title and in good faith, and were entitled to compensation for the improvements under the betterment act (Kirby's Dig. §§ 2754-2757).

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 55.*]

8. IMPROVEMENTS (§ 4*) — COMPENSATION — PROFITS.

The betterment act (Kirby's Dig. §§ 2754-2757), providing that the owner shall be allowed the rents of the land that shall have accrued within three years next before the commencement of the suit therefor, deprives the true owner of all the mesne profits that accrued prior to that time, but it gives to him the rents on the land in the exact condition in which they are for the period subsequent to the three years next before the commencement of the suit, the measure of rents recoverable being the fair rental value of the land in its improved condition during the period named in the act, which means the net rents resulting from deducting from the gross rental value the amounts expended for necessary repairs, and such other necessary expenses as under the custom of the country have been paid for salary of an overseer in the management and collection of the rents.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. § 22; Dec. Dig. § 4.*]

9. IMPROVEMENTS (§ 4*) — COMPENSATION — PROFITS.

Where occupants of the lands of another were entitled to the value of the improvements placed thereon by their predecessor in possession and the predecessor would be chargeable with rents for certain years, the occupants should be charged with such rents, though they were actually received by the predecessor, who had since died, and whose estate was not brought into the restitution suit brought by the true owner; and where the value of the improvements exceeded the amount of the rents for those years, they should be charged with the entire rents of those years.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. § 22; Dec. Dig. § 4.*]

10. IMPROVEMENTS (§ 4*)—RENTS.

Though rents that accrued prior to the three years before the true owner sued for possession of the land and the rents from the occupants claiming under a void judicial sale are not recoverable under the betterment act (Kirby's Dig. §§ 2754-2757), yet, on equitable principles, such rents should be set off without restriction against the claim of the occupants for reimbursement of the purchase money received by the true owner.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. § 22; Dec. Dig. § 4.*]

11. JUDICIAL SALES (§ 55*)—VOID SALE—RIGHT OF PURCHASER—PROFITS—INSURANCE MONEY.

An occupant of land under a void judicial sale, who is liable under the betterment act (Kir-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by's Dig. §§ 2754-2757), to account to the true owner for the rents of the land, is not liable for insurance money received on a policy insuring a house destroyed by fire and rebuilt by the occupant, for the insurance money did not arise from the property, but was payable to the occupant by reason of a personal contract with insurer.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 55.*]

12. JUDICIAL SALES (§ 55*)—VOID SALE—RIGHTS OF PURCHASER—RECOVERY OF RENTS—INTEREST.

An owner of land, entitled to recover rents under the betterment act (Kirby's Dig. §§ 2754-2757) from occupants under a void judicial sale, is entitled to interest on all rents from the time they were received by the occupants and those under whom they claimed.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. § 96; Dec. Dig. § 55.*]

13. JUDICIAL SALES (§ 55*)—VOID SALE—RIGHTS OF PURCHASER—TAXES.

Occupants of land under a void judicial sale are entitled to recover all taxes paid on the land and the interest on the taxes paid by them, and those under whom they hold the land, from the time such taxes were paid.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 55.*]

14. JUDICIAL SALES (§ 55*)—VOID SALE—COMPENSATION FOR IMPROVEMENTS—VALUE.

The value of improvements, placed on the land of another by a bona fide occupant thereof under a void judicial sale, is determined as of the time of the recovery by the true owner; that being the time the improvements are turned over to, and go into the usable possession of, the true owner.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 55.*]

15. JUDICIAL SALES (§ 55*)—VOID SALE—COMPENSATION FOR IMPROVEMENTS—VALUE.

The value of improvements, placed on land by a bona fide occupant under a void judicial sale, is based on the enhanced value which the improvements at the time of the recovery by the true owner impart to the land; but the enhanced value of the land should arise solely by reason of the improvements themselves, and should be determined only by the ordinary considerations that apply to lands similarly situated, and the condition of the improvements at the time of the recovery, the difference in the value of the land without the improvements and the value of the land with the improvements in their then condition, should be considered together with the reasonable cost in making the improvements and their deterioration, but the value should not exceed the cost of making the improvements or replacing them at the time of the recovery, and in the condition in which they are at that time.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 55.*]

16. JUDICIAL SALES (§ 55*)—VOID SALE—RIGHT TO IMMEDIATE POSSESSION—PAYMENT OF VALUE OF IMPROVEMENTS.

Under the betterment act (Kirby's Dig. § 2755), providing that no writ shall issue for the possession of land in favor of the successful party until payment has been made to the occupant of the amount due him for the improvements and the taxes paid, an owner, entitled to the possession of land in the occupancy of one claiming in good faith under a void judicial sale, is not entitled to the possession of the land until an accounting of the rents and profits and the value of the improvements and the taxes

paid has been had and a final determination made.

[Ed. Note.—For other cases, see Judicial Sales, Dec. Dig. § 55.*]

17. APPEAL AND ERROR (§ 80*)—ORDERS APPEALABLE.

An order, in proceedings by the true owner to recover the possession of land and the rents thereof, brought against an occupant holding in good faith under a void judicial sale, which directs an accounting of the rents and profits, the value of the improvements by the occupant, and the taxes paid, and that the true owner shall not have the possession until the accounting has been had and a final determination made, is not a final order, and is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 494; Dec. Dig. § 80.*]

Battle and Hart, JJ., dissenting in part.

On Rehearing.

18. APPEAL AND ERROR (§ 1176*)—DISPOSITION OF CASE ON APPEAL—REMAND.

Where a decree of the trial court involving title to land is reversed, the Supreme Court must remand the case to the trial court with directions to enter a decree in accordance with the order and opinion of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4588; Dec. Dig. § 1176.*]

Appeal from Woodruff Chancery Court, Northern District; Josephus O. Marshall, Special Chancellor.

Suit by Sallie Spott Rankin against Cora McDonald and others to recover lands in the possession of defendants under a void judicial sale, and the rents and profits thereof. From the decree both parties appeal. Modified and affirmed in part, and reversed and remanded in part.

This cause has been before this court several times, and the various questions involved in and decided upon former appeals will be found in the following opinions: Rankin v. Schofield, 70 Ark. 83, 66 S. W. 197; Rankin v. Schofield, 71 Ark. 103, 66 S. W. 197, 70 S. W. 306, 100 Am. St. Rep. 59; Rankin v. Schofield, 81 Ark. 440, 98 S. W. 674; Rankin v. Fletcher, 84 Ark. 150, 104 S. W. 933; Schofield v. Rankin, 80 Ark. 86, 109 S. W. 1161. The questions which are presented upon the present appeal to this court involve the determination and adjustment of the rights of the parties to the improvements and taxes, and the rents and profits of the lands in litigation. These lands belonged to J. N. S. Gibson, who died in 1884, seised and possessed thereof. The original suit herein was instituted in the Woodruff chancery court on the 17th day of August, 1886, by the collateral heirs of J. N. S. Gibson, as plaintiffs in that suit, against the administrator of his estate, Bettie Harwell, who was at one time his wife, and Sallie Spott Gibson (now Rankin), the appellee in this appeal, who was his only child, as defendant in that case, for the purpose of partitioning said lands. At the January term, 1889, of that court a consent de-

cree was rendered directing the sale of the property in controversy. For that purpose a commissioner was appointed, who made a sale of the property in the latter part of the year 1889. At that sale one L. B. McDonald, who was not a party, but a stranger, to the suit, became the purchaser of the property at the bid and price of \$14,050. The commissioner made the report of said sale to said chancery court, and at its January term, 1890, that court duly approved and confirmed the sale, and directed the commissioner to execute to the said purchaser a deed for said land. The commissioner executed said deed to said McDonald, which was duly approved by and acknowledged in said court in the manner prescribed by law. L. B. McDonald went into possession of the lands under said deed in 1890 and made permanent improvements upon the lands. In 1896 he conveyed a portion of said lands to his daughter, Antoinette Bond, who is one of the appellants in this appeal; and in 1899 he conveyed the remaining portion of said lands to Cora and Jesse McDonald, who are his daughter-in-law and grandson, and who are the other appellants in this appeal.

In 1889, at the time that said consent decree was entered, Sallie Spott Rankin was a minor of tender years, and she came of age in June, 1899. On February 19, 1900, she prayed an appeal to this court from said consent decree, under which the sale of said lands was made to said McDonald, and on November 15, 1902, that decree was reversed by this court. *Rankin v. Schofield*, 71 Ark. 168, 66 S. W. 197, 70 S. W. 306, 100 Am. St. Rep. 59. On December 20, 1902, Sallie Spott Rankin filed a supplemental complaint in said cause against the said appellants, seeking therein to recover from them the possession of said lands and the rents and profits thereof, and process on said supplemental complaint was served on said appellants on January 8, 1903. An answer was filed by them, in which they claimed title to the lands under said commissioner's deed executed to said McDonald, and the conveyance from McDonald to them. A decree was rendered by the chancery court in their favor, and that decree was reversed by this court. *Rankin v. Schofield*, 81 Ark. 440, 98 S. W. 674. It was there found that Sallie Spott Rankin was the only child and sole heir of said J. N. S. Gibson, and the owner of said lands; and it was held that the said consent decree of the Woodruff chancery court ordering the sale of said lands was void, because it was entered solely by the consent of the parties, and without any consideration or judicial determination, and, said Sallie Spott Rankin being then an infant, her guardian had no authority to consent to such a decree, and also because the consent decree was not authorized by the issues raised in the pleadings. In that opinion this court expressly stated

that it did not "undertake to determine the rights of the parties to a return of proceeds of sale of lands received by the appellant (Sallie Spott Rankin), rents of lands and improvements thereon, or other incidents consequent on the recovery of the same."

Upon the cause being remanded to said chancery court that court entered a decree setting aside the commissioner's conveyance, which had been executed in 1890 to said L. B. McDonald, and decreeing in favor of said Sallie Spott Rankin a recovery of said lands. It appointed a special master to take and state an account of the value of the improvements and amount of taxes paid on said lands by the appellants and those under whom they claimed, and also an account of the rents and profits of said lands and of the repairs made thereon. It also directed the taking of an account of the purchase money which was paid by said McDonald and received by the parties to the original proceedings. It provided that said accounts be taken and stated separately as to the lands conveyed to and claimed by said Antoinette Bond, and as to the lands conveyed to and claimed by said Cora and Jesse McDonald. That court further decreed: "It is further ordered that no writ of assistance or other process for the possession of said lands shall issue in favor of plaintiffs in said supplemental proceedings until the value of the aforesaid improvements and taxes shall have been ascertained, and any balance, if any there shall be owing to said defendants on account of said improvements, after setting the value and amount of such improvements off against any amount that may be coming to said plaintiffs on account of rents and profits, less the cost of repairs, shall have been paid. In taking the account of rents the master will ascertain the amount commencing with the first year, to wit, 1890, and ascertain what rents were received by L. B. McDonald for that year, or what he might by the exercise of ordinary diligence—that is, the diligence which a man of reasonable capacity would exercise in his own business—and will charge him with the rents thus received, or which he might have received, for that year. He will next ascertain the cost of all necessary repairs upon said lands for that year, and deduct the amount thereof from the amount of rents, in like manner, for each year covered by the period aforesaid. In taking the account for improvements he will ascertain and state specifically each permanent improvement which he finds to have been made, and the nature and character thereof, and value such improvements added to said premises. He will also find as separate item what amount such improvement may have added to the rental value of said premises. The master will proceed as early as practicable to take and state such account. Whereupon said plaintiffs renewed their motion

filed herein, to wit, on the 3d day of January, 1903, for writ of restitution, which motion is by the court overruled at this time, on the ground that the court is of the opinion that the defendants herein are entitled to an accounting for the value of permanent improvements placed upon said premises and taxes, and that no writ of restitution should be issued until the master aforesaid shall make his report, and the same shall have been approved by the court."

A great deal of evidence was taken by the master relative to these matters submitted to him, and he made a detailed report of his findings relative thereto. The findings of the master as to the values and amounts of the items submitted to him are well sustained by the evidence, and his work has been done so well and thoroughly in this respect that neither party has made any objection thereto in that regard. Their objections are based solely upon the rights of the respective parties to recover the respective items. The special chancellor approved these findings, but altered the report of the master by allowing certain items and disallowing others. Upon a final hearing the special chancellor entered a decree in favor of Antoinette Bond in the sum of \$2,095.50, the same being a net balance which he found to be due upon improvements made and taxes paid upon that portion of the lands conveyed to her, and in favor of Sallie Spott Rankin, and against Cora and Jesse McDonald in the sum of \$4,662.81; the same being a net balance found by him to be due on the mesne profits of that portion of the lands which were conveyed to Cora and Jesse McDonald. In the above amounts there were not included any rents for the year 1908 in any of said lands. From this decree all the parties have appealed to this court. Sallie Spott Rankin also prayed a separate appeal from that portion of the decree refusing to give to her the immediate possession of all the lands. The two appeals have been consolidated in this court, and the cause is now docketed, and will be referred to, with Antoinette Bond and Cora and Jesse McDonald as appellants and Sallie Spott Rankin as appellee.

Moore, Smith & Moore, for appellants. Gustave Jones, H. F. Roieson, Harry M. Wood, N. W. Norton, P. R. Andrews, and Rose, Hemingway & Rose, for appellee.

FRAUENTHAL, J. (after stating the facts as above). The matters that are now involved in this case, and which are presented to us on this appeal for our determination, relate to the respective rights of the parties to a recovery for improvements and taxes upon the one side, and the rents and profits of the land on the other. The determination of these matters depend principally, if not entirely, upon whether or not the betterment act applies to this case. It has been

decided that the appellee is, and has been ever since the death of her father, the true owner of all said lands. According to the common law, the true owner of land had a right to the land, and that included the right to enter on it when the possession was withheld, and to have and own the improvements placed thereon by any one, which were considered to be but a part of the land itself, and the true owner had also a right to all the rents and profits issuing from the land. No distinction was made between a bona fide and mala fide possessor. As to the true owner, the possession of the occupying claimant was wrongful, and he could acquire no rights in another's property by his wrongful acts. But it soon became apparent that this rule was harsh and unjust when lasting and permanent improvements, which actually increased the value of the lands, were placed thereon by an innocent and bona fide holder, and offset the value of the rents and profits. To cure this harsh rule the courts of equity adopted the doctrine of requiring the value of the permanent improvements in such cases to be offset against the rents and profits whenever the owner of the lands applied to such court of equity for an accounting by the possessor of the rents and profits. This doctrine was applied in pursuance of the great equitable principle that "he who seeks equity must do equity." The rights thus recognized by the courts of equity were founded upon the principle that the occupant who thus went into possession of the land in ignorance of the invalidity of his title, although technically a possessor in bad faith, because he might have discovered such defect, yet he was not to be placed in the position of one who fraudulently takes possession without any title and keeps the true and known owner out of possession. But these rights accorded to such an occupant were only of an equitable nature, and his remedies could only be enforced in a court of equity. The reason and justice of recognizing such rights resulted in the enactment of statutes which granted them as substantive rights, which could be enforced in the very courts that determined the title to the land, and also gave to the occupant a recovery for the amount of the value of the improvements in excess of the value of the mesne profits. *Green v. Bidle*, 8 Wheat. 1, 5 L. Ed. 547; 8 Pomeroy, Eq. Jur. (3d Ed.) § 1241; 2 Story, Eq. Jur. §§ 799a, 799b; *Warvelle on Ejectment*, §§ 546, 557; *Jones v. Great Southern Fire Proof Hotel Co.*, 86 Fed. 370, 30 C. C. A. 108; *New Orleans v. Christmas*, 131 U. S. 191, 9 Sup. Ct. 745, 33 L. Ed. 99; *Byers v. Fowler*, 12 Ark. 292; *Cunningham v. Ashley*, 18 Ark. 182, 63 Am. Dec. 62; *McCloy v. Arnett*, 47 Ark. 458, 2 S. W. 71. The Legislature of the state of Arkansas in 1883 enacted the statute commonly known as the "Betterment Act," which is embraced in sections 2754-2757, Kirby's Dig. That statute defines (A)

the qualifications of the occupant who is entitled to its benefits; (2) it fixes the value of the improvements and taxes which it grants to such occupant; (3) and the amount of the mesne profits which are recoverable by the owner.

1. It is contended by the counsel for appellee that L. B. McDonald and the appellants claiming under him are not such occupants as are described in the betterment act; and they base their contention upon the ground that said McDonald purchased the land during the pendency of this suit, under a decree which was declared to be void by this court. The question which is thus presented for determination is, What is the character of the occupancy which the possessor must have in order to fall within the provisions of this statute? The statute describes such occupant to be "any person, believing himself to be the owner, either in law or equity, under color of title, (who) has peaceably improved, or shall peaceably improve, any land which upon judicial investigation shall be decided to belong to another." It thus appears that the person must occupy the land under color of title, and with the honest belief that he has title to the land. In the case of *Fee v. Cowdry*, 45 Ark. 410, 55 Am. Rep. 560, the court described such occupant as being "one who not only supposes himself to be the true proprietor of the land, but who is ignorant that his title is questioned by some one claiming better right to it." In *Beard v. Dansby*, 48 Ark. 183, 2 S. W. 701, in describing the requirements which such occupant should possess, this court said: "Good faith, in its moral sense, as contradistinguished from bad faith, and not in the technical sense in which it is applied to conveyances of title, as when we speak of a bona fide purchaser, meaning thereby a purchaser without notice, actual or constructive, is implied in the requirement that he must believe himself to be the true proprietor. It must be an honest belief, and in ignorance that any other person claims a better right to the land." It was held in *Shepherd v. Jernigan*, 51 Ark. 275, 10 S. W. 765, 14 Am. St. Rep. 50, that where a party improved lands in good faith, and under the belief that he was the true owner, he is entitled to the benefits of this betterment act, and that such notice as might be gained from the registry of the deed is not sufficient to preclude him from those benefits. This court, in the case of *Bloom v. Strauss*, 70 Ark. 483, 69 S. W. 548, 72 S. W. 563, held that a bona fide occupant, who held under a last will which was defective upon its face, could claim the benefit of this statute. In the case of *Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373, this court held that one who had purchased under a probate sale which was declared void was such an occupant as could claim the benefits of this statute. In that case the purchaser at the judicial sale had been the appraiser of the land that was sold, and upon that

account it was held that such sale was fraudulent in law, and on account of such fraud it was void. But the court found that the purchaser acted in good faith, and in an honest belief that he would obtain a good title to the land, although he knew the facts which constituted the legal fraud and made the sale invalid. That was a judicial sale, under which a purchase was made, and the parties in interest had a right to appeal therefrom, or to institute proceedings to avoid said sale, which they did, so that in that case the occupant was a purchaser during the pendency of the proceedings, under a sale which was afterwards declared void; and this court held that the provisions of the betterment act applied in that case. *Cowling v. Nelson*, 76 Ark. 146, 88 S. W. 913. From all these cases it will be seen that the cardinal requisite that the occupant should possess is good faith, and an honest belief in the title under which he occupies the land, and an ignorance of his title being questioned by another who claims a better right, in order for him to be entitled to the benefits of the statute. He may know the facts which prove the invalidity of his title, yet if, through mistake of the law, he still believes that title good, he can hold in good faith within the meaning of the betterment act.

The doctrine of *lis pendens* applies to purchasers, or others acquiring title from a party to the action, and generally it does not apply to strangers to the suit. But where the decree under which the sale is made is wholly void by reason of some jurisdictional defect, it can confer no title. The purchaser in such instance, although a stranger to the suit, cannot in law be an innocent purchaser so as to acquire the title. But whether this doctrine is founded upon notice, or upon public policy, it only applies to the title itself which is thus acquired, and does not apply to the rights and benefits which are given to the party under the betterment act. The occupant holding under a tax deed which, on account of some jurisdictional defect, is declared void, or holding under a sale made under a decree in some tax proceeding which is declared void, although he knows, or has means of knowing, of these jurisdictional defects in his title, has yet been held to come within the terms of this statute. The constructive notice of the invalidity of the title which will deprive the purchaser at such a sale from acquiring the title as an innocent purchaser does not affect the rights of such a purchaser under the betterment act if he obtained the title in good faith and held possession without actual notice that his title was assailed by one claiming a better title. Ordinarily there is greater confidence placed in a purchase at a judicial sale than at any other sale, on account of the great confidence reposed by the people in the proceedings of our courts. But if the doctrine of *lis pendens* shall apply to defeat such purchasers of the benefits of the betterment act, they

are placed at a greater disadvantage than a purchaser at any other sale. The doctrine of *lis pendens*, it is said, results not so much from notice, but is largely founded upon public policy. And so likewise, the provisions of the betterment act, which grant to the bona fide possessor of the land a recovery for the value of the improvements made thereon by him, have resulted from public policy. The policy thus advanced by this statute should prevail, and the public policy thus announced by the legislative will would not be subverted by applying the doctrine of *lis pendens* to those occupying claimants of land who otherwise would be entitled to the benefits of this act.

In this case it is conceded that the purchaser, McDonald, went into possession of the land under color of title, and that title was held to be valid by this court in the first hearing of the cause involving that question. The evidence tends to show that the purchaser believed in the strength of that title, and, until these supplemental proceedings were instituted and the summons served on them, he and the appellants had no knowledge of any one questioning that title, or asserting a better title to the land. The special chancellor found that these occupants held the lands under color of title in good faith, and in the honest belief that they had a perfect title to the land, and these findings appear to be well sustained by the evidence. We are of the opinion, therefore, that the facts of this case bring it within the terms of the betterment act. The appellants are therefore entitled to the value of all improvements made prior to January 8, 1903, the time that the summons was served herein on them, and to all taxes paid by them and those under whom they claim; and the appellee is entitled to recover all mesne profits that shall have accrued within three years next before the commencement of this supplementary suit.

2. Before the passage of the betterment act the courts adopted various measures for estimating the value of the improvements that should be allowed to the occupant, and the mesne profits that should be allowed to the true owner. Some allowed the first cost of the improvements, with interest, others fixed their value at the time of the notice received by the possessor of the title of the true owner, while others fixed their value at the time of the recovery. So likewise they differed in the amount of the mesne profits that should be recovered by the owner; some allowing the rents only on the lands, without the improvements, and others on the lands as they were improved. *Haskins v. Spiller*, 3 Dana (Ky.) 573; *Barnett v. Higgins*, 4 Dana (Ky.) 565; *Evetts v. Tendick*, 44 Tex. 570. The betterment act conferred upon the occupant certain substantive rights, and for the true owner it fixed the definite mesne profits which he could recover. As is said in the case of *Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373, the betterment act is "one to ad-

just equities between the owners of the lands and persons who have occupied the same under color of title, believing themselves to be the owners—bona fide occupants. * * * In other words, when the occupant holds in good faith under color of title, the owner can recover the land and mesne profits for three years, and the occupant can recover the value of his improvements and amount of taxes." These are the rights of the parties as fixed by this statute. The statute says that the owner shall be allowed the rents of the lands that shall have accrued within three years next before the commencement of the suit. It deprives the true owner of all the mesne profits that accrued prior to that time, but it gives to him the rents on the lands in the exact condition in which they are for the period subsequent to three years next before the commencement of the suit.

It is urged by the appellants that they should not be charged with the rents and profits arising from the improvements made by them, but only for the rents on the lands in the condition in which they were when McDonald took possession. To sustain their contention counsel for appellants especially rely upon the case of *State v. Baxter*, 50 Ark. 447, 8 S. W. 188; but that case is but a continuation of the case of *State, Use of Garland County, v. Baxter*, 38 Ark. 462, which was a suit instituted in 1881, long prior to the passage of the betterment act. The principles applied in that case were based upon an accounting which allowed rents without restriction. It was an action to set aside a lease obtained by the occupant for a long term, and under which he had made improvements on the land, which lease was subsequently set aside for fraud; it had no application to the terms of the betterment act. The various rules that have been formulated by courts of equity in attempting to make equitable adjustments of the rights of the occupant on the one hand, to the value of the improvements and the taxes paid, and on the other hand, of the owner to the rents and profits, were based upon such principles of equity as in the opinion of those courts were right. In the uncertainty of these decisions the betterment act was enacted to definitely fix these respective rights, and it fixed, as a substantive right for the owner of the land, the rents of the lands for the period therein named, with the improvements which the lands then possessed. The general rule adopted by the courts for the measure of damages in cases for the recovery of mesne profits is the fair rental value of the lands during the period of the withholding. Analogous to that ruling, the measure of rents and profits which are recovered under the betterment act is the fair rental value of the lands in their improved condition during the period named in the betterment act. This means the net rents; that is to say, the amounts expended for necessary repairs, and for such necessary expenses as under the custom of

the country have been paid for salary of an overseer in the management and collection of the rents, should be deducted from the gross rental value. This is on the theory that the owner would have had to have done this. *Warvelle on Ejectment*, § 543; *Wallace v. Berdell*, 101 N. Y. 13, 3 N. E. 769; *Hodgkins v. Price*, 141 Mass. 162, 5 N. E. 502.

It is urged by appellants that Cora and Jesse McDonald should not be charged with the rents for the years of 1900 and 1901, because the rents for those years were actually not collected or received by them, but by W. L. McDonald, who has since died, and whose estate is not brought into this restitution suit. But these appellants became entitled to the value of the improvements, for which they are allowed a recovery, which were placed upon the lands, not by them, but by him under whom they claim, and he would be chargeable with these rents. To the extent of the fund so received by them for such improvements it is but equitable that they should be charged with said rents; and, inasmuch as the value of the improvements exceeds the amount of the rents for those years, they should be charged with the entire rents of those years. The rents of the lands that accrued prior to December 20, 1899, cannot be recovered by the appellee, by virtue of the betterment act; but, upon equitable principles, these rents should be set off without restriction against the claim of appellants for reimbursement of the purchase money received by the appellee. The appellants are entitled in equity to recover such portion of the purchase money paid under said invalid sale for said land which was actually received by the appellee, for the reason that the appellee now recovers the land, which was the sole consideration for the money so paid, and it is but equitable that reimbursement should be made therefor. But during the years prior to 1900, those paying the purchase money received the rents and profits from these lands, and therefore, upon equitable principles, those mesne profits for the full period, and without restriction, should be applied on such claim for reimbursement of the purchase money.

It is urged by the appellants that for the years prior to 1900 they should not be charged with the mesne profits from improvements made by them, but only with the profits of the lands in the condition that they were when McDonald took possession. But it is unnecessary to pass upon this contention, for the reason that, according to the value of the rents as found by the master, and which finding is approved, the rents of the lands, with only said original improvements, would exceed the largest amount of said purchase money that can be claimed to have been received by the appellee; and this is true when the purchase money and the rents are apportioned to the respective tracts occupied by the respective appellants.

Upon the tract of land occupied by ap-

pellant Bond a house was burned and rebuilt by the occupant. This house had been insured by the occupant for a number of years for \$1,050, and the insurance money was collected by the occupant. This sum was by the master charged to the appellant Bond as a part of the rents, but was disallowed by the special chancellor. The contract of insurance was a personal contract of appellant Bond, and the consideration was paid solely by her. The insurance money, therefore, did not in law arise from the property, but was payable to the appellant Bond by reason of her personal contract with the insurance company. She was therefore not chargeable therewith. *Roesch v. Johnson*, 69 Ark. 30, 62 S. W. 416; *Langford v. Searcy College*, 73 Ark. 211, 83 S. W. 944.

The appellee is entitled to recover interest on all rents from the time they were received by appellants and those under whom they claim. 15 Cyc. 208; *Nunn v. Lynch* (Ark.) 115 S. W. 926. Likewise the appellants are entitled to recover all taxes, and the interest on all taxes, paid by them and those under whom they hold the land from the time such taxes were paid.

3. Under the evidence in this case all the improvements were made prior to the service of the summons in this supplemental proceeding, and therefore the occupying claimants must be paid the value of those improvements. The value of the improvements is determined at the time of the recovery, for that is the time that they are turned over to and go into the usable possession of the holder of the title. In *Summers v. Howard*, 33 Ark. 490, this court, in speaking of the time when the value of the improvements should be estimated, said: "Such allowances [for improvements] are made upon the ground that the improvements do in fact pass into the hands of the plaintiff as a new acquisition; and they can only be a new acquisition to him to the extent of their value at the time he recovers or obtains possession of them, and therefore their value at that time is to be allowed, and nothing more." *Warvelle on Ejectment*, § 553; 15 Cyc. 222; *Greer v. Fontaine*, 71 Ark. 605, 77 S. W. 56. The value thereof is based upon the enhanced value which these improvements at the time of the recovery impart to the land. But such enhanced value of the land should arise solely by reason of the improvements themselves, and should be determined only by the ordinary considerations that would apply to lands that are similarly situated. The condition of the improvements at the time of the recovery should be taken into consideration. The difference in the value of the land without the improvements and the value of the land with the improvements in their then condition would be a just sum to allow therefor. In any event no value that the land might impart to the improvements should be considered in estimating the value of such improvements. The reasonable cost in making

the improvements, their deterioration, if any, or the reasonable cost of making them at the time of the recovery in their then condition, may well be taken into consideration in arriving at the value of such improvements.

In determining the value of these improvements the master found the amount of the cost thereof at the time of the recovery, and then added 50 per cent. thereof to such cost, on the theory that, under the testimony, the value of the land was thus enhanced by these improvements in excess of their cost. This estimate of the value of the improvements was approved by the special chancellor. This is an arbitrary mode of fixing such valuation, rather than one based on the actual value of the betterment and amelioration of these improvements to the land. The value of the improvements should not exceed the cost of making them or replacing them at the time of the recovery and in the condition in which they are at that time. *New Orleans v. Gaines*, 15 Wall. 624, 21 L. Ed. 215.

The special chancellor properly refused to grant to Sallie Spott Rankin the immediate possession of the land at the time of her application. The betterment act is applicable to this case, and that statute provides that "no writ shall issue for the possession of the land in favor of the successful party until payment has been made to such occupant of the balance due him for such improvements and the taxes paid." Kirby's Dig. § 2755. Until the accounting of these matters was had, and a final determination thereof made, the possession of the lands should not have been given to her. Such an order was also on this account not such a final order from which an appeal would lie. *Crittenden*, Ex parte, 10 Ark. 333; *Fitzpatrick v. Phillips*, 41 Ark. 85; *Davie v. Davie*, 52 Ark. 224, 12 S. W. 558, 20 Am. St. Rep. 170; *Cohn v. Huffman*, 52 Ark. 436, 12 S. W. 1071; *Hargus v. Hayes*, 83 Ark. 186, 103 S. W. 163; *Brown v. Norvell*, 88 Ark. 590, 115 S. W. 372. In the final decree of the Woodruff chancery court it was ordered and decreed that the appellee recover all the lands; that a writ of restitution issue to her for the immediate possession of the lands which were claimed by appellants Cora and Jesse McDonald, and that a writ of restitution should be issued to her for the lands claimed by the appellant Antoinette Bond, after the payment of said sum, which was the amount of the balance of the value of the improvements made on said land, and found by the court as still due to said appellant. Under the findings of the chancellor this portion of the decree relative to the possession of the lands was correct. But as hereinafter directed, a restatement of the accounts of the matters upon which the findings of the court were based will be ordered by this court. And if as a result of such an accounting it shall be found that nothing is due to either of the appellants upon the improvements and taxes upon the respective tracts, then immediate writs of restitution

will issue to the appellee for such tract or tracts.

The findings of the special chancellor and the decree rendered by him are in the main in accord with this opinion; but in some particulars it does not conform with it. The decree will therefore be reversed. But we are of the opinion that the findings of the special master of the Woodruff chancery court are amply sustained by the evidence as to the values and the amounts of taxes, rents, interest, and all other matters submitted to him and set out in his report, except as to the improvements; and as to the improvements we are of opinion that his findings of the actual cost thereof at the time of the recovery will give the true values thereof with which amounts the appellants should be credited, and that the only error committed in that regard was in adding to such cost the additional sum of 50 per cent. of such cost. We are of opinion that a restatement of the account as to all matters involved herein and submitted to said special master can be made from the evidence taken by the special master, so that it will conform with this opinion and without taking any additional testimony. For this reason we do not think it necessary to remand this cause in order to make such a restatement of these accounts; but we deem it advisable that a special master be appointed by this court for the purpose of making a restatement of said accounts from the evidence as appears in the report of the special master (and which is a part of the record of the case) which will conform with this opinion. To that end therefore a special master will be appointed by this court. Said special master will be directed to take the evidence contained in the report of John G. Haralson, the special master of the Woodruff chancery court, and which is a part of the record herein; that from said evidence he make and state an account of the improvements, taxes, and mesne profits of the lands, together with interest on the taxes and mesne profits between the respective parties to this suit, and in accordance with this opinion. In making and stating said accounts he will make and state separate accounts of all the above matters relative to the lands that were in the possession of the appellant Antoinette Bond, and which are called in said special master's report the "Bond" place, and relative to the lands that were in the possession of the appellants Cora and Jesse McDonald, and which are called in said report the "McDonald" place. And this cause will be continued for the further orders of this court after said report of the special master of this court shall be taken, made, and filed in this court. And thereupon this cause will be remanded to the Woodruff chancery court, with directions to enter a decree in accordance with the opinion of this court.

BATTLE and HART, JJ., dissent to so much of this opinion as allows to appellee

rents on improvements made by appellants and those under whom they claim.

On Rehearing.

FRAUENTHAL, J. The appellants and appellee herein, respectively, filed motions herein for a rehearing. After due consideration of said motions we are of the opinion that the motions should be overruled, except as herein indicated.

By our opinion in this case the findings of the special chancellor were in all things approved, except only as to his finding of the value of the improvements made on the lands by appellants and those under whom they claim. As to the value of those improvements, we held that the sole error in the finding of the special chancellor was in adding to the cost thereof the sum of 50 per cent. of such cost; and we held that, "as to the improvements, we are of opinion that his findings of the actual cost thereof at the time of the recovery will give the true amounts thereof, with which amounts the appellants should be credited." The appellee has filed a motion in which she states that, according to the finding of the special chancellor, the said cost of the improvements made on the land claimed by appellant Bond amounted to \$5,865, to which the special chancellor added \$2,932.50 being 50 per cent. of same, and which latter finding was only disapproved; that if the amount of the final balance found by the special chancellor as due to the appellant Bond, to wit, \$2,591.88, should be deducted from this disallowed item of credit of \$2,932.50, it would represent the true final amount due to appellee from appellant Bond on the accounting, to wit, \$340.62; that the said cost of the improvements made on the lands claimed by appellants Cora and Jesse McDonald amounted to \$2,520, to which the special chancellor added \$1,260, being 50 per cent. of same, and which latter item was only disapproved; that if to the final balance found by the special chancellor as due by the appellants McDonald, to wit, \$4,662.81, should be added this disallowed item of credit of \$1,260, it would represent the true final amount due to appellee from the appellants Cora and Jesse McDonald upon the accounting, to wit, \$5,922.81, and the appellee asks that the portion of the order in our former opinion which refers the restating of an account to a master be set aside, and that the opinion and the decree be modified as above stated. Upon further examination of the report of the special master and the findings of the special chancellor, we are of the opinion that the above correctly states the cost of the respective improvements, at the time of the recovery, made on the two tracts, and that in fixing the value of said improvements at said amounts the rights of appellants cannot be prejudiced. The value of said improvements is therefore found as above

stated. It follows that upon said final accounting of the improvements, taxes, and mesne profits there is due by the appellant Antoinette Bond to the appellee the sum of \$340.62, and that there is due by the appellants Cora and Jesse McDonald to the appellee the sum of \$5,922.81, and that these should have been the findings of the special chancellor, and a decree rendered in favor of appellee for these respective amounts and a recovery of the lands. The order heretofore made herein for the appointment of a master and the reference to him for a restatement of the account is set aside. The former opinion of this court is modified so as to conform with this additional opinion.

That portion of the decree of the Woodruff chancery court which grants to the appellee the restitution of the land claimed by the appellants Cora and Jesse McDonald and recovery against said appellants of \$4,662.81 is modified so that it will decree in favor of the appellee the recovery of said lands claimed by appellants Cora and Jesse McDonald, and a recovery against said appellants of the sum \$5,922.81; and the decree of the chancery court as to said appellants Cora and Jesse McDonald, thus modified, is affirmed. That portion of the decree which finds in favor of the appellant Antoinette Bond for a balance due on improvements and postponing the restitution of the lands claimed by said appellant Bond is reversed; and said portion of the cause is remanded to the Woodruff chancery court, with directions to enter a decree in favor of appellee for immediate recovery of said land claimed by appellant Bond and a recovery against said Bond for the sum of \$340.62. We do not enter a decree in this court in favor of appellee and against the appellant Antoinette Bond in accordance with the above opinion for the reason that the title to land is herein involved, and that portion of the decree is reversed. Where the decree of the lower court involving title to land is reversed, this court thereupon remands the cause to the lower court, with directions to enter a decree in that court in accordance with the order and opinion of this court. In the McDonald branch of this case the lower court entered a decree in favor of the appellee for the land, and that much of that portion of the decree we have affirmed. We have only modified in that branch of the case the amount of the damages that appellee should recover. Therefore that portion of the decree can be modified, and, as modified, affirmed.

KING v. BYRNE et al.

(Supreme Court of Arkansas. Oct. 25, 1909.)

1. DESCENT AND DISTRIBUTION (§ 47*)—PERSONS ENTITLED—CHILD OMITTED FROM WILL. Under Kirby's Dig. § 8020, providing that, where testator in his will omits to mention the

name of a child or the legal representatives of such child living at the time of the execution of the will, he shall so far as regards such child be deemed to have died intestate, and it shall be entitled to such proportion of the estate as if testator died intestate, the great granddaughter of testator cannot recover where she was not living when the will was made.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 126-130; Dec. Dig. § 47.*]

2. DESCENT AND DISTRIBUTION (§ 47*)—PERSONS ENTITLED—OPERATION OF WILL.

Under such statute, the great granddaughter could not recover if her mother was living when the will was made; the grandchildren being mentioned by class in the will.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 126-130; Dec. Dig. § 47.*]

3. DESCENT AND DISTRIBUTION (§ 71*)—ESTABLISHMENT OF RIGHT TO SHARE—CHILDREN OMITTED FROM WILL.

The burden is on one claiming under Kirby's Dig. § 8020, relating to children omitted from will, to show his right to recover.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 233; Dec. Dig. § 71.*]

Appeal from Lafayette Chancery Court; E. O. Mahoney, Chancellor.

Suit by Blanche King against L. A. Byrne and others. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

D. L. King, for appellant. L. A. Byrnes, for appellees.

BATTLE, J. This suit was brought by Blanche King in the Lafayette chancery court against Lawrence A. Byrne, C. L. Byrne, J. V. Brame, and Henry Moore for the recovery of lands. She alleged in her complaint that Alexander Byrne died seised and possessed of personal and real property and left a last will and testament, and thereby devised and bequeathed to his wife, Frances Byrne, all his property for and during her natural life and one-fifth of his estate remaining at the death of Frances Byrne to his granddaughter, Irene Lewis, who died leaving the plaintiff, Blanche King, her only child and heir surviving; and alleged that Irene Lewis was the granddaughter of Frances Byrne, and that she (Lewis) died leaving plaintiff her only child and heir surviving as before stated; that Frances Byrne made a will on the 4th day of September, 1888, without naming plaintiff or providing for her therein, which was duly probated and admitted to record; and that Frances Byrne died seised and possessed of certain real estate. She did not allege that any of the estate of Alexander Byrne remained after the payment of his lawful debts, or that she (plaintiff) was living at the time Frances Byrne executed her last will and testament. She asked for a decree for one-fifth of the real estate of which Alexander and Frances Byrne severally died seised and possessed.

The defendants answered, and denied that

any of the estate of Alexander Byrne remained after the payment of his lawful debts, and that plaintiff was living at the time Frances Byrne executed her last will and testament.

Upon the final hearing of the cause, the court dismissed plaintiff's complaint for want of equity; and she appealed to this court.

It was not claimed or shown that any of the estate of Alexander Byrne, deceased, remained after the administration of his estate and the payment of his debts. We take that fact as conceded. It is not alleged or shown that plaintiff was living when Frances Byrne made her will. She claims that she is entitled to share in the property of Frances Byrne, deceased, on the theory that she died intestate as to her; Mrs. Byrne not having named or provided for her in the will, which so far as it affects this cause is as follows:

"3d. After all of my funeral expenses and debts have been fully discharged, then all of the remainder of my property, personal and real, moneys, credits, choses in action, of whatever name, nature or description, which may come to my ownership, by bequest, devise or purchase, I hereby bequeath and devise absolutely unto my two sons, Lawrence A. and Cassius L. Byrne, to be shared in by them equally, and to be taken by them absolutely, at my death.

"While I have bequeathed and devised all my property absolutely to my said two sons, it is my wish that they shall, from time to time, contribute, out of my said estate, such sums of money or property, to my grandchildren, as they may require or need, to relieve their wants, leaving my said two sons to use their own discretion, as to the time and manner of such contributions, believing that they will do what is right and equitable in the premises."

The following is the statute upon which appellant bases her claim: "When any person shall make his last will and testament, and omit to mention the name of a child, if living, or the legal representatives of such child born and living at the time of the execution of such will, every such person, so far as regards such child, shall be deemed to have died intestate, and such child shall be entitled to such proportion, share and dividend of the estate, real and personal, of the testator as if he had died intestate," etc. Kirby's Dig. § 8020.

Appellant cannot recover under this statute because it is not shown that she was living at the time the will was made. If her mother, Irene, was living then, she could not recover because the latter was mentioned by class (grandchildren) in the will. *Brown v. Nelms*, 86 Ark. 368, 112 S. W. 373. It is alleged by plaintiff, and not denied by the defendants, that appellant's grandmother, Mary Lewis, born Byrne, the daughter of Alexander and Frances Byrne, is dead,

but it is not alleged or shown when she died.

The burden was upon the plaintiff to show that she was entitled to recover, and she has failed to do so. Decree affirmed.

BURNSIDE v. UNION SAWMILL CO.

(Supreme Court of Arkansas. Oct. 25, 1909.)

1. INJUNCTION (§ 16*)—ADEQUATE REMEDY AT LAW.

An injunction should not be granted where plaintiff has a full, adequate, and complete remedy at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 15; Dec. Dig. § 16.*]

2. INJUNCTION (§ 52*)—REMOVAL OF TIMBER—REMEDY AT LAW.

Plaintiff, who purchased certain standing timber from a grantee of defendant, was not entitled to an injunction restraining defendant from interfering with the cutting and removal of the timber, since plaintiff might sue at law for possession or for damages.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. § 52.*]

3. INJUNCTION (§ 52*)—INSOLVENCY OF DEFENDANT.

The complaint not alleging defendant's insolvency did not show that the mischief sought to be enjoined would be remediless at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 105; Dec. Dig. § 52.*]

4. INJUNCTION (§ 36*)—DISPUTE AS TO RIGHTS.

That the parties placed different constructions on various provisions of a timber deed as to the timber conveyed did not warrant equitable relief, since a court of law could construe the deed as well as a court of equity.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 82-84; Dec. Dig. § 36.*]

Appeal from Union Chancery Court; E. O. Mahoney, Chancellor.

Action for injunction by the Union Sawmill Company against J. W. Burnside. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

R. L. Floyd and N. C. Marsh, for appellant. Gaughan & Sifford, for appellee.

FRAUENTHAL, J. The Union Sawmill Company, who was the plaintiff below, instituted this suit against J. W. Buckner, defendant below, in December, 1908, in the Union chancery court, seeking to enjoin the defendant from in any manner interfering with or preventing the plaintiff or its agents from cutting and removing 100,000 feet of standing pine timber. In its complaint it alleged that in 1906 the defendant had by deed sold to the Geo. W. Miles Timber & Lumber Company the pine timber 12 inches in diameter standing on certain lands, and that the Geo. W. Miles Timber & Lumber Company thereafter sold said timber to plaintiff; that the timber involved in this suit is standing on the above lands inside of an inclosed field containing tracts of cleared land; and that defendant claims that he did not sell the timber in such field, and fur-

ther claims that plaintiff is not entitled to any timber that was less than 12 inches in diameter at the date of the deed, and refuses to permit plaintiff to cut the said timber and remove same. It is further alleged that plaintiff will make profit out of the manufacture of the timber, which, on account of many contingencies, especially a fluctuating market, cannot be ascertained in a suit for damages. The defendant demurred to the complaint upon the grounds that it does not show that plaintiff will suffer irreparable damage, and that it does not allege the insolvency of the defendant; that it is without equity, and does not state a cause of action. The court overruled this demurrer over defendant's objection. Upon a trial of the cause, the court granted the injunction as asked for in the complaint. The defendant has appealed to this court.

Under the allegations of the complaint in this case, the plaintiff had a full, adequate, and complete remedy at law, and in such case an injunction should not be granted. 16 Am. & Eng. Ency. Law (2d Ed.) 352. If the plaintiff became the owner of the property involved in this suit by virtue of a purchase thereof from a grantee of the defendant, and the defendant withheld possession thereof, the plaintiff has the right to sue at law for its possession or for damages. Where there is a failure to deliver or convey property, the value of such property is the measure of the damages sustained; and the right to recover such damages in a suit at law would be a full and complete remedy for the wrongful withholding of such property. 13 Cyc. 168.

The complaint does not allege the insolvency of the defendant, and therefore does not show that the mischief sought to be enjoined would be remediless at law. And there was no evidence tending to show that the defendant was not perfectly solvent. This case is in this particular analogous to those cases where it is sought to enjoin the cutting of timber on land. In those cases, it has been held that, under rights analogous to the rights alleged in the complaint in this case, an injunction would not be granted in the absence of any allegation of the defendant's insolvency. *Ex parte Foster*, 11 Ark. 304; *Myers v. Hawkins*, 67 Ark. 413, 56 S. W. 640; *Western Tie & Timber Co. v. Newport Land Co.*, 75 Ark. 286, 87 S. W. 432; *Haggart v. Chapman*, 77 Ark. 527, 92 S. W. 792.

The fact that the parties place different constructions on the timber deed in regard to its various provisions would not be ground for equitable relief. A court of law can construe the deed equally as well as a court of equity. And there are no other allegations in the complaint sufficient to show that the plaintiff will suffer irreparable injury if an injunction is not granted.

It follows that the lower court erred in overruling the demurrer to the complaint.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The decree of the lower court is reversed, and this cause is remanded, with directions to sustain the demurrer to the complaint with leave to be given to the plaintiff to amend the same, if he is so advised, and to proceed not inconsistent with this opinion.

CAMPBELL v. HYDE.

(Supreme Court of Arkansas. Oct. 25, 1909.)

1. FALSE IMPRISONMENT (§ 7*) — ARREST BY POLICE OFFICER—WARRANT.

Defendant, a police officer, on information from parties, who knew the facts, that plaintiff had violated a peace ordinance, made affidavit before the mayor for a warrant of arrest, charging plaintiff with disturbing the peace. The warrant was issued, and plaintiff was arrested by defendant. *Held* that, the warrant being fair upon its face, the defendant was protected from liability for false imprisonment in serving it; it not being necessary that the warrant should have been in all respects regular. It was sufficient if it appear to have been lawfully issued, and such as he might lawfully serve.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 8-10; Dec. Dig. § 7.*]

2. FALSE IMPRISONMENT (§ 7*)—PROTECTION BY PROCESS—PROCESS—FAIR ON FACE.

A process is fair on its face which proceeds from a court or magistrate, or body having authority by law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it issued without authority.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 8-10; Dec. Dig. § 7.*]

3. FALSE IMPRISONMENT (§ 7*)—MALICIOUSLY—PROBABLE CAUSE—MALICIOUS PROSECUTION.

While a person who procures a warrant may be liable to an action for malicious prosecution if he acts maliciously and without probable cause, he is not liable to an action for false imprisonment.

[Ed. Note.—For other cases, see False Imprisonment, Cent. Dig. §§ 46-50; Dec. Dig. § 7.*]

Appeal from Circuit Court, Jackson County; J. W. Phillips, Special Judge.

Action by J. E. Hyde against W. W. Campbell. Judgment for plaintiff, and defendant appeals. Reversed and dismissed.

Appellee sued appellant for false imprisonment alleging that on or about the 23d day of November, 1907, in the city of Newport, Jackson county, Ark., defendant did forcibly, falsely, maliciously, and against his will arrest without warrant or other legal process, and imprison him and restrained him of his liberties for three days, or thereabout; that by reason of said false arrest and imprisonment maliciously committed by appellant against appellee he suffered great shame, was greatly injured in his good name, reputation, and standing, and otherwise suffered great injury, to his damage in the sum of \$10,000, for which amount he prayed judgment. Appellant filed an answer, in which he denied the allegations of the complaint, and for defense set up the following: That

he was a police officer of the city of Newport, Ark., and as such it was his duty to serve warrants of arrest on persons charged with violating the criminal laws in said city, and with violating the ordinances of said city; that on the 23d day of November, 1907, there was instituted before the mayor of said city a charge against appellee for disturbing the peace by cursing and threatening to fight, and being drunk in Aaron Keedy's hotel, also on the streets of said city, all in said city, and on or about the 20th day of November, 1907; that the mayor of said city issued a warrant of arrest for appellee, and placed the same in the hands of appellant for service; that in pursuance of said warrant, and acting thereunder, appellant went to the place where appellee could be found, and served said warrant on him, after which time they walked together to the mayor's place of holding court; that at said place appellee was turned over to the marshal of the city of Newport, Ark., according to the rules and regulations governing the police department of said city, after which time appellant had nothing further to do with appellee; that the only connection appellant had with said transaction was the serving of said warrant of arrest on appellee; that said warrant was duly and regularly issued before said arrest by said mayor; that appellant did nothing in the premises but what it was his duty to do as an officer; that said warrant was served in a gentlemanly manner; that appellant did not imprison appellee at all, and that all of his acts and doings in relation to said arrest were strictly in pursuance to said warrant and the law, and in due performance of appellant's duties as a peace officer of said city; and that he did not in any manner mistreat appellee, and concluded with a prayer for judgment in his behalf.

Appellee, among other things, testified that on or about the 23d day of November, 1907, appellant arrested him, and took him up the streets of Newport and delivered him to Mr. Baird at the Hose House. He did not carry appellee into the mayor's court then. Appellant never said anything about a warrant when he arrested appellee; said: "You will have to go before the mayor." Appellee's friend put up \$5 for his first appearance. Then appellee got the money back, thinking he could give bond. Carothers, the city marshal and chief of police, then said, "I will go with you wherever you ask me to," and appellee replied, "You will have to go to jail then." Carothers locked appellee up, and in a little while appellee made his bond and was released from custody. Appellee was not shown any warrant by appellant. Appellant, after arresting him, delivered him to Carothers, and Carothers for a short time, while appellee was unable to make the bond, put appellee in jail. The appellant was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

there the morning they took appellee out of the mayor's court and put him in jail. Appellee admitted that appellant was a police officer of the city of Newport at the time he made the arrest. Various ordinances were introduced showing that appellant had authority to arrest persons for violating the city ordinances, and making appellant a conservator of the peace within the city. An ordinance was introduced showing that it was the duty of appellant after making arrests to deliver the persons arrested to the city marshal.

There was testimony on behalf of appellant showing that appellant received information from parties who knew the facts that appellee had violated a peace ordinance of the city of Newport; that appellant upon this information made affidavit before the mayor for a warrant of arrest, charging appellee with disturbing the peace contrary to the ordinances of the city. Thereupon the mayor issued the warrant for the arrest of appellee, and appellant arrested appellee upon this warrant. The appellant, among others, presented the following prayers for instructions: "(5) The defendant was an officer of the city of Newport at the time of the alleged arrest, and as such had full power and authority to make the arrest in question. (6) You are instructed that the mayor had jurisdiction to issue the warrant in question, and further instructed that an officer is fully protected in serving a warrant that is fair on its face. (7) Before you can find for the plaintiff, you must believe and find from the evidence that the defendant arrested the plaintiff without any warrant, and that the defendant imprisoned the plaintiff. (8) The defendant was fully justified in serving the warrant on the plaintiff, if he had such warrant, and this is true although you may believe that the plaintiff may have previously been arrested on a warrant issued by a justice of the peace. (9) If the defendant had a warrant fair on its face, issued by competent authority at the time he arrested the defendant, he was fully justified in making such arrest, and your verdict should be for the defendant." "(12) If the defendant, W. W. Campbell, upon information received from credible persons of such a nature a person would ordinarily believe to be true, made an affidavit charging the offense of disturbing the peace, and if defendant, believing in good faith and without any carelessness on his part that the plaintiff Hyde had committed such offense, and a warrant fair upon its face was thereupon issued by the mayor, then the defendant, W. W. Campbell, would be protected in acting under such warrant as if the affidavit upon which the warrant was issued had been made by some other person in good faith. (13) You are instructed that under the evidence in this case the defendant, W. W. Campbell, was authorized to make the affidavit to procure the issuance of the warrant in question." The above prayers were refused, and appellant

duly objected and excepted to the court's ruling.

The court gave the following: "Gentlemen of the jury, in this case I instruct you under the testimony that you must find a verdict for the plaintiff." "(2) You are instructed that one who causes, instigates, participates in, or sets in motion, a wrong is liable for the damages resulting therefrom, and it is not a justification or excuse that others were likewise connected with the wrong. (3) Your verdict being for the plaintiff, you will assess such damages as will fully compensate plaintiff for his loss of time, for the shame and humiliation sustained by him; for the disgrace and injury to his reputation and standing in the community caused by such arrest and imprisonment, considering all the surrounding circumstances. All these matters should be considered by you in arriving at the amount of damages to which plaintiff is entitled. (4) The plaintiff having been unlawfully arrested by the defendant, you are instructed that he thereby became liable for all damages growing out of such unlawful arrest, whether committed by him or by any other officer, until he was discharged. The damages that the plaintiff is entitled to are just, actual damages." The jury returned a verdict for the plaintiff, appellee, fixing his damages at \$100. Judgment was rendered for that sum, which appellant seeks to reverse by this appeal.

Jeffery & Grant and Campbell & Suits, for appellant.

WOOD, J. (after stating the facts as above). The court erred in instructing the jury to return a verdict in favor of appellee and in the instructions given. The court also erred in refusing appellant's prayer for instructions. This court, in *Trammell v. Russellville et al.*, 34 Ark. 106, 36 Am. Rep. 1, said: "It is established doctrine that process, fair on its face, will protect from liability the officer executing it. It is not meant that it shall in all respects be regular; but that it shall appear to have been lawfully issued, and such as the officer might lawfully serve. That process may be said to be fair on its face which proceeds from a court or magistrate, or body having authority by law to issue process of that nature, and which is legally in form, and on its face contains nothing to notify or fairly apprise the officer that it issued without authority. When such appears to be the process, the officer is protected in making service; he is not concerned with any illegalities that may exist back of it. That the marshal and his deputy were protected from liability by the warrants we think is clear." Judge Caldwell, speaking for the Circuit Court of Appeals, in *Carman v. Emerson*, 71 Fed. 264, 18 C. C. A. 38, announced the following: "The writ was in due form, and served within the territorial jurisdiction of the court in a lawful manner, by an officer authorized by law to serve it. The rule has

long been settled that no imprisonment by virtue of a legal writ in due form, issued by a court of competent jurisdiction, and served in a lawful manner, is false imprisonment. It matters not that upon a presentation of all the facts it appears that the writ was improvidently or wrongfully issued. The existence of such facts does not make the writ void or illegal, or impair its efficacy as a complete defense to an action for false imprisonment brought against the officer serving it, or the party who procured it to be issued and instigated its service. In such cases, if the party procuring the issuance of the writ acts maliciously and without probable cause, he may be liable to an action for malicious prosecution, but he is not liable to an action for false imprisonment."

It follows that upon the undisputed facts of this record the appellant is not liable for false imprisonment. The court erred in so holding, and for the errors indicated the judgment must be reversed, and the cause is dismissed.

JACKSON v. STATE.

(Supreme Court of Arkansas. Oct. 25, 1909.)

1. RAPE (§ 40*)—EVIDENCE—ADMISSIBILITY.

On a trial for rape, the reputation of prosecutrix for unchastity is admissible to show her consent.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 55-59; Dec. Dig. § 40.*]

2. WITNESSES (§ 337*)—IMPEACHMENT.

The credit of prosecutrix as a witness in a trial for rape may be impeached by evidence that her general reputation for truth or immorality renders her unworthy of belief, but not by particular wrongful acts.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1129-1131; Dec. Dig. § 337.*]

3. CRIMINAL LAW (§ 830*)—INSTRUCTIONS—REQUESTS.

Accused requesting an instruction submitting an issue must request a correct instruction or the refusal to give it is not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. § 830.*]

4. RAPE (§ 59*)—EVIDENCE—INSTRUCTIONS.

Where, on a trial for rape, the prosecutrix testified that the rape occurred at night at a place she believed to be remote from human habitation, and that her resistance was overcome through fear, and accused testified that the intercourse was voluntary, the court on proper request must charge that the failure to make an outcry might be considered in connection with the other facts as showing want of resistance.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 97; Dec. Dig. § 59.*]

5. RAPE (§ 59*)—EVIDENCE—INSTRUCTIONS.

Where, on a trial for rape, the state mainly relied on the testimony of prosecutrix, and accused testified that the intercourse was voluntary, that thereafter he took her to a neighbor's house, that she made no complaint, that he subsequently met her, and that her manner to him was friendly, the refusal to charge that the failure to make immediate complaint, and that

she remained friendly for some time, could be considered on the question whether the intercourse was by consent, was erroneous.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 96; Dec. Dig. § 59.*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Sam Jackson was convicted of rape, and he appeals. Reversed and remanded.

H. A. Parker, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

HART, J. Sam Jackson was indicted, tried before a jury, and convicted of the crime of rape in the Monroe circuit court. The case is here on appeal.

Counsel for appellant assigns as error the refusal of the court to give the following instruction: "The court instructs the jury that if they find from the testimony that the victim or prosecutrix is a woman of immoral character that the jury should consider this fact for two purposes: (1) It goes to her credibility as a witness. (2) The jury may consider it upon the question of consent." This instruction was based upon the evidence adduced at the trial tending to show that the prosecutrix was a woman of unchaste character. The instruction was properly refused in the form in which it was presented. Her reputation for chastity may not be put in issue to shake her credit as a witness, but only to show her consent, and so no rape. Her credit as a witness may be impeached by evidence that her general reputation for truth or immorality renders her unworthy of belief, but not by evidence of particular wrongful acts. The reason for admitting evidence concerning her chastity is that a jury might more readily infer assent to the intercourse in an unchaste woman than in a virtuous one. Hence the instruction was not correct in the form in which it was presented. *Maxey v. State*, 66 Ark. 523, 52 S. W. 2; *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14, 12 L. R. A. (N. S.) 1153; 1 Wigmore on Evidence, §§ 199, 200; 3 Rice on Evidence, p. 605. Appellant under the authorities, supra, was entitled to an instruction on the bad reputation of the prosecutrix for chastity as affecting the question of her consent. But it was the duty of appellant to ask a correct instruction. *Mabry v. State*, 80 Ark. 345, 97 S. W. 285; *Allison v. State*, 74 Ark. 454, 86 S. W. 409, and cases cited; *Snyder v. State*, 86 Ark. 456, 111 S. W. 465; *Western Coal & Mining Co. v. Burns*, 84 Ark. 74, 104 S. W. 535.

Counsel for appellant urges upon us a reversal because the court refused to give the following instruction: "The court instructs the jury that it was the duty of Estella Williams, when she thought a rape was about to be committed on her, to make an outcry; and that, if she failed to do so, the jury can consider this fact as showing want of resist-

ance." The court properly refused the instruction in the form in which it was presented. The prosecutrix testified that the rape occurred in the nighttime at a place she believed to be remote from human habitation, and that her resistance was overcome through fear. Appellant testified that the intercourse was voluntary. Hence it cannot be said that it was the duty of the prosecutrix to make an outcry; for this would have invaded the province of the jury in expressing an opinion on the evidence. If a proper instruction on the question had been asked, the court should have told the jury that the failure to make an outcry might be considered by the jury in connection with the other facts and circumstances adduced in evidence as tending to show want of resistance.

Counsel for appellant also complains that the court refused to instruct the jury as follows:

"(7) The court instructs the jury that, if they find from the evidence that Estella Williams failed to make complaint immediately after the alleged commission of said offense, the jury may consider this upon the matter as to whether she gave her consent or not.

"(8) The court instructs the jury that, if they find from the evidence in this case that the defendant and the prosecutrix remained friendly for some time after the alleged outrage, this can be considered whether the sexual intercourse was by consent or not."

These instructions, or one of similar import, should have been given. 23 Am. & Eng. Ency. of Law (2d Ed.) pp. 862, 863, and cases cited. Appellant testified that after he had sexual intercourse with the prosecutrix he carried her to a neighbor's house, and that, after sitting around the fireside for some time, she went to bed without making any complaint; that he met her on two different occasions after this before a charge of rape was preferred against him; and that her manner toward him was friendly and cordial. It is the natural instinct of a woman to complain of an outrage of this kind at the first opportunity, and to have a feeling of aversion against the perpetrator of it. The theory of the state was that she was overcome by fear of appellant. This view was presented to the jury by the court by a proper instruction. Appellant's theory was that his intercourse with the prosecutrix was by her consent. He was entitled to have this view presented to the jury. The state relied mainly upon the testimony of the prosecutrix for a conviction. The testimony of the appellant was in direct conflict with her testimony. Hence the refusal to give the instructions was prejudicial to the appellant. *Hamilton-Brown Shoe Co. v. Choctaw Mercantile Co.*, 80 Ark. 438, 97 S. W. 234; *Little Rock Ry. & Elec. Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97; *Smith v. State*, 50 Ark. 545, 8 S. W. 941;

Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405.

Other assignments of error are pressed for our determination, but, as they relate to matters that will not likely arise upon a new trial of the case, they need not be considered.

For the error in refusing to give instructions Nos. 7 and 8, requested by appellant, the judgment is reversed and the cause remanded for a new trial.

ST. LOUIS, I. M. & S. R. CO. v. McNAMARE.

(Supreme Court of Arkansas. June 28, 1909.)

1. VENUE (§ 63*)—CHANGE OF VENUE—STATUTORY PROVISIONS.

Kirby's Dig. § 7996, provides that a party may obtain a change of venue on a petition stating that he believes that he cannot obtain a fair trial in the county where the action is pending on account of the undue influence of his adversary, etc. The petition shall be verified and supported by the affidavits of at least two credible persons that affiants believe the statements of petitioner are true. Section 7998 provides that on presenting the petition, which may be resisted, the judge may order a change of venue, etc., provided that where plaintiff sues in a county other than that of his residence, or where the occurrence of which he complains took place, unless compelled to do so to get service on defendant, defendant shall have the right to a change of venue on presentation of his petition duly verified. *Held* that, where the conditions contained in the proviso to the latter section exist, defendant is entitled as of right to a change of venue, and his verified petition need not be supported by affidavits.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 109; Dec. Dig. § 65.*]

2. DEATH (§ 47*) — ACTIONS — COMPLAINT — STATUTES.

A complaint, alleging that the death of plaintiff's husband was caused by the negligence of defendant railroad in failing to block its frogs and guard rails as required by law, states a cause of action under Rev. St. Mo. 1899, § 2865 (Ann. St. 1906, p. 1644), giving a right of action for death caused by the wrongful act, neglect, or default of another, and not under section 2864, giving a right of action for death caused by the negligence of the servant operating defendant's instrument of transportation.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 61; Dec. Dig. § 47.*]

3. DEATH (§ 11*) — STATUTES — CREATION OF NEW CAUSE OF ACTION.

Rev. St. Mo. 1899, § 2865 (Ann. St. 1906, p. 1644), giving a right of action for death caused by wrongful act, etc., where the injured person would have been entitled to recover had death not ensued, does not create a new cause of action, but simply transmits one that therefrom existed, and would have ceased to exist on the death of the injured party but for the provisions of the section.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 15; Dec. Dig. § 11.*]

4. DEATH (§ 7*)—STATUTES—CAUSE OF ACTION —NATURE.

Rev. St. Mo. 1899, § 2865 (Ann. St. 1906, p. 1644), giving a right of action for damages for death caused by wrongful act where the injured person would have been entitled to recover had death not ensued, does not inflict a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

penalty by way of punishment, but merely gives compensation for the damages sustained.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 14; Dec. Dig. § 7.*]

5. DEATH (§ 35*)—ACTIONS—JURISDICTION.

An action may be maintained in Arkansas under Rev. St. Mo. 1899, § 2865 (Ann. St. 1906, p. 1644), giving a right of action for damages for death caused by wrongful act; such statute being substantially similar in import and character to the Arkansas statute on the subject.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 50; Dec. Dig. § 35.*]

6. CONSTITUTIONAL LAW (§ 301*)—DUE PROCESS OF LAW—DEPRIVATION OF DEFENSE—CONTRIBUTORY NEGLIGENCE.

Act. Mo. Feb. 28, 1907 (Laws 1907, p. 181), § 1, requires all corporations, etc., operating railroads in the state to maintain the best known appliances to fill or block all switches, frogs, and guard rails on the roads, in all yards, etc., to prevent, as far as possible, the feet of employes or other persons from being caught therein. Section 2 provides that the contributory negligence of any person injured or killed by reason of noncompliance with the act shall not relieve the railroad from liability in an action for damages. *Held*, that the act is within the police power of the state, and is not unconstitutional because depriving a railroad of the defense of contributory negligence, and thereby depriving it of its property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 857; Dec. Dig. § 301.*]

7. COMMERCE (§ 10*)—REGULATION BY STATE—STATUTE.

Since Congress has not required railroads engaged in interstate commerce to fill or block switches, frogs, and guard rails on their roads, Act. Mo. Feb. 28, 1907 (Laws 1907, p. 181), requiring railroads so to do, does not conflict with Act Cong. April 22, 1908 (35 Stat. 65, c. 149), commonly known as the "employer's liability act," whereby Congress assumed jurisdiction over injuries to employes engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 8; Dec. Dig. § 10.*]

McCulloch, C. J., dissenting in part.

Appeal from Circuit Court, Marion County; Brice B. Hudgins, Judge.

Action by Ruth E. McNamare against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

This is an action by Ruth E. McNamare, widow of F. McNamare, against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for alleged negligence in killing her husband while in the employment of said railway company. The material facts upon which the suit is based are as follows: On the 18th day of February, 1908, plaintiff's husband was in the employment of the defendant as a brakeman on one of its freight trains, running from Cotter, Ark., to Crane, Mo. On said date one of the defendant's freight trains upon which her said husband was a brakeman was running north on defendant's railroad at or near Melva, Mo., and the conductor ordered her husband, who was in the rear of said train, to walk over the

cars and notify the engineer to head-in on a switch in the yards at Melva for the purpose of allowing a passenger train to pass. In obedience to the order, McNamare went forward and notified the engineer. The engineer, instead of heading into the switch, went to the other end of it for the purpose of backing into it. It was the duty of McNamare to assist in operating the switch. For that purpose, as the engine approached the switch stand, he jumped off of it. His foot was caught in an unblocked frog on guard rail, and was held so firmly that he could not unloose it so as to get out of the way of the train. The train ran over him, severing his legs from his body, which resulted in his death. In getting off of the engine he jumped on the side next to the switch, instead of on the opposite side, as he was required to do by the rules of the company. There was a jury trial and verdict for the plaintiff in the sum of \$7,500. From the judgment entered on the verdict the defendant has appealed.

E. B. Kinsworthy, S. D. Campbell, and T. T. Dickinson, for appellant. Jones & Seawell and Hamlin & Seawell, for appellee.

HART, J. (after stating the facts as above).

1. Counsel for appellant assign as error the action of the court in refusing to grant it a change of venue. In its petition for a change of venue appellant states: "That it verily believes that it cannot obtain a fair and impartial trial in this, Marion, county, on account of the undue prejudice against the petitioner in said county. It further says the plaintiff is not a resident of Marion county, Ark., but is a resident of the state of Missouri; that her cause of action, if any she has, and the occurrence of which she complains, did not take place in Marion county, Ark., but occurred in the state of Missouri, and plaintiff was not compelled to institute her suit in Marion county in order to get service on the defendant"—and ends with a prayer to grant it an order changing the venue of this case to some other county in the state of Arkansas, against which there was no valid objection, and for all other proper relief.

The facts are that appellee came to Marion county after the suit was brought, a few weeks before the date of the trial, and resided there at the time of the trial. At the time her husband received the injury complained of, they resided at the town of Cotter, in Baxter county, Ark., through which county appellant's line of railroad also extended. The injury complained of occurred in the state of Missouri. The action was not commenced in the county of the plaintiff's residence, nor in the county where the occurrence she complains of took place, and it was not necessary to bring the suit in Marion

county in order to get service on the appellant. Hence, upon presentation of its petition duly verified, appellant was entitled as a matter of right to a change of venue.

We will quote the two sections of our statutes relative to the question: Section 7996 provides: "Any party to a civil action trial by jury may obtain an order for change of venue therein by a motion upon a petition stating that he verily believes that he cannot obtain a fair and impartial trial in said action in the county in which the same is pending on account of the undue influence of his adversary, or of the undue prejudice against the petitioner, or his cause of action, or defense, in such county. The petition shall be signed by the party and verified as pleadings are required to be verified, and shall be supported by affidavits of at least two credible persons to the effect that affiants believe that the statements of the petitioner are true." Section 7998: "Upon presenting the petition, which may be resisted, and notice to such judge, he may make an order for the change of venue in such action if, in his judgment, it be necessary to a fair and impartial trial, to a county to which there is no valid objection, which he concludes is most convenient to the parties and their witnesses; provided, that, in case where the plaintiff shall have instituted suit in a county other than that of his residence, or of the county where the occurrence of which he complains took place, unless compelled to do so in order to get service on the defendant, the defendant shall have the right to a change of venue upon presentation of his petition duly verified."

The language, "upon presenting the petition, which may be resisted," plainly contemplates the petition duly verified and the supporting affidavits. This is so for the reason that it provides for a resistance, which could not be done and which would not be necessary to be done unless a petition for change of venue duly verified and with supporting affidavits as required by the statute had been filed. In short there would be nothing to resist unless the requirements of 7996 had been complied with. The proviso contained in the latter part of section 7998 is a limitation upon the preceding part of the section. Where the conditions contained in the proviso exist, they defeat the operation of the first part of the section. In other words, the proviso conditionally limits the operation of the statute relative to a change of venue. It provides that, when the conditions exist, the change of venue shall be granted as a matter of right upon presentation of the petition duly verified. If the Legislature had intended that the supporting affidavits should accompany the petition as a prerequisite to the granting of a change of venue, it would have used the language "upon presentation of his petition duly verified together with the supporting affidavits"; but the expression of the one excludes the use of the other. In the case of *St. Louis South-*

western Railway Co. v. Furlow, 81 Ark., at page 499, 99 S. W. 690, the court said: "The statute plainly means that if the plaintiff commences an action in a county other than that of his residence, or other than that of the county in which this occurrence of which he complains took place, unless he is compelled to do so in order to get service on the defendant, the latter shall have the right to a change of venue upon presentation of his petition in proper form, duly verified, containing allegations of the statutory grounds of prejudice or undue influence and supported by the affidavits of two credible witnesses." The use of the words, "and supported by the affidavits of two credible witnesses," used by the court, was not necessary to a proper determination of the issue under consideration, and the views we have expressed in the present case are in harmony with the rest of the opinion.

2. Appellee alleges in her complaint that she is entitled to maintain this action under section 2864 of the Revised Statutes of Missouri of 1899 (Ann. St. 1906, p. 1637). Counsel for appellant contend that section 2864 is penal in its character, and that the courts of one jurisdiction will not enforce the penal statutes of another. The allegations of the complaint do not state a cause of action under section 2864, but do state a cause of action under section 2865 of the Revised Statutes of Missouri. The right of action given in section 2864 is for a death caused by the negligence of the servant operating the defendant's instrument of transportation, whether it be a locomotive, car, train of cars, steamboat, its machinery, stagecoach, or other public conveyance, while the right of action given in the two sections next following is for a death caused by the negligence of the defendant, which may mean his own negligence, as, for instance, in furnishing an unsafe vehicle, or it may mean his negligence through his servant in some particular other than the particular specified in section 2864, for which, if the person injured had not died, he would have had a cause of action. *Casey v. Transit Co.*, 205 Mo. 721, 103 S. W. 1146; *Crohn v. Kansas City Home Telephone Co.*, 131 Mo. App. 313, 109 S. W. 1068. The complaint in this case alleges that the death of McNamare was caused by the negligence of appellant in failing to block its frogs and guard rails as required by the act approved February 28, 1907. See Laws Mo. 1907, p. 181. Hence it states a cause of action under section 2865, and not under 2864, of the Missouri Revised Statutes. Section 2865 does not create a new cause of action, but simply transmits one that theretofore existed, and would have ceased to exist upon the death of the injured party but for its provisions. *Strotzman v. St. Louis, Iron M. & Sou. R. Co.*, 211 Mo. 227, 109 S. W. 769. Section 2865, Rev. St. Mo. 1899, is as follows: "Whenever the death of a person shall be caused by a wrongful act, neglect or default

of another, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured."

It will be seen that the recovery permitted by this statute, giving a right of action for death by wrongful act, is not a penalty inflicted by way of punishment, but is merely compensatory for the damages sustained by the widow, to whom under the Missouri statutes the right of action was transmitted on the death of her husband. It is well settled that an action under such statutes may be maintained in another state having a statute substantially similar in import and character, *St. Louis, I. M. & S. R. Co. v. Halst*, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65, and numerous cases cited in note to the case of *Ralsor v. Chicago & Alton Ry. Co.*, on page 806 of 2 Am. & Eng. Ann. Cases. Counsel for appellant urges upon us that the statutes are not substantially similar in their character. As we have already shown, the statute of Missouri under which the suit was brought is similar to ours in that it is not a suit for a penalty, but for damages as compensation; and also that it does not create a new cause of action, but simply provides for the survival of the cause of action where death ensues. There is no objection that the right of action is enforced by the widow as provided by the laws of Missouri instead of by the personal representative for the benefit of the estate; and for the beneficiaries of the deceased, as provided by our statutes. In *Dennick v. Railroad Company*, 103 U. S. 11, 26 L. Ed. 439, the United States Supreme Court said of a similar action: "It is indeed a right dependent solely on the statute of the state; but when the act is done for which the law says the person shall be liable, and the action by which the remedy is to be enforced is a personal and not a real action, and is of that character which the law recognizes as transitory and not local, we cannot see why the defendant may not be liable in any court to whose jurisdiction he can be subjected by personal process or by voluntary appearance, as was the case here. It is difficult to understand how the nature of the remedy, or the jurisdiction of the courts to enforce it, is in any manner dependent on the question whether it is statutory right or a common-law right. Wherever, by either the common law or the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties." To the same effect, see *Boston & M. R. Co. v. McDuffey et al.*, 79 Fed. 934, 25 C. C. A. 247. Therefore

we are of the opinion that under the principles above declared the suit can be maintained in this state.

3. It is next contended that the act approved February 28, 1907 (Laws Mo. 1907, p. 181), is unconstitutional. The act reads as follows:

"Section 1. That all companies or corporations, lessees or other persons owning or operating any railroad or part of railroad in this state, are hereby required, on or before the first day of September, nineteen hundred and seven (1907), to adopt, put in use and maintain the best known appliances or inventions to fill or block all switches, frogs and guard rails on their roads, in all yards, divisional and terminal stations, and where trains are made up, to prevent, as far as possible, the feet of employes or other persons from being caught therein. Any company or corporation, lessees or other person, owning or operating any railroad, or part of a railroad in this state, who shall fail to do any act or thing in this section required to be done, or shall cause any act or thing not to be done, or shall aid or abet any such omission, shall be deemed guilty of a violation of this law, and shall forfeit and pay the sum of ten dollars (\$10.00) for every such offense, and each day shall constitute a separate and distinct offense. At every term of a court of record of this state having criminal jurisdiction, the judge thereof shall direct and charge grand juries to make special inquiry as to violation of this law.

"Sec. 2. When any employé or other person shall be injured, maimed or killed, by reason of the noncompliance with the provisions of this act then in any action for damages which may be instituted against any railroad company, corporation or lessee for such injuring, maiming or killing, proof of contributory negligence or carelessness on the part of any employé or other person so injured, maimed or killed, shall not relieve such railroad company (corporation) or lessee from liability."

Counsel first urged that the act is unconstitutional because it takes away the defense of contributory negligence from the railroad company and thereby deprives it of its property without due process of law. The rule on that subject as laid down by Mr. Elliott is as follows: "There are many modern statutes requiring the performance of specified acts and denouncing a penalty against persons who fail or refuse to perform the designated acts. In some of the books it is suggested that the doctrine of contributory negligence does not apply where the injury is caused by a violation of the statute. The overwhelming weight of authority is, however, that the doctrine does apply, unless the statute abrogates the rule of the common law. Principle and authority, as we believe, require the conclusion that, although the violation of a statute may give a right of action to one who is injured thereby, it does

not, unless expressly or by necessary implication so declared, give a right of action to one who is himself guilty of contributory negligence." *Elliott on Railroads*, vol. 3, § 1315. See, also, *Labatt, Master & Servant*, vol. 2, §§ 951, 952; *Quackenbush, Adm'r, et al. v. Wis. & Minn. R. Co.*, 62 Wis. 411, 22 N. W. 519. Here the act expressly deprives the railway company of the defense of contributory negligence. The policy of the law on which the defense is excluded is that it is in the nature of a penalty for the neglect of the railroad company to comply with a regulation of the Legislature deemed necessary for the lives of its employes. We are of the opinion that such acts fall within the police power of the state, and are within the scope of legislative authority.

Again it is urged by counsel for appellant that Congress by act of April 22, 1908 (35 Stat. 65, c. 149), has assumed jurisdiction over injuries to employes engaged in interstate commerce, and that such jurisdiction is exclusive. In the case of *Chicago, Rock Island & Pacific R. Co. v. State*, 86 Ark. 412, 111 S. W. 456, this court held that the Arkansas statute requiring railroad companies to equip certain freight trains with at least three brakemen, in so far as it relates to interstate commerce, is not in conflict with any act of Congress on that subject, and is valid until Congress legislates on the same subject. The court, speaking through Chief Justice Hill, said: "There is no direct interference with the legislation of Congress relied upon by the act in question. Each may stand. Each covers its own field, and there is no apparent ground of conflict possible in the operation of the two acts, for they do not reach the precise subject-matter." So, in the present case, it may be said that Congress has not required railroad companies engaged in interstate commerce to fill or block all switches, frogs, and guard rails on their roads or in their yards, and there is no conflict therefore between the act now under consideration and the act of Congress of April 22, 1908, commonly known as the "employer's liability act."

4. Counsel for appellant also contend that the court erred in submitting to the jury the question of whether the place where McNamare received the injuries which resulted in his death was a yard on appellant's line of railroad, and urges that the court should have declared as a matter of law, under the evidence adduced, that such place was not a "yard" within the meaning of the act of Missouri of February 28, 1907, above quoted. The case seems to have been tried on the theory that the act does not contemplate that all switches, frogs, and guard rails on the road shall be filled or blocked, but that only such as are in yards, divisional and terminal stations, and where trains are made up fall within the provisions of the act. Inasmuch as the question of filling or blocking frogs, switches, and guard rails on all parts of the

road may arise on a new trial of the case, and for the reason that neither the Supreme nor appellate courts of the state of Missouri have to our knowledge construed the act, we will refrain from considering this assignment of error.

5. Other assignments of error are urged upon us for our consideration; but they are upon questions of evidence and on the improper remarks of counsel in their argument to the jury, and they need not arise on a retrial of the case. Hence we will not now consider them.

For the error in not granting appellant a change of venue as indicated in the opinion, the judgment will be reversed, and the cause remanded for a new trial.

MCULLOCH, C. J. I concur in the judgment of reversal, because I think the trial court erred in hearing evidence as to the existence of the grounds for change of venue set forth in the petition, and in overruling the petition; but I do not concur in that part of the opinion which holds that "where the plaintiff shall have instituted suit in a county other than that of his residence, or of the county where the occurrence of which he complains took place, unless compelled to do so in order to get service on the defendant," the change may be granted on presentation of a verified petition without supporting affidavits. I think the statute means that under such circumstances the petition must be verified, and must also be supported by the affidavits of at least two credible persons, as provided in section 7996 of Kirby's Digest, but that the grounds of the petition cannot be inquired into. This was what we stated in *St. L. S. W. Ry. Co. v. Furlow*, 81 Ark. 496, 99 S. W. 689, to be the proper construction of the statute. Section 7996 of Kirby's Digest provides in general terms what a party shall do in order to obtain a change of venue, and it requires the supporting affidavits of at least two credible persons. Section 7381 of Sandels & Hill's Digest, which was amended by the act of April 13, 1899, reads as follows: "Upon presenting the petition and notice to such judge, he shall make an order for the change of the venue in such action to a county to which there is no valid objection, which, in his judgment, is most convenient to the parties and their witnesses."

Now the only change wrought in the law by the act of 1899 is to allow the grounds stated in the petition to be inquired into by the court, except in cases where the plaintiff improperly institutes the action in a county other than that of his residence or where the injury complained of occurred; and it is clear to me that the Legislature did not intend to change the form or substance of the petition, or to relieve the petitioner from the necessity of presenting supporting affidavits to his petition in order to show the good faith of his allegations that he "verily believes that he cannot obtain a fair and impartial trial

of said action in the county in which the same is pending." My opinion is that the Legislature only intended to make the petition and the supporting affidavits of credible persons conclusive as to the existence of grounds for a change of venue, where the plaintiff has instituted an action in the wrong county, the same as the law stood as to all actions before the passage of the act. The language of the act of 1899 fully bears out my construction. It begins with a declaration that "upon presentation of the petition, which may be resisted," etc., the court or judge shall make the order for a change if in his judgment it be necessary to obtain a fair trial. What is meant by the word "petition" as thus used? Surely not a bare petition, without supporting affidavits, for section 7996, which is neither amended nor repealed, expressly provides that the petition must be accompanied by supporting affidavits. Now, if the Legislature used the words "presentation of the petition" in the beginning of this section without intending to dispense with the necessity for supporting affidavits, then it is reasonable to suppose that there was no intention, in using the words "presentation of the petition duly verified" in the concluding part of the section, to dispense with the requirement for supporting affidavits.

I think that in actions instituted in a county other than that of the plaintiff's residence, and other than the county where the injury complained of occurred, unless compelled to do so in order to get service of summons, the act of 1899 made no change in the requirements at all, and in such cases the defendant must still, as before, present a petition duly verified by affidavit, and supported by the affidavits of at least two credible persons. The inquiry of the court is then limited to the ascertainment whether or not the supporting affiants are credible persons, and, if they are found to be such, the change of venue must be granted as a matter of course.

WESTERN UNION TELEGRAPH CO. v. ASKEW.

(Supreme Court of Arkansas. Oct. 25, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 67*) — COMMERCIAL MESSAGES—NOTICES.

Where a message on its face showed that it related to a commercial business transaction between the sender and addressee, of value to each, the telegraph company had notice of any actual damage that might result from its negligence in failing to transmit it properly.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 65; Dec. Dig. § 67.*]

2. TELEGRAPHS AND TELEPHONES (§ 70*) — TRANSMISSION OF MESSAGE — MISTAKES — LOSS OF SALE—DAMAGES.

Plaintiff having been offered two cars of hay delivered at T., at \$15 a ton, while the offer was still open wired his acceptance by an open message in which plaintiff's name was transmitted as "G. H. Arnold," instead of "J.

H. Askew." By reason of this mistake, the seller failed to ship the hay and on plaintiff learning of its nonarrival more than a month thereafter when the price had materially advanced, he purchased other hay in the open market at the advanced price. Held that the measure of plaintiff's damages against the telegraph company for the error was the difference between the price of the hay purchased, and the value thereof at the time it should have been delivered.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 72, 73; Dec. Dig. § 70.*]

Appeal from Circuit Court, Columbia County; G. W. Hays, Judge.

Action by J. H. Askew against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff, appellee, was conducting a general mercantile establishment at Waldo, Ark., when on or about the 1st day of October, 1906, he received by letter from the Roswell Trading Company of Roswell, N. M., an offer to ship him two cars of choice alfalfa hay at \$15 a ton, delivered at Texarkana. This offer was still open and unrevoked on the 3d day of October, 1906, when during the regular hours for receiving messages the plaintiff delivered to the agent of the appellant company at Waldo, Ark., a message accepting the offer. The message was signed "J. H. Askew." It was transmitted as if signed by G. H. Arnold, instead of J. H. Askew, the sender. Relying on the accuracy and promptness of the telegram, the plaintiff, appellee, waited for notice of the arrival of the hay at Texarkana until November 6, 1906, the time when the hay ought to have been at Texarkana. His first information of the error was in reply to his letter of inquiry as to why the hay had not been delivered. In the meantime the price of this grade of hay had advanced materially and the appellee seeks to recover damages for the failure to properly and promptly transmit the message of acceptance as measured by the difference between the offered price and the market price of the same grade of hay on the day on which the error was first discovered. In addition plaintiff's complaint prayed for damages suffered by the loss of anticipated profits in the sale of this hay in the regular course of business. The proof did not sustain this allegation. The court below expressly found against prospective damages. The plaintiff does not appeal from the judgment of the court, and abandons this portion of the complaint. The case was submitted to the court sitting as a jury, which found that the plaintiff suffered no damage by a loss of anticipated profits, but that he suffered actual damages to the amount of \$66, for which judgment was rendered.

Geo. H. Fearons, Rose, Hemingway, Cantrell & Loughborough and Todd & Hurley, for appellant. W. H. Askew, for appellee.

WOOD, J. (after stating the facts as above). The judgment of the court eliminated all claim for damages by reason of the loss of anticipated profits set up in the complaint. The message "Roswell Trading Company, Roswell, N. M., ship two cars choice alfalfa fifteen dollars, delivered at Texarkana, J. H. Askew," on its face showed that it related to a commercial business transaction between the sender and sendee of importance and value to each. Where such is the case, the telegraph company has notice of any direct or actual damages that may result from its negligence in failing to transmit the message promptly, and is liable therefor. *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Postal Tel. Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 19 Am. St. Rep. 55; *W. U. Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Tel. Co. v. Hyer Bros.*, 22 Fla. 637, 1 South. 129, 1 Am. St. Rep. 222, 228. Cases are cited giving examples of messages calling for application of the above rule in *Postal Tel. Co. v. Lathrop*, *supra*. The measure of damages in such cases is the difference between the price that the sender of the message agreed to pay for the merchandise had the telegram been seasonably delivered and the sum which he would have been compelled to pay at the same place, in order, by the use of due diligence after notice of the failure of the telegram, to have purchased the like quantity and quality of the same species of merchandise. *Squire v. West, Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 161; *True v. International Tel. Co.*, *supra*, and cases there cited.

Without discussing the evidence in detail, it suffices to say that it warranted a finding by the court that the Roswell Trading Company made appellee an offer to sell two cars of choice alfalfa hay on October 3, 1906, which offer appellee duly accepted on that day by his telegram delivered to appellant for transmission; that by appellant's failure to transmit the telegram appellee lost the bargain and the benefit of the contract with the Roswell Trading Company, which the prompt delivery of his telegram would have closed and secured to him; that appellee, by the course of trade and prior dealings between himself and the Roswell Trading Company, could not be charged with negligence in having failed to discover the mistake of the Telegraph Company before November 12, 1906, the day when he discovered the error; that on November 12, 1906, the price of alfalfa hay was \$18 per ton, or \$3 more than appellee would have had to pay for the hay delivered at Texarkana on the day the contract (except for the negligence of appellant) would have been closed. Appellee began buying hay as soon as he discovered that his telegram had not been correctly transmitted, but did not remember what it had cost him delivered. It thus appears that through appellant's negligence ap-

pellee, as we have stated, lost the contract that he would have made with the Roswell Trading Company on October 3, 1906, and the measure of damages is as above announced. This rule for the measure of damages in such cases is recognized in *Telegraph Co. v. Hall*, 124 U. S. 444, 8 Sup. Ct. 577, 31 L. Ed. 479. The rule has its analogy in cases where there is a breach of contract on the part of the vendor in not delivering goods according to his contract of sale. The rule in such cases is: "That where the vendor is in default for not delivering goods or chattels in pursuance of the contract of sale, and no money has been advanced by the vendee, the true measure of damages is the difference between the contract price and the value at the time the article should have been delivered; and the reason of the rule is conclusive, to wit, that such damages, added to the contract price which the vendee has not parted with, will enable him to buy the article in the market." *Dey v. Dox*, 9 Wend. (N. Y.) 127, 24 Am. Dec. 137. See, also, *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, and other cases cited in appellee's brief.

There is nothing in *Telegraph Co. v. Feller*, 58 Ark. 29, 22 S. W. 917, 41 Am. St. Rep. 81, *Brewster v. Tel. Co.*, 65 Ark. 539, 47 S. W. 560, and *Telegraph Co. v. Love Banks*, 73 Ark. 205, 83 S. W. 949, in conflict with the rule above announced as to the measure of damages. In those cases the facts were different from the facts of the case at bar, and the rule for the measure of damages therein announced was the correct one for the facts of those cases. But the cases show that upon a state of facts parallel to those at bar the rule would be as we have stated in this case. In *Western Union Tel. Co. v. Love Banks*, *supra*, it is held, quoting syllabus: "The measure of damages for the negligent failure of a telegraph company to deliver a message offering a price for a commodity held for sale is the difference between such price and the sum for which the commodity could have been sold for at the time the message should have been delivered." In *Brewster v. Western Union Tel. Co.*, *supra*, at page 540 of 65 Ark., page 561 of 47 S. W., Judge Riddick, speaking for the court, says: "The law requires that a party should exercise due diligence to avoid injury to himself, and the measure of damages in such a case is the difference between the contract price of the cattle and that which plaintiffs would have been compelled to pay at the same place in order, by due diligence after delivery of the telegram or notice of the failure to deliver it, to purchase the same number and grade of cattle." Although appellee designated the damages which he sustained as the "loss of profits," and sued for the "loss of said profits," yet his complaint sets forth the facts, and among other allegations are these that: "Said Roswell Trading Company would have filled said order if said telegram had been properly transmit-

ted, and delivered to said Roswell Trading Company." The market price of choice alfalfa hay at Roswell, N. M., on November 15, 1906, was \$20 per ton, delivered at Texarkana. The prayer is for damages in the sum of \$175 and for "other proper relief." Under all the allegations of the complaint, and the proof taken without objection, we are of the opinion that the judgment of the court in favor of appellee for actual damages in the sum of \$66 is not "without the issue."

The judgment is therefore affirmed.

BAKER v. NANNY, Sheriff.

(Supreme Court of Arkansas. Oct. 25, 1909.)

ANIMALS (§ 44*)—MALICIOUS KILLING AND WOUNDING—JUDGMENT—PAYMENT—COUNTY WARRANTS.

Kirby's Dig. §§ 1892, 1893, provides that any person who shall willfully, etc., kill or wound any animal of another with or without malice toward the owner which it is made larceny to steal, shall on conviction be fined or imprisoned, and shall be liable for damages to the owner, and the court shall render judgment for the party threefold the amount of damages assessed. *Held*, that the amount so assessed for the benefit of the owner was not payable to the county, under the statute providing that certain fines, penalties, and forfeitures imposed by the court, shall be paid into the county treasury for county purposes, and hence a judgment for damages so rendered was not payable to the sheriff in county warrants.

[Ed. Note.—For other cases, see *Animals*, Dec. Dig. § 44.*]

Appeal from Circuit Court, Marion County; Brice B. Hudgins, Judge.

Mandamus on relation of E. C. Baker to compel John Nanny, as Sheriff of Marion County, to accept county warrants in payment of a judgment for damages assessed against relator for the malicious killing and wounding of certain mules. From a judgment denying the relief asked, relator appeals. Affirmed.

W. S. Chastain, for appellant. S. W. Woods, for appellee.

BATTLE, J. E. C. Baker was convicted in the Marion circuit court of malicious mischief, committed by killing one mule and wounding another, the property of J. F. Dudley, and was fined \$50, and judgment was rendered for that amount and costs of prosecution in favor of the state of Arkansas, and in the same prosecution upon the same conviction the damages of Dudley was assessed, and judgment was rendered against the defendant in favor of Dudley for \$180 damages to the mules. Execution was issued upon the judgment in favor of Dudley and placed in the hands of John Nanny, the sheriff. The defendant tendered him (sheriff) the warrants of the county of Marion in payment of the amount due for damages, and be refused to accept them. He (Baker) there-

upon applied to the Marion circuit court for a writ of mandamus to compel the sheriff to accept, and the court refused to grant it, and he appealed.

The judgment rendered against Baker for damages in the prosecution for malicious mischief was based upon the following statutes, which, so far as applicable, are as follows: "If any person shall willfully, maliciously or wantonly, by any means, whatsoever, kill, maim or wound any animal of another with or without malice toward the owner of the animal, which it is made larceny to steal, he shall on conviction be punished by a fine of not less than twenty nor more than one hundred dollars, or by imprisonment in the county jail for a period not less than ten nor more than sixty days, or by both such fine and imprisonment, and shall, moreover, be liable to damages to the owner of the animal so killed, maimed or wounded, as in the preceding section provided"—which is as follows: "And the jury who shall try such case shall assess the amount of damages if any actual damages has occurred, * * * and the court shall render judgment in favor of the party for threefold the amount so assessed by the jury." Kirby's Dig. §§ 1892, 1893.

Under these statutes the judgment for the damages to the animal killed or wounded is rendered in favor of the owner. It is for compensation to the owner as well as punishment to the accused. The judgment is not due and payable to the county, and is not to be paid as a fine into the county treasury for the benefit of the county; the statute upon that subject providing: "All fines, penalties and forfeitures imposed by any court or board of officers whatsoever, except those imposed by mayors or police courts in any city or town, shall be paid into the county treasury for county purposes." Hence as the judgment in favor of the owner is not payable into the county treasury, and is not a debt due the county, and is intended as compensation for damages suffered by the owner, it is not payable in county warrants. We cannot see upon what principle it is so payable; there being no statute requiring it.

Judgment affirmed.

BLUM v. PULASKI COUNTY.

(Supreme Court of Arkansas. Oct. 25, 1909.)

APPEAL AND ERROR (§ 70*)—INTERLOCUTORY JUDGMENT—REVIVAL—DISMISSAL OF APPEAL.

An order of revival, under Kirby's Dig. §§ 6312, 6313, 6315, providing for the revival of actions within a specified time, is not appealable and is reviewable only on appeal from final judgment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 367-385; Dec. Dig. § 70.*]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action on behalf of Pulaski County against R. A. Furth and another, revived after the death of Furth in the name of Sam Blum, his executor. From the order of revival, Blum appeals. On motion to dismiss. Granted.

J. W. House and Rose, Hemingway, Cantrell & Loughborough, for appellant. Jones & Hamiter and Carmichael, Brooks & Powers, for appellee.

PER CURIAM. An action was instituted on behalf of the county of Pulaski in the chancery court of that county against R. A. Furth and another. Furth died during the pendency of the action, and appellant, Blum, qualified as executor. On motion of appellee the chancery court entered an order reviving the cause as to the estate of Furth in the name of appellant as executor, and he took an appeal to this court. He contends that the order of revivor was entered after the time within which the statute authorizes the same, and that the court erred in so doing. Appellee now moves the court to dismiss the appeal on the ground that the order of revivor was not final, the action being still pending, and that the appeal is premature.

The statutes relating to the subject are as follows:

"Sec. 6312. An order to revive an action against the personal representatives of a defendant, or against him and the heirs or devisees of the defendant, cannot be made, unless by consent, until after six months from the qualification of the personal representatives.

"Sec. 6313. An order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor, unless in one year from the time it could have been first made. * * *

"Sec. 6315. When it appears to the court by affidavit that either party to an action has been dead, or, where he sues or is sued as a personal representative, that his powers have ceased for a period so long that the action cannot be revived in the names of his representatives or successor without the consent of both parties, it shall order the action to be stricken from the docket." Kirby's Dig.

The court is of the opinion that the order is not final in the sense that it concludes the rights of the parties to the action, and that the appeal in this case is premature. The order does not end the action, even if it be erroneous, for the action is still pending. The error of reviving the action, if error it be, is like any other erroneous ruling of the court, to be reviewed on appeal from the final decree in the cause. In *Ayres v. Anderson-Tully Co.* (Ark.) 116 S. W. 199, we held that an order of court vacating a judgment ren-

dered at a former term of the court was a final one and was appealable; this upon the ground that it concluded the rights of the parties in the former judgment which had become final at the lapse of the term, and that the party in whose favor it was rendered had the right to appeal from the subsequent judgment and order disturbing his rights therein. A different question is presented in this case, for here no judgment has ever been rendered which finally concludes the rights of the parties. The action is still pending, and any error committed by the court during the progress of the proceedings may be corrected on appeal, taken when the final decree is entered.

So the appeal is dismissed.

CAMPBELL et al. v. SAMPLES.

(Supreme Court of Arkansas. Oct. 25, 1909.)

1. STATUTES (§ 161*)—REPEAL BY IMPLICATION.

Where the later of two statutes covers the whole subject-matter of the former, and is evidently intended as a substitute, it will be held to repeal such prior act, though there be no express words to that effect and the old act contains provisions not in the new.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.*]

2. ELECTIONS (§ 311*)—PUNISHMENT OF ELECTION OFFICERS—STATUTES—REPEAL.

Act March 4, 1891 (Laws 1891, p. 32), relating to elections, provides, in section 33, that every public officer who shall willfully neglect to perform any duty imposed on him by the act, or do anything forbidden thereby, shall be deemed guilty of a misdemeanor, punishable by removal from office, or fine or imprisonment, or both. Section 43 provides that any election officer who willfully makes a false count of ballots, or falsely certifies the returns of any election, or steals or destroys any ballot, tally sheet, box, etc., shall be deemed guilty of a felony, punishable by imprisonment, etc. Section 44 provides that any violation of this act by any election officer, etc., for which no punishment is elsewhere specifically prescribed shall be deemed guilty of a misdemeanor and punishable as in this act provided for misdemeanor. *Held*, that the act repeals by implication Kirby's Dig. § 1667 (being section 21 of the general election law of January 23, 1875 [Laws 1874-75, p. 97]), providing for the punishment of election officers who neglect to perform any of their duties or are guilty of corruption or misbehavior in any matter appertaining to such election, etc.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 336; Dec. Dig. § 311.*]

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Separate actions by Ben Samples against C. J. Campbell and against Jack Moore. The cases were consolidated, and judgment was rendered for plaintiff, and defendants appeal. Reversed, and actions dismissed.

Sam R. Chew, for appellants. C. A. Starbird, for appellee.

McCULLOCH, C. J. Plaintiff, Ben Samples, who claimed to be a citizen and qualified

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

elector of a certain township in Crawford county, Ark., instituted separate actions in the circuit court of that county against the defendants, C. J. Campbell and Jack Moore, who were judges of election at the general election held on September 14, 1908, to recover the penalty of \$200 prescribed by the following statute: "If any judge or clerk of any election, or any other person concerned in the conducting of any election, shall neglect, improperly delay or refuse to perform any of the duties required by law, having undertaken to do so, or shall be guilty of corruption, partiality or manifest misbehavior in any matter or thing appertaining to such election, or shall unduly attempt to influence the election, he shall forfeit and pay the sum of two hundred dollars, to be recovered by indictment, or by action of debt, in the name of any person who may sue for the same." Section 1667, Kirby's Dig. This statute is a section of the general election law enacted January 23, 1875, entitled "An act providing a general election law" (Laws 1874-75, p. 97, § 21). The General Assembly enacted another election law which was approved on March 4, 1891, and was entitled "An act to regulate elections in the state of Arkansas" (Acts 1891, p. 32). It provides, as the title of the act implies, a method of conducting elections, and contains the following sections prescribing penalties:

"Sec. 38. Every public officer, upon whom any duty is imposed by this act, who shall willfully neglect or omit to perform such duty, or who shall do any thing which is by this act forbidden, other than the things specifically enumerated in sections 37 and 43 hereof, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by removal from office, and imprisonment in the county jail not less than six months nor more than twelve months, or by a fine of not less than one hundred dollars nor more than five hundred dollars, or by both such fine and imprisonment."

"Sec. 43. Any election officer or other person whomsoever who shall willfully make a false count of any election ballots, or falsely or fraudulently certify the returns of any election, or steal, destroy, secrete or otherwise make way with any election ballot, tally sheet, certificate or ballot box, either before or after the closing of the polls, shall be deemed guilty of a felony, and on conviction thereof, punished by imprisonment at hard labor in the penitentiary not less than two years nor more than seven years."

"Sec. 44. Any violation of this act by any election officer, or other person whomsoever, except a state or county officer, for which no punishment is elsewhere specifically prescribed in this act, shall be deemed guilty of a misdemeanor, and punishable as in this act provided for misdemeanors."

The two cases were consolidated, and the

trial resulted in favor of plaintiff against the defendants for a recovery of the penalties sued for. On appeal to this court, the contention of the defendants is that the above-quoted sections of the act of March 4, 1891, repealed by implication section 1667 quoted above and taken from the act of January 23, 1875.

The case of *Brown v. Haselman*, 79 Ark. 213, 95 S. W. 136, was a suit brought against the officers of a school election to recover the penalty under section 1667. The argument was made there, as in this case, that the statute had been repealed by the later enactment. We considered it unnecessary then to pass upon the question, as we held that that section did not apply to school elections. We are convinced, however, that the judgment in that case should have been affirmed, not only on the grounds stated in the opinion, but also on the further ground that the statute had been impliedly repealed by the act of March 4, 1891. Now that the question is squarely presented, we so hold. This court has a number of times decided that, while repeals by implication are not favored, still "where the later of two statutes covers the whole subject-matter of the former, and it is evident that the Legislature intends it as a substitute, the prior act will be held to have been repealed thereby, although there may be no express words to that effect, and there be in the old act provisions not in the new." *St. L. & S. F. R. Co. v. Bowman*, 76 Ark. 32, 88 S. W. 1033, and cases cited. Now, applying this rule to the question presented, it is evident that the sections quoted above from the act of March 4, 1891, cover fully the ground covered by section 1667, Kirby's Dig., and it is not reasonable to presume that the Legislature intended to leave that act in force. We do not mean to hold that the act of 1891 repeals all the provisions of the act of January 23, 1875, on the subject of general elections. The later act contains no express repeal; but, on the contrary, it expressly leaves in force some of the provisions of the old law. We have no doubt, however, that the section upon which this act is based was repealed.

The judgments rendered against the two defendants are therefore reversed, and the two actions against them are dismissed.

MANEY v. BURKE.

(Supreme Court of Arkansas. Oct. 25, 1909.)

1. TAXATION (§ 770*)—LAND COMMISSIONER'S DEED—CONSTRUCTION—LAND CONVEYED.

C. purchased an undivided one-half of the S. W. $\frac{1}{4}$ of section 29, at judicial sale, which was confirmed at November term, 1889. July 10, 1897, C. conveyed the lands to plaintiff. An undivided half of the same section was sold to the state January 29, 1883, under a decree in overdue tax proceedings. An undivided half of

the same section was sold, at delinquent tax sale, April 14, 1884, to the state for the nonpayment of the taxes for 1883. October 14, 1889, the Commissioner of State Lands executed to defendant a deed for lands, describing them as the undivided one-half of the S. W. $\frac{1}{4}$ of section 29, forfeited in 1883, and the undivided one-half of the S. W. $\frac{1}{4}$ of section 29 sold to the state at overdue tax sale January 29, 1883. The tax records for 1883 show that the whole of the S. W. $\frac{1}{4}$ of section 29 was assessed in the name of J., and in the margin where is usually marked "Paid" was marked "Und. $\frac{1}{2}$." The tax books for 1886 to 1890 show an undivided one-half paid on by J. and one-half left to the state. *Held*, that the deed of the commissioner conveyed the whole of the S. W. $\frac{1}{4}$ of section 29 to defendant; the description of an undivided one-half as forfeited for the nonpayment of taxes for 1883, and an undivided one-half as sold to the state under overdue tax proceedings for a different year, showing that the whole of the S. W. $\frac{1}{4}$ of section 29, and not a half, was intended to be conveyed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1545, 1672; Dec. Dig. § 776.*]

2. TAXATION (§ 789*)—LAND COMMISSIONER'S DEED—EVIDENCE OF TITLE.

A deed from the Commissioner of State Lands is prima facie evidence of title in the grantee.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1536; Dec. Dig. § 789.*]

3. EJECTMENT (§ 86*)—STRENGTH OF DEFENDANT'S TITLE.

Where defendant in ejectment shows prima facie title, plaintiff must overcome such title and show title in himself, as he can only rely on his own title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 244; Dec. Dig. § 86.*]

4. LEEVES (§ 27*)—LEEVE TAXES—FORECLOSURE—NATURE OF PROCEEDING.

A foreclosure proceeding to enforce a lien for unpaid levee taxes is not a proceeding in rem against the land, but is an adversary proceeding against the owners, to recover the levee taxes, and, in default of their payment, to have a lien therefor declared upon the land.

[Ed. Note.—For other cases, see Levees, Cent. Dig. § 25; Dec. Dig. § 27.*]

5. EJECTMENT (§ 95*)—TAXATION IN NAME OF PERSON NOT OWNER—OWNERSHIP.

Proof that land was assessed for taxes in the name of one person, and the taxes paid by him, is not sufficient to establish ownership in him so as to sustain a recovery of the land against the holder of a prima facie title in possession, since taxes for general purposes are a charge upon the land, and are not infrequently assessed in the name of one not the owner and paid by him.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 287; Dec. Dig. § 95.*]

Appeal from Circuit Court, Phillips County; Hance N. Hutton, Judge.

Action by R. C. Burke against Luke Maney. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

R. W. Nichols and W. G. Dinning, for appellant. Bevins & Mundt and J. H. Stevenson, for appellee.

HART, J. Luke Maney is in possession of a certain tract of land in Phillips county, Ark., under a deed from the State Land Com-

missioner for the nonpayment of taxes. His deed is dated October 14, 1889. He has been in possession of the land since his deed was executed, and has cleared a part of it, and placed valuable improvements on it. R. C. Burke brought suit in ejectment against him in the Phillips circuit court to recover the land. The suit was commenced October 3, 1901. The statement of facts is as follows: In 1889 the Cotton Belt levee district instituted suit in the Phillips chancery court against the Jacks Real Estate Company for the purpose of enforcing its lien for unpaid levee taxes and obtained judgment against it upon personal service for the amount of the unpaid levee taxes. In default of the payment thereof the commissioner of the chancery court was directed to sell, among other lands, the undivided $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 29, township 3 S., range 4 E., in Phillips county, Ark., for the purpose of satisfying said indebtedness. Pursuant to the directions of said decree the lands were sold, and H. H. Cage became the purchaser. The sale was duly reported and confirmed by the court at its November term, 1889. On July 10, 1897, Cage conveyed the lands to R. C. Burke. The record shows that the undivided $\frac{1}{2}$ of said section 29 was sold to the state of Arkansas on January 29, 1883, under a decree of the Phillips chancery court in what is generally known as the "overdue tax proceedings." The record also shows that the undivided $\frac{1}{2}$ of said section 29 was sold at delinquent tax sale on April 14, 1884, to the state for the nonpayment of the taxes for 1883. The record also shows that on the 14th day of October, 1889, the Commissioner of State Lands executed a deed to Luke Maney to lands described as follows:

Parts of sec- tion	Sec- tion	Town- ship	Range	Acres	Years forfeited.
Und. $\frac{1}{2}$ S.W. $\frac{1}{4}$	29	3 S.	4 E.	80	1883
Und. $\frac{1}{2}$ S.W. $\frac{1}{4}$	29	3 S.	4 E.	80	Sold to State at overdue tax sale January 29th, '83.

The tax records for 1883 show that the whole of the S. W. $\frac{1}{4}$ of said section 29 was assessed in the name of Jacks & Co., and that in the margin, where is usually marked "Paid," was marked "Und. $\frac{1}{2}$." The tax books for 1886 show an undivided one-half paid on by Jacks & Co., and one-half undivided left to the state. It is the same for the years 1887-88-89 and 90, except it was paid on by the Jacks Real Estate Company. The court instructed the jury that the title to the lands in controversy was in the plaintiff, Burke, and directed a verdict for him for the recovery of the land, which was accordingly done. The case is here on appeal, and counsel for Maney predicates error upon the action of the court in giving a peremptory instruction in favor of Burke.

The deed of the Commissioner of State Lands conveyed the whole of the S. W. $\frac{1}{4}$ of section 29 to Maney. The description as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

given in the deed is copied in the statement of facts. It shows that an undivided $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 29 was sold to the state at overdue tax sale on January 29, 1883, and an undivided $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of said section 29 was forfeited to the state for the nonpayment of the taxes of 1883. The description contained in the deed shows that the forfeiture for nonpayment of taxes occurred in different years. That being so, *prima facie*, the title to the whole quarter section passed to the state, and the deed of the Land Commissioner in like manner conveyed the whole quarter section to Maney. The deed of the Land Commissioner describing an undivided one-half as forfeited for the nonpayment of taxes for 1883 and an undivided one-half as sold to the state under overdue tax proceedings for a different year shows that the whole of the S. W. $\frac{1}{4}$ of said section 29, and not an undivided half thereof, was intended to be conveyed.

The deed of the Commissioner of State Lands to Maney was *prima facie* evidence of title in him. *Allen v. Phillips*, 87 Ark. 185, 112 S. W. 403; *Cracraft v. Meyer*, 76 Ark. 450, 88 S. W. 1027; *Doniphan Lumber Co. v. Reid*, 82 Ark. 31, 100 S. W. 69. It is well settled in this state that a plaintiff in ejectment must rely upon his own title. *Allen v. Phillips*, *supra*. This rule has been announced so frequently by this court that there is no need for a further citation of authority to support it. Hence Burke, to recover, must not only overcome this *prima facie* title in Maney, but must show title in himself.

The levee foreclosure under which he claims title, as far as the record of that proceeding is shown herein, was not a proceeding in rem against the land, but was an adversary proceeding against the Jacks Real Estate Company to recover the levee taxes, and in default of their payment to have a lien therefor declared upon the land. It is contended by counsel for Burke that the forfeiture to the state at delinquent tax sale in 1884 for the nonpayment of the taxes of 1883 was void because the land was assessed in the name of Jacks & Co. or the Jacks Real Estate Company, and that the taxes were paid by that company. Proof that the lands were assessed for taxes, and that the taxes were paid by that company for 1883, is not sufficient to establish ownership in that company at the time of the forfeiture, upon which to sustain an action for the recovery of the land against the holder of the *prima facie* legal title and in possession of the land. Taxes for general purposes are a charge upon the land and are not against the owner. It is a matter of common knowledge that land is frequently assessed and the taxes paid in the name of another person than the owner. Hence it would be strange, indeed, to hold that proof that the land was assessed and the

taxes paid in the name of one person would be sufficient proof upon which he might base an action for the recovery of the land against one who holds the *prima facie* legal title.

We are of the opinion that the court erred in instructing the jury that the title to the land was in the plaintiff, Burke, and that they should return a verdict in his favor for the recovery of the land; and, for this error, the judgment will be reversed, and the cause remanded for a new trial.

ARKANSAS SMOKELESS COAL CO. v. PIPPINS.

(Supreme Court of Arkansas. Oct. 25, 1909.)

1. MASTER AND SERVANT (§§ 109, 217*)—INJURY TO SERVANT—VICIOUS ANIMAL—KNOWLEDGE OF MASTER—ASSUMPTION OF RISK.

Where a master negligently furnishes his servant with a mule of such a vicious nature that the servant is liable to be injured because of its viciousness, the master will be liable, if he knew, or could have known by ordinary care, of the vicious propensities of the animal, unless the servant knew that the animal was dangerous, but continues to use it, in which case he assumes the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 204, 585; Dec. Dig. §§ 109, 217.*]

2. MASTER AND SERVANT (§ 118*)—INJURY TO SERVANT—NEGLIGENCE OF MASTER.

Plaintiff was employed in a mine at driving a coal car hauled by a mule. In driving down a steep grade in an entry or passageway he was kicked by the mule and knocked off the car and between it and the walls of the entry. The wall of the entry was about one foot from the car track. *Held*, that as the entry was sufficiently wide to permit the car to pass in safety, and as it could not be reasonably anticipated by the employer that the employes would be injured by being kicked or otherwise falling between the cars and the walls, he was not negligent in the construction of the entry.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 209; Dec. Dig. § 118; * *Mines and Minerals*, Cent. Dig. § 219.]

3. MASTER AND SERVANT (§§ 101, 102*)—INJURY TO SERVANT—DUTY OF MASTER—SAFE APPLIANCES.

A master is not bound to furnish absolutely safe appliances, but only to exercise reasonable care to furnish such appliances as are suitable for the purposes for which they are intended, and to exercise ordinary care to see that they are kept in such condition.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 173; Dec. Dig. §§ 101, 102.*]

4. MASTER AND SERVANT (§ 265*)—INJURY TO SERVANT—PRESUMPTION OF NEGLIGENCE—BURDEN OF PROOF.

In an action by a servant for personal injuries, the burden is on the servant to show that the master was negligent.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 878; Dec. Dig. § 265.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Action by J. J. Pippins against the Arkansas Smokeless Coal Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

J. J. Pippins instituted this action to recover damages for personal injuries of a permanent nature sustained by him while in the service of the Smokeless Coal Company in consequence of the alleged negligence of the defendant company. J. J. Pippins was employed by the coal company on the 14th day of January, 1908. He first worked for the defendant company as a digger of coal. Then he was put to work as a driver. When the coal is mined, it is hauled on a small car on a track. The tracks lead from the room into the entry, and from there to what is called the "parting." The cars are carried along the track just as coal cars are carried on a railroad track; the motive power being a mule. It is the duty of the driver to hitch the mule to the car or cars and drive to the parting, where the cars are hoisted from the mine. He then unhitches the mule from the loaded cars, and hitches him to empty cars to carry back to the room. It is a part of his duty to sprag the cars. This consists in putting iron or wooden stakes about 1½ feet long between the spokes of the wheel and the body of the car to check the speed of the car while going downgrade. In other words, spragging is the act of applying brakes to the coal cars. On the day Pippins was injured he had been engaged in driving for about two hours, and was making his third trip. The mule was hauling two cars, and Pippins was seated on the front end next to the mule. The cars were going down a steep grade in the west third entry or passageway. Pippins looked to see if his "buddy" was behind him. He then looked around at the mule. Being afraid that the cars would run on the mule, he hallooed at him. When he did this, the mule kicked him with both feet, knocking him off the car and between it and the walls of the entry. The wall of the entry was about one foot from the car track. Pippins' body was so badly crushed that the lower part of it became wholly paralyzed. His physician says that he will never be able to do any kind of physical work, and will not likely live many years longer. Pippins was 34 years old at the time he was injured. He predicates his right of recovery on the alleged negligence of the coal company in furnishing him with a vicious mule to work and in the defective condition of the entry. Pippins recovered judgment against the coal company for \$2,000, and the case is here on appeal.

Jesse A. Harp and Geo. W. Dodd, for appellant. A. J. Koenigstein, for appellee.

HART, J. (after stating the facts as above). Counsel for appellant insist that the court erred in not directing a verdict in favor of appellant. The law in regard to the negligence of the master in furnishing his servant with a vicious animal to work stands on the same footing as furnishing him a dangerous appliance. The rule is aptly stated by Mr. Thompson, as follows: "But, if a master

furnishes for the use of the servant a horse or other animal of such a vicious nature that the servant is liable to be injured in consequence of its viciousness, the master will be liable if he knew, or by the exercise of ordinary care could have known, of the vicious propensities of the animal, unless the servant knew that the animal is dangerous, but nevertheless continues to use it, in which case he assumes the risk of injury from it." 4 Thompson on Negligence, § 404. To the same effect, see 26 Cyc. 113, and cases cited in note 80; 1 Labatt on Master & Servant, § 206. In the case at bar there was sufficient evidence adduced at the trial on the part of the appellee from which the jury might infer that the animal was of a vicious nature, and that that fact was not known to appellee; but there is no evidence which would warrant the jury in finding that the coal company knew that the mule was vicious, or by the exercise of ordinary care could have known it. All the employes of the company who testified on the subject except one said that the mule was not vicious. One of the employes testified as above stated to facts from which the jury might have inferred that the mule was vicious, but he was not shown to have been the keeper of the mule, or to have been in such position that it could be said that his knowledge was the master's knowledge.

2. On the question of the defective condition of the entry, we are of the opinion that under the facts disclosed by the record the appellee is not entitled to recover, and that this case in that respect is controlled by the principles announced in the case of *St. Louis & San Francisco Rd. Co. v. Hill*, 79 Ark. 76, 94 S. W. 914. In that case a train was passing over a bridge of the railroad company, and the bridge gave way and wrecked the train. A brakeman on the train was killed. The engine was derailed before it reached the bridge, and there was evidence tending to show that the bridge was sufficient to sustain the train had it remained upon the track, and that the derailment of the train caused the bridge to give way. The court said: "The bridge in question was constructed solely for the passage of defendant's trains on the track over Crowder creek. There was evidence tending to prove that it was sufficient for that purpose. There is no evidence to show, and plaintiff does not contend, that the derailment of the train was owing to defects of the bridge. That being true, the derailment did not prove that the defendant was negligent in the construction or maintenance of the same." So, in the case at bar, it may be said that the entry was sufficiently wide to permit the passage in safety of the mine cars, and it could not be reasonably anticipated by the coal company that its employes would be injured by being kicked, or otherwise falling, between its cars and the walls of the entry. The case at bar does not come within the rule announced in *McNamara v. Logan*, 100 Ala. 187, 14 South. 173.

There the servant was injured while engaged in spragging the cars. The testimony showed that it was his duty to walk along beside the cars and to sprag them when they started down a steep grade. The entry was too narrow for that purpose at the place where the servant was injured while engaged in the performance of his duties of spragging or blocking the cars, and the court held that, the evidence being in conflict as to whether the entry was dangerously narrow, or the cars dangerously near the wall at that point, the question of negligence was for the jury. In the present case there was no testimony to show that it was the duty of the driver to alight from the cars to sprag them. On the contrary, the uncontradicted testimony shows that the drivers always rode on the cars while engaged in the performance of their duties. Under the testimony in the case at bar, there was no necessity for sufficient room between the sides of the car and the walls of the entry for the use of the driver in spragging, and consequently there was no defect in the condition of the entry where the injury occurred. A master is not bound to furnish absolutely safe appliances, but only to exercise reasonable care to furnish such appliances as are suitable for the purposes for which they are intended, and to exercise ordinary care to see that they are kept in such condition.

There is no presumption of negligence in a case like this. The burden of showing that the appellant was negligent in regard to the matters alleged in appellee's complaint was upon him. Having failed to establish negligence in regard to either of the allegations of his complaint, the verdict of the jury is without evidence to support it.

Therefore the judgment must be reversed, and the cause remanded for a new trial.

MABRY et al. v. KETTERING et al.

(Supreme Court of Arkansas. Oct. 25, 1909.)

1. APPEAL AND ERROR (§ 19*)—MOOT QUESTION.

Where plaintiffs only prayed that defendants be restrained from developing certain photographic plates and from publishing or using the photographs, and in their brief on appeal admitted that this had been done, the case presented a moot question, so far as the rights of the parties were concerned, which would not be determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63, 64; Dec. Dig. § 19.*]

2. TORTS (§ 8*)—RIGHT OF PRIVACY—PHOTOGRAPHS OF CRIMINALS.

Officers of the law are entitled to take and use the photographs of persons confined in jail on a criminal charge, for the purpose of identification.

[Ed. Note.—For other cases, see Torts, Dec. Dig. § 8.*]

3. INJUNCTION (§ 96*)—RIGHT OF PRIVACY—PHOTOGRAPHS OF CRIMINALS.

Officers of the law being entitled to take and use photographs of persons in jail charged

with crime for purposes of identification, the persons photographed cannot maintain a suit for an injunction for the use of the photographs, without showing specifically that they are to be used improperly.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 167; Dec. Dig. § 96.*]

Appeal from Pulaski Chancery Court; John E. Martineau, Chancellor.

Action by J. C. Mabry and others against Ralph Kettering and others. Judgment for defendants, and plaintiffs appeal. Affirmed. See, also, 117 S. W. 746.

Bradshaw, Rhoton & Helm, for appellants. Wm. G. Whipple and Powell Clayton, for appellees.

MCCULLOCH, C. J. Mabry and others instituted this suit in chancery against Kettering and others, praying for an injunction restraining the latter from developing plates of the photographs of the plaintiffs, who were then confined in jail under criminal charges, and from "publishing or uttering, or causing to be uttered or published, said photographs, or any photographs, of these plaintiffs." The question involved is fully set forth in the opinion of this court delivered on the motion to dissolve the temporary injunction. *Mabry v. Kettering* (Ark.) 117 S. W. 746. A demurrer was sustained by the chancellor to the complaint, and the plaintiffs have appealed to this court.

In our former opinion we said that "the complaint, when it comes to be considered by this court on final hearing of the cause, will present an interesting question concerning what is now termed by modern authorities the 'right of privacy,' or the right of an individual to invoke the jurisdiction of a chancery court to restrain an improper use of his photograph without his consent." We were probably too hasty in stating that this question would arise on the final hearing of the case here; for on further consideration we do not find it necessary to a decision of this case for us to go into the question referred to.

The plaintiffs only asked that the defendants be restrained from developing the plates and from publishing or using the photographs. Now they admit in their brief that this has been done. So the case only presents a moot question, so far as the rights of the parties are concerned. Moreover, the plaintiffs allege in their complaint that they are confined in jail on a criminal charge; and, as we held in the former opinion that the officers had a right to use the photographs for the purpose of identification, the prayer of the complaint asked for too much in asking that they be restrained from using the plates altogether. The complaint does not point out specifically any improper use to be made of the photographs. Therefore the defendants having the right to use them for a

legitimate purpose, and having already done so, the plaintiffs have no right to restrain them without showing specifically that the photographs are to be used improperly.

It is true that it is alleged in the complaint that the photographs were taken by the defendants "for the avowed purpose of developing said plates into photographs, as these plaintiffs believe and allege, for the purpose of having said photographs placed in what is known as the 'rogues' gallery'"; but they fail to state what the rogues' gallery consists of, and we cannot take judicial cognizance thereof. For ought we know to the contrary, it may be some legitimate method of identification of criminals, or those charged with crime; and we have held that the photographs of accused persons may be used for such purpose.

We conclude, therefore, that the plaintiffs are entitled to no relief on the showing made, and the decree is therefore affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. CORMAN et al.

(Supreme Court of Arkansas. Oct. 25, 1900.)

1. EXECUTORS AND ADMINISTRATORS (§ 51*)—DEATH (§ 31*)—STATUTES—BENEFICIARIES.

Kirby's Dig. § 6289, provides that, where death shall have been caused by a tort, and the injured party could have sued therefor if he had not died, then the tort-feasor who would have been liable except for the death of the injured person shall still be liable in spite of such death, even though the death be caused under circumstances amounting to a felony. Section 6290 provides that an action for wrongful death shall be brought by and in the name of decedent's personal representative, and, if there be none, then by the heirs at law; the amount recovered being for the exclusive benefit of the widow and next of kin of the decedent, to be distributed in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate. *Held*, that such statute creates two causes of action—one for the benefit of the estate to recover damages which the decedent could have recovered had he survived the accident, and the other for the benefit of the widow and next of kin for the damages which they sustained by the death.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 51;* Death, Cent. Dig. §§ 38, 40, 42; Dec. Dig. § 31.*]

2. DEATH (§ 35*)—NATURE OF ACTION—TRANSITORY ACTION—JURISDICTION.

An action by a decedent's widow and next of kin for his wrongful death is transitory, and may be maintained in a state other than that in which the accident occurred.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 50; Dec. Dig. § 35.*]

3. DEATH (§ 8*)—RIGHTS OF PARTIES—WHAT LAW GOVERNS.

The rights of the parties to an action for wrongful death must be determined in accordance with the law of the state where the injury occurred.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 12, 36, 52, 121, 133; Dec. Dig. § 8.*]

4. DEATH (§ 31*)—WHO MAY SUE—WIDOW AS HEIR.

A widow is one of the heirs at law of her husband within Kirby's Dig. §§ 6289, 6290, providing that an action for wrongful death shall be brought by the heirs at law of the decedent, the amount recovered to be for the exclusive benefit of the widow and next of kin.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 42; Dec. Dig. § 31.*]

5. DEATH (§ 41*)—ACTIONS—PARTIES PLAINTIFF—"HEIRS AT LAW."

Where decedent was survived by a widow and one child, such widow and child were his only heirs at law within Kirby's Dig. §§ 6289, 6290, providing for an action for wrongful death to be brought by the heirs at law of the deceased person, and were therefore the only necessary parties plaintiff.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 56, 57; Dec. Dig. § 41.*]

For other definitions, see Words and Phrases, vol. 4, p. 3265.]

6. MASTER AND SERVANT (§ 278*)—DEATH OF SERVANT—RAILROADS—DANGEROUS TRACK—DERAILING DEVICE.

In an action for death of a railroad brakeman in a collision between the engine on which he was riding and certain ballast cars left on a storage track, which had rolled down the descending grade onto the main track by reason of defective brakes and a failure to block the wheels, evidence held to warrant a finding of defendant's negligence in failing to install a derailing or other device to prevent the escape of such cars.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 963; Dec. Dig. § 278.*]

7. MASTER AND SERVANT (§ 226*)—INJURIES TO SERVANT—ASSUMED RISK.

A servant assumes the risk of all dangers from the ordinary incidents of the service, but does not assume the risk of dangers arising from the negligent acts of his employer, unless, after becoming aware thereof and appreciating the danger, he exposes himself to it by continuing in the service.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659, 660, 662; Dec. Dig. § 226.*]

8. MASTER AND SERVANT (§ 217*)—INJURIES TO SERVANT—RAILROADS—DERAILING DEVICE—ASSUMED RISK—KNOWLEDGE OF DANGER.

A railroad brakeman whose duties did not limit his activities to any particular part of the railroad's right of way was not bound to know that the company had not provided a derailing or other safety device at a particularly dangerous point where a storage track connected with the main line on a descending grade to prevent a collision between trains on the main track and cars set out on the storage track which might run down the grade onto the main track because the defective brakes with which they were equipped were insufficient to hold them, and hence a brakeman in a train on the main track did not assume the risk of injuries sustained in such collision.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 577, 578, 589; Dec. Dig. § 217.*]

9. MASTER AND SERVANT (§ 201*)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—CONCURRENCE NEGLIGENCE OF FELLOW SERVANT.

Where a railroad brakeman was injured because of the railroad company's negligence in failing to provide a derailer or other safety device at a dangerous switch, he was entitled to recover, though the negligence of his fellow serv-

ants concurred with that of the railroad company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 521, 530; Dec. Dig. § 201.*]

Appeal from Circuit Court, Franklin County; Jephtha H. Evans, Judge.

Action by Emma Corman and another against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Murray L. Corman was a brakeman in the employ of the defendant railway company, and was killed by the derailment of an engine on which he was riding in the discharge of his duties on August 9, 1907, at Wagoner, I. T. The engine was pulling a local freight train and was approaching Wagoner, and was within the yard limits. Corman was on the running board of the engine, preparing to go down on the pilot for the purpose of operating a switch for the train to go in upon a siding. There was another track used as a passing and storage track—principally the latter—and a few minutes before Corman's engine reached the north end of the track some ballast cars standing on this track were struck and put in motion by other cars handled by the crew of another train. These cars rolled down the descending grade of the storage track to the end and out upon the main track, and collided with Corman's engine, while he was on it, overturning the engine and crushing him to death. This passing and storage track was about 2,500 feet long, and had a decided grade in each direction; the summit of the grade being about in the middle. The grade each way was steep enough that cars when once put in motion would roll to the end. There was no derailing device of any kind at the end of this track to prevent cars from rolling upon the main track. There were 15 or 20 or 25 of the ballast cars standing on the storage track, and the brakes on them were not in working order. When they were put in motion, a brakeman who was a member of the other train crew mounted the string of cars and tried to put on brakes so as to stop them, but, on account of the brakes not working, he failed to accomplish this. It is shown that in loading the ballast cars with a steam shovel gravel would get in the ratchets of the brakes, thereby preventing their use. It is also shown that the brakes on some of them were out of working order in other respects.

The present action was instituted in the circuit court of Crawford county by Emma Corman, the widow, and Murray Corman, an infant child and sole heir at law of Murray L. Corman, deceased, to recover damages sustained by them as such widow and next of kin on account of the death of said decedent. There was no administration upon the estate. The complaint sets forth two

charges of negligence against the defendant which are alleged to have been the proximate cause of Corman's death: One, that the defendant was guilty of negligence in failing to have a derailing device at the end of the storage track so as to prevent cars from rolling down the grade from that track upon the main track; and the other that the defendant was negligent in permitting cars on which the brakes were out of repair to be left on the storage track. The defendant in its answer denied the charges of negligence, and pleaded that Corman was guilty of contributory negligence, and also that he had assumed the risk.

The jury returned a verdict in favor of the plaintiff, assessing the damages at \$10,000. Judgment was rendered accordingly, and the defendant appealed. Other facts tending to explain the points at issue will be stated in the opinion.

Lovick P. Miles, for appellant. Robt. J. White, for appellees.

McCULLOCH, C. J. (after stating the facts as above). It is contended that the plaintiff cannot maintain this action, and that it can be maintained only by an administrator of the decedent's estate. This question was attempted to be raised by a demurrer to the complaint on the alleged ground that the plaintiff was without legal capacity to sue. It was also shown by evidence that the parents of said decedent were living, and the contention is made that they might, as such parents, claim damages by reason of the death of their son, and that the suit should therefore have been brought by an administrator. The statutes of Arkansas (sections 6280, 6290, Kirby's Dig.), embodying the principles of the English Statute known as Lord Campbell's act, were in force in the Indian Territory when the injury in question occurred. One section of this statute reads as follows: "Every such action shall be brought by, and in the name of, the personal representative of such deceased person, and if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and, in every such action, the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person. Provided, every such action shall be commenced within two years after the death of such person." Act May 2, 1890, c. 182, § 31, 26 Stat. 94. This

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

statute creates two causes of action—one for the benefit of the estate, to recover damages which the decedent could have recovered had he survived the accident, and the other for the benefit of the widow and next of kin, for the damages which they sustained by reason of the death. *Davis v. Railway Co.*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283. The present action falls within the last-named class. It is a transitory action, and can be maintained in this state, but the rights of the parties must be determined in accordance with the law of the place where the injury occurred. *St. L., I. M. & Sou. R. Co. v. Halst*, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65.

Now, the statute provides that, "if there be no personal representatives, then the action may be brought by the heirs at law of such deceased person." Who, then, constitute the heirs at law? The widow is one within the meaning of the statute, for she receives a distributive portion of the recovery. *McBride v. Berman*, 79 Ark. 62, 94 S. W. 913. The child is the only other heir at law, and by the plain letter of the statute is the only other person who is a necessary party to the action. Nothing is found in the decision in the case of *McBride v. Berman*, supra, which militates against this conclusion. The action in that case was instituted by the widow alone, without joining the collateral heirs at law, there being no children of the decedent. Was the defendant company guilty of negligence in failing to install a derailing device so as to keep the cars from rolling off the storage track, and, if so, did Corman assume the risk of the danger to which he was exposed by reason thereof? In considering the question of negligence, all the facts must be kept in mind. This was a track used, not only for trains to pass, but it was used mainly for the storage of cars. On it a large number of cars were stored daily, and among them was a considerable number of empty ballast cars with brakes out of order. It was the custom to store these cars there, and the ordinary use of them in loading them with dirt and gravel for ballast necessarily put the handbrakes out of service on account of gravel lodging in the ratchets of the brakes. These cars were habitually left on the track in bunches and on a steep grade, which would cause them, when once put in motion, to roll to the end of the storage track and onto the main track, unless brakes were put on. The ordinary condition in which the brakes were left made it impossible for cars to be stopped when once put in motion, for it appears from the evidence that on the particular occasion in question a brakeman of the other train crew made every effort to stop the cars, but failed because the handbrakes could not be worked.

We are clearly of the opinion that these facts presented a situation which warranted

the jury in finding that defendant was guilty of negligence in failing to exercise reasonable care to furnish a safe place to its employees at which to do their accustomed work. The situation thus described was a dangerous one—at least, the jury was warranted in finding that to be so—and defendant did not discharge its full duty to its employees merely by prescribing a system of rules requiring trainmen when they stored cars on the track to see that the brakes on them were set or that the wheels were blocked. Some device ought to have been installed to prevent the escape of these cars from the storage track if they should be put in motion, for it was obvious to any one that, when once started down the grade, they would roll to the end, and go out on the main track where they would be likely to collide with trains. This is precisely what occurred when Corman was killed, and it was a catastrophe which could have been anticipated by an employer who was exercising the care of a reasonably prudent person for the safety of employees.

Nor can we hold as a matter of law, which learned counsel for appellant insist we should hold, that under the circumstances of this case Corman assumed the risk. That was a question of fact for the jury to determine, instead of a question of law for the court to decide, as the evidence presented a condition of affairs from which different minds might reach different conclusions. An employee by his contract of service impliedly agrees to assume and bear the risk of all dangers from the ordinary incidents of the service, but these do not include the dangers arising from negligent acts of his employer, unless, after he becomes aware of such negligence and appreciates the danger arising therefrom, he exposes himself to it by continuing in the service. Of course, if a person of ordinary intelligence is aware of a danger, he is presumed to appreciate it; but it does not necessarily follow that because one becomes aware of a negligent act he appreciates the danger arising therefrom. This may, under some circumstances, be a question of fact to be determined by a trial jury, unless the danger is obvious, in which case a person of average experience and intelligence, being shown to be aware of the negligent act, is presumed to appreciate an obvious danger arising therefrom. But it is not correct to say that an employee assumes the risk of danger arising from negligent acts of his employer merely because he could by the exercise of ordinary care have discovered the defect brought about by such negligence. This might constitute contributory negligence of an employee in failing to discover a defect, but it would not be an assumption of risk, for the doctrine of assumed risk is based upon and grows out of contract; and, before it can be said that the employee has assumed the risk

of danger caused by his employer's negligence, it must appear that he was aware of the negligence and appreciated the danger. *St. L. I. M. & Sou. R. Co. v. Birch* (Ark.) 117 S. W. 243; *C., O. & G. Ry. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837.

We are not now speaking of the ordinary conditions of the service as existing when the employé took service, for of these he must take notice. When he enters into a contract to perform service for his employer, he agrees to work at the place expressly or impliedly designated in the contract, and with the tools and appliances regularly furnished by the master for use, "so far as these things were open and obvious, so that they could readily be ascertained by such examination and inquiry as one would be expected to make if he wished to know the nature and perils of the service in which he was about to engage." *Rooney v. Sewall & Day Cordage Co.*, 161 Mass. 153, 36 N. E. 789; *C., O. & G. R. R. Co. v. Thompson*, 82 Ark. 11, 100 S. W. 83. A familiar illustration of this is the general use or failure to use unblocked frogs in the operation of railroads. It is obvious to any employé whether or not the plan of blocking frogs at switches has been adopted, and one who takes service for the purpose of engaging in the operation of trains must take notice of that which is obvious to all. Learned counsel insist that, because we have held in *C., O. & G. R. Co. v. Thompson*, *supra*, and in other cases, that a railroad employé must take notice of the use of unblocked frogs, we should hold, in necessary consequence, that he must take notice of the failure to use a derailing device on each side track along the entire line of road where they work. This does not follow, for we think it would be unreasonable and unjust to say as a matter of law that railroad trainmen must take notice and be deemed to have contracted to assume the risk of every defect existing along the entire line of road which is obvious to one working at the particular place where it exists. To illustrate: To a switchman working daily in a certain yard the defective condition of a certain switch would be obvious; but not so to a brakeman who passes through the yard on his regular trip without using this particular switch. Nor is the failure, generally as a plan of operation, to use derailing devices, comparable with the use of unblocked frogs. If the unblocking of frogs is due to the general plan of construction which is adopted along the line of the road, an employé would have to take notice of the fact of the general plan of construction adopted; but the exercise of ordinary care might require the use of a derailing device at some particularly dangerous place, even though

the general plan of construction did not include the use of any such device, and an employé who is bound to take notice of the general plan of construction would not necessarily be bound to assume that a device especially needed at a particularly dangerous place had not been installed. It would be a question of fact for the determination of a jury, under all the circumstances of the case, whether or not the employé knew that the particular device was not used at the particular place.

But it does not even appear in this case from the evidence that derailing devices were not adopted at all on the line of road along which Corman worked. On the contrary, it affirmatively appears that they were used at some places along the line. It is true that the evidence shows that they were not used generally at side tracks; but this track was used mainly for storage of cars, and the grade was exceptionally steep. It was an extraordinarily dangerous place, a place of unusual peril to crews of passing trains, on account of the circumstances described. Whether Corman knew that no derailing device was in use at this place, or whether he should have inferred from the fact that they were not used at other passing tracks that none was used at that place, was peculiarly a question for the determination of a jury. There was no direct evidence at all that Corman actually knew that no derailer was used there, no evidence that he ever used that track in his work, nor any as to the length of time he had been working along that division of the road. He was not using the track at the time of the injury. We conclude, therefore, that the evidence warranted a finding that Corman did not assume the risk.

We are also of the opinion that there was sufficient evidence to warrant the submission to the jury of the question whether or not the defendant was guilty of negligence in allowing the ballast cars with defective brakes to be habitually left standing on this storage track where there was no derailer. Even if the negligence of the fellow servants of Corman concurred with that of the master in causing the injury, the latter is responsible, for it is plain that, but for the absence of the derailing device, the injury would not have occurred. *Chicago Mill & Lbr. Co. v. Cooper* (Ark.) 119 S. W. 672. The giving and refusal of instructions is complained of as error, but it is not necessary to discuss these assignments further than to say that the several rulings of the court and the instructions referred to violate no principle herein announced, and we find no error in them.

Judgment affirmed.

SEBASTIAN v. ROSE.

(Court of Appeals of Kentucky. Nov. 12, 1909.)

1. DIVORCE (§ 57*)—JURISDICTION.

Divorce proceedings are exclusively within the jurisdiction of the chancery courts.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 198; Dec. Dig. § 57.*]

2. DIVORCE (§ 209*)—DECREE FOR ALIMONY—ENFORCEMENT—SUMMARY PROCEEDINGS—CONTEMPT.

While under the direct provisions of Ky. St. 1909, § 1663 (Russell's St. § 154), a judgment in chancery for money or other specified thing may be enforced by any appropriate writ allowable on a judgment at law, under subsection 2, providing that nothing herein shall prevent the carrying of a judgment into execution according to the ancient chancery practice, circuit courts have all the powers of the English chancery courts, and may as an incident thereto summarily enforce their decrees by attachment and imprisonment, and hence payment of the balance of an alimony decree could be enforced by motion for a rule to show cause against punishment for contempt for nonpayment.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 756; Dec. Dig. § 269.*]

3. DIVORCE (§ 245*)—DECREE FOR ALIMONY—MODIFICATION.

Ky. St. § 2123 (Russell's St. § 73), permitting the court on final judgment to make orders for the care and maintenance of minor children, and, at any time afterward, upon petition of either parent, to revise on alter the same, contemplates further control by chancery courts over divorce decrees awarding alimony, so that the court granting the divorce may modify the decree by enlarging, lessening, or suspending the allowance of alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 692; Dec. Dig. § 245.*]

4. DIVORCE (§ 177*)—ABSOLUTE DIVORCE—APPEAL.

A decree of absolute divorce is final, and cannot be reviewed on appeal by the trial court; only divorces from bed and board being subject to retrial under the direct provisions of Civ. Code Prac. § 427.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 563; Dec. Dig. § 177.*]

5. DIVORCE (§ 169*)—DECREE—CONSTRUCTION—"FILED AWAY."

A recital in a divorce decree that a part of the judgment for alimony was paid by defendant, and, that the case was "filed away," was, in effect, keeping control of the case to be redocketed upon notice; the parties not having been dismissed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 551; Dec. Dig. § 169.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2764-2770.]

6. DIVORCE (§ 152*)—DECREE—ON AGREEMENT.

While a defendant in a divorce action may refuse to defend under an agreement with plaintiff, the decree of divorce cannot be the subject of agreement, but is the court's action upon the allegations and proof.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 514; Dec. Dig. § 152.*]

7. DIVORCE (§ 239*)—NEW TRIAL—AWARD OF ALIMONY.

While a new trial cannot be granted after entry of a decree of absolute divorce, and the judgment is final unless annulled upon petition of both parties under Civ. Code Prac. § 426, a

new trial may be granted upon the question of allowing or refusing alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 683; Dec. Dig. § 239.*]

8. DIVORCE (§ 280*)—APPEAL—DECISIONS REVIEWABLE—ALIMONY.

Judgments allowing or refusing alimony are reviewable on appeal.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 764; Dec. Dig. § 280.*]

9. ATTORNEY AND CLIENT (§ 101*)—AUTHORITY—COMPROMISE—RECEIVING LESS AMOUNT THAN JUDGMENT.

An attorney in a divorce action is without authority to compromise by accepting a less amount of alimony than awarded by the decree in satisfaction thereof, without express authority of his client; such compromise being voidable at the client's option.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 215; Dec. Dig. § 101.*]

10. ATTORNEY AND CLIENT (§ 103*)—AUTHORITY—RATIFICATION BY CLIENT.

Where an attorney compromised a suit without authority by accepting a less amount of alimony than awarded his client by the judgment, the client, upon learning of the act, must either ratify or disaffirm it, and, on disaffirming, must occupy the same position as before the compromise, and cannot at the same time deny the attorney's authority and claim the benefits of the compromise.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 154; Dec. Dig. § 103.*]

11. DIVORCE (§ 286*)—APPEAL—ALIMONY—SCOPE OF REVIEW.

On appeal from an order denying a motion for rule to show cause why defendant should not be compelled to pay the balance of alimony awarded plaintiff in a divorce action, the question whether plaintiff is entitled to alimony is not open, the only question being the amount thereof; defendant claiming that judgment for the amount awarded thereby was fraudulently or inadvertently entered.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 769, 770; Dec. Dig. § 286; Appeal and Error, Cent. Dig. § 598.]

12. DIVORCE (§ 240*)—ALIMONY—CONSIDERATIONS IN AWARDING.

The dependent condition of defendant's abandoned wife, the needs of his infant child, defendant's wealth when the action was begun as well as when the award was made, and his earning capacity and reasonable future expectancy and probable ability to pay alimony, should all be considered in determining the amount of alimony.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 675-678; Dec. Dig. § 240.*]

Appeal from Circuit Court, Owsley County.

"To be officially reported."

Motion by Daisy D. Sebastian against W. C. Rose for a rule to show cause why defendant should not be punished for contempt for failure to pay the balance of an award of alimony by a judgment in a divorce action. From a judgment denying the motion, and enjoining the collection of the balance of such alimony, plaintiff appeals. Reversed and remanded for further proceedings.

Wm. H. Holt, for appellant. Hazelrigg & Hazelrigg, for appellee.

O'REAR, J. Appellant and appellee were married June 13, 1901. Appellee was then

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a young man about 25 years old. His wife was a year or two younger. Appellee's father was a man of wealth, and had considerable business interests. Appellee was a partner in some of his enterprises, was industrious, a good business man of sound judgment, and successful; but he had contracted the habit of inebriacy. Upon his marriage he took his bride to his father's dwelling to reside. A month later he abandoned her, leaving her without means of support. She was compelled to return to her father's home, where she resided till his death in 1907. March, 1902, after the separation, she gave birth to a son, who is still living so far as the record shows. In 1902 she brought this suit against her husband for divorce and alimony, asking also that she be given the permanent custody of the child, and that she be restored to her maiden name. Her father was a lawyer, a man of high social and professional standing, but possessed of moderate means. He had other children also. In appellant's suit for divorce she joined as defendants the parents and brothers of appellee, charging that her husband had conveyed and transferred his property to them in fraud of her rights, and to defeat her action for alimony. Appellee did not file an answer in the case. Appellant introduced evidence in support of her claim. It showed her right to a divorce under the statute on the ground of abandonment. As to the alleged transfer of property the evidence was very meager. A judgment was entered in the case on May 14, 1903, granting to appellant an absolute divorce from appellee, restoring her to her maiden name, and adjudging her the custody and control of the child. She was also adjudged \$1500 as alimony, and \$50 as counsel fee in the case. The judgment concludes: "Thereupon came G. B. Rose and paid \$500 on the judgment to the plaintiff, and \$50 to John C. Eversole, and this case is fled away."

G. B. Rose was the father of appellee. John C. Eversole was an attorney in the case for appellant. Appellant's action against G. B. Rose and his wife and sons concerning appellee's property was dismissed. On December 11, 1907, appellant filed a motion (of which due notice was given to appellee) for a rule against appellee to show cause why he should not be punished for contempt of court for his failure to pay the balance of the judgment above named. Appellee responded that he ought not to pay any part of the balance, because the judgment was entered by the fraud or mistake of appellant's counsel (her father having been one of her attorneys in the suit for divorce and alimony); that the judgment was in fact a compromise of the suit; that appellee had a valid defense to the action, involving matter that would have been humiliating or disgraceful to her if disclosed, and that, upon her father's being advised of the fact, he as-

sented to the compromise, and induced appellant to likewise agree to it; that the agreement was that appellee was to pay appellant \$500 only as alimony, and the \$50 counsel fee, but that as a salve to her feelings the judgment was to recite that she was adjudged \$1,500 as alimony, all of which was to be indorsed satisfied upon the payment of \$500 and the \$50 attorney fee; that counsel relied upon appellant's father, James M. Sebastian, one of her counsel, to have the proper orders entered, but that he failed to do so through fraud or oversight. Appellant replied, denying the authority of her father to make the compromise of \$500, and denied that he did so. She denied that appellee had any defense to her action of divorce, and denied that it involved her moral conduct. Upon this issue the motion was tried. The evidence is that James M. Sebastian acted as attorney for appellant in the divorce case; that while Mr. John C. Eversole was also counsel Mr. Sebastian was the senior and managing attorney; that he did agree to take \$500 in full settlement of his daughter's alimony, and upon his reporting that she had consented to it the \$500 was paid, and the judgment entered. The evidence also shows that appellant did not authorize the settlement and knew nothing of it until it was disclosed in the response filed upon this motion. There was no evidence introduced or offered impugning appellant's conduct or character. Thereupon the circuit court adjudged that the motion be denied, and that the collection of the balance of the judgment be perpetually enjoined. It is from that judgment that this appeal is prosecuted.

Divorce proceedings in this state come within the exclusive cognizance of courts of chancery jurisdiction. Judgments in chancery may be enforced by any appropriate writ allowed for the enforcement of judgments at law. Section 1663, Ky. St. (Russell's St. § 154). But it is provided by subsection 2, § 1663, that "nothing in this article shall prevent either party from proceeding to carry an order or judgment of court into execution according to ancient practice of courts of chancery." The circuit courts of this state have all power anciently vested in the English Courts of Chancery. *Rebhan v. Fuhrman*, 21 Ky. Law Rep. 17, 50 S. W. 976. Those courts had, and circuit courts of Kentucky now have, the power, as an incident of their chancery jurisdiction, to enforce obedience to their orders and decrees by summary mode, attachment, and imprisonment. Said this court in *Ballard v. Caperton*, 2 Metc. 412: "This power belongs of necessity to the court, that its judgments and orders may be carried into execution and not remain powerless, and that its dignity and right to respect may be preserved by prompt punishment of contumacy." The practice of proceeding by rule in such cases is seemingly sustained by *Evans v. Stewart*, 38 S. W. 697,

18 Ky. Law Rep. 941, and *Tyler v. Tyler*, 90 Ky. 31, 34 S. W. 898, 17 Ky. Law Rep. 1341. Furthermore, the statute contemplates further control by courts of chancery over their decrees in cases where alimony has been adjudged (section 2123, Ky. St. [Russell's St. § 731] for, as observed in *Logan v. Logan*, 2 B. Mon. 150: "If hereafter the circuit judge shall be satisfied that this allowance is either inadequate or superfluous, he will, of course, modify it by enlargement, curtailment, or suspension altogether, according to circumstances, retaining, as he must, the control of the case for that purpose, and for the benevolent purpose also of keeping open the door of ultimate reconciliation." The original decree in this case "filing the case away" was, in effect, keeping control of the case, to be redocketed upon notice, as the parties were not dismissed. The decree of divorce is final. It may not be reviewed on appeal, or a new trial granted by the trial court. Divorces a mensa et thoro may be retried in the circuit court (section 427, Civ. Code Prac.; *McCracken v. McCracken*, 109 Ky. 706, 60 S. W. 720, 22 Ky. Law Rep. 1448), but in no other. Hence we are precluded, as, was the circuit court, from re-examining the grounds of the judgment for divorce in this case, in so far as that judgment granted the divorce, even if there was an issue upon that point. But there is not. The abandonment of appellant by her husband appears to have been a cruel act, wholly unexplained, and without mitigation. The solemn and sacred vows of the altar, the highest form of contract, the most important social relation, were forgotten by the bridegroom ere the honeymoon had waned; and it seems even the pride of paternity was not enough to move to compassion a nature insensible to the demands of conjugal obligation.

Grounds for divorce may not be confessed. They must be proved. Section 422, Civ. Code Prac. They cannot legally be the subject of agreement. Not the consent of dissatisfied parties, but the judgment of the courts alone, may dissolve the marital relation. True, a defendant to an action for divorce may decline to defend, even though he has a defense. The act may be the result of agreement. Nevertheless, when the decree is entered, it is the court's judgment upon the record as made, and establishes a new status, not subject to retrial in court. The decree of divorce in this case must therefore abide, unless the parties by their joint personal petition to the court granting the divorce procure its annulment as allowed by section 426, Civ. Code Prac. But judgments allowing or refusing alimony are subject to review on appeal; or to new trial upon proper grounds therefor being shown.

This proceeding to enforce the payment of the judgment for alimony was, as we have seen, one authorized by the practice in chancery. Relief will be granted according to the rules of equity. We are satisfied from the

evidence that Mr. Sebastian, representing appellant as her attorney, did agree with the father and the attorney for appellee that the payment of \$500 and the attorney's fee of \$50 would be in satisfaction of the judgment for alimony, and that the judgment fixing the amount was predicated upon that agreement, rather than upon the proof in the record. We are also satisfied that appellant did not authorize the compromise, and did not know of it. Her counsel had not the legal authority to enter into a compromise for her without her express authority. *Smith v. Dixon*, 3 Metc. 438; *Cox v. Adelsdorf*, 51 S. W. 616, 21 Ky. Law Rep. 421. The compromise was therefore voidable by her. When appraised of it, she must elect to either ratify or disaffirm it. If she ratify it, that ends it. If she disaffirms it, then she must consent to stand where she was before it was made. She will not in equity be allowed to say in one breath that she will claim the fruits of the agreement, and in the next breath to deny the condition upon which the agreement was made. The case then stands thus: A divorce has been granted to appellant upon allegation and proof of abandonment. Her claim for alimony asserted in the petition is undisposed of. She has been paid \$500 on her claim for alimony, and \$50 on her counsel fee. That she is legally entitled to alimony in this case is not now an open question. The only question is: How much should be awarded her? Even upon the showing she made in the partial preparation of the case, it seems to us that \$1,500 was wholly inadequate. Just what property appellee then had is not satisfactorily shown. But it is shown that he had youth, health, strength, and business ability, no mean assets in these times. Many a man begins life with the charge of a family with no more, yet achieves success. The dependent condition of the wife, the helplessness and just needs of their child, both imposing legal and moral obligations upon the husband and father not discharged by divorce, nor diminished by his abandonment, or want of affection, are elements which enter into the court's consideration in fixing the amount of alimony. Not only what appellee had when the action was begun, but what he has now, and his reasonable expectancy (*Muir v. Muir*, 92 S. W. 314, 28 Ky. Law Rep. 1355, 4 L. R. A. [N. S.] 909) and his earning capacity (*Canine v. Canine*, 16 S. W. 367, 13 Ky. Law Rep. 124) may also be considered, and should be, in ascertaining the just amount necessary to maintain appellant and her child comfortably, and to educate the child fittingly, and the probable ability of appellee to pay it. This is exacted of appellee not as a penalty alone for his fault (though that may also be considered), but is in discharge of his contractual, and more particularly of his social, obligation imposed on him by law as an incident of manhood and the head of a family.

Let the judgment be reversed, and cause remanded for further proceedings not inconsistent with this opinion.

YANCEY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 5, 1909.)

1. CONSTITUTIONAL LAW (§ 91*)—RIGHT OF PEACEABLE ASSEMBLY—RIGHT TO PETITION LEGISLATURE—CIRCULATION OF PETITION.

Under Const. § 1, subsec. 6, which provides that citizens of the state shall have the right to assemble in a peaceable manner for their common good, and to apply to the government for the redress of grievances, or other proper purpose by petition, address, or remonstrance, any citizen or number of citizens may petition the Legislature of the state for any necessary and proper purpose, which includes the right to lawfully circulate the petition and procure others to sign it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 173; Dec. Dig. § 91.*]

2. LIBEL AND SLANDER (§ 148*)—CIRCULATION OF PETITION—PRIVILEGED COMMUNICATION.

Defendant, in a prosecution for criminal libel, was a judge of the county court. He caused to be sent to C., who was the foreman of a former grand jury, a letter asking that C. sign an inclosed petition or an affidavit, to be used in impeachment proceedings before the Legislature, to the effect that G., who was the state attorney for the judicial district in which all three parties lived, was an unfit and incompetent officer, he being frequently and almost constantly drunk, etc. Held that, if defendant in good faith believed G. to be such an unfit and incompetent officer as the letter and petition appear to make him, the defendant had the right to inquire of C. as to his knowledge of G.'s unfitness and incompetency, and to ask his assistance in procuring the impeachment of G. by the Legislature.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 407-411; Dec. Dig. § 148.*]

3. LIBEL AND SLANDER (§ 148*)—CIRCULATION OF PETITION—IMPEACHMENT PROCEEDINGS—PRIVILEGED COMMUNICATION.

Ky. St. 1909, § 2172 (Russell's St. § 172), provides that a person desirous of procuring the impeachment of any officer shall, by petition in writing to the House of Representatives signed by himself and verified by his own affidavit, and the affidavits of such others as he may deem necessary, set forth the facts upon which he prays an impeachment. Defendant, in a prosecution for criminal libel, was a judge of the county court. He caused to be sent to C., who was foreman of a former grand jury, an affidavit and petition addressed to the House of Representatives, charging G., the state attorney for the district in which all three parties lived, with acts reprehensible in one of his official position. Held that, if G.'s conduct was so bad as to make him a fit subject for impeachment, in rendering such assistance as would tend to bring it about, defendant and C. should be presumed to be discharging a social or public duty, and defendant's communication was within the scope of his duty as an officer and good citizen; it not being alleged in the indictment that it was made without reasonable grounds.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 407-411; Dec. Dig. § 148.*]

4. LIBEL AND SLANDER (§ 148*)—CIRCULATION OF PETITION—PRIVILEGED COMMUNICATIONS.

The right conferred by Ky. St. 1909, § 2172 (Russell's St. § 172), to file the affidavits

of other persons in proceedings for the impeachment of an officer necessarily carries with it the right to make reasonable and proper inquiry to obtain them.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 407-411; Dec. Dig. § 148.*]

5. LIBEL AND SLANDER (§ 148*)—IMPEACHMENT PROCEEDINGS—JUDICIAL PROCEEDING—PRIVILEGED COMMUNICATIONS.

An impeachment proceeding is a judicial proceeding, and whatever writings in the way of petitions, affidavits, or pleas as may properly be used in an impeachment proceeding are, as to statements of fact contained therein, as much privileged as other writings or pleadings prepared for use or filed in the course of ordinary litigation.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 407-411; Dec. Dig. § 148.*]

Appeal from Circuit Court, Carroll County.

"To be officially reported."

W. P. Yancey was convicted of criminal libel, and he appeals. Reversed and remanded.

Winslow & Howe, W. O. Jackson, W. B. Moody, and M. H. Bourne, for appellant. Jno. S. Gaunt, Jas. Breathitt, Atty. Gen., Tom B. McGregor, Asst. Atty. Gen., J. A. Donaldson, M. S. Downs, Chas. Strother, Arthur Cox, and F. C. Greene, for the Commonwealth.

SETTLE, J. At the January term, 1908, of the Carroll circuit court the grand jury found and returned against the appellant, W. P. Yancey, the following indictment: "The grand jury of Carroll county, in the name and by the authority of the commonwealth of Kentucky, accuse W. P. Yancey of the offense of criminal libel committed as follows, to wit: The said W. P. Yancey in the county and circuit aforesaid did, on the 17th day of January, 1908, within 12 months next before the finding of this indictment, unlawfully, willfully, maliciously, and knowingly write and publish a certain written statement, to wit, a letter, which letter imputed to one F. C. Greene, then commonwealth attorney of the Fifteenth judicial district of Kentucky, dishonesty, misconduct in office, corruption in the discharge of his official duties, and incompetency in the performance of same, and did sign same, and mail and deliver same to the following persons in Carroll county, Ky.: B. W. Ransdell, John Davis, A. S. Lee, A. G. Kendall, Arthur Carico, C. M. Bond, C. C. Coghill, J. C. Duvall, R. E. Crutcher, Harry Grobmeyer, Joe Hayes, Forrest Adcock, and divers others whose names are to this grand jury now unknown, all residents of Carroll county, Ky., said written letters being in words as follows: 'W. P. Yancey, Judge of Owen County Court. Owenton, Kentucky, January 17, 1908. Mr. C. C. Coghill, Carrollton, Ky.—My Dear Sir: We should like

very much to have you sign a petition or affidavit would be better, something like the one I inclose. I only send this thinking it might answer the purpose, if not, all right. A petition has been circulated in this county petitioning the Legislature to remove Greene from office. We would like very much to have an affidavit signed by you as foreman of the May term of the grand jury to the effect that Greene is wholly incompetent and corrupt in his office. If this meets your approval you can write me by Wednesday of next week as we want to go to Frankfort Thursday with affidavits. Yours truly in confidence, W. P. Yancey.' The inclosure in said letter and part of said letter is in words and figures as follows: 'We, the undersigned citizens of Carroll county, Ky., state that we were members of the grand jury at the ——— term of the Carroll circuit court, for the year 1907, and that during that said term of the court, the commonwealth attorney for the Fifteenth judicial district of Kentucky, one F. C. Greene, was constantly and habitually drunk, so much so that he was incapacitated from attending to the duties of his said office in a proper and becoming manner; that at the close of the term of our said service as grand jurors, when several indictments had been prepared, the said F. C. Greene could not be found, and that we found that he was trying to make his escape from the city of Carrollton, and that it was necessary for us to have the said Greene arrested by the sheriff of Carroll county and returned to the jury room, in order that he might sign the said indictments. The affiants state that the said F. C. Greene has persistently and continuously shown his incompetency and unfitness for the office of commonwealth attorney, in that he is frequently and almost constantly drunk, and they respectfully ask and petition the Legislature of Kentucky to impeach the said Greene and remove him from his said office.' Now the grand jury says that said Yancey wrote said letter and caused said inclosure to accompany same, and vouched for the truth of same, well knowing at the time he so published same that it was and is false, libelous, infamous, and malicious, and same was and is false and libelous, and same was so done by the said Yancey with the malicious purpose and criminal intent to injure said F. C. Greene in his profession and in the discharge of his official duties, and against the peace and dignity of the commonwealth of Kentucky. F. C. Greene, Commonwealth Attorney, Fifteenth Dist. of Kentucky." The trial of appellant resulted in his conviction of the alleged criminal libel, his punishment being fixed by verdict of the jury at a fine of \$500. Appellant entered motion in arrest of judgment, and also filed a motion and grounds for a new trial, but both motions were overruled by the circuit court, and these rulings gave cause for this appeal.

Appellant's first complaint is that the trial court erred in overruling his demurrer to the indictment. This complaint is mainly based upon the ground that both the letter and the inclosed petition set forth in the indictment were privileged communications, and therefore their publication did not constitute an indictable offense. Subsection 6, § 1, Bill of Rights, Const., provides that citizens of the state shall have "the right of assembling together in a peaceable manner for their common good, and of applying to those invested with the power of government for the redress of grievances, or other proper purpose by petition, address or remonstrance." Manifestly, the foregoing declaration of the Bill of Rights confers upon any citizen, or number of citizens, the right to petition the Legislature of the state for any necessary and proper purpose, and if one may lawfully sign his name to a petition to be presented to the Legislature for a proper purpose, he may likewise lawfully circulate the petition and procure others to sign it. The letter and inclosed petition set forth in the indictment show that appellant was seeking either a petition or affidavit from Coghill to be used in an impeachment proceeding, to be instituted in the Legislature against Greene, and nothing contained in the indictment negatives this idea. If, as these writings show, appellant in good faith believed Greene, the commonwealth's attorney of the judicial district in which he and Coghill reside, to be such an unfit and incompetent officer as the letter and petition appear to make him, then appellant had the right to inquire of Coghill as to his knowledge of the alleged unfitness and incompetency of Greene, and to ask his assistance in procuring the impeachment of Greene by the Legislature.

Section 2172, Ky. St. (Russell's St. § 172), provides: "A person desirous of procuring the impeachment of any officer shall, by petition in writing to the House of Representatives signed by himself and verified by his own affidavit, and the affidavits of such others as he may deem necessary, set forth the facts upon which he prays an impeachment." It will be observed that the paper Coghill was asked by appellant to sign was an affidavit and petition addressed to the House of Representatives. As appellant was judge of the Owen county court, and Coghill had been a member of the grand jury during the Carroll circuit court at which Greene was charged with certain acts reprehensible in one of his official position, and both appellant and Coghill were citizens of the district of which Greene was commonwealth's attorney, the communication complained of was between persons having a common interest, and mainly in the nature of an inquiry of Coghill as to his knowledge of what Greene had done at the Carroll court. If Greene's conduct was so bad as to make him a fit subject of impeachment, it is no less than the truth to say that, in rendering such as-

assistance as would tend to bring about his impeachment, appellant and Coghill should be presumed to have acted in the discharge of a social or public duty and from the standpoint of good citizenship. The communication was within the scope of appellant's duty as an officer and good citizen, and it is not alleged in the indictment that it was made without reasonable grounds. Not only were the letter and inclosure from appellant to Coghill in the nature of an inquiry and request for the latter's assistance, but it was also a confidential communication, for the letter closes with the words, "Yours truly in confidence." The inclosure contains no statement of fact made by appellant; it is merely a part of the inquiry, and in addition a statement of the facts the writer supposed to be in Coghill's possession, and which, if true, he was expected to swear to, in which event it would be used by appellant, in connection with the contemplated impeachment proceedings, as a petition or one of the affidavits allowed by the statute in support of the petition praying Greene's impeachment. The right conferred by the statute to file the affidavits of other persons in such a proceeding necessarily carries with it the right to make reasonable and proper inquiry to obtain them.

An impeachment proceeding is a judicial proceeding; the Legislature being the trial court. This being true, whatever writings in the way of petitions, affidavits, or pleas as may properly be used in an impeachment proceeding are, as to the statements of fact contained therein, as much privileged as other writings or pleadings prepared for use or filed in the course of ordinary litigation in the courts of the country. An excellent statement of the law on this subject, as we understand it, may be found in Roberson's Criminal Law, § 592: "There are certain communications which are privileged, and are not deemed libelous, because of the occasion upon which they are made, though the party making them may in fact be in error, and not able to prove them to be true. A communication is regarded as privileged if made in good faith, upon any subject-matter upon which the party communicating has an interest, or in reference to which he has a duty public or private, and either legal, social, or moral, if the defamatory matter is honestly believed to be true by the person publishing it, and made to a person or body of men having a corresponding interest or duty. Thus proceedings in courts of justice, legislative proceedings, and petition and memorials to the Legislature are privileged." The rule here announced was approved by this court in *Ranson v. West*, 125 Ky. 457, 101 S. W. 885, 31 Ky. Law Rep. 82; *Sebree v. Thompson*, 126 Ky. 223, 103 S. W. 374, 31 Ky. Law Rep. 642, 11 L. R. A. (N. S.) 723. Also *Cooley on Torts*, § 251; *Townsend on*

Slander and Libel, § 221; 18 Am. & Eng. Ency. of Law, 1023. Being of opinion that the writings alleged in the indictment to be libelous belong to the class of communications regarded by the law as absolutely privileged, we conclude that the learned special judge erred in overruling the demurrer to the indictment. This view of the matter makes it unnecessary for us to consider the numerous additional contentions urged by appellant for a reversal.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

MARTIN v. SPURLOCK.

(Court of Appeals of Kentucky. Nov. 4, 1909.)

APPEAL AND ERROR (§ 1099*)—DECISION ON APPEAL—SECOND TRIAL—OPINION AS TO CONCLUSIVENESS OF EVIDENCE.

Where, on appeal in litigation over the possession of land, it is declared that the evidence shows conclusively that defendant had been in adverse possession for more than 20 years before suit as owner, and that a very considerable portion had been inclosed by him and was under cultivation, and there was no evidence on a subsequent trial to the contrary, judgment should be for defendant, regardless of how disputed boundary lines of a patent should be run.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4376; Dec. Dig. § 1099.*]

Appeal from Circuit Court, Floyd County. "Not to be officially reported."

Suit by R. M. Spurlock against James Martin. From the judgment, both parties appeal. Reversed, with directions to dismiss the petition.

See, also, 68 S. W. 396, 24 Ky. Law Rep. 212.

Wm. H. Holt and J. F. Butler, for appellant. James Goble, for appellee.

CARROLL, J. In 1892 Spurlock brought this suit against Martin to recover possession of a tract of land in Floyd county, described as follows: "Beginning at sugar tree and black walnut; thence N. 71° W., 80 poles; S. 24° W., 60 poles; S. 10° W., 120 poles; S. 20° W., 114 poles; S. 44° E., 144 poles; S. 71° E., 80 poles, to two beeches, black oak, and 2 chestnuts, in the gap of the ridge between said branch and the Bolling branch; N. 37° E., 80 poles, to a stake in the Morgan gap; N. 85° W., 40 poles; N. 38.5° E., 40 poles, to the beginning." He averred that he was the owner and entitled to the possession of this land, and that Martin was unlawfully holding it. A judgment, adjudging Spurlock the owner of the land and awarding him possession, was rendered by default; Martin, although summoned, not appearing. Afterwards Martin filed an action in equity to vacate the judgment upon various grounds not necessary to mention. The lower court dismissed his petition, and upon appeal to this court the judgment was reversed, in an opinion that may be found in 68 S. W. 396, 24 Ky. Law Rep. 212.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Upon a return of the case, Martin filed an answer, traversing the petition, pleading adverse possession, and that the matters in controversy, in so far as adverse possession was concerned, were adjudged in his favor by this court in the opinion supra. The record on this appeal, so far as the evidence is concerned, is the same as on the former, with the exception of two unimportant depositions taken after the return of the case. When it was again submitted, the court adjudged that the Spurlocks were the owners of and entitled to the possession of the following tract of land, to wit: "Beginning at walnut tree and black walnut, beginning corner to 100-acre survey made in the name of Elijah Canada; thence N. 71° W., 80 poles; S. 24° W., 60 poles; S. 10° W., 120 poles; S. 20° W., 114 poles; S. 44° E., 144 poles; thence a straight line to the 2 beeches and black oak and 2 chestnuts in the Bolling's gap; thence S. 71° E., 80 poles; thence N. 37° E., 80 poles, to a stake in the Morgan gap; N. 85° W., 40 poles; N. 38.5° E., 40 poles, to the beginning. The court further adjudged that James Martin was the owner of the 73-acre patent described herein, except so far as is herein adjudged to the Spurlock heirs." From this judgment both parties appeal.

It will be observed that the court inserted "a straight line" from the end of the line "S. 44° E., 144 poles," to the beeches, oak, and chestnut in the Bolling gap, and then ran the lines as called for in the patent, with the exception that line "S. 71° E., 80 poles," comes in after leaving the trees at Bolling's gap, in place of being the course and distance that brought the line to these trees, as in the patent. By omitting from the judgment the words "thence a straight line to the 2 beeches, black oak, and 2 chestnuts in the Bolling gap," the lines given in the judgment do not interfere with Martin's boundary. But, with this matter omitted from the judgment, the courses and distances given in the judgment, when applied to the map on file with the record, will not touch the marked trees at Bolling's gap. To run to these trees it is necessary to change the course "S. 44° E., 144 poles," to "S. 14° E., 144 poles." It is difficult to understand upon what theory the court in its judgment inserted a straight line from "S. 44° E., 144 poles, to Bolling's gap." There is no evidence in the record that authorizes the incorporation of this line in the patent boundary.

But we do not deem it necessary to consider further how the lines of the patent should be run, as the judgment should have been for Martin upon the question of adverse possession. In the former opinion the court said: "The evidence shows very conclusively that appellant, Martin, had been in the open, adverse, and notorious possession of this land for more than 20 years before the institution of the suit by appellees, Spurlocks, claiming

to be the owners thereof, and that a very considerable portion of it had been inclosed by him and was under cultivation."

There is no evidence in the case that authorizes us to depart from this expression of opinion, and so the judgment must be reversed, with directions to dismiss the petition.

EAST TENNESSEE TELEPHONE CO. v. CITY OF HARRODSBURG.

(Court of Appeals of Kentucky. Nov. 3, 1909.)

TELEGRAPHS AND TELEPHONES (§ 33*)—REGULATION—CHARGES—"BUSINESS SERVICE."

The words "business service," in a telephone company's franchise fixing the maximum rate for such service, mean the ordinary service between business men and other citizens within the radius specified, and do not include service rendered to a telegraph company under a joint traffic arrangement which does not increase the cost of the service rendered by the latter company.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 21; Dec. Dig. § 33.*]

Appeal from Circuit Court, Mercer County. "To be officially reported."

Action by the City of Harrodsburg against the East Tennessee Telephone Company. From a judgment for plaintiff, defendant appeals. Reversed.

E. H. Gaither, for appellant. C. E. Rankin and R. W. Keenon, for appellee.

CLAY, C. Appellant, East Tennessee Telephone Company, is the owner of a franchise for the maintenance and operation of a system of telephone service in Harrodsburg and Mercer county, Ky. Section 6 of the franchise is, in part, as follows: "The maximum rate during the term of this franchise shall be as follows: * * * For business service within a radius of one and one-half miles from the exchange, one party line, per month, \$2.75; the same service, two party line, per month, \$2.00. * * * In the event the foregoing provisions of this section, or any of them, shall be violated by the owner or operator of said system of said telephone, or any manager or agent, or servant of said owner or operator, or its assigns, by charging, demanding, collecting, or receiving any sum in excess of the rates herein provided for, said owner or operator shall forfeit to the city of Harrodsburg the sum of ten dollars in liquidated damages for each day said terms are violated, said damages to be for the benefit of the citizens of Harrodsburg, unless said owner or operator shall refund such amount of overcharge when demanded after giving proper evidence of each overcharge." This is an action by the city of Harrodsburg to enforce the penalty above referred to against appellant for an alleged overcharge in its telephone rates. It is charged in the petition that J. D. Parrish is a citi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

zen and resident of Harrodsburg, Ky., engaged in transmitting to other points, and receiving from other points and transmitting to said citizens, telegraphic messages; that he is also engaged in the business of receiving for transportation by express freight from the citizens of said town and that community, and the business of delivering to said citizens freight transported to them from other cities, under an arrangement which he has with the telegraph and express companies which he represents; that he is required to furnish the office room and furniture, and to send out to persons residing a distance from his office the telegraphic messages of persons desiring them sent over the telegraph lines, and for all his services in said business; that he has in his possession a store in said city, within 250 yards of defendant's Harrodsburg exchange; that desiring a telephone service as contemplated in, and required by, the franchise referred to, he requested the defendant to furnish it to him; that in compliance with his request it installed in his building a telephone instrument, and connected him with the Harrodsburg exchange; that he is now, and has at all times been, ready, willing, and able to pay to said defendant the sum of \$2.75 for services per month; that said amount has been tendered appellant, but that it refused, and still refuses, to accept the same; that notwithstanding said franchise, the appellant has adopted a different method of charging him for said telephone service; that it demands and charges him 2 cents for each and every call, and 15 per cent. of all sums which he collects for transmitting telegraph messages from Harrodsburg, Ky., to other distant points; that during the month of March, 1900, it demanded, charged, collected, and received from him, for each and every day between February 28, 1900, and April 1, 1900, a period of 31 days, in excess of \$2.75 per month for the services furnished him, which charges were paid by him under protest; that complaint of the overcharge was made, and proof thereof offered to appellant, but that it failed and refused to refund any sum on account thereof. It is then charged that, by reason of the violation of its franchise agreement and the overcharge exacted of J. D. Parrish, appellant had become indebted to plaintiff in the sum of \$10 per day for 31 days, amounting to \$310. Appellant thereafter filed its answer. The first paragraph contained a general denial of certain allegations of the petition. By the second paragraph the defense is made that John D. Parrish is the agent of the Western Union Telegraph Company, a corporation duly and legally organized and engaged in the business of transmitting and receiving telegraph messages throughout the country; that said Parrish is also the agent of the Southern Express Company, a common carrier of goods and stock, and that said Parrish has no busi-

ness other than as agent for the said corporations; that under the traffic arrangement with the Western Union Telegraph Company, duly executed in writing, between that company and appellant for the purpose of mutual benefit and profit, appellant made and entered into a contract whereby it agreed to transmit for the Western Union Telegraph Company to each of defendant's subscribers, any messages received over the wires of the Western Union Telegraph Company. The charge for this service is 2 cents for each message. It is further stipulated that, for each message delivered over appellant's lines to the Western Union Telegraph Company for transmission over its lines, appellant is to receive 15 per cent. of the net cost of said message to said sender; that said contract embraces all of the exchanges of the appellant, and that it is a valid, binding, and equitable contract, and that the Western Union Telegraph Company and the appellant are mutually bound thereunder and are each attempting to perform and live up to said contract; that the said J. D. Parrish is attempting to nullify the contract and avoid the provisions thereof by demanding of the appellant a telephone ostensibly for his personal business, but with the fraudulent purpose of using the same to receive and transmit messages for and from the Western Union Telegraph Company, and to thereby nullify the said contract with said company. It is further averred in the second paragraph that it had offered to install for Parrish's use, individually and as agent of the Southern Express Company, a telephone at the business rate of \$2.75 per month, and a second phone for the Western Union Telegraph Company under the said agreement and traffic arrangement with said company; that Parrish has refused to accept said phones, under such conditions; that said contract with the Western Union Telegraph Company is in full force and effect in all the exchanges, under appellant's control, and that the same was in existence at the time said telephone was installed in the office of the Western Union Telegraph Company at Harrodsburg. By amended answer it is further averred that the contract between appellant and the Western Union Telegraph Company was in existence, and that the appellant and the Western Union Telegraph Company were each operating under said contract before the passage of the franchise granted to appellant by the city of Harrodsburg in 1908; that it offered to said Parrish, agent of the Western Union Telegraph Company, a telephone for all purposes other than business of the latter company at the rates fixed by said ordinance, but that he refused to accept the same. A demurrer was sustained to the second paragraph of appellant's answer and to the amendment thereof. Evidence was then heard, and the case submitted to the jury. The court peremptorily instructed the

jury to return a verdict in favor of appellee, city of Harrodsburg, for the sum of \$310, and the telephone company appeals.

While several grounds for reversal are urged, we deem it necessary to consider only one; that is, the propriety of the court's action in sustaining the demurrer to the second paragraph of the original answer and the amendment thereof. It appears from these pleadings that appellant and the Western Union Telegraph Company are both public service corporations, engaged in the business of receiving and transmitting messages. They have made a joint traffic arrangement by which the cost of the messages transmitted by them is to be prorated upon a certain basis. This arrangement applies to all exchanges under the control of appellant, and to every place where the Western Union Telegraph Company has an office. According to the franchise the maximum rate is as follows: "For business service within a radius of one and one-half miles from the exchange, one party line, per month, \$2.75; the same service, two party line, per month, \$2.00." The question, then, arises: What is meant by the words "business service" as used in the franchise? In our opinion the council meant the ordinary business service between the business men and other citizens within the radius specified in the ordinance granting the franchise. We do not believe the council intended that the words "business service" should include service of the kind rendered by appellant to the Western Union Telegraph Company. In our opinion the council did not intend to affect in any way the joint traffic arrangement between two such public service corporations as appellant and Western Union Telegraph Company. If the service rendered by the Western Union Telegraph Company to the citizens of Harrodsburg and vicinity was rendered more costly by reason of the charge exacted by appellant, a different question would be presented. So far as it appears in the answer, the Western Union Telegraph Company alone pays the cost of such service, and pays it under and by virtue of a contract which it has with appellant. There is no increased cost that the citizen is required to pay. The increased cost required of Parrish is not exacted from him as a citizen of Harrodsburg, but only as the agent and representative of the Western Union Telegraph Company. He cannot therefore obtain for his personal use a telephone from appellant, and then as the agent of the Western Union Telegraph Company use the telephone for the purpose of nullifying the contract between appellant and the Western Union Telegraph Company. If the franchise ordinance were intended to apply to a commercial arrangement between two public service corporations, engaged in the same line of business, it is manifest that the telephone company would be placed at a great disad-

vantage. Its proportion of the profits of the business done would depend, not upon its contract with the telegraph company, but upon the maximum rate fixed for ordinary business service. As said above, we are of opinion that the council did not intend that the maximum rate fixed in the franchise ordinance should control the joint traffic arrangement between two such corporations. We, therefore, conclude that the trial court erred in sustaining appellee's demurrer to the second paragraph of appellant's answer and the amendment thereof.

Judgment reversed, and cause remanded, for proceedings consistent with this opinion.

CINCINNATI, N. O. & T. P. RY. CO. v.
LOWRY.

(Court of Appeals of Kentucky. Nov. 3, 1909.)

1. RAILROADS (§ 446*)—KILLING STOCK—NEG-
LIGENCE—QUESTION FOR JURY.

Where, in an action against a railroad for killing stock, plaintiff showed facts establishing some negligence on the part of the railroad employees, it was for the jury to determine whether the killing was due to want of care.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

2. RAILROADS (§ 446*)—KILLING STOCK—NEG-
LIGENCE—QUESTION FOR JURY.

Where, in an action against a railroad for killing stock, the engineer and fireman admitted the killing, and testified that they were only able to see the stock at about 100 yards distance, and that they immediately did everything within their power to bring the train to a stop, and there was evidence that the engine did not shut off steam, but was working steam 300 yards before the train struck the stock, and continued to do so thereafter, and the tracks made by the stock could be seen for about 900 yards over the track to where the stock were struck, the question of the negligence was for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.*]

Appeal from Circuit Court, Jessamine County.

"Not to be officially reported."

Action by Louis S. Lowry against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

N. L. Bronaugh and John Galvin, for appellant. Everett B. Hoover and L. H. Miller, for appellee.

CLAY, C. Appellee, Louis S. Lowry, instituted this action against appellant, Cincinnati, New Orleans & Texas Pacific Railway Company, to recover damages for the negligent killing of two mules and a horse on its right of way. The jury returned a verdict in appellee's favor for the sum of \$250, and the railroad company appeals.

At the time the stock was killed appellee was the owner of a farm lying along and adjacent to appellant's right of way, and had a gateway or private crossing over same.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appellant's railroad from this gateway southward for about 900 yards was a straight track, with considerable upgrade for about 200 yards south of the gate. On the night of March 7, 1908, two mules and a horse belonging to appellee went through his gate and on to the track of appellant's road. They were found dead the next morning by the side of the track, and on the right of way, about 300 yards from appellee's gateway. Appellant contends that the facts of this case bring it within the rule announced by this court in *Kentucky Central R. R. Co. v. Talbot*, etc., 78 Ky. 621, and that it was entitled to a peremptory instruction. In that case it was held that where the railroad company introduces as witnesses those employes who, from the circumstances of the particular case, would be presumed to know whether there had been any negligence on the part of the company, and they testified that there was no negligence, and there was no evidence to the contrary, or any circumstances tending to impeach them, the law is for the railroad company. The engineer and fireman on the train which killed the stock were introduced as witnesses. They admitted the killing, but testified that they were only able to see the stock from about 100 yards distant from the train, and that they immediately cut off the air, reversed the engine, and did everything within their power to bring the train to a stop. At the time the train was running about 35 miles an hour. The stock signal, consisting of four sharp blasts, was blown. The train could not have been stopped inside of its length. There is some discrepancy between the testimony of the fireman and engineer. The fireman testified that the stock was hit on the curve a half mile beyond the cut. The engineer testified that the stock was struck on the straight track about a quarter of a mile beyond the cut. The fireman further testified that the brakes were put on, and the train stopped about 30 car lengths the other side of the stock, while the engineer stated that the train did not stop at all. They both testified that the steam was turned off and the engine reversed. For the appellee Joe Grant testified that he lived not a great distance from the track, and was lying awake some time between 2 and 4 o'clock, when the train passed by. The engine did not shut off steam at all, but was working steam 300 yards before the train struck the stock, and continued to work steam until it passed out of hearing, far beyond the stock. He identified the train as the one which struck the stock by saying that he heard the stock whistle, consisting of several sharp blasts, and that no other trains passed there during that time. According to the testimony of Joe Delany, section foreman, the tracks made by the stock could be seen for a distance of about 900 yards over the railroad track to the point where the stock

was struck by the train. Part of the track was upgrade, and part downgrade.

From the foregoing, it will be seen that there is not only testimony of a witness tending to impeach the testimony of the fireman and engineer, but the physical facts tend to contradict them. If the tracks of the stock killed indicated that they had been running down the track for a considerable distance, this was a circumstance to be taken into consideration in determining whether or not those in charge of the engine could have seen the stock in time to prevent the injury. In cases of this character the plaintiff can rarely show when the stock were in fact seen. He must, therefore, rely in the main upon the circumstances attending the killing to show negligence; and, when he shows facts establishing some negligence on the part of the railroad employes, the statutory presumption of negligence is not overthrown. It is then a question for the jury whether or not the killing of the stock was due to want of care. *Louisville & Nashville R. R. Co. v. Moore*, 84 S. W. 1144, 27 Ky. Law Rep. 293. In the case of *Illinois Central R. R. Co. v. Stanley*, 96 S. W. 846, 29 Ky. Law Rep. 1054, the rule is thus stated: "The jury were not bound, in the face of the facts which tended to show the negligence of appellant, to accept the testimony of its employes, although no other living witness saw the accident. The jury had the right to apply the maxim *res ipsa loquitur*." In the case under consideration, one witness testified to facts which contradict the fireman and engineer to a certain extent, and the circumstances of the killing are somewhat in conflict with their statements. That being the case, the court properly submitted the question of negligence to the jury, and we cannot say that their finding is flagrantly against the evidence.

Judgment affirmed.

COVINGTON & C. R., TRANSFER &
BRIDGE CO. v. MULVEY'S
ADM'R.

(Court of Appeals of Kentucky. Nov. 4, 1909.)

RAILROADS (§ 364*)—INJURY TO PERSON NEAR
TRACK—COAL FALLING FROM CAR—NEGLIGENCE.

The probability that a boy, who with a few other boys plays on the private premises of a railroad company, adjoining its right of way, will be in a position to be struck by a lump of coal falling from a passing car is not so great as to impose on the company the duty of loading its cars with reference to his presence, or of inspecting its cars to see that he is not injured by falling coal; and there is no liability for injury so occurring, in the absence of wantonness and recklessness.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1252; Dec. Dig. § 364.*]

Appeal from Circuit Court, Campbell County.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"To be officially reported."

Action by John Mulvey's Administrator against the Covington & Cincinnati Railroad, Transfer & Bridge Company. Judgment for plaintiff. Defendant appeals. Reversed and remanded.

Galvin & Galvin, for appellant. Arthur C. Hall and J. A. Shackelford, for appellee.

CLAY, C. John Mulvey, as administrator of John Mulvey, Jr., deceased, instituted this action against the Louisville & Nashville Railroad Company, the Chesapeake & Ohio Railway Company, and appellant, the Covington & Cincinnati Railroad, Transfer & Bridge Company, to recover damages for the death of his decedent. Upon the conclusion of the testimony the court gave a peremptory instruction in favor of the Louisville & Nashville Railroad Company and the Chesapeake & Ohio Railway Company. Judgment was entered in their favor, and from that judgment there is no appeal. The case as to appellant was submitted to the jury, which returned a verdict in favor of appellee for the sum of \$2,500. From that judgment this appeal is prosecuted. The failure of the trial court to award it a peremptory instruction is the only ground for reversal urged by appellant.

The facts are as follows: Appellant is the owner of a bridge which spans the Ohio river at Covington, Ky. It also owns and maintains railroad tracks running from Seventeenth street, in Covington, through said city and over said bridge to points in Cincinnati, Ohio. It has locomotives which it uses for the purpose of transporting trains over the bridge and roads owned by it. At Fifth and Johnson streets in Covington, Ky., there is a vacant and uninclosed lot, which has a frontage of about 50 feet on the south side of Fifth street, and a depth of about 100 feet. This lot is bounded on the west by a stone wall or approach to said bridge, and on the east by an alley. The top of the wall is about 10 feet above its base or the level of the lot. There are two tracks on this wall; the east track being used by trains going north, and the west track by those going south. The lot in question is owned by appellant. In the summer time it has been used as a playground by children. At times they would gather up coal on the tracks and from cars, and make a fire on the lot. On December 11, 1907, about 7:30 o'clock p. m., and after dark, the decedent, John Mulvey, who was then about 12 years of age, in company with several other boys the same age, was playing on the lot referred to. Early in the day they had built a fire on the lot within a distance of 4 or 5 feet from the bridge wall. On the occasion of the accident they were sitting around the fire when they heard a train approaching from the south. This train consisted of about 20 cars, four of which were loaded with coal. As the engine

approached, the boys all ran back 30 or 40 feet to escape the cinders and ashes from the engine. Shortly after the engine passed, young Mulvey ran back to the fire and took a seat thereby. In a short time one of his companions called the attention of the other boys to the fact that Mulvey was lying on the ground. About that time one of the boys saw a dark object rolling along the ground about three or four feet from young Mulvey's head. The witness who testified to this fact made a statement inconsistent with it, but on the trial of the case insisted that he had seen something rolling along the ground at the time Mulvey was injured. When their attention was called to young Mulvey, the boys rushed to his assistance. It was found that he had a wound in the top of his head. This wound contained particles of dirt. Mulvey's companions carried him to his home. It was found by the physician summoned to attend him, and by the coroner at the inquest, that young Mulvey's neck was broken. The lump of coal which it is claimed fell from the car, and which was seen rolling when young Mulvey was injured, was picked up by one of the boys, and later turned over to the coroner as evidence. There is also evidence to the effect that there was no other coal on the lot at the time of the injury. Some of the witnesses also testified that the coal in the coal cars was heaped up in the center of the cars. Appellant proved title to the lot, and also showed that the cars containing the coal were loaded at least 250 miles from the point where the accident occurred.

In discussing this case we may admit that there is some evidence tending to show that young Mulvey was killed by being struck on the head by a lump of coal which fell from one of the cars as the train passed by. The doctrine of the Turntable Cases, of course, has no application to this case. This is not a case where a dangerous agency that was alluring and attractive to children was left in such position that they could and would use it. Nor is it a case where the premises were rendered unsafe by a spring gun or any trap that would injure a person if he came in contact with it. Appellee, however, insists that, as children had been playing upon the lot in question for a long time, with the knowledge or acquiescence of appellant, it was the duty of the latter to anticipate their presence, and so load its cars as not to injure any one of them. This court has gone to the extent of holding that where a railroad track runs through a populous community, along or across streets, where from the nature of things persons may be reasonably expected at any time, it is the duty of those in charge of the train to have it under reasonable control, to keep a lookout for persons using the track, and to give timely warning of the approach of the train. *Illinois Central R. R. Co. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. (N. S.) 352. The reason for

this rule is that the long and continued use of the track at the point in question by large numbers of persons is sufficient to indicate a reasonable certainty that persons will be found there. This rule has never been extended to cases where there was no customary use of the track at the point of the injury. The presence of persons on the track because of its customary use by the public being reasonably certain, there is a strong probability of some one's being injured unless proper precautions are taken to prevent accidents. The necessity for precaution is due to the fact that the very movement of a train is dangerous, and likely to injure those caught unawares. But the probability that a boy, who with a few other boys plays upon the private premises of a railroad company, adjoining its right of way, will be in position to be struck by a lump of coal falling from a passing car is not so great as to impose upon the company the duty of loading its cars with reference to his presence, or of inspecting its cars to see that he is not injured by falling coal. Under such circumstances there is no liability, unless the injury is wanton or reckless. There is no evidence in this case to show either one of these prerequisites to a recovery. The death of the decedent was simply the result of an unfortunate accident, which could not have been reasonably anticipated by appellant. We, therefore, conclude that the court erred in failing to give a peremptory instruction in favor of appellant.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

WESTERN UNION TELEGRAPH CO. v. TAYLOR.

(Court of Appeals of Kentucky. Nov. 9, 1909.)

TELEGRAPHS AND TELEPHONES (§ 71*)—MISTAKE IN TRANSMISSION—MENTAL ANGUISH—DAMAGES.

Where through defendant telegraph company's negligent mistake in transmitting a message plaintiff was led to believe that both his parents were dead, whereas in fact only one was dead, a verdict for \$450 for mental anguish was not excessive.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 74; Dec. Dig. § 71.*]

Appeal from Circuit Court, Fulton County. "Not to be officially reported."

Action by Oscar M. Taylor against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Robbins & Thomas, Richards & Ronald, Geo. H. Fearons, A. M. Tyler, and R. G. Robbins, for appellant. Herschel T. Smith, for appellee.

NUNN, C. J. This is the third appeal of this case. The first was prosecuted by the

present appellee from a judgment sustaining a demurrer to and dismissing his petition. The action of the lower court was reversed. See 101 S. W. 969, 31 Ky. Law Rep. 240. On the next trial appellee secured a verdict for \$1,000, and this court reversed the judgment because the lower court refused to give a certain instruction offered by appellant, which was copied into the opinion and discussed. See 112 S. W. 844. The facts presented in the case were stated in full in the two opinions referred to. Appellant did not introduce any testimony on either trial, therefore the facts as presented by appellee stand without the slightest contradiction. The lower court on the last trial gave the additional instruction copied in the opinion, and committed no error in admitting or rejecting testimony. In fact appellant's counsel suggest no ground for reversal in their brief except that of excessive verdict. The testimony without contradiction, shows that appellee was caused to expend in traveling more than \$50 by reason of the negligent transmission of and delay in delivering the telegrams. This leaves \$450 of the judgment awarded appellee for mental anguish resulting from the negligence of appellant's servants, and we are asked to reverse this judgment because it is so excessive that it shows it was the result of passion and prejudice on the part of the jury returning the verdict. It is peculiarly within the province of the jury to fix the damages in a case of this character, and this court has refused to disturb such verdicts when the amounts were more than the court would have awarded. In the case of *Western Union Telegraph Company v. Caldwell*, 126 Ky. 42, 102 S. W. 840, 31 Ky. Law Rep. 497, 12 L. R. A. (N. S.) 748, this court said: "The recovery of \$1,000 in damages is more than should have been awarded, but we do not feel disposed to reverse because the amount seems to be excessive. It is extremely difficult, in fact we might add impossible, to fix any certain standard of recovery in cases of this character. In the very necessity of the case the amount must be left to the judgment and discretion of the jury; and, unless their award is so excessive as to be palpably unjust, it will not be disturbed."

For these reasons, the judgment of the lower court is affirmed.

CORRIGAN v. HUNTER.

(Court of Appeals of Kentucky. Nov. 12, 1909.)

1. MASTER AND SERVANT (§ 302*)—LIABILITY FOR UNAUTHORIZED ACT OF SERVANT.

The trainer of one maintaining a stable of race horses having no authority to hire or select boys to be used in training the horses, but his authority being restricted to use of such boys as had been employed for such purpose, his act of placing on a horse a boy not so employed was without the scope of his authority; so that, un-

less it was ratified, the master was not liable for injury to the boy.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1219, 1225; Dec. Dig. § 302.*]

2. MASTER AND SERVANT (§ 330*)—RATIFICATION OF SERVANT'S ACT—EVIDENCE.

It is not sufficient evidence that C., a horse-man, ratified the unauthorized act of his trainer in using in the training of horses a boy not employed for such purpose, that C. once saw the boy at the race track, rode to town on the same street car with him, paid his fare into a theater, and said that he was going to see his mother.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1272; Dec. Dig. § 330.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, 2d Division.

"To be officially reported."

Action by Mary Hunter against Edward Corrigan. Judgment for plaintiff. Defendant appeals. Reversed and remanded, with directions.

O'Neal & O'Neal, for appellant. McChord, Hines & Norman, for appellee.

CLAY, C. Richard Hunter, an infant 11 years of age, was injured while riding one of appellant's race horses. His mother, Mary Hunter, instituted this action against appellant for damages. The cause of action was based upon the wrongful act of appellant in using the boy without her consent in the hazardous business of riding race horses. The boy's leg was broken and it had to be amputated. The trial resulted in a verdict for Mary Hunter, the mother, in the sum of \$750. From the judgment based thereon, this appeal is prosecuted.

According to the evidence for appellee, Richard Hunter, about three weeks prior to the accident, had gone to the race track near the city of Louisville where appellant had a stable of horses. This he did without his mother's consent. Mary Hunter, the mother, was working out, and, when she left for her daily work, the boy was at home. Upon the return of his sister from school in the afternoon, Mary Hunter learned that the boy had not gone to school. Search was then made for him for several days, but the boy was not found. After more than a week the boy returned to his mother's home, and told her that he had a home with Mr. Corrigan on Fourth street, and all that he had to do was to cut the kindling, carry water, and bring in coal and help around the house. In the course of three or four days the boy made a second visit to his mother. About a week later he was injured. June Collins, appellant's trainer, placed the boy on a thoroughbred yearling with instructions to take the horse to the stable. As the boy proceeded on the horse to the stable, some one who was cleaning out a stall threw some hay out of the stall on a sack, and frightened the horse. The boy tried to stop the horse, but was unable to do so. It finally stumbled and fell,

throwing the boy to the ground. In getting up, the horse crushed the boy's ankle and foot. He was taken to a hospital, and remained there for five months. While there his leg was amputated. While at appellant's stable the boy slept in the bed with appellant's trainer, June Collins. He ate meals which were furnished by appellant to his employes. According to the evidence for appellant, the boy had run away from home, and was brought to appellant's trainer to see if the latter could do something with him. The trainer took the boy for the purpose of teaching him to ride with a view to making a profit out of his training for himself and the boy or his mother. Only appellant, who was occasionally at the track, and his secretary, who was stationed there, had authority to hire or engage the services of boys for the purpose of exercising and cooling off the horses. At the time of the accident there were six or seven boys employed for this purpose. While the trainer had authority to select boys from among those hired for that purpose to ride appellant's horses, he had no authority to employ or discharge boys. He was given no discretion in the matter of selecting employes. When the boy was injured, appellant had on hand a sufficient number of boys to perform the services required, and there was no emergency or necessity requiring the services of any outside boy. Appellant contends that the court erred (1) in refusing to award him a peremptory instruction; and (2) in assuming as a matter of law that the trainer in placing the boy on the horse was acting within the scope of his authority.

Appellee insists that the facts adduced in evidence were sufficient to justify the court in concluding as a matter of law that Collins, the trainer, was acting within the scope of his authority. In this connection appellee relies upon the principle announced in *Robards v. P. Bannon Sewer Pipe Co. et al.*, 113 S. W. 429, 18 L. R. A. (N. S.) 923, wherein this court said: "It is not the test of the master's liability for the wrongful act of the servant from which injury to a third person has resulted that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been held liable for the negligent or tortious act of the servant the servant acted, not only without express authority to do the wrong, but in violation of his duty to the master. It is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." The above doctrine was announced in a case where a party not on the premises was shot by a night watchman employed to protect the premises and to use firearms for that purpose. There the general authority of the night watchman to protect the premises and to use firearms was fully stated in the substituted petition, and it necessarily followed that the act was authorized by the master under the general authority given to the night watchman.

Counsel for appellee argue in this case that Collins, the trainer, had general authority to train appellant's horses, and to select and place the boys upon the horses; that in doing this he was acting in the interest of his master and performing a service for the latter; that the authority to do the particular act (i. e. the placing of Richard Hunter upon the horse) naturally followed from the general authority which the trainer had to train the horses. Appellee's position in this matter would be sound if it were shown that Collins, the trainer, had general authority to hire or select such boys as he saw fit for the purpose of exercising the horses. Under those circumstances, it would not be necessary to show that he had particular authority to select Richard Hunter for that purpose; for Hunter would then be included within the class which Collins had the right to, and did, employ. In that event, the statement of Collins that he was using the boy for his own benefit and with a view to making a jockey of him, to their mutual profit, would play no part in the case. He could not make such a claim when the boy was selected under his general authority for the purpose of exercising horses. In this case no such authority was shown. The uncontradicted evidence of Corrigan, his secretary and trainer, is that the trainer had no authority to hire or select boys to be used in training the horses. Corrigan had a sufficient number of boys on hand to perform such services. No emergency existed which required the use of an additional boy. The trainer had no right to place upon the horse a boy not engaged for that or similar services. If Hunter had been one of the boys hired for that purpose, then the trainer's act would have been that of the

master, and the latter would have been liable. Having no authority to employ or select boys generally to exercise the horses, and his authority being restricted to the use of such boys as had been employed for that purpose, it necessarily follows that the particular act of placing Hunter upon the horse in question was not within the scope of the trainer's authority. In performing the act, Collins acted for himself alone, and not within the scope of his authority as appellant's trainer.

It therefore follows that appellant is not liable unless there was such acquiescence on his part as amounted to a ratification of the act done. When we come to consider this question, we find that appellant's secretary saw Hunter riding a horse some two or three times. He then ran the boy away from the premises. Collins again took the boy back because he felt sorry for him, as he had no home. After that time it is not shown that either appellant or his secretary had knowledge of the fact that the boy was riding appellant's horses. The only other circumstance from which acquiescence might be inferred was the statement of the boy that upon one occasion he saw Corrigan at the track and asked the latter to take him down town. Corrigan let the boy ride down on the same street car with him, and gave him 15 cents to pay his way into the theater. The boy stated that Corrigan said he was going to see the boy's mother. There is nothing in these facts to show acquiescence. They go no further than to show that Corrigan saw the boy once, rode down on the same street car with him, paid his way into a theater, and said that he was going to see the boy's mother. It is not shown for what purpose he was going to see the mother, nor is it shown that he ever in fact went to see her. Manifestly this is not sufficient to show that appellant knew the boy was riding his horses, and thus acquiesced in the arrangement between Collins and the boy. Our conclusion, then, is that there was not sufficient evidence on the question of ratification to justify the court in submitting the case to the jury.

For the reasons given, we are of opinion that the court erred in refusing appellant a peremptory instruction. Upon the next trial, unless there be additional evidence tending to show that Collins had authority to select boys other than those hired by Corrigan or his secretary for the purpose of exercising horses, or additional evidence tending to establish the acquiescence of appellant in the arrangement made by Collins with the boy, the court will instruct the jury to find for appellant.

Judgment reversed and cause remanded, with directions for a new trial consistent with this opinion.

SPOUSE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Oct. 29, 1909.)

1. CRIMINAL LAW (§ 561*)—EVIDENCE—SUFFICIENCY.

The guilt of accused must be established by evidence to the exclusion of a reasonable doubt; and, where the evidence taken as a whole creates only a suspicion of accused's guilt, there is nothing to submit to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.*]

2. HOMICIDE (§ 235*) — EVIDENCE — SUFFICIENCY.

On a trial for murdering a child by setting fire to the house in which the child dwelt, evidence held not to support a conviction because of the failure to show that accused burned the house.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 494; Dec. Dig. § 235.*]

Appeal from Circuit Court, Carter County.
"Not to be officially reported."

John Sprouse was convicted of murder, and he appeals. Reversed and remanded.

W. D. O'Neal, Jr., Frank Prater, and G. W. Skaggs, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

BARKER, J. This is the second appeal of this case. The opinion on the first appeal is to be found in 116 S. W. 344.

Appellant, John Sprouse, was indicted with Alonzo Kelly, charged with the murder of Dovie Cooper, committed by feloniously setting fire to and burning the dwelling house of Charles Cooper while Dovie Cooper was sleeping within it, and thereby burning her to death. The defendant, Sprouse, was tried separately from his codefendant, Kelly, with the result that he was found guilty by the jury as charged in the indictment, and his punishment fixed at confinement in the penitentiary for life. From the judgment based upon that verdict he appealed to this court, with the result that the judgment was reversed.

It is not deemed necessary to make an elaborate statement of the evidence as shown in the record. With but little change it is substantially the same as upon the former trial. We deem it now sufficient, except as hereinafter set forth, to refer to the opinion on the former appeal for a more comprehensive statement of the facts. It was said in the opinion upon the first appeal that there was no evidence that Cooper's house was burned by an incendiary, and none to connect him with the burning, even if it be assumed that the crime of arson had been committed; and, at the conclusion of the opinion, it was said that if upon another trial the evidence was substantially the same as upon the first, the court should award the defendant a peremptory instruction to find him not guilty. Upon this appeal we have read the evidence contained in the transcript with the greatest care and attention, and

we are now, as before, of the opinion that there is not the slightest evidence upon which to base the assumption that Cooper's house was burned in any other way than by accident. None of the Cooper family were willing to say, or did say, that the house was burned intentionally. On the contrary, all of the evidence which bears upon this point tends to show an accidental burning. The fire occurred on the night of the 14th day of September, 1908, and it will be recalled that this was during a most protracted drought, extending all over this part of the country. The testimony shows that there had been no rain for a long time, and everything was unusually dry. The house was frame, and the roof was old and moss-grown. There had been a fire in Mrs. Cooper's sleeping room made of hickory hearts, a species of timber which emits sparks that hold fire longer than those from any other burning timber. There had also been a fire in the yard within 30 feet of the house, where Mrs. Cooper had been making soap, or some other household article which required to be boiled. This fire was also made of hickory hearts, and there was during the night a wind blowing. It will thus be seen that everything was propitious for an accidental fire. The family were awakened by the fire between 10 and 11 o'clock, and at that time the house was completely enveloped by the flames. It was with the greatest difficulty that the adult members of the family escaped from the flames. Two little children, one of whom was Dovie Cooper, could not be rescued, and were burned to death. The only additional evidence introduced by the commonwealth on the second trial was the statement of Anderson Hays, which is so short that we copy it in full: "I had a conversation with him [John Sprouse] on Irish creek in August or July, 1908. He proposed to sell his farm to me. I told him I had nothing to buy with. He said he would take \$300, that \$100 went to Jim Hicks, and the rest was his, but he would give me \$25 or more, if necessary, of it, if I would help him get Charley Cooper out of there; that he had to get him out, and he might have to go out between two days, and might have to go out over the coals"—and of Doc. Murphy, who testified as follows: "I heard John Sprouse ask Charley Cooper if he was not afraid he would get burned up there, and Charley said no; he had not done anybody that much harm. Sprouse said some time he was uneasy and afraid that he would." Now this is all that is in the case which even tends to create a suspicion that the appellant might have burned the house. Sprouse had no motive to burn out Charley Cooper. He had sold the farm to him, and been paid for his interest, and had made his vendee a general warranty deed. Burning the house would not get Cooper out, or give

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Sprouse the property or any interest therein. The evidence shows without contradiction that the appellant was friendly with Cooper, and was working for him just before the fire. Murphy's evidence amounts to nothing whatever, nor does in our opinion that of Anderson Hays. The character of Hays for truthfulness and veracity was thoroughly impeached, and his entire story is apocryphal on its face, but, assuming it to be true, it does not show, or tend to show, that the appellant burned the house, or that anybody burned it; and we are therefore of opinion that the trial court should have awarded the defendant a peremptory instruction to the jury, at the close of all the evidence, to find him not guilty.

The law, in a criminal case, requires that the guilt of the defendant should be established by the evidence to the exclusion of a reasonable doubt. Where the evidence, taken as a whole, creates only a suspicion that the defendant might be guilty, there is nothing to submit to the jury. In our opinion, as said before, this is the sum total of the value of the evidence of the commonwealth in this case, and therefore the judgment is reversed, with instructions that if, upon another trial, the evidence is substantially the same as upon this, the court award the defendant a peremptory instruction to the jury to find him not guilty.

EVERMAN v. EVERMAN.

(Court of Appeals of Kentucky. Nov. 12, 1909.)

1. ACKNOWLEDGMENT (§ 55*) — CONCLUSIVE-NESS.

In view of Ky. St. § 3760 (Russell's St. § 4862), providing that, except on allegation of fraud or mistake, no fact officially stated by an officer in the form of a certificate shall be questioned collaterally, the certificate of a grantor's signature and acknowledgment is conclusive in a suit by a party claiming under the deed, where the certificate was not attacked for mistake or fraud.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 290-300; Dec. Dig. § 55.*]

2. APPEAL AND ERROR (§ 1009*) — REVIEW — CHANCELLOR'S FINDING OF FACT.

A chancellor's finding of fact on conflicting evidence is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3972; Dec. Dig. § 1009.*]

3. JURY (§ 28*)—RIGHT TO TRIAL BY JURY—WAIVER.

Assuming that a party is entitled to a jury trial on issues before the chancellor, he could not, after his request was granted and withdrawn on his motion, delay several years before making it again, and complain of the refusal of the court to entertain it.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 181; Dec. Dig. § 28.*]

Appeal from Circuit Court, Carter County.
"Not to be officially reported."

Suit by Lafayette Everman against G. W. Everman. From a judgment for plaintiff, defendant appeals. Affirmed.

E. B. Wilhoit, for appellant. John M. Waugh, for appellee.

CARROLL, J. William Everman died intestate at the age of 92 years, in 1899, leaving surviving him several children; two of them being the appellant and appellee. In 1891 he and his wife, Elizabeth, conveyed a small tract of land to the appellee, Lafayette Everman, in consideration of \$1 in hand paid, and the further obligation to support and care for the grantors during their respective lives. This deed was signed and acknowledged by the grantors on the day of its execution, but was not recorded in the proper office until June, 1894. After the death of William Everman and his wife, Elizabeth, Lafayette Everman brought this suit against the appellee to recover from him about 25 acres of the land included in the deed made to him by his father. He alleged that he was the owner of, and entitled to, the possession of the land, and that G. W. Everman was wrongfully withholding it. In defense to the action G. W. Everman attacked the conveyance, upon the ground that its execution had been procured by fraud and undue influence, and that William Everman was not competent to understand the nature and quality of his act, and in fact did not either sign or acknowledge the deed. He further set up that about 1893 or 1894 William Everman gave him by parol the land in controversy, and he had since been occupying it under this parol gift. The action, although brought in ordinary, was transferred to equity, and after being prepared for trial was submitted to the chancellor, who adjudged that Lafayette was entitled to the relief sought. From that judgment this appeal is prosecuted.

With the exception of one question of law raised, the issues are purely those of fact. The evidence is conflicting upon the question of the competency of William Everman to make the deed, but is very satisfactory upon the point that he signed and acknowledged it. Indeed the certificate of the officer, which is in regular form, is conclusive upon this question, as it was not attacked for mistake or fraud on his part. Ky. St. § 3760 (Russell's St. § 4862). Upon the facts we cannot say that the chancellor's judgment was not correct. When the answer was filed, the appellant moved the court to submit out of chancery the issues of fact involved to a jury. This motion was sustained by the court, and thereafter the action for some reason remained on the docket without being tried for about two years, when, upon motion of counsel for appellant, the court set aside the order submitting the issues to a jury. Some two years afterwards counsel for appellant again moved the court to submit the issues out of chancery to a jury,

and this motion the court properly overruled. Assuming that appellant was entitled to a jury trial upon the issues, he could not, after his request was granted and withdrawn upon his motion, delay several years before making it again, and complain of the refusal of the court to entertain it.

The judgment of the lower court is affirmed.

CONWAY v. LOUISVILLE & N. R. CO.
(Court of Appeals of Kentucky. Nov. 9, 1900.)

"To be officially reported."

Dissenting opinion.

For majority opinion, see 119 S. W. 206.

HOBSON, J. Section 786, Ky. St. (Russell's St. § 5335), requires railroad companies to provide each locomotive engine passing upon its road with a bell of ordinary size and a steam whistle, and requires that the bell shall be rung or the whistle sounded outside of incorporated cities and towns at a distance of at least 50 rods from the place where the roads cross upon the same level any highway, and that the bell shall be rung or whistle sounded continuously or alternately until the engine has reached the highway crossing. Section 466, Ky. St. (Russell's St. § 3), also provides that the person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of its violation, although a penalty is therein imposed. Accordingly it has been steadily held by this court that where the proper signals are not given of the approach of a train to a public crossing as required by the statute, and by reason thereof a traveler on the highway is hurt, he may recover damages. South Conway, a boy 11 years of age, took his father's horse to water, and while riding back from the creek along the county highway approaching the crossing, and on his way to the crossing, was hurt in this way: The road ran, as it approached the crossing, for a few yards parallel with the railroad. A freight train running rapidly came up behind the horse, giving no signal of its approach to the crossing, and caused the horse to run away, thus injuring the child very seriously. The county road at this point ran along a fill just outside of the railroad ties. No signals of the approach of the train being given, the child was caught in a trap with the creek on one side of him and the rapidly approaching railroad train coming up behind his horse on the other side, when the ties of the railroad ran out nearly to the line of the county road. That the horse should become frightened when a rapidly running train suddenly dashed upon it from behind without warning was to be expected. The danger to the traveler at this narrow point was just as great for all practical purposes as far as the manage-

ment of the horse went as it would have been if he was at the crossing. The purpose of requiring signals to be given of the approach of the train 50 rods from the crossing is that the traveler may know of the approach of the train, and have an opportunity to take steps for his own protection. When there was a failure of the train in question to give any notice of its approach to the crossing, the child was caught in a trap, and the first he knew of the approach of the train was from the fright of his horse. It is entirely immaterial whether he was at the crossing or 73 yards from it. He was on the county highway. He was riding to the crossing, and as a traveler on the highway, was entitled to notice of the approach of the train as required by the statute. The fact that the county road for a short distance ran parallel with the railroad in no way lessened his rights. On the contrary, the danger of the situation required a greater degree of care on the part of those operating the train. The opinion seems to be based upon the idea that the child does not testify what he would have done if the proper signals of the approach of the train had been given. If he had undertaken to testify on this subject, the court would manifestly have excluded the evidence. He can tell what he did, but what he would have done under other conditions he cannot testify to; for he cannot be allowed after he is hurt to tell what was in his mind or what he would have done if something had happened that did not happen. He can testify to all that he did, and what he would have done if signals had been given that were not given must be determined by the jury under the evidence and all the circumstances. The opinion intimates broadly that, if the child had said that he would have waited at the creek if signals had been given of the approach of the train, then a peremptory instruction should not have been given. It also intimates broadly that, if he had testified that he would have protected himself in some other way, the peremptory instruction should not have been given. What he may now say he would have done if the signals had been given might be entirely different from what he would, in fact, have done in the emergency in which he was placed. The question he may testify to is what he could have done. He was entitled by law to the signals of the approach of the train. When they were not given, he was deprived of an opportunity to secure himself. If he could by ordinary diligence have protected himself from danger if the signals had been given, then it should be presumed that he would have exercised ordinary care for a child of his age under the circumstances. It is manifest from the proof that, if the child had known that the train was coming a minute before his horse took fright, he could have turned him around and ridden back down to the creek, even if it be con-

ceded that he had left the creek before the train reached the whistling board. When signals are not given of the approach of the train, and the traveler on the highway is injured because he is not aware of the approach of the train, and is thus caught at a disadvantage, it must be a question for the jury whether or not his injury is primarily due to the failure of those in charge of the train to give the signals of its approach. In *Ill. Cen. R. R. Co. v. Mizell*, 100 Ky. 235, 38 S. W. 5, 18 Ky. Law Rep. 738, no signals of the approach of a train to a crossing were given, and the plaintiff's horse ran off with her, throwing her and injuring her seriously. Sustaining a recovery, this court said: "The principal ground relied on by appellant is that the alleged negligence in failure to blow the whistle was not the proximate cause of the injury; but, if by reason of that failure the appellee went upon the track and her horse was there frightened by the approaching train, the jury, if they believe appellee's witnesses, had evidence from which they were entitled to find that the negligence was the proximate cause of the injury, and that the damage followed as a continuous and natural sequence from the negligent act, and was a result which might have been foreseen and expected as the result of the conduct complained of, for it was to be expected that passengers on horseback might be traveling along the highway." The same rule is laid down in *Rupard v. C. & O. R. R. Co.*, 88 Ky. 280, 11 S. W. 70, 10 Ky. Law Rep. 1023, 7 L. R. A. 316, although in that case a peremptory instruction was given because Mrs. Rupard was negligent in not looking out for the train. But in this case the child was only 11 years old. He was not upon the crossing, but simply approaching it, and if it is conceded, as in the *Rupard* Case, that an action may be maintained for the negligence of the railroad company unless there was contributory negligence on the part of the plaintiff, then manifestly the case should have gone to the jury under a long line of opinions by this court. See *L. & N. R. R. Co. v. Clark*, 105 Ky. 571, 49 S. W. 323, 20 Ky. Law Rep. 1375; *L. & N. R. R. Co. v. Ueltschi*, 97 S. W. 14, 29 Ky. Law Rep. 1136; *C. & O. R. R. Co. v. Vaughn*, 97 S. W. 774, 30 Ky. Law Rep. 215; *L. & N. R. R. Co. v. Lucas*, 99 S. W. 959, 30 Ky. Law Rep. 339; *C., N. O. & T. P. Ry. Co. v. Champ*, 104 S. W. 988, 31 Ky. Law Rep. 1054; *L. & N. R. R. Co. v. Taylor*, 104 S. W. 776, 31 Ky. Law Rep. 1142.

This case is practically on all fours with *C. & N. R. R. Co. v. Ogles*, 73 S. W. 751, 24 Ky. Law Rep. 2180, except that there were in that case facts showing that the plaintiff was not guilty of contributory negligence. But, as the child here was only 11 years old, he could only be required to use such care as might be reasonably expected from a child of his age; and, if the railroad company was

negligent, it cannot shield itself from the consequences of its own negligence because the child did not take those precautions that might reasonably be expected of an adult. In so far as the opinion is predicated in any degree upon contributory negligence on the part of the child, it is in conflict with the opinions of this court above cited; and, in so far as it is based on the ground that the child does not testify what he would have done if the signals had been given, it disregards the settled rules of evidence. In *L. & N. R. R. Co. v. McNary's Adm'r*, 128 Ky. 408, 108 S. W. 898, 32 Ky. Law Rep. 1272, 17 L. R. A. (N. S.) 224, where there was testimony by bystanders as to what occurred when the woman was struck showing just how the accident occurred, and it was insisted that a peremptory instruction should have been given the jury to find for the defendant, this court said: "The woman manifestly could have seen the train if she had looked in that direction just before she went on the track, but she had a right to assume that notice of the approach of a train would be given; and, where proper signals are not given, this court has held in a number of cases that the question whether the traveler used ordinary care is for the jury—[citing authorities]. To hold as a matter of law that the footman is guilty of contributory negligence barring a recovery for his injury whenever he goes upon a railroad track without stopping, looking, or listening would be practically to exempt railroads from all responsibility in cases of this sort." The rule, stop, look and listen is not applied. There is nothing to show negligence on the part of the child except that he was riding along the road and did not look behind him. He had not reached the crossing. If his horse was gentle and did not usually take fright from the cars, this was at least not a reason for requiring unusual precautions on his part. If his horse had, when frightened, run back and not forward to the crossing, he would have the same right of action if hurt as he now has. The gist of his action is that the signals to which he was entitled were not given, and it is not material whether his horse was thus frightened at the crossing or a few yards from it. He cannot recover unless he used ordinary care, but what would be ordinary care for a child 11 years old might not be ordinary care for an adult. In *City of Owensboro v. York's Adm'r*, 117 Ky. 300, 77 S. W. 1130, 25 Ky. Law Rep. 1397, this court quoted with approval from 7 Am. & Eng. Enc. of Law, 408: "As the standard of care thus varies with the age, capacity, and experience of the child, it is usually, if not always, where the child is not wholly irresponsible, a question of fact for the jury whether the child exercised the ordinary care and prudence of a child similarly situated; and, if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the

standard which the law erects for determining what is ordinary care in a person of full age and capacity." The same rule is thus stated in 29 Cyc. 642: "It is also a question for the jury to determine under all the facts whether a child exercised such care and discretion as might reasonably be expected of one of his age, capacity, and experience situated as he was." In *United States Natural Gas Co. v. Talmage Hicks* (decided May 19, 1909) 119 S. W. 166, this court said: "The general rule is that, when a child reaches the age of 14 years, the legal presumption is that it knows right from wrong, and it is responsible for its acts. Between that age and seven years the legal presumption is with the child, and, to make it responsible, it must be shown by testimony that it had sufficient intelligence and discretion to realize and to know what would be the result of its acts. Hence it is always proper to submit the question of contributory negligence in such cases to the jury." See, also, 1 *Shearman and Redfield on Negligence*, § 73. When the plaintiff is placed in a position of peril by the defendant's negligence, and thus suffers an injury, the rule is that he may recover unless at the time he failed to exercise ordinary care for his own safety, and but for this would not have been injured. Here by the defendant's negligence the plaintiff was placed in a position of peril and was injured; and, under the rule heretofore laid down by this court, he may recover unless he failed then to exercise ordinary care for his own safety. What he would have done if the defendant had not been negligent is only material on the question of proximate cause. *Western Union Telegraph Co. v. Caldwell*, 126 Ky. 42, 102 S. W. 840, 31 Ky. Law Rep. 497, 12 L. R. A. (N. S.) 748; *Sutton v. Western Union Tel. Co.*, 110 S. W. 874, 33 Ky. Law Rep. 577.

The rule in this state is that, if there is any evidence, the question is for the jury. The scintilla rule has been so often upheld that the question is no longer open. The proof is abundant that no signals of the approach of the train were given, and that the child was thus caught in a trap. By reason of the want of the signals he had no opportunity to protect himself as he would have had if the signals had been given. The facts show that, if proper signals were given, a person of ordinary care could have protected himself. It cannot be presumed that the child would not have used ordinary care for one of his age; and, it being conceded that the defendant was negligent in the discharge of a legal duty required of it for his protection as a traveler on the highway, it was a question for the jury whether this negligence was the proximate cause of his injury, and whether he exercised such care as may be reasonably expected of a child of his age under the circumstances. The opinion of the court refers to *L. & N. R. R. Co. v. Smith*,

107 Ky. 178, 53 S. W. 269, 21 Ky. Law Rep. 848, C., N. O. & T. P. R. R. Co. v. Bagby, 29 S. W. 320, 16 Ky. Law Rep. 533, L. & N. R. Co. v. Bowen, 39 S. W. 31, 18 Ky. Law Rep. 1099, C. & O. R. R. Co. v. Pace, 106 S. W. 1176, 32 Ky. Law Rep. 806, and L. & N. R. R. Co. v. McCandless, 123 Ky. 121, 93 S. W. 1041, 29 Ky. Law Rep. 563, but these were all cases where crossing signals were not involved. The gist of this case is that the plaintiff was entitled to the crossing signals, and these were not given. To say that the child cannot recover because on the facts shown he was as a matter of law guilty of contributory negligence is to adopt in this state the rule, stop, look, and listen before the traveler reaches the crossing and to make it apply to a child eleven years old. Under the opinion, the rule would apply equally if the child had been on the crossing. If not, why not? For he was equally entitled to the crossing signals as he approached the crossing as when he was on it.

I therefore dissent from the opinion.

NUNN, C. J., concurs in this dissent.

WRIGHT v. SCHULTZ.

(Court of Appeals of Kentucky. Oct. 29, 1909.)

1. TRIAL (§ 396*)—FINDINGS—EVIDENCE—ISSUES.

Where an action by the buyer of an animal for the price paid and express charges, on the ground that the animal shipped by the seller was not the animal which he had described to the buyer, was tried as though every material representation made in the seller's letter describing the animal was in issue, the court's finding that the animal shipped was brown, while the seller had described the animal as black, was against the seller, though plaintiff, in the petition, failed to allege that the animal shipped was not black.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 396.*]

2. WITNESSES (§ 328*)—EVIDENCE—CREDIBILITY.

Where a buyer of an animal warranted by the seller sued for the price paid on the ground that the animal shipped was not the one sold, it was competent to show that the seller did not personally know the fact on which the warranty was based, as affecting his credibility as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1103; Dec. Dig. § 328.*]

3. SALES (§ 397*)—RECOVERY OF PRICE BY BUYER—EVIDENCE.

In an action by the buyer of an animal for the price paid, on the ground that the animal shipped by the seller was not the one sold, evidence that the seller did not personally know the fact on which his warranty was founded was competent.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 397.*]

4. SALES (§ 397*) — RECOVERY OF PRICE BY BUYER—EVIDENCE.

Where in an action by the buyer of an animal for the price paid, on the ground that the animal shipped by the seller was not the one sold, it appeared that the seller had given

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the measurements of the animal which he agreed to sell, a finding that the measurements of the animal delivered did not correspond with the measurements given by the seller was justified by evidence showing a difference, though the measurements of the animal delivered were made while the animal was either in a dying condition or after it was dead.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 397.*]

5. APPEAL AND ERROR (§ 1008*)—FINDINGS—CONCLUSIVENESS.

A finding in an action at law must be treated as the verdict of a properly instructed jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008*]

Appeal from Circuit Court, Boyle County.
"Not to be officially reported."

Action by Amos R. Schultz against Joe E. Wright. From a judgment for plaintiff, defendant appeals. Affirmed.

George E. Stone and Chas. H. Rodes, for appellant. Fox & Jackson, for appellee.

LASSING, J. In the winter and early spring of 1907 the appellee, Amos R. Schultz, a resident of Hampstead, Md., entered into correspondence with the appellant, Wright, looking to the purchase of a jack; Wright being a dealer in jack stock. After some considerable correspondence, Schultz purchased a jack of a certain description from Wright for \$375, and directed that the jack be shipped to him by express. Thereafter, on March 4th, the jack was delivered by Wright to the express company, to be shipped to appellee at his home at Hampstead, where it arrived on the morning of March 7th at about 8 o'clock. Appellee was present when it arrived and saw it unloaded from the car. When taken from the car it had a small skinned place upon its side and also upon its head, indicating that it had been down. It appeared sluggish, and when taken to appellee's stable, a short distance from the track, it refused to eat and was evidently sick. Such medical skill and attention was given it as the place afforded; but in spite thereof it continued to grow worse, and two days later died. On the afternoon of the same day that it arrived at Hampstead, to wit, the 7th of March, appellee wrote to Wright the following letter:

"Mr. Joe E. Wright, Junction City, Ky.—Dear Sir: Jack you shipped came in this morning he is not the jack you promised to ship the jack I bought through correspondence called for a Four Year old this one shows a Six Year old mouth or older was to be 60 inches high from bottom of foot to top shoulder 60 inches. This jack measures about 57 inches. Arm not over 16 inches this is not satisfactory by any means. Now there is one way to make it satisfactory that is to fill your contract to do that is to ship the jack you sold me as I have the letters with

measurements you sent and sent you the money that you agreed to take for the Four Year old. Know I want you to ship the Four Year old with measurements as agreed through correspondence at once Expressage prepaid and I will crate this jack and return him at your expense. Wire me at once if you are going to comply with this letter or I will positively proceed to enter suit immediately.

"Yours truly,

A. R. Schultz."

Having paid for the jack before he ordered it shipped, and having been compelled to pay the expressage, amounting to \$35, before the company would deliver it up to him, he filed suit against Wright in Boyle circuit court, wherein he sought to recover of him the amount of money which he had paid him for the jack and the express charges which he had paid the company for shipping him, on the ground that the jack shipped was not the jack which he had bought and which had been described to him by Wright in the correspondence. Issue was joined upon the material allegations of the petition, to wit: The question as to whether or not the jack shipped was the one sold. The case was tried by the court without the intervention of a jury, and the court found in favor of the plaintiff. Upon motion of the defendant, a separate finding as to the law and facts was given, and upon this finding judgment was rendered in favor of the plaintiff for the full amount sued for. A motion for a new trial was made, and, having been overruled, this appeal is prosecuted.

The negotiations leading up to the trade and the trade itself were conducted and closed by correspondence. The offer and acceptance are found in the following letters:

"Junction City, Ky., Feb. 15, '07.

"Mr. A. R. Schultz, Hampstead, Md.—Dear Sir: We have your favor of the 13th, and contents noted very carefully. We would like very much to do some business with you, but we are afraid that you are inclined to want to buy a jack for too little money. Mules have been advancing very fast in price, and we are sure will go higher than they are now, as we cannot at all supply the demand. Jacks have also advanced in price within the last two or three years, and we have had to put at least 20 per cent. on the price of our jacks compared to what we sold them for two years ago. We are going to give you prices and descriptions of our four year old jacks. He is black, with white points, has good feet and legs, large bone with plenty substance, nice smooth round body, mounts up well in front, long rangy neck, and very fine head and ears. This jack is very vigorous, and is an animal with lots of style and action, very high-headed, and can run like a horse. He is perfectly kind and gentle, and very easy to handle. We have tried him, and know him to be a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

producer of very fine large mules, and we will give you a written guarantee that he is a good breeder, sure foal getter, sound and all right in every respect. From tip of nose to root of tail he is 106 inches; height, from top of shoulder to bottom of foot 60 inch; girth 64 inch; body 80; arm 21 inch; knee 14 inch; ears from tip to tip 29 inch. Now, Mr. Schultz, this is a very fine young jack, and you will not make a mistake if you buy him. He is a very quick performer, and also a splendid teaser. You will not need a stallion with him. Now, as you state that you are going to trust me to ship you a jack, I want to say that I can recommend this jack as being all right in every way, and I also know that your people cannot pick any flaws in him, as he is a jack of very fine appearance. We have been holding him for \$500, but as you state that you cannot come to see us, but will leave the shipping of him to us, we will price him to you at \$400 cash. We mean business, and not \$1 less than \$400 will buy him, and when you buy a jack for less money than we have priced him, I fear you will get something that may not give you perfect satisfaction, and one that your people may not be pleased with. But we will give you description and measurements of a jack that we can sell for less money. He is six years old, very black, with white points, has plenty of bone and substance, nice round body, mounts up well in front, and has very good head and ears. He measures from tip of nose to root of tail 103 inches, top of shoulder to bottom of foot 59 inches; girth 60 inch; body 70 inch; arm 19 inch; knee 12 inch; hock 17 inch; ears from tip to tip 28 inch. He is a good breeder, and his mules are fine and large; will also guarantee him to be a good breeder, sure foal getter sound and all right; and will say that he is perfectly straight, no blemishes of any kind, is a quick performer, good teaser, do not have to use a stallion, and we will price him at \$250 cash. He is not as fine an individual as the first young jack we priced, neither has he as much style and action, but as far as his breeding is concerned he will give you satisfaction, and your people will find no fault in this respect. We have tried to be very plain, and expect to give you an honest, square deal. We have told you straight about the jacks, and you can take your choice. Send us a bank draft, or certified check, and we will ship you the jack at once. Hoping to hear from you by return mail, and to receive your order for jack, we remain,

"Yours very truly, Joe E. Wright."

"Junction City, Ky., Feb. 22, 1907.

"Mr. A. R. Schultz, Hampstead, Md.—Dear Sir: We have your favor of the 18th, and also of the 19th. We note that you have decided that you want the big black jack that we priced at \$400. Now, Mr. Schultz, you remember that we said to you in our former letter that \$400 was as cheap as we could

sell this jack, and that we would not take anything off the price, and we would much prefer to sell you the jack we priced you at \$200 than to take any off the price of the \$400 jack; but as you seem anxious to do some business, and of course we think you would be willing to help us to sell other jacks in your section, we have decided to let you have him at \$375. We are looking for a number of buyers about the 1st of March, and we would like to ship out this jack as soon as possible, as we do not like to have jacks that are sold in our barn, as the buyer is almost sure to want the jacks that have been bought by some one else, and especially if they are good ones. So please let us have your draft by return mail for the \$375 and give us shipping instructions, and we will let the jack go forward at once. Hoping to have your order by return mail, we remain,

"Yours very truly, Joe E. Wright.

"P. S.—You need not be uneasy about our shipping the jack when the weather is bad, for this we never do, but would like to have full instructions so that he can go forward, that we can start him the first pretty warm day. We personally superintend the loading and shipping of the jacks we sell, and we will see that he is put on the car in good condition."

"Hampstead, Md., Feb. 25, 1907.

"Mr. Joe E. Wright, Junction City, Ky.—Dear Sir: Will send certified check tomorrow get ready to ship jack weather is fairly good here now. I thank you kindly for letting me have the jack for \$375. Mr. C. J. Trimmer of Hacketstown, New Jersey, recommends you very highly wrote me that he got a better jack than expected. My shipping point is Hampstead, Md., Adams Express when you ship jack put a valuation on him of \$700, so that if any accident occurs Railroad Co. is responsible. My people here has never saw such a jack as you described there is quite a lot of breeding starting around here the last year or so and no jack in 25 miles of this place. It is more than likely you will sell another one in this section soon. Will start check tomorrow.

"Yours truly, A. R. Schultz."

"Junction City, Ky., Feb. 28, 1907.

"Mr. A. R. Schultz, Hampstead, Md.—Dear Sir: We have your favor of the 25th, and thank you very much for the order. We have marked the jack sold, and have asked our express agent to secure for us the very best rate possible from Junction City to Hampstead, Md. The shipping will not be delayed any longer than we can possibly help, as we explained to you we like for the jacks to go out as fast as they are sold, but will be careful to start him in good condition, weather and other conditions being favorable for the shipment. Think we can ship him by March 4th if there is no hindrance more than we know of now. Will

notify you, however, the day before we ship, so you will get our letter in time to be on the lookout for him. Will also send guarantee on the jack as soon as shipped. Again thanking you for the order, and hoping that you will be highly pleased with the jack and that you will be pleased as well as our friend Mr. Trimmer and recommend us to other customers we may have in your section, as our experience has taught us that well-pleased customers are the best advertisement we can have, :

"Yours very truly, " Joe E. Wright."

The sole question raised on this appeal is whether or not the finding and judgment of the chancellor is so flagrantly against the evidence as to warrant its being set aside and reversed. The letter of the appellant, containing the statements relative to the color, age, size, and qualities of the jack, upon which appellee acted and was induced to purchase same, represented that he was black in color, four years old, showed certain measurements, and was known by the appellant to be a sure foal getter. The testimony of appellant measured up fully to his representations in every particular as to the jack shipped, except that he admitted that he had only owned this jack a short time and had made no season with him, and it is not altogether clear that he had any personal knowledge of this jack's breeding qualities. The other witnesses introduced by him supported his testimony in the main. While, on the other hand, appellee testified that the jack received by him was brown in color, from six to eight years old, and smaller in the various measurements than represented. The trial judge found that the jack shipped did not measure up to the representations made in the following particulars: First, that he was brown, instead of black; second, that appellant did not know him to be a sure foal getter; and, third, that the measurements of the knee and arm were 12 inches full and 17 inches, respectively, whereas these measurements in the letter were represented to be 14 and 21 inches, respectively.

It is urged that the finding of the trial judge that the jack shipped was a brown jack is not against appellant, for the reason that appellee failed to allege in his pleading that the jack shipped was not a black jack; but, inasmuch as it is alleged that the jack received was not the jack bought, we think this point is not well taken, and this is especially true when the case was tried out upon the issues raised as though every material representation made in the letter was placed in issue. So, likewise, it is urged that the finding of the court that the appellant did not personally know the jack to be a sure foal getter is a finding upon an immaterial point, for at last the question would turn upon the fact as to whether or not he was a sure foal getter,

rather than upon the appellant's knowledge of this quality in the jack. It was competent for the plaintiff to show that the defendant did not, as a matter of fact, know that the statement he made of the jack in this particular was true. Such testimony was at least competent as affecting the credibility of the witness, and this fact seemed to have been given considerable weight by the trial judge. But, be that as it may, it was competent evidence for what it was worth, and the finding upon this point is against appellant.

As to the other two points upon which the court finds against him, it was urged that the measurements were taken of a jack either in a dying condition or after he was dead. This is an argument that might properly be addressed to the court, and under all the circumstances it would have been the province of the court to determine whether or not a jack's knee would shrink as much as from one to two inches when he had been sick or injured for two or three days, or even after he was dead. So, likewise, whether or not the foreleg, where it joins the body, would under like conditions shrink as much as four inches. The court found against appellant upon these points, and it not being denied, for the reason, we presume, that it could not be, that these measurements are material and important in the make-up of a jack—bone, size, and substance being looked upon as points of excellence—unless the court should have found that this difference in these particular measurements was due to the enfeebled condition or death of the jack, which he did not, then there is no escaping the conclusion that appellee did not get the jack described in the letter received by him from appellant. Numerically, the weight of the testimony upon this point is in favor of appellee. He was a stranger, residing in another state, relying wholly upon the representations of appellant, and under these circumstances it behooved appellant to deal with him with the utmost fairness. The allegation in his letter, that he knew the jack to be a sure foal getter, shows, when viewed in its most favorable light, that he was not overnice in drawing distinctions between personal knowledge and hearsay, and this fact evidently had some bearing upon the court in leading him to the belief that he was likewise careless in handling the tape when making the measurements of the knee and arm.

On the whole case, we are not prepared to say that, if we were passing upon the verdict of a properly instructed jury, we would feel authorized to grant a reversal, and, as has been frequently held, the finding of the trial court in a case of this character must be treated as the verdict of a properly instructed jury.

The judgment is affirmed.

LOUISVILLE & N. R. CO. et al. v. HAHN'S
ADM'R.†

(Court of Appeals of Kentucky. Nov. 9, 1909.)

1. MASTER AND SERVANT (§ 276*)—INJURY TO
SERVANT—NEGLIGENCE—EVIDENCE.

In an action for the death of a locomotive fireman, evidence held to support a finding that decedent was struck by a semaphore pole maintained at a point so close to the track as to be a source of great danger to trainmen, authorizing a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 959; Dec. Dig. § 276.*]

2. MASTER AND SERVANT (§§ 113, 210*)—IN-
JURY TO SERVANT—ASSUMPTION OF RISK.

Where a railroad maintains obstructions near its tracks, it is liable for injuries occasioned by its neglect of duty, and a trainman knowing of them does not assume the risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 224, 556; Dec. Dig. §§ 113, 210.*]

3. MASTER AND SERVANT (§ 289*)—INJURY TO
SERVANT—CONTRIBUTORY NEGLIGENCE.

Whether a locomotive fireman charged with the duty of keeping a lookout in front of the locomotive and to the rear of the train, who was struck by a semaphore pole near the track and killed, was guilty of contributory negligence, held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

Appeal from Circuit Court, Nelson County.

"To be officially reported."

Action by Charles A. Hahn's administrator against the Louisville & Nashville Railroad Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

John S. Kelley, Trabue, Doolan & Cox, and Benjamin D. Warfield, for appellants. Nat. W. Halstead, Charles F. Ogden, D. A. McCandless, and F. E. Daugherty, for appellee.

CLAY, C. This action was instituted in the Nelson circuit court by W. G. Hahn, as administrator of Charles A. Hahn, deceased, against the Louisville & Nashville Railroad Company, the Illinois Central Railroad Company, and the Kentucky & Indiana Bridge & Railroad Company to recover damages for the destruction of the life of Charles A. Hahn. The trial court gave a peremptory instruction in favor of the Kentucky & Indiana Bridge & Railroad Company. The jury returned a verdict against the Louisville & Nashville Railroad Company and the Illinois Central Railroad Company for the sum of \$5,000. From the judgment based thereon, this appeal is prosecuted.

While several alleged errors are assigned as grounds for reversal, counsel for appellants state in their brief that they do not care to have the judgment reversed unless this court shall hold that plaintiff made no case to submit to the jury, and that the trial court erred in refusing to award appellants a peremptory instruction. We shall there-

fore discuss the case from the standpoint of the question thus presented. Decedent, Charles A. Hahn, at the time of his death was in the employ of the Louisville & Nashville Railroad Company and engaged in the capacity of a locomotive fireman. The accident occurred on the south track of the Short Route Railway in the city of Louisville. The railway referred to extends from near Floyd street to Thirteenth street, in the city of Louisville. It consists of a double track, and passes over a trestle commencing at Floyd and First streets. The grade between Floyd and First streets is very steep. Located about 120 feet west of Floyd street is a semaphore pole which was used for signal purposes for the benefit of all the trains of the different companies using the Short Route Railway track. The Short Route Railway was maintained, controlled, managed, and operated by the Illinois Central Railroad Company as a part of its system, under and by virtue of a lease for a period of 99 years. The Louisville & Nashville Railroad Company had for a long time prior to the death of the decedent been using the Short Route Railway track daily for the purpose of passing its trains over it, and was so using the track on the occasion of the accident. On the day the decedent was killed the Louisville & Nashville Railroad Company was taking a train consisting of 32 cars to the Big Four Railroad. This train was in charge of two engines. The Louisville & Nashville engine was in front, while the Big Four engine was in the rear. At the time of the accident, the train was passing over the south track of the Short Route Railway. The Louisville & Nashville engine was backing. The decedent was thus placed on the side next to the semaphore. The negligence charged is that the defendants suffered and permitted the semaphore pole to be and remain so close and in such dangerous proximity to the track of the said Short Route Railway, over which the engine on which the decedent was fireman was passing, as to render same unsafe and dangerous to the decedent in the discharge of his duties as such fireman, and dangerous and unsafe to the employees of the company in operating trains along and over said track. When decedent was last seen, he was in the engine at Jackson street. He then had a conversation with the engineer, O'Hern, who told him to have his fire hot as it was a heavy pull up that hill. Some time after passing the semaphore pole, decedent was missing. His body was afterwards found some 30 or 40 feet west of the pole. An examination of the pole showed that there was a fresh mark on it at about the height of a man's head seated in the engine cab or standing in the gangway. Decedent's cap was found at the foot of the pole. A portion of his brains was also found about five feet from the pole. There was no blood or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied December 17, 1909.

clothing found upon the wheels of the engine. Blood was found upon the wheels of the other cars beginning with the car next to the engine. The top of decedent's head was knocked off. One of his hands was found about 12 feet west of the semaphore pole. His body was cut in two. Blood and flesh were found strung along the track from about 12 feet west of the semaphore pole, where the body was found, a distance of 30 or 40 feet.

The accident occurred on July 4, 1907. It took place about 4:15 a. m. While the evidence for appellants is to the effect that it was then broad daylight, the evidence for appellee is that it was barely day, and the morning being a hazy one, it was necessary in signaling to use lighted lanterns. According to appellee's testimony, the semaphore pole was located at a point from 14 to 18 inches distant from a passing engine or car. The position of the pole was such as to be a source of danger to the men operating the trains. According to the evidence for appellants, the pole was some distance further from a passing engine or car, and it was necessary that it should be placed at that point. It was a permanent structure, and had been there during all the time that decedent was in the employ of the Louisville & Nashville Railroad Company, a period of eight or nine months. While appellants' witnesses testify that it was necessary that the semaphore pole be located at the point where it was located, the witnesses for appellee say that it should have been placed upon the side of the tracks at a point where its presence would not be dangerous to trainmen, and in this position it would have been just as serviceable for the purposes required. It was shown by various witnesses that it was decedent's duty, while not engaged in the actual act of firing, to assist the engineer to keep a lookout. To this end it was necessary for him, not only to look in the direction in which the train was moving so as to avoid coming in contact with people or objects on the track, but also to look to the rear of the train in order to take signals from brakemen. On the other hand, there was testimony to the effect that at the particular time the decedent was killed the engineer could see the head brakeman and take all the necessary signals from him.

It is first insisted by appellants that, under the facts of this case, the jury could do nothing more than guess; that there was no evidence tending to show that decedent was actually struck by the semaphore pole; that he might have fallen out of the engine and the same result followed. While it is true that no one saw the accident, and that whatever conclusion is reached in regard to the cause of the accident is deducible only from the circumstances, in our opinion all the facts point unerringly to the conclusion that decedent was struck by the semaphore pole. It is altogether improbable that a fall

from an engine would have knocked off a portion of decedent's skull. The presence of his cap at the semaphore pole, the fact that the pole was marked at a place where his head would likely come in contact with it, the character of the blow on the head, and the further fact that a portion of his brains were found at that particular point, when considered in connection with the improbability of his death having occurred in any other way, removed the case from the field of speculation, and were sufficient to authorize the finding of the jury that the decedent's head was actually struck by the pole.

But it is insisted that decedent in projecting his head from the engine was acting solely for himself, and not in the performance of any duty in the capacity of fireman. The proof, however, shows that it was the decedent's duty, not only to look in front of the engine, but to the rear of the train. If it was a hazy morning, as some of the witnesses testify, it is certainly true that decedent could get a better view, not only of the track, but of the train, by projecting his head out of the engine. Where it is the duty of the fireman to keep a lookout, we will not say that it is negligence upon his part to attempt to perform this duty in a manner that will render it most effective. Nor can we say he was acting merely for his own convenience when his purpose was to serve his master in a most commendable way.

Lastly, it is insisted that the semaphore pole was a permanent structure and necessary for the operation of trains; that the decedent had passed it daily for several months, and he must assume the risk of being injured thereby. In support of this conclusion, we are cited to 4 Thompson's Commentaries on the Law of Negligence, § 4755. It is undoubtedly true that this doctrine has been recognized in certain jurisdictions, but it is not the law of this state. Thus in the case of Cincinnati, etc., R. Co. v. Sampson's Adm'r, 97 Ky. 65, 30 S. W. 12, this court used the following language: "It is contended that this bridge has been constructed for many years, and, no employé having been injured or killed by reason of its construction, it must be assumed that it is such a structure as is reasonably safe for its employés. We cannot adopt this view of counsel, but, on the contrary, it is plain from the record before us that this overhead structure was in no such condition as enabled this employé to discharge the duty he owed the company, and at the same time, however careful, protect himself from the danger impending by reason of the unsafe condition of the bridge. The employé assumes the ordinary risks pertaining to an employment that is often and necessarily attended with much danger, but this does not exempt the railroad company from liability when reasonable precaution on its part would save its employés from harm, and in a case like this where the exercise of the

slightest care would have prevented the accident. There can be and has been no reason assigned in this case why a corporation with the means to construct a railway would in the construction of all or large bridges leave them in such a condition as involves its employes, brakemen, in imminent peril when passing through them, when with a small expenditure such structures in this regard could be made perfectly safe. We are aware of many reported cases, some of which have been referred to by counsel, where the absence of ordinary care and the means of knowing the condition of the bridge by the employe have been held as relieving the railway company from responsibility in such cases. This court, however, has not followed or approved those decisions in reference to such structures, but, on the contrary, in the case of *Derby's Adm'r v. Kentucky Central Railroad Company*, 9 Ky. Law Rep. 153, 4 S. W. 303, plainly intimated that if the intestate in that case had been required to be on top of the car as it passed through the structure in discharge of his duty, and was killed by reason of its being too low for the cars to pass under, the brakeman standing erect upon them, a recovery would have followed." In the case of *Finley v. Louisville Ry. Co.*, 31 Ky. Law Rep. 740, 103 S. W. 343, this court said: "We are unable to perceive any difference in the principles governing the liability of the master for injuries to a servant caused by an obstruction overhead and one caused by an obstruction at the side or any other place." In the same connection the court uses the following language: "From these authorities it is perfectly manifest that the rule in the state of Kentucky is that the master is required to furnish the servant a reasonably safe place to work; and, unless it is in the line of the servant's duty, he is not required to make an inspection of the place of work to discover the defects and the danger incident thereto; and he is not precluded from recovering of the master when he is injured by defects or dangerous obstructions, unless he knows of them or they are patent to persons of his experience and understanding." In 26 Cyc. 1130, the rule is thus stated: "A railway company is bound to exercise reasonable care and diligence to prevent obstructions or erections on or over or near its tracks which are a source of danger to its servants, and will be held liable for injuries occasioned by its neglect of duty." Many cases are there cited to support the doctrine of the text.

Under the facts of this case, there can be no doubt that the presence of the semaphore pole at the point where it was located was a source of great danger to men operating the trains along the Short Route Railway. We cannot say as a matter of law that decedent was guilty of contributory negligence in pro-

jecting his head for the purpose of keeping a lookout at a time when it would come in contact with the semaphore pole. That was a question for the jury.

We therefore conclude that the court did not err in refusing appellants a peremptory instruction.

Judgment affirmed.

CITY OF LOUISVILLE v. COOKE et al.†

(Court of Appeals of Kentucky. Nov. 9, 1909.)

1. WILLS (§ 641*)—CREATION OF LIFE ESTATE—CONDITIONS—CREATION OF DEBTS.

A will devising a life estate to testator's son on condition that, if a judgment was entered against him subjecting his interest in the property or its use or income for his debts, the estate would cease at the date of the judgment, though appealed from, is valid.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 641.*]

2. WILLS (§ 641*)—CONSTRUCTION—JUDGMENT FOR TAXES.

Under such will that a judgment was entered against the life estate for taxes and the estate ordered sold was not such a debt as determined the estate as it was testator's intention that only debts created by the act of the son himself could have that effect.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 641.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by the City of Louisville against H. B. Cooke and another to recover city taxes. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

C. B. Blakey and J. M. Chilton, for appellant. C. B. Seymour, for appellees.

HOBSON, J. The will of George G. Cooke, made in the year 1893, contained among other things the following provision: "All the balance of my estate of every character and description, real, personal and mixed, and including the estates in remainder heretofore mentioned in this will, I hereby devise in equal parts to my two sons, H. Brent Cooke and J. Easton Cooke upon the following trusts and with the following limitations, to wit: the part devised to each of them shall be held by him for his own benefit for the period about to be mentioned, but without any power in him to sell or encumber the same, or to anticipate its income or in any way subject same to his debts, for and during his natural life or until a court of competent jurisdiction shall by a judgment hold that his interest in said property, or its use or income is liable to be subjected to his debts or liable to be sold or encumbered by him, or to have its rents and profits anticipated by him, with remainder after such death or judgment to my grandchildren now born or to be hereafter born, per capita and not per stirpes, but in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied December 17, 1909.

case of the death of any such grandchild, leaving descendants, before the termination of the particular estate, the interest he or she would have taken shall go to his or her descendants. And though such judgment should be appealed from, still it is my will that said beneficial interest of that son against whom such judgment shall be entered shall cease and determine at the date of the judgment appealed from." The city of Louisville instituted this action against H. Brent Cooke and J. Esten Cooke to recover the city taxes for the years 1906 and 1907 on property which they had received under this clause. They filed an answer, in which they claimed to have a defeasible life estate in the property. Thereupon the city filed an amended petition setting up the conditions under which they held the life estate in the land, and asked for a sale of their life estate to satisfy the payment of the taxes. They demurred to the amended petition. Their demurrer was overruled, and a judgment was rendered against them for the taxes, adjudging that their life estate was subject to the payment of the debt; that under the will their life estate thereupon ceased, and the title to the property vested in their children. Leave was given to the city of Louisville to proceed against the grandchildren of George E. Cooke for the taxes and a sale of the property. The city of Louisville appeals.

It was held in *Bull v. Ky. Nat. Bank*, 90 Ky. 452, 14 S. W. 425, 12 Ky. Law Rep. 536, 12 L. R. A. 37, that a provision in a will such as that before us is valid. By section 2908, Ky. St.,¹ all taxes remaining uncollected on the 1st day of May shall be deemed a debt from the taxpayer to the city, arising as by contract and may be enforced as other contract debts, where the taxpayer is under no disability; but this statute was passed long after the will in question was made. The thing that the testator had in mind was to provide against his two sons selling or encumbering the property in any way or making it subject to debts of their own creation. He had in mind debts voluntarily created by them, not charges created by law without their volition. He had in this provision of his will no reference to the taxes required for the support of the state or municipal government. Their life estate may be sold to pay the taxes without its being terminated as provided in the will. The testator had no intention to so fix the estate as to shield it from taxation or to provide that, if his sons did not pay the taxes on the estate, it should go to his grandchildren.

Under the pleadings the court should have entered a judgment subjecting the life estate of the defendants in the property to the tax claims. If this fails to pay the taxes, the city may be allowed to amend its petition

and bring the grandchildren before the court and subject the remainder.

Judgment reversed and cause remanded for further proceedings consistent herewith.

SMITH v. RUEHL.

(Court of Appeals of Kentucky, Nov. 10, 1909.)

1. INSANE PERSONS (§ 71*)—INSANE HUSBAND—LANDS—SALE BY WIFE—PROCEEDINGS.

Ky. St. § 2131 (Russell's St. § 4634), provides that when a husband has become permanently deranged the wife may be empowered by decree to convey by her own deed any of her real estate freed as to it and its proceeds from any claim of her husband, provided that the husband shall have been adjudged a lunatic by a court of competent jurisdiction. *Held*, that where a wife, whose husband had been duly declared insane, filed an ex parte petition in the circuit court stating the facts and with it an authenticated copy of the record showing the lunacy adjudication and prayed for a decree authorizing the sale of her land free from any claim of her husband, and a guardian ad litem was appointed, a decree granting the relief prayed without any evidence other than the record of the inquest, and without having before the court any person representing the husband, was not objectionable for failure to make the husband's committee or guardian, if any, a party defendant.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 118; Dec. Dig. § 71.*]

2. INSANE PERSONS (§ 26*)—ADJUDICATION OF INSANITY—CONCLUSIVENESS.

A judgment of the circuit court adjudging a husband a lunatic was conclusive in a subsequent proceeding by the wife to obtain a decree authorizing a sale of her land free from any interest of the husband as provided by Ky. St. § 2131 (Russell's St. § 4634).

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 35, 36; Dec. Dig. § 26.*]

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Suit by Rose Smith against Margaret Ruehl. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Frank V. Benton and Henry A. Faber, for appellant. William U. Warren, for appellee.

CARROLL, J. In a suit by the appellant to enforce specifically a contract for the sale of real estate purchased from her by the appellee, the appellee defended upon the ground that the appellant could not make a good title. The lower court sustained her defense, and the appellant has brought the case here.

The appellant's immediate vendor obtained the land from a Mrs. Puff, and the only question in the case is whether or not Mrs. Puff conveyed a good title. In 1906 Henry Puff, the husband of Mrs. Puff, was adjudged by the circuit court of Campbell county, in a proceeding instituted for that purpose, to be a person of unsound mind and a lunatic, and he was ordered to be and was confined in one of the state institutions for the insane.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Afterwards his wife filed her ex parte petition in the Campbell circuit court, in which she set out that she was the owner of certain described land, and that her husband who had been adjudged a lunatic was incurable and confined in the state asylum for the insane, and she prayed for a decree that she have the right to dispose of any real estate that she then owned or might thereafter acquire, free from any claim of her husband. Although neither the husband, nor any person, was made a party to the petition, a summons was issued against him and executed as provided in section 53 of the Code upon the superintendent of the asylum in which he was confined. Thereafter a guardian ad litem was appointed, and when his report was filed the court, without hearing any evidence, except the record of the inquest, or having before it any person representing the husband, entered a judgment decreeing that "the petitioner, Kate Puff, may by her own deed sell and convey any of her real estate, freed as to it and its proceeds from any claim of her husband."

It is insisted that this proceeding was void, upon the ground that it was necessary under the statute that the husband, and his committee or guardian, if he had one, should be made a party defendant to the action, and a summons executed upon either the committee, father, or guardian. Section 2131 of the Kentucky Statutes (Russell's St. § 4634), under which the proceeding by Mrs. Puff was instituted, reads as follows: "When the husband abandons the wife and lives separate and apart from her, or abandons her without making sufficient provision for her maintenance, or when he is confined in the penitentiary for an unexpired term of more than one year, or when he becomes permanently deranged in his mind, the wife, by judgment of a court of equity, may be empowered to sell and convey by her own deed any of her real estate freed as to it and its proceeds from any claim of her husband; provided, that in case of insanity he shall have been adjudged a lunatic by a court of competent jurisdiction." Under this statute it is not, in our opinion, necessary that the wife shall do more, in a case like the one before us, than file her ex parte petition in the circuit court, stating the facts, and with it file an authenticated copy of the record showing that the husband has been adjudged a lunatic by a court of competent jurisdiction. The manner in which a husband may be divested of his interest in the estate of his wife is entirely within the control of the legislative department of the state, and it seems that the Legislature only deemed it necessary that the wife should bring to the notice of the chancellor by her petition the disability under which her husband was laboring, and that then the court might make such orders as were necessary to grant the relief desired without service of process upon any per-

son or the appointment of a guardian ad litem. It would probably have been better if the Legislature had prescribed more definitely the practice or method of procedure, or have directed that the committee or guardian or some person interested in the person and estate of the person of unsound mind should be brought before the court to represent his interests; but it did not see proper to do this, and we do not feel authorized to supply by judicial interpretation a system of practice and procedure that the legislative department did not deem it necessary to incorporate in the statute.

We are confirmed in the correctness of our construction of the statute by the fact that section 2145 in the same chapter in the statute (Russell's St. § 4635), directing how the inchoate right of dower of an insane married woman may be divested upon the petition of her husband, provides that: "The wife and her committee, if she have one, shall be made defendants to said action; if she have no committee, the court shall appoint an attorney to defend for her, * * * and if the court be satisfied by the proof that the wife is a confirmed lunatic, it may adjudge the sale and conveyance of her inchoate right of dower in said land; and if she has a committee, the court may direct that he unite with the husband in the deed conveying said land; or if she has no committee, the court shall appoint a commissioner, who shall unite with the husband in such conveyance. A deed so executed shall pass such wife's inchoate right of dower. Before any judgment pursuant to this section shall be rendered, the husband, with at least two good sureties, shall execute, before the court, a covenant to the commonwealth for the benefit of the wife, to be approved by the court, that she shall be paid the value of her right of dower in said land should such right thereafter become complete." It will thus be seen that, in providing for the sale of land in which an insane wife has an inchoate right of dower, particular care is taken to protect her interest, and if the Legislature had intended that the same or a similar practice should be followed in a proceeding to divest the husband of his interest it would have so declared. Why the Legislature did not see proper to guard as carefully the interest of the husband as that of the wife, we are unable to say; but that it did not is manifest from the sections of the statute quoted.

This view of the case renders it unnecessary to consider the regularity of the process served upon the husband. Mrs. Puff filed with her petition copies of the records of the Campbell circuit court showing that her husband was in that court adjudged to be a lunatic. The judgment of that court and the orders appearing are conclusive in this action of the question that the proceedings in the Campbell circuit court by which the husband was adjudged a lunatic were regular.

Crown Real Estate Co. v. Rogers (Ky.) 117 S. W. 275.

Wherefore the judgment of the lower court is reversed for proceedings in conformity with this opinion.

PHILLIPS v. HUNDLEY et al.

(Court of Appeals of Kentucky. Nov. 4, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 21*)—ADMINISTRATORS C. T. A.—VOID OR ERRONEOUS APPOINTMENT—TIME FOR REVIEW.

The appointment, as an administrator with the will annexed, of another than the one entitled to, and asking for, the appointment, governed, as provided by Ky. St. § 3891, by sections 3896, 3897 (Russell's St. §§ 3937, 3919, 3920), as to appointment of administrators, is not void for want of jurisdiction, but only erroneous; so that it can be reviewed only by an appeal from the county court to the circuit court within 60 days of the order, and not by appeal from an order denying a motion made at a subsequent term to set aside such appointment and appoint the one entitled to it.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 113; Dec. Dig. § 21.*]

Appeal from Circuit Court, Marion County.

"To be officially reported."

Proceedings relative to appointment of an administrator with the will annexed of J. G. Phillips, deceased. From a judgment of the circuit court dismissing an appeal from the county court, Bird Burton Phillips appeals; E. N. Hundley and others being the appellees. Affirmed.

H. P. Cooper and Lindsay & Edelen, for appellant. W. W. Spalding, W. C. McChord, and Samuel Avritt, for appellees.

CARROLL, J. J. G. Phillips died testate in Marion county in December, 1907. In his original will he nominated E. N. Hundley as executor, but by a codicil John B. Phillips and Owen D. Thomas were substituted as executors in place of Hundley. The decedent left surviving him his widow and four children; one of the children being the appellant, Bird Burton Phillips. The first regular county court day after the death of Mr. Phillips occurred on January 6, 1908. The county court that convened on this day was adjourned until January 10th, when the executors Thomas and Phillips offered the will for probate, to which Hundley objected. For various reasons not necessary to mention the disposition of the case was continued until January 22d, when the county court met and probated the will; all opposition to it having been withdrawn. After the probate the nominated executors stated to the court that, if W. C. Rogers and J. A. Kelly were appointed administrators with the will annexed, they would relinquish their right to qualify. In this arrangement the widow and children, except appellant, also

concurred. Thereupon the appellant demanded the right to be appointed administratrix, but the court appointed Rogers and Kelly, and on that day they qualified and entered upon the discharge of their duties. The record shows that when the parties appeared in court on the 22d day of January, and announced their desire that Kelly and Rogers be appointed, "Bird Burton Phillips, a daughter of J. G. Phillips, deceased, thereupon by attorney demanded that she be appointed and qualified as administratrix with the will annexed in lieu of the said J. A. Kelly and W. C. Rogers, and in lieu of all other persons," which motion the court overruled; and on the same day the following order was entered: "In the Matter of the Estate of J. G. Phillips. Bird Burton Phillips by attorney moved the court to set aside so much of the order this day entered as appoints J. A. Kelly and W. C. Rogers administrators with the will annexed of J. G. Phillips, and refused to appoint her, Bird Phillips, as a void order; and, the court being advised, overruled said motion, to which Bird Burton Phillips objected and excepted, and prayed an appeal to the circuit court." The county court record also shows that on February 3, 1908, which was the first day of the second regular term of the county court after the death of Mr. Phillips, the following order was entered: "In the Matter of the Estate of James G. Phillips. This day came Miss Bird Phillips, by attorney, and moved the court to appoint her administratrix with the will annexed of the estate of her father J. G. Phillips, deceased. The court, for reasons sufficient to itself, declined to take action of any kind upon said motion." And again, on the 2d day of March, 1908, Miss Phillips appeared in court, and renewed her motion, which was continued until March 11, 1908. On May 4, 1908, Miss Phillips filed her affidavit in the county court, setting out her qualifications for and right to the office of administratrix, and "moved the court to set aside as void the former order of this court appointing W. C. Rogers and J. A. Kelly as administrators of the estate of her father, J. G. Phillips, and to appoint her as administratrix of her said father's estate with the will annexed; and the court, being sufficiently advised, overruled each of said motions, and on account of the said former appointment refused to grant letters of administration to Bird Phillips, to all of which Bird Phillips objected and excepted and prayed an appeal to the Marion circuit court, which is granted." On May 26th Miss Phillips filed and perfected her appeal in the circuit court, and when the case came up for hearing, the appellees moved to dismiss the appeal, because it was not prosecuted in time. The circuit court sustained this motion, and Miss Phillips appeals.

It will be observed, as shown by the records of the county court, that Miss Phillips appeared in the county court when Kelly and Rogers were appointed as administrators, and asked to be appointed in their place, and that when her motion was overruled, she prayed an appeal to the circuit court, but did not perfect it. Appeals in matters like this must be prosecuted from the county court to the circuit court within 60 days after the order appealed from is made in the county court. The order of the county court, made in January appointing Kelly and Rogers administrators and refusing to appoint Miss Phillips, was a final and appealable order. And if she desired to have this order reviewed in the circuit court, an appeal should have been taken and perfected in that court within 60 days thereafter. It is evident, however, that the appeal to the circuit court was prosecuted, not from the orders of the county court made in January, but from the order made in May. In support of the right to appeal from the order made in May it is argued that the appointment of Kelly and Rogers under the circumstances stated was void, and hence the county court should have set it aside at any time; and, if it refused, the circuit court should set it aside on appeal. That being a void order, it was not important whether the motion to vacate it was made during the term—that is, before the regular term of the county court in February—or afterwards, and that when Miss Phillips moved the court in May to revoke the appointment of Kelly and Rogers and substitute her, she had the right, within 60 days thereafter, to appeal from the order overruling her motion, and have the matter of the appointment of Kelly and Rogers, and the refusal to appoint her, inquired into. In this view of the case we are unable to agree. If the order appointing Kelly and Rogers was void upon the ground that the court had no jurisdiction to appoint them, there would be much force in the argument presented by her counsel. But the appointment of Rogers and Kelly was not void. It was only erroneous. We may concede that under section 3896 of the Kentucky Statutes (Russell's St. § 3919) Miss Phillips was entitled to be appointed at the time Kelly and Rogers were, if the widow had declined the appointment; but, as their appointment was only erroneous, and the court had jurisdiction to appoint them, Miss Phillips, who objected to their appointment, should have prosecuted within 60 days thereafter an appeal to the circuit court, and failing to do this, she lost her right to complain about the appointment. In *Underwood v. Underwood*, 111 Ky. 966, 65 S. W. 130, 23 Ky. Law Rep. 1287, the court held that the appointment of a public administrator before the expiration of three months after the death of a decedent was void—holding that under section 3905 of the Ken-

tucky Statutes (Russell's St. § 3920) the court had no jurisdiction to make the appointment until the three months had expired; but this rule has never been applied to the appointment of administrators under sections 3896, 3897 (Russell's St. 3919, 3920), of the Kentucky Statutes; and the appointment of an administrator with the will annexed is, as provided in section 3891 of the Kentucky Statutes (Russell's St. § 3937), regulated by these sections. On the contrary, we held in *Buckner v. L. & N. R. Co.*, 120 Ky. 600, 87 S. W. 777, 27 Ky. Law Rep. 1009, *Young's Adm'r v. L. & N. R. Co.*, 121 Ky. 483, 89 S. W. 475, 28 Ky. Law Rep. 451, *Spayd v. Brown*, 102 S. W. 823, 31 Ky. Law Rep. 438, *Cunningham v. Clay (Ky.)* 112 S. W. 852, and *McFarland v. L. & N. R. Co. (Ky.)* 113 S. W. 82, that the appointment of an administrator, not of kin to the deceased, before the second county court day after the death of the intestate, was erroneous, but not void. It, therefore, follows that as the order of the county court appointing Rogers and Kelly was erroneous, the only way to correct it was by an appeal to the circuit court within 60 days from the date of the order making the appointment.

Wherefore the judgment of the lower court is affirmed.

GOFF v. HURST.

(Court of Appeals of Kentucky. Nov. 5, 1909.)
BROKERS (§ 56*)—RIGHT TO COMMISSIONS—EFFICIENT AGENT—PROCURING CAUSE OF CONTRACT.

Where a real estate broker who had been authorized to sell the timber on a tract of land merely informed the purchaser, who had been negotiating with the owner for some time in regard to purchasing the land, that he had the land for sale, but did nothing further, and knew nothing of the subsequent negotiations which led up to the sale, which was not made until the vendor agreed that a mill and the down timber would be included, and also agreed to the purchaser's terms as to time of payment, he was not the efficient agent in, or the procuring cause of the contract, so as to entitle him to a commission.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 85–89; Dec. Dig. § 56.*]

Appeal from Circuit Court, Breathitt County.

"To be officially reported."

Action by R. A. Hurst against C. P. Goff. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

E. C. Hyden, W. W. McGuire, and O. H. Pollard, for appellant. J. J. C. Bach, for appellee.

SETTLE, J. R. A. Hurst brought this suit against C. P. Goff. He alleged in his petition that Goff had employed him to procure for him a purchaser for the timber on a tract of 1,076 acres of land known as the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Ware Cannel Coal tract, and had agreed to pay him \$500 upon condition that he would procure him a purchaser for the timber at the price of \$10,000 that he procured such a purchaser who bought the property, and that Goff had refused to pay him the \$500. Goff filed an answer in which he denied that Hurst had procured a purchaser of the timber, or that the sale was in any wise induced by him. There was a trial of the issues thus joined resulting in a verdict and judgment in favor of the plaintiff. Goff appeals.

The evidence introduced by Hurst on the trial was in substance as follows: Samuel E. Patton in the spring of 1906 had some correspondence with Goff relative to the purchase of the timber, but they came to no agreement. In October the negotiations were renewed, and in December no agreement between them had been reached. At this time Hurst met Goff in Jackson and had a talk with him about finding him a purchaser for the timber. On December 6th he wrote Goff the following letter: "Jackson, Ky., Dec. 6, 1906. Cas Goff, Esq., Paris, Ky. Dear Sir: I had a talk with you about the property you were interested in in this county last fall and you indicated to me that if I found a purchaser to let you know and you would give me the right to sell same. I have a purchaser and he will act promptly. Please put the lowest price on the timber of each tract and give me the number of acres and the location of each tract and at once, and write me by return mail and oblige, Respectfully, R. A. Hurst." On December 10th Goff wrote Hurst as follows: "Paris, Ky., Dec. 10, 1906. Mr. R. A. Hurst, Jackson, Ky. Dear Sir: The only piece of timber we are offering now for sale is a boundary of 1.076 acres at the mouth of Troublesome Creek, known as the Ware Cannel Coal Cos. boundary. The standing timber on this boundary I offer for \$10,000.00. If you can find a buyer at the price will allow you 5% or \$500.00. Very Resp., C. P. Goff."

Hurst immediately upon receiving this letter from Goff saw Patton and informed him that he had the tract of land for sale, and that it could be purchased for \$10,000. He asked him to take the matter up with Goff. Patton said he would examine the timber, and take the matter up with Goff. He did make an examination of the timber, and on the 31st of December he closed a trade with Goff, by which he paid Goff \$10,000 for the timber on the land standing and down and a mill Goff owned. Hurst did not notify Goff that Patton was the man he was furnishing as a buyer. He did not introduce Patton to Goff. He knew nothing of the correspondence carried on between them for the sale of the timber. He was not present at any of the meetings they had, and knew nothing of them. He did not notify Goff at

any time that he had seen Patton about the timber, and Goff did not know that Hurst claimed to have had anything to do with the matter until a month after the trade was made. Patton did not buy the timber through Hurst, but bought it independently of him of Goff, and he did not make the trade with Goff until Goff agreed to put in the mill and down timber, and also agreed to his terms as to the time of payment of the price. The rule is that, to be entitled to a commission, a broker must be an efficient agent in, or the procuring cause of the contract, or it is sometimes expressed he must be the primary procuring cause or controlling cause. *Collier v. Johnson*, 67 S. W. 830, 23 Ky. Law Rep. 2453, and cases cited. In the case at bar Hurst was in no sense the efficient or procuring cause of the contract. At the time that Hurst saw Patton, he had been negotiating for some months with Goff for the purchase of the timber, and Goff had priced it to him at \$10,000. Hurst did nothing except to see Patton and inform him that he had the tract of land for sale, and ask him to take the matter up with Goff. He gave Patton no information that he did not already have except to inform him of his agency. After telling Patton this, he did not see Patton any more and had nothing to do with the matter; but Goff went on and made the trade with Patton without any help from Hurst. To say on this proof that Hurst was the primary controlling cause of the contract would be to make the rule mean nothing and to ignore the principle on which the rule rests. On the admitted facts the court should have instructed the jury peremptorily to find for the defendant. *Alexander v. Breeden*, 14 B. Mon. 154, is not like this case. There the agent procured the purchaser, and the owner of the property prevented him from selling it for the price named as he would have done but for the owner's interference. In *Coleman v. Meade*, 18 Bush. 358, the broker procured the purchaser, and he was accepted by the owner of the property.

Judgment reversed and cause remanded for further proceedings consistent herewith.

LOUISVILLE RY. CO. v. ROSER.

(Court of Appeals of Kentucky. Nov. 11, 1909.)
DAMAGES (§ 131*)—PERSONAL INJURIES—EXCESSIVENESS.

Plaintiff, a steam fitter earning \$2.25 per day, was injured on August 9, 1907. On September 16th following he returned to work, and worked 12 days in that month, losing but few days thereafter because of inability to work, and in November following his wages were increased. He had no broken bones or dislocated joints. Several physicians testified that he had a curvature of the spine, and that he had suffered a severe nervous shock, and that pressure on either side of the spinal column which was enlarged and swollen increased the pulse. There was other evidence, however, that the increas-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed temperature and pulse may have been due to acute indigestion from which he suffered, and, though the physicians testified that his condition would likely grow worse, there was no satisfactory evidence of a permanent impairment of his power to earn money. *Held*, that a verdict for \$5,000 was so excessive as to indicate passion and prejudice and required a new trial.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 357-367; Dec. Dig. § 131.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division. "Not to be officially reported."

Action by George Roser against the Louisville Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Fairleigh, Straus & Fairleigh, for appellant. Bennett H. Young, for appellee.

CLAY, C. Appellee, George Roser, instituted this action against appellant, Louisville Railway Company, to recover damages for personal injuries. The jury returned a verdict in favor of appellee for the sum of \$5,000, and the Louisville Railway Company appeals.

George Roser was a passenger on one of appellant's Second Street cars on August 9, 1907. He was on his way to the railroad shops in South Louisville, where he was employed as a steam fitter. The car was going south, and as it neared Chestnut street a work car going east on Chestnut street reached the intersection. The work car had the right of way under the rules of the company, and it was the duty of those in charge of the Second Street car to stop and wait until the work car had crossed over the intersection. The motorman on the Second Street car knew this to be the rule and endeavored to obey the same by stopping his car, but was unable to do so because the air brake was out of order. There was also testimony by a former employé to the effect that he at one time had charge of car 901—the car on which appellee was a passenger—and that the brake was then out of order, and he reported this fact to his superior officers. The latter denied that he made any such report. When the Second Street car struck the work car, appellee was thrown from the platform to the ground. He was picked up in a semiconscious condition, in which he remained for about 36 hours.

Appellant urges as grounds for reversal: (1) Newly discovered evidence; (2) misconduct of counsel; and (3) that the verdict is excessive. In view of the conclusion of the court, we shall consider only the last ground.

The evidence as to appellee's injuries is as follows: The collision occurred on August 9, 1907. At the time of the accident, appellee worked for the Louisville & Nashville Railroad Company as a steam fitter, and had

been working for that company for five months prior to the date of the accident, at \$2.25 per day. On the 16th day of September, 1907, he went back to work and worked 12 days in September. From that time on he lost but a few days from his usual occupation of a steam pipe fitter. The work in which he was engaged required a strong man. In November following the accident his wages were increased from \$2.25 to \$2.35 per day. He had no broken bones or dislocated joints.

Dr. Schackner, who was appointed by the lower court to examine appellee, made two examinations; one in May prior to the trial, and one on the day of the trial. He testified that on each occasion he found appellee's temperature above normal and some acceleration of the pulse. This condition, however, could be attributed to various causes. He discovered no injury to appellee's person, except, perhaps, a slight impairment of the motion in one shoulder. There might be some slight lateral curvature of the spine. He found no shrinkage nor atrophy of any part; no evidence of structural impairment. Appellee was well nursed, and his muscles were solid, not flabby. There might be a very slight rigidity of the muscles of the back.

Dr. Dudley S. Reynolds testified that he found that appellee's right shoulder blade seemed detached. Close to the ribs it had less motion than the left shoulder blade. The right shoulder blade was held down. There was a curvature of the spine, which, in his opinion, was the result of violence. This curvature of the spine was not there on the former examination. There was some rigidity of the muscles in the back, which was a nervous manifestation. There were points of tenderness at three places in appellee's spine. When asked the question if appellee was liable to get better or worse, the witness replied that he had grown worse since the first examination.

Dr. Forest Gabbert, who treated appellee at the time of his injuries, testified that appellee was more or less unconscious at the time. His back was swollen, also his right shoulder. The latter was also considerably bruised and tender. The whole spinal column was more or less wrenched and tender on pressure. Witness called in Dr. Breidenthal, because he thought the case was more serious than he anticipated at first. Appellee worked against the advice of witness. Had had control and observation of appellee since the accident. In answer to the question whether or not appellee was getting better or worse, witness replied that he was getting worse. Could not say whether he suffered much or little pain. Appellee suffered pain on pressure and complained more or less of pain. Witness also testified that appellee's temperature was above nor-

mal, and to the further fact that his pulse and breathing were above normal.

Dr. George B. Breidenthal testified that he made an examination of appellee on August 25th, and found him extremely nervous and apparently in much pain. His temperature, respiration, and pulse were above normal. In answer to the question whether or not appellee was getting better or worse, the witness replied that he was getting worse. In the opinion of witness, if appellee were going to get better he would have improved before that.

Dr. Curran Pope testified that he examined appellee thoroughly from head to feet. He found his temperature, pulse, and respiration considerably above normal. Appellee at the time of the examination was in a state of very severe nervous shock. There was a scar about one inch in length, rather deep, just above the left ear, and also a scar on the left ear about where it joined the skin of the scalp. Appellee's spine was curved from side to side; that is, it had a lateral curvature. There was a place four by six inches on either side of the spinal column that was enlarged and swollen. Pressure upon this place raised the pulse to 120. Appellee's shoulder had been considerably wrenched, and the shoulder blade was in such condition you could not slip your hand under, and the blade was not as freely movable as it should be. In answer to the question whether or not appellee would get better or worse, witness replied that he did not think he would get better, but that there was every probability of his getting worse. In his opinion appellee had not the proper nerve force to carry on the functions of the body. From the character of the injuries received, witness was of the opinion that appellee had suffered a great deal of pain. Witness had some doubt as to whether or not appellee was in condition to do proper work.

Appellee himself testified that, while he had worked, it was always accompanied with much pain. He had to work because it was necessary to support his family.

Here, then, we have a case where a man, although injured, continues to perform the laborious work of a steam pipe fitter. It is true that he lost some time from his work because his services were not needed; but he lost very few days because of his inability to work. It was developed on cross-examination that the fact that appellee's temperature, pulse, and respiration were above normal may have been due to other causes. He was suffering from acute indigestion. This may have had something to do with it. Furthermore, the very fact that he was undergoing an examination may have had some bearing upon the condition of his pulse, temperature, and respiration. When it was sought to ascertain from the witnesses whether or not in their opinion appellee's

injuries were permanent, the answers of the physicians were to the effect that he would likely grow worse. There was no positive statement from which it could be fairly deduced that appellee's power to earn money would be permanently impaired. Notwithstanding the testimony of the physicians that appellee was not in fit condition to do proper work, the fact nevertheless remains that he was actually employed in the work of a steam fitter, and that his wages for that service had been increased from \$2.25 to \$2.35 per day. The physicians seem to have been rather guarded in their opinions, and it is apparent from their testimony that appellee might continue to grow worse for a certain length of time and thereafter grow better. All that they say may be true, and yet appellee have suffered no permanent impairment in his power to earn money. They were just as positive in their opinions that he was not capable of doing proper work at the very time that he was doing proper work as they were in the belief that he would continue to grow worse. In our opinion their testimony partakes too much of mere speculation and is by no means convincing that appellee was permanently injured. That being the case, we conclude that, although a punitive damage instruction was authorized by the evidence, a verdict for \$5,000 was so excessive as to appear at first blush to have been the result of passion and prejudice on the part of the jury. We are therefore of the opinion that the ends of justice require that this case be remanded for a new trial.

Judgment reversed for proceedings consistent with this opinion.

MILLIKEN, County Treasurer, et al. v. GEORGE L. GILLUM & SON.

(Court of Appeals of Kentucky. Nov. 5, 1909.)

1. COUNTIES (§ 204*)—ALLOWANCE OF CLAIM—ORDER—INDEFINITENESS.

An order of the fiscal court that "the following claims were allowed and made payable out of the county levy for 1906: 'Roads,' Flowers, J. S. Commissioner at Duncan's on Muddy River \$1,650.00," held void for indefiniteness; it being impossible to determine from the language of the order whether he was appointed commissioner to construct a bridge, public road, or some other public improvement not described.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 317; Dec. Dig. § 204.*]

2. EVIDENCE (§ 387*)—COUNTY RECORDS—EXTRANEOUS EVIDENCE—ADMISSIBILITY.

The fiscal court, like other courts, must speak through its records, and extraneous evidence is not admissible to show the meaning of its orders.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1702; Dec. Dig. § 387.*]

3. BRIDGES (§ 20*)—FISCAL COURTS—DELEGATION OF DISCRETION.

Although the fiscal court cannot delegate to an agent the discretion with which the law

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

clothes it, it may after determining the necessity therefor appoint a commissioner, not a member of the court, to construct a bridge or contract for its construction, but it should in advance direct through its records the character of the bridge and its cost, and not allow the commissioner a round sum for the work, or leave to his judgment the character of the work and the cost, or allow him to obtain the money in advance for the doing of the work, either by a sale or assignment of the warrants therefor, or collecting it from the county treasurer.

[Ed. Note.—For other cases, see *Bridges*, Cent. Dig. § 37; Dec. Dig. § 20.*]

4. COUNTIES (§ 155*)—FUNDS—DISPOSITION.

The fiscal court has no power to order the county treasurer to pay into the hands of a third person the county's money, to be paid out by him months later in satisfaction of county indebtedness created by him, nor does the fact that such method is customary sanction or legalize the method.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 223-225; Dec. Dig. § 155.*]

5. COUNTIES (§ 64*)—FISCAL COURTS—VOID APPOINTMENTS.

An order of the fiscal court appointing one of its members a commissioner to do certain county work was void.

[Ed. Note.—For other cases, see *Counties*, Dec. Dig. § 64.*]

6. COUNTIES (§ 167*)—FISCAL COURTS—VOID ORDERS—COUNTY WARRANTS—EQUITY.

Plaintiffs discounted two warrants issued to a bridge commissioner upon a void order of the fiscal court of L. county. Both parties acted in good faith. The parties to the transaction only followed a custom which, though unsanctioned by law, had long obtained in the county. The bridge constructed with part of the money received from plaintiffs was of excellent material and workmanship, and its cost was less than expected by the fiscal court. The fiscal court accepted the bridge, which was used regularly by the people, and is worth the cost of construction. *Held*, that equity required that defendant county should pay plaintiffs the amount they furnished to construct the bridge.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 249; Dec. Dig. § 167.*]

7. COUNTIES (§ 167*)—FISCAL COURTS—VOID ORDERS—COUNTY WARRANTS—EQUITY.

Since the bridge commissioner sold plaintiffs void warrants, he is liable to them for the difference between what they paid him for the warrants and the amount for which they were given judgment against the county.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. § 249; Dec. Dig. § 167.*]

Appeal from Circuit Court, Logan County.
"To be officially reported."

Action by George L. Gillum & Son against John W. Milliken, as treasurer of Logan county, and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

R. W. Davis and S. R. Crewdson, for appellants. Browder & Browder, for appellees.

HOBSON, J. The fiscal court of Logan county during its regular October term, 1905, allowed numerous claims, including one of \$1,650 involved in this action. That part of the order allowing this claim is as follows: "The following claims were allowed and made payable out of the county levy for 1906: 'Roads.' Flowers, J. S. Commissioner at

Duncan's on Muddy River \$1,650.00." Soon after the allowance of the claim, Flowers, who was a magistrate of Logan county and therefore a member of the fiscal court, procured of the clerk of the Logan county court two warrants covering the amount named; one of them being for \$450 and the other for \$1,200. In November, 1905, he assigned the two warrants to appellees, George L. Gillum & Son, a firm composed of George L. Gillum and Perry Gillum, engaged in the hardware business in Russellville, and received of them \$1,552.40 therefor. Of the amount thus received, Flowers expended \$1,108.17 in constructing an iron bridge on Muddy river, where it is crossed by the Russellville and Morgantown road near Duncan's in Logan county. Following the completion of the bridge, the appellees, George L. Gillum & Son, demanded of the appellant John W. Milliken, treasurer of Logan county, payment of each of the warrants assigned them by Flowers, but that officer refused to pay them, and appellees thereupon brought suit against him in his official capacity and against Logan county and also against J. H. Flowers to recover the \$1,650 claimed to be due them upon the warrants.

The answer filed by the treasurer for himself and Logan county denies any liability on their part upon the warrants, claims that both are void for uncertainty, that the fiscal court was without power to appoint Flowers commissioner to construct the bridge, and that the assignment of the warrants by the latter to appellees was unauthorized and void, as were his acts in constructing the bridge and expending therefor such part of the money he received from appellees as was applied to that purpose. The answer of Flowers alleged the bona fides of the assignment of the warrants to appellees, and of his acts in constructing the bridge and expending therefor the money received of appellees, and also alleged that out of the balance of \$444.23 he claimed was left in his hands after paying for the bridge he paid \$200 for road work in the Russellville magisterial district which the fiscal court had directed him as commissioner to have done, but later refused to pay him for, and was entitled to \$42 for his services in superintending the building of the bridge, and these sums, it was averred, he was entitled to be paid out of the \$444.23, left in his hands, but \$184.23, and the latter sum he was, as alleged, entitled to retain for services rendered by him as commissioner of public roads by order of the fiscal court. Responsive pleading controverting both answers was filed by appellees.

The circuit court on the issues thus made, and following the taking of proof by the parties, rendered the following judgment, viz.: "These consolidated causes coming on to be heard upon the pleadings and testimony and the court being advised, it is now adjudged

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by the court that the plaintiffs, George L. Gillum and Perry Gillum, partners trading as George L. Gillum & Son, recover of the defendant, Logan county, the sum of \$1,108.17, with interest thereon at the rate of 6 per cent. per annum from the 1st day of January, 1907, and two-thirds of their costs in these actions expended, for which execution may issue after 10 days. To which judgment the defendant Logan county objects and excepts, and prays an appeal to the Court of Appeals, which is granted. It is further adjudged by the court that the plaintiffs as above named recover of the defendant J. H. Flowers the sum of \$454.83, with interest thereon from January 1, 1907, until paid at the rate of 6 per cent. per annum, and one-third of their costs in these actions expended, for which execution may issue after 10 days. To all of which judgment against him the defendant J. S. Flowers objects and excepts, and prays an appeal to the Court of Appeals, which is granted. The court delivered a written opinion in these actions, which is hereby filed and made a part of this record, and these cases are hereby continued." We concur in the conclusions expressed in the written opinion of the circuit court that the order allowing Flowers the \$1,650 was and is void, because of its indefiniteness and the want of authority on the part of the fiscal court to appoint Flowers, one of its members, a commissioner to construct a bridge. It is impossible to determine from the language of the order for what purpose Flowers was appointed a commissioner, whether to construct a bridge, public road, or some other public improvement not described.

The fiscal court, like other courts, must speak through its records. Extraneous evidence to show the meaning of its orders will not be allowed. As the fiscal court, though a court of record, is one of limited jurisdiction and powers the greater reason exists for applying to its records the rule referred to, otherwise the counties of the state could not conduct their monetary affairs with safety, or protect themselves from expensive and unnecessary litigation. The fiscal court cannot delegate to an agent the discretion with which the law clothes it. It may, after determining the necessity therefor, appoint a commissioner, not a member of the court, to construct a bridge or contract for its construction, but in doing so it should in advance direct through its records what character of bridge it should be and its cost, instead of allowing him a round sum with which to do the work and leaving to his judgment what shall be the character of the work and its cost, or allowing him to obtain the money in advance of the doing of the work, either by a sale and assignment of warrants therefor, or collecting it from the county treasurer.

The treasurer of the county is the legal custodian of its money and responsible upon

his official bond for its safe-keeping and payment, and the fiscal court has no power to order the county's money paid by the treasurer into the hands of another person to be paid out by the latter some months later in satisfaction of the county's indebtedness created by the person receiving the money. Nor can the fact that such a method of building and paying for roads and bridges had long been a matter of custom in Logan county sanction or legalize the method. In the instant case the warrants embracing the sum allowed for the construction of the bridge were assigned to and discounted by appellees in November or December, 1905, when the commissioner had not made a contract for the construction of the bridge, and did not know what it would cost. The money he received upon the warrants he held until the summer of 1906, when about two-thirds of it was paid on the bridge, leaving the remainder in his hands, which, it is claimed for the county, has not since been expended as contemplated by the fiscal court. Such methods of conducting the business of a county cannot receive our approval. In no event had the fiscal court the power to appoint Flowers commissioner to construct the bridge in question, as he was a magistrate of Logan county, and by virtue thereof a member of the fiscal court of the county. In the case of Pulaski County v. Sears, 117 Ky. 249, 78 S. W. 123, 25 Ky. Law Rep. 1381, it was held that an order of the fiscal court investing the county judge with the general supervision of the roads of the county and making the magistrate in each magisterial district his assistant was void. In Boyd County v. Arthur, 118 Ky. 932, 82 S. W. 613, 26 Ky. Law Rep. 906, it is said: "The statutes that we have referred to have the same end in view when they forbid members of the fiscal court being interested in any contract or work. * * * Vaughn v. Hullett, 119 Ky. 380, 84 S. W. 309, 27 Ky. Law Rep. 35; Daviess County v. Goodwin, 116 Ky. 801, 77 S. W. 185, 25 Ky. Law Rep. 1081. It is patent, however, from the record that the warrants issued to Flowers were discounted by appellees in good faith, and that Flowers also acted in good faith in so disposing of the warrants. Indeed, the record casts no reflection upon the character of any of the parties to the transaction, but, on the contrary, shows that they but followed a custom which, though unsanctioned by the law, had long obtained in Logan county. It is conceded that the bridge constructed across Muddy river near Duncan's, under the supervision of Flowers, was of excellent material and workmanship, and that its cost was less than was expected by the fiscal court. As before stated, the bridge cost \$1,108.17, and this sum was admittedly paid by Flowers out of the \$1,552.40 obtained from appellees upon the warrants. As the fiscal court of Logan county seems to have accepted the bridge and it has been in use

by the people of the county since its completion and is conceded to be worth the amount expended by Flowers in its construction, we think equity requires that Logan county should pay appellees the \$1,108.17 they furnished to construct the bridge. Therefore in so adjudging the circuit court did not err. As Flowers, however innocent of any purpose to wrong them, sold and assigned appellees the two void warrants, he is liable to them for the difference between what they paid him for the warrants and the amount for which they were given judgment against Logan county; that is, they were entitled to recover of him \$454.83, with interest from January 1, 1907, and for this sum and interest the circuit court very properly gave appellees judgment against Flowers.

The circuit court did not pass upon the credits and demands asserted against the claim of appellees and against Logan county by the answer of Flowers, nor will we do so, as it appears that these matters cannot be relied on to defeat appellees' claim, and besides they, with other like demands, are involved in another action between Flowers and Logan county, pending in the Logan circuit court.

Finding no error in the judgment appealed from, it is affirmed both as to Logan county and J. H. Flowers.

WICKHAM'S ADM'R v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Nov. 10, 1909.)

1. MASTER AND SERVANT (§ 236*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a watchman employed to keep trespassers on a railroad track from being injured by trains suddenly stepped without looking from a place of safety before an approaching train, which he knew was due, he was negligent as a matter of law barring a recovery for his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 739; Dec. Dig. § 236.*]

2. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT—CARE REQUIRED OF MASTER.

A railroad does not owe to its watchman employed to keep trespassers on the track from being injured by trains the duty of regulating the speed of its trains, and it is not liable for the death of the watchman struck by a train, merely because it operated the train at a negligent speed, because of the fact that the public customarily used the track at that point, which was within an incorporated town.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 274; Dec. Dig. § 137.*]

Appeal from Circuit Court, Spencer County.
"To be officially reported."

Action by John Wickham's administrator against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Reasor & Crume, Edwards, Ogden & Peak, and Peak & Holland, for appellant. Luther C. Willis and Benjamin D. Warfield, for appellee.

CLAY, C. Appellant, J. W. Crume, as administrator of John Wickham, instituted this action against appellee, Louisville & Nashville Railroad Company, to recover damages for the destruction of the life of John Wickham. At the conclusion of all the testimony the court awarded appellee a peremptory instruction.

The deceased, John Wickham, was killed on April 29, 1908. At the time of his death he was 53 years of age. He was then in the employ of appellee in its South Louisville yards as day watchman, and had been working in that capacity for about six months. He was earning \$40 per month. His duties as watchman were to protect the property of appellant in its yard at the point where he was stationed, and to see that school children and other trespassers were kept off the track and not injured by passing trains. The deceased was killed in Highland Park, an incorporated town of about 2,000 inhabitants. Highland Park is situated about one-half mile south of the southern limits of the city of Louisville. Its principal thoroughfare is Ottawa street, which crosses the tracks of appellee about 150 feet north of the station at Highland Park, about 680 feet south of the "FX" tower, and about 700 feet south of the point where decedent was killed. At the "FX" tower, the point near which decedent lost his life, appellee had three tracks, namely: North Main, South Main, and "Drill track." Just north of the "FX" tower the tracks became numerous and constitute appellee's yards; there being 12 tracks in all. There is a street on each side of the yards, one on the east and one on the west, running north from Ottawa street. They run for a short distance only. At the place where decedent was killed, appellee's right of way was about 80 feet wide. There was proof tending to show that a number of persons passed across the track at this point. Appellant was struck by train No. 4, which is a fast passenger train running between Nashville and Cincinnati. It was due at the "FX" tower just north of Highland Park at 8:43 a. m. It was on time on the morning of April 29, 1908. It was then running between 25 and 30 miles an hour. Its speed was a little less than its usual rate. Just prior to the accident the decedent was in the tower house talking to one Harry Barker. In the presence of decedent, and at a time when decedent was close enough to hear, Mr. Daniels, the tower operator, told Barker that No. 4 was approaching. Barker and decedent then left the tower house. Train No. 4 did not stop at the tower house. When it arrived it gave the usual signals of its approach by blowing the whistle and continually ringing the bell. The decedent went to a point between North Main track, that on which No. 4 was running, and track No. 1. At that time he was in a safe place. These tracks were about 10 feet

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

apart. He then walked a distance of about 25 feet between these two tracks until he got where the switch target was located. As decedent approached the switch target, the yard engine was coming toward the switch target with a number of freight cars attached, and was making the usual and customary noises incident to a moving freight train. When decedent reached the switch target, he turned to pass between it and the North Main track. This brought him in dangerous proximity to train No. 4, which was then passing. Up to that time he had been in a safe place. When he attempted to step between the switch target and the North Main track, train No. 4 was right on him, and he was struck by the engine and killed.

It is not charged that there was any negligence in failing to give the usual, customary, and timely warning of the approach of the train. It is not alleged that those in charge of the train saw, or by the exercise of ordinary care could have seen, decedent in time to avoid injuring him. The only negligence relied upon is the speed of the train. To sustain this contention it is argued that it was shown that there was a customary use by the public of appellee's tracks at that point, and, as the accident happened in an incorporated town, appellee should have run its train with reference to the presence of such persons, and that it was negligence on its part to pass that point at a speed of 25 or 30 miles an hour. In considering this question, it must be remembered that there was some evidence tending to show that decedent had actual notice of the approaching train. Whether this be true or not, it is certainly true that decedent was employed to keep trespassers on the tracks from being injured. He had been employed as watchman for six months. It was his duty to know the time of the arrival and departure of trains at that point. What, then, was the duty of appellee towards decedent?

In the case of *Conniff v. L. H. & St. L. Ry. Co.*, 124 Ky. 763, 99 S. W. 1154, 30 Ky. Law Rep. 982, where damages were sought for the death of a flagman who was stationed by the railroad company at a street crossing in Louisville to warn persons of the approach of trains, this court said: "It was as much the duty of Conniff to keep a lookout for trains approaching the crossing, and give warning to travelers, when he was arranging the switch targets, as it was when he had finished his task and was engaged in no other way than as flagman. Resting the case upon this ground, appellee did not owe Conniff any lookout duty, and was under no obligation to give him warning of the approach of its trains; in fact, owed him no duty, until, as the court said in the instruction, he was discovered to be in peril."

In the case of *Cincinnati, N. O. & T. P. Ry. Co. v. Harrod's Adm'r* (Ky.) 115 S. W. 699, the distinction between the duty owing by railroad companies to a licensee and to

those whose duty it is to know of the time of the arrival of trains is clearly pointed out. There the decedent was a brakeman in the employ of the Southern Railway Company. He was at work in the railroad company's yards at Georgetown, Ky., and was engaged with others in shifting cars. This court, in discussing the question of excessive speed, said: "If Harrod had been a section workman in the yards at Georgetown, his case would not have been less than it is. Sectionmen work in railroad yards, as well as in the country, at all times, and may reasonably be expected there at any time. They must be aware of the time of the running of the trains over the track on which they are at work. Even though those in charge of a fast train knew they were working at that point, or might reasonably be expected to be working there, they also knew it was their duty to maintain a clear track for that train, and to themselves keep out of its way, as they well could. Would the speed of the train, even though negligence to the passengers or licensees, have been negligence as to them? We think not, and it would make no difference whether they were in the yards at Georgetown, at Kincaid, or in the country, where there was no station, for it must always be borne in mind that negligence toward a person is the antithesis of a duty owing to that person. But the facts of this case carry us one step further. Decedent actually knew that train No. 4, a fast through passenger train, was due to pass his point at 6:50. He obtained the knowledge for the very purpose of keeping out of its way. When it came along at the very moment it was due to come, it were as if he had at that moment notice of the fact. Why do trains whistle and ring their bells? Obviously to notify people, whom they owe a duty to, of their approach. If, then, the person to be notified already knows the fact, why again notify him? *L. & N. R. R. Co. v. Taaffe's Adm'r*, 106 Ky. 535, 50 S. W. 850, 21 Ky. Law Rep. 64; *Helm v. L. & N. R. R. Co.*, 33 S. W. 396, 17 Ky. Law Rep. 1004; *Craddock v. L. & N. R. R. Co.*, 16 S. W. 125, 13 Ky. Law Rep. 18. And why are trains required by the common law to slacken their speed when passing through populous settlements? Because it is far more probable that one or more persons from among so great a number may be, and probably will be, rightfully using the tracks of the railroad at that point at that moment unaware of the train's approach, and, if the too high rate is maintained, they will be run over and killed or injured before they could get out of the way even after learning that the train was coming. But those who know that the fast train is due and coming in cannot rely upon its duty towards others ignorant of the fact, so as to charge its operatives with negligence in running it at high rate of speed, for with their knowledge, by keeping off the track, the speed of the train

would be harmless to them. But the facts here carry us still another step. Decedent unnecessarily went from a place of safety to one of great hazard to serve his own convenience alone, and thereby put himself in a position where no amount of care in operating train No. 4 would have saved him. They could not see him until he suddenly stepped out on the track immediately in front of their engine. Whether running 20 or 50 miles an hour then, the train could not have been stopped in time to avoid striking him. Between the tracks was a safe place in which to do his work. On the west side was safer, though not quite so convenient. To step in to the middle of the main track, at the moment a fast, heavy train was due, and which he knew was due, without looking, is such an act of negligence that its quality is not debatable. Nor can it be ignored in law. Being established without question, its legal effect is a pure question of law."

The rule laid down in *I. C. R. R. Co. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729, 30 Ky. Law Rep. 93, 11 L. R. A. (N. S.) 332, is not applicable to this case. There Murphy was one of the public, and a licensee. In this case the decedent was an employe whose duty it was, not only to keep others out of the way of approaching trains, but himself likewise. Furthermore, Wickham, who had been in a place of safety, suddenly stepped before the approaching train, which he knew was due, and without looking. As said in the case of *Cincinnati, N. O. & T. P. Ry. Co. v. Harrod's Adm'r*, supra, this was such an act of negligence that its quality is not debatable.

In view of the foregoing authorities, we conclude that the speed of the train at the time of the accident was not negligence as to the decedent. It would be a strange rule, indeed, that would require a railroad company to regulate the speed of its trains with reference to the presence of a watchman, whose duty it was to know when the train would arrive and keep others and himself from being injured by it. As no other negligence is relied upon, we conclude that the court properly directed a finding in favor of appellee.

Judgment affirmed.

OFFUTT & BLACKBURN v. DOYLE.

(Court of Appeals of Kentucky. Oct. 29, 1909.)

1. APPEAL AND ERROR (§ 964*)—CONSOLIDATION OF ACTIONS—DISCRETION OF TRIAL COURT—REVIEW.

The action of the court in directing that an original cause of action and a cause of action presented by cross-petition shall be heard together by the same jury will not be disturbed unless it appears that in the exercise of a sound discretion, the court should have ordered separate trials before separate juries.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3834; Dec. Dig. § 964.*]

2. JURY (§ 95*)—COMPETENCY OF JURORS—PRIOR SERVICE—SIMILAR CAUSE.

In actions by buyers of seed wheat based on the seller's warranty that the wheat was good, and the fact that it did not germinate, the seller made his pleading a cross-petition against a warehouseman alleging that he had stored the wheat in the latter's warehouse, and that the latter violated his agreement. Some of the actions by the buyers were tried before juries without the issues made by the cross-petition being heard. Thereafter the actions on the cross-petitions were consolidated, and were called for trial at the same term of court. *Held*, that the refusal of the court to continue the consolidated action or to impanel a new jury to try it on the ground that the jurors on the regular panel had served in trying the issues in the original actions was proper; the issues being entirely different, though in relation to the same subject-matter.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 428; Dec. Dig. § 95.*]

3. EVIDENCE (§ 406*)—PAROL EVIDENCE—RECEIPTS—CONTRACTS.

A receipt issued by a warehouseman stating the receipt of a specified quantity of wheat for delivery on the presentation of the receipt properly indorsed and the payment of the charges, and which provides that the wheat is held for the owner at his risk as to fire or depreciation, that the grain may be mixed with grain of like quality and may be delivered from any bin containing like quality of grain, is more than a receipt, and is a contract fixing the rights of the parties, and parol evidence is inadmissible to vary its terms, in the absence of fraud or mistake, though a receipt may be contradicted by parol evidence without any averment of fraud or mistake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1825; Dec. Dig. § 406.*]

4. TRIAL (§ 252*)—INSTRUCTIONS—EVIDENCE.

Where a written contract between the parties to an action is set up or relied on in the pleadings or is introduced in the evidence, the court should instruct on the writing, and, though there is evidence of mistake or fraud or want of consideration, the court should charge that the writing is the contract unless the jury believe that it was not executed, or that it was without consideration, or was procured by fraud or mistake.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 604, 607; Dec. Dig. § 252.*]

5. EVIDENCE (§§ 431, 432, 433, 434*)—PAROL—ADMISSIBILITY.

Where there is a denial of the execution of a written contract relied on or an averment of want of consideration or of fraud or that by mutual mistake it does not contain the contract, parol evidence is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1975-2020; Dec. Dig. §§ 431, 432, 433, 434.*]

6. TRIAL (§ 244*)—INSTRUCTIONS—POINTING OUT PARTICULAR EVIDENCE.

The rule that it is not proper to point out particular evidence in an instruction or to give undue prominence to any fact applies to parol evidence, and not to written evidence of a contract.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 578; Dec. Dig. § 244.*]

Appeal from Circuit Court, Scott County.

"To be officially reported."

Consolidated cross-action by Ed. Doyle, a defendant in several actions, against Offutt & Blackburn. From a judgment for the

former, the latter appeal. Reversed, and new trial granted.

B. M. Lee, for appellants. Bradley & Bradley, for appellee.

CARROLL, J. The appellants are seed warehousemen, and in July, 1907, the appellee Doyle stored in their warehouse some 600 bushels of wheat. In the fall of the same year the appellee sold this wheat to a number of farmers, who wanted it for seedling purposes. The farmers to whom the wheat was sold sowed it, and it failed to germinate. Thereupon the farmers brought suits against appellee for damages, and each of them recovered judgment against him for the price paid for the wheat. The suits of the farmers were based on the ground that the wheat was bought to be used as seed wheat, and for no other purpose, and that appellee warranted it to be good seed wheat. In his answer to these various suits, which was in substance a traverse, appellee made his pleading a cross-petition against appellants, averring in the cross-petition: That, when he stored the wheat in the elevator of appellants, he informed them that it was to be sold as seed wheat, and they agreed to store the same in a separate bin or elevator and deliver to him, or the persons to whom he might sell, the identical wheat stored, and also to deliver No. 2 wheat. That in violation of their agreement appellants failed to keep the wheat in a separate bin or elevator, and mixed it with other wheat, allowing it to become overheated, and also that they failed to deliver to him No. 2 wheat. He also averred that by mistake appellants issued to him the following receipt: "Received in store from Ed. Doyle 601 bushels of wheat, grade No. 2, which we will deliver to Ed. Doyle or order, upon presentation of this receipt properly indorsed, on payment of charges. This property is held for the owner in store at his risk as to fire or depreciation from any cause. This grain may be mixed with grain of like quality, and may be delivered from any bin containing like quality of grain." And that, when he learned the contents of the receipt, he notified them that a mistake had been made in its issue, and they told him to keep the receipt, and they would store his wheat in a separate bin or elevator. He asked judgment against them for the amount of any judgment that might be obtained against him by the farmers who had sued him. To this cross-petition the appellants filed an answer denying all its material allegations, but they did not set up or rely on the receipt as containing the contract between them. It appears from the record that three of the suits filed by the farmers against appellee were tried before juries without the issues made by the cross-petition being heard or disposed of, and that after verdicts had been returned in favor of the farmers in these cases the actions of appellee against appellants on his cross-peti-

tion in the cases in which the farmers had obtained judgments were by consent consolidated and called for trial at the same term of the court at which the farmers who sued appellee had obtained judgments against him. When the consolidated actions on the cross-petition were called for trial, the appellants moved the court to continue the case or impanel a new jury to try the issues upon the ground that the jurors upon the regular panel had served in trying the issues on the original petition between the farmers and appellee. The court overruled the motion, and the record shows that the panel of jurors who tried the case on the cross-petitions of appellee against appellants was composed, with one exception, of the same persons who sat as jurors in the cases of the farmers against the appellee. We are asked to reverse the verdict in favor of appellee for the alleged error of the court in refusing to continue the case or select new jurors before whom it might be tried, and for error in giving and refusing instructions.

Although the record does not contain the evidence heard in the cases of the farmers against Doyle, it is entirely probable, and we so assume, that in those cases the juries heard a good deal about the suits pending on the cross-petitions of Doyle against Offutt & Blackburn; and possibly they formed some opinion as to the merits of the case pending between Doyle and Offutt & Blackburn. The issues in the two cases, however, were very different. In the suits between the farmers and Doyle there were really only two questions in dispute: One, whether the wheat was bought for and represented to be good seed wheat, the other whether or not it germinated; whereas, in the suit between Doyle and Offutt & Blackburn, the issues were first whether or not Offutt & Blackburn agreed to keep the wheat in a separate bin, or so that it would not become heated; and, second, whether or not they committed a breach of this agreement in putting it in bins with other wheat and permitting it to become overheated, and in failing to deliver No. 2 wheat. But without respect to the similarity or difference in the facts in the cases between the farmers and Doyle, and those between Doyle and Offutt & Blackburn, it is a sufficient answer to the argument of counsel to say that the court in its discretion might have directed the actions of Doyle against Offutt & Blackburn to be tried with the suits of the farmers against Doyle. Doyle's cause of action against Offutt & Blackburn was affected by and grew out of the original cause of action against him. If his contention was true, the suits of the farmers against him were caused by the negligence or breach of contract on the part of Offutt & Blackburn. If the court had directed the original cause of action, and the cause of action arising on the cross-petition to be heard at the same time before the same jury, the jurors in place of hearing both cases at different times

would have heard both of them together, and it is plain that the effect on their minds would be precisely the same. If the facts they heard in the cases of the farmers against Doyle operated to prejudice them in any way against Offutt & Blackburn, it would have affected them the same way if the cases had been heard together. And so we are unable to perceive how Offutt & Blackburn were prejudiced by the ruling of the court.

It is quite a common practice for the trial court to order an original cause of action and a cause of action presented by cross-petition to be heard together by the same jury; and, although this practice may sometimes operate to the disadvantage of one of the litigants, it will not be ground for reversal unless it is made to appear that in the exercise of a sound discretion the trial court should have ordered separate trials and before jurors who did not sit in the first trial. It is, of course, of the highest importance that jurors who are called upon to decide issues of fact should be free from bias or prejudice for or against either of the parties to the litigation, and that their minds should be in such condition as to receive, free from former opinions or impressions, the evidence introduced in support of the respective contentions of the parties. But this much-desired end cannot in all cases be obtained; and in trials where cross-petitions are allowable, and the court in the exercise of a sound discretion directs the issues on the original and cross-petition to be heard together, the jurors necessarily hear evidence in one branch of the case that may have a tendency to influence their judgment upon the other.

We may further add that, if a new jury had been impeached, they would necessarily have learned all about the suits of the farmers in the trial of the case between Doyle and Offutt & Blackburn. Doyle's cause of action against Offutt & Blackburn was rested solely on the ground that he was obliged to pay damages to the farmers who sued him. And so, in the trial of his case against Offutt & Blackburn, the facts as to his loss and how it occurred and everything relating thereto would necessarily be brought to the attention of the jury.

Counsel for appellant requested the court to give an instruction saying, in substance, that the warehouse receipt was the written evidence of the contract between the parties, and the law presumed that it expressed the true agreement, and the jury should so find, unless they believed that the contract between the parties was that the wheat should be stored in a separate bin and kept as seed wheat, and that by mutual mistake this part of the agreement was omitted from the receipt. But the court refused to give this or any instruction based on the receipt. Offutt & Blackburn introduced evidence showing that the receipt contained the only contract they had with Doyle, while the evidence for Doyle tended to show that the receipt did not

contain the contract, and that this fact was known to and in effect acknowledged by Offutt & Blackburn. There was also evidence conducing to show that Offutt & Blackburn did not properly handle the wheat or deliver No. 2 wheat. The execution and delivery of the receipt was admitted; the only contention of Doyle being that it did not fully express the contract. In the absence of mutual mistake as to its contents, the receipt was the contract between the parties. It not only acknowledged the receipt of the wheat, but contained an agreement upon the part of Offutt & Blackburn to deliver it. Although called a warehouse receipt, it was more than an ordinary receipt, and must be treated as a contract fixing the right of the parties as to the matters it related to. When there is a written contract between the parties engaged in litigation, and the contract is set up or relied on in the pleadings, or is introduced in evidence, the court should give an instruction based on the writing. A writing is the best evidence of what the parties agreed to do; and, when its execution is admitted, in the absence of fraud, want of consideration or mistake, their rights must be settled according to its terms. Where there is a denial of the execution of a paper, or an averment that it was obtained by fraud, or that by mutual mistake it does not contain the contract, or a want of consideration is pleaded, it is proper to admit oral evidence to sustain the pleas. But this does not change the rule that the court should instruct the jury that the writing is the contract; and they should so find, if it was executed, unless they believe from the evidence that it was executed without consideration or by fraud or mistake as the case may be. A writing like this does not stand on the same footing as parol evidence. It has been ruled time and time again that it is not proper to point out particular evidence in an instruction, or to give undue prominence to any fact; but this practice applies to parol evidence, and not to written evidence of a contract. If in the trial of an ejectment case the plaintiff introduces deeds and records showing that he has a good paper title, the court should instruct the jury that the record evidence invests the plaintiff with a good title and they should so find, unless they believe it is avoided by some defense set up by the defendant that is supported by the evidence. And so in a suit on a promissory note, judgment, or other record, the law gives high regard to written contracts, and, when engagements or undertakings are reduced to writing, the legal presumption is that they express the true agreement between the parties.

It should, however, be noted that the rule stated with reference to written contracts, deeds, and records does not apply to an ordinary receipt acknowledging the payment of money or other thing, or to the recital in an instrument of the amount of the consideration paid or received. A receipt is only

prima facie evidence of the truth of what it contains. It may be assailed and contradicted by parol evidence without any averment of fraud or mistake in its execution or delivery. The distinction in this particular between deeds, contracts, and other agreements and receipts is well pointed out in *Gully v. Grubbs*, 1 J. J. Marsh. 387, where, in discussing this question, the court said: "Wherever a right is vested or created or extinguished by contract or otherwise, and writing is employed for that purpose, parol testimony is inadmissible to alter or contradict the legal and common-sense construction of the instrument. But that any writing, which neither by contract, the operation of law, nor otherwise, vests or passes, or extinguishes any right, but is only used as evidence of a fact, and not as evidence of a contract or right, may be susceptible of explanation by extrinsic circumstances or facts. Thus a will, a deed, or a covenant in writing, so far as they transfer or are intended to be evidences of rights, cannot be contradicted or opposed in their legal construction by facts 'aliunde.' But receipts or other writings, which only acknowledge the existence of a simple fact, such as the payment of money for example, may be susceptible of explanation and liable to contradiction by witnesses." This principle has been approved in *Caldwell v. Hardin*, 3 T. B. Mon. 349; *Peddle v. Hill*, 4 T. B. Mon. 370; *Gordon v. Gordon*, 1 Metc. 285, and many other cases.

If, therefore, the contract did express the agreement between the parties, Doyle was not entitled to recover unless Offutt & Blackburn failed to deliver to him No. 2 wheat, or were guilty of negligence in storing or handling the wheat. On another trial of the case the court will in addition to the other instructions given, in substance, instruct the jury that the receipt was the contract between the parties unless by mutual mistake it failed to express the true agreement between them, and the jury should find for Offutt & Blackburn if they delivered to Doyle No. 2 wheat and were free from negligence in storing or handling it. There should also be incorporated in instruction No. 1 the idea that the receipt controlled, unless there was a mistake in it.

Wherefore the judgment is reversed with directions for a new trial in conformity with this opinion.

PATRICK et al. v. PATRICK.

(Court of Appeals of Kentucky. Oct. 28, 1909.)

1. WILLS (§§ 439, 450*)—CONSTRUCTION—INTENTION OF TESTATOR.

The court in construing a will should aim to ascertain testator's intention, and should, if possible, so construe the will as to uphold each item or clause thereof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 966; Dec. Dig. §§ 439, 450.*]

2. WILLS (§ 672*)—CONSTRUCTION—CREATION OF TRUST—IMPLICATION.

Testator devised all his property to his son, provided he should pay a specified sum to each of his sisters, and declared that the property should be kept together until the death or remarriage of the wife, and that the son should remain with the family and manage the estate until the wife's death or remarriage, when the property should pass as provided for. *Held*, that the wife was the beneficiary of the entire estate for life or during widowhood, with remainder to the son, who took the title as trustee for the wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1579; Dec. Dig. § 672.*]

3. WILLS (§ 821*)—CHARGE ON PROPERTY DEVISED—NATURE.

A testamentary gift to testator's son, provided that he pay to each of his sisters a specified sum and that if any of the sisters should be dead at testator's death the sum should be paid to her bodily heirs, was a gift to the son on condition that the payments to his sisters were made, which payments must be made at the death of testator, and the amount due each, with interest from the end of the year succeeding testator's death, was a charge on the son's interest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2114, 2116; Dec. Dig. § 821.*]

4. WILLS (§ 686*)—CONSTRUCTION—TRUSTS CREATED—TERMINATION.

Where testator devised all his property to his son, provided that he pay to each of testator's daughters a specified sum, and declared that the property should be kept together until the death or marriage of testator's wife, and that the son should remain with the family and manage the estate until the wife's death or remarriage, the fact that the son removed from the property did not affect the trust created in favor of the wife or the rights of the wife, where the son continued to faithfully execute the trust.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1631, 1637; Dec. Dig. § 686.*]

5. TRUSTS (§ 315*)—TESTAMENTARY TRUSTS—COMPENSATION OF TRUSTEE.

Where the will creating a trust does not declare that the trustee shall not be compensated for the services rendered in executing the trust, the court may allow him a reasonable compensation therefor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 433-435; Dec. Dig. § 315.*]

6. WILLS (§ 602*)—CONSTRUCTION—ESTATES CREATED.

Testator devised all his property to his son, provided he pay a specified sum to each of testator's daughters, and declared that the property should be kept together until the death or marriage of testator's wife, and that the son should remain with the family and manage the estate until the wife's death or marriage, and that if the son should die without bodily heirs his share should go to his surviving sisters or to their bodily heirs. *Held*, that the son acquired a fee in the entire estate, subject to defeat by his death without living issue before the death or marriage of testator's wife.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351-1359; Dec. Dig. § 602.*]

7. WILLS (§ 602*)—CONSTRUCTION—DEFEASIBLE FEE—TIME OF CONTINGENCY.

The rule that where an estate is given by will which may be defeated on the happening of a contingency, and there is no other period apparent or intended in which the event shall occur, it shall refer to an event happening within the lifetime of the testator, does not obtain when

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the will shows on its face with reasonable certainty that the event to which the contingency refers is in contemplation of testator to occur after his death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351-1359; Dec. Dig. § 602.*]

Appeal from Circuit Court, Davless County.
"To be officially reported."

Action between W. T. Patrick and others, and Fannie Patrick, for the construction of the will of R. E. Patrick, deceased. From a judgment construing the will, the former appeal. Affirmed.

Miller & Todd and C. S. Walker, for appellants. La Vega Clements and Ben D. Ringo, for appellee.

SETTLE, J. R. E. Patrick died in Davless county leaving a will which was duly admitted to probate. So much of the will as it will be necessary to consider is as follows:

"(1) I will all my property real, personal and mixed to my son, W. T. Patrick, after paying all my debts and funeral expenses, provided, he shall pay to each one of my daughters, to wit, Maggie Bishop, Cora Jesse, Mollie Ayers, Minnie Patrick, Fannie Patrick, Annie Patrick, Luvena Patrick, \$100.00. If any of my said daughters shall be dead at my death, then the \$100.00 shall be paid to her bodily heirs, if any; if none, the \$100.00 shall belong to said W. T. Patrick.

"(2) If my beloved wife shall survive me I will and desire my property be kept together just as it is until her death or marriage, my son, W. T., to stay with the family and manage the estate to the best possible advantage until her death or marriage when the property shall pass as in item one.

"(3) If my son shall die without bodily heirs his share of my estate shall go to his surviving sisters, or to their bodily heirs, if any shall be dead leaving bodily heirs."

The testator was survived by his widow and the son and seven daughters named in the will. The son resided on the real estate devised at the time of the testator's death, but has since removed to another home acquired with means of his own. While the fact does not clearly appear from the record before us, we take it for granted that the widow and daughters of the testator, or such of the latter as are unmarried, still reside on the land devised. By the present action brought in the court below the widow set up claim to an estate for life or during her widowhood in the property devised, asked a construction of the will, that the executor, W. T. Patrick, be required to settle his accounts as executor, and pay her the net income arising from the estate. The answer, in substance, denies that she owns any interest in the estate devised, asserts title in appellant to the whole estate and his right to certain credits in the settlement of his accounts as executor. The issues presented by the plead-

ings made a construction of the will necessary, and the construction given it by the circuit court was that the appellee as widow took, under its provisions, an estate for life, or during her widowhood, in the property devised, with remainder at her death or marriage to appellant. Therefore by the judgment rendered it required of appellant the accounting asked, and he, being dissatisfied with the judgment, has appealed.

A will should, if possible, be construed so as to uphold each item or clause thereof. The end to be attained is the ascertainment of the testator's intention. Applying these well-known rules to the will under consideration, we think its meaning is that appellee, after the payment of the testator's debts, takes or becomes the beneficiary of the entire estate devised, for life, or during her widowhood, with remainder to appellant. The title, however, to the estate which she takes is, by the will, vested in appellant as her trustee. In other words, so long as she lives and remains unmarried, appellant holds in trust for her the title to the property devised. At her death or marriage the trust will cease, and, if he is then living, the estate devised becomes his absolutely. The requirement of the will that the property after the death of the testator shall be "kept together just as it is until her death or marriage, my son, W. T., to stay with the family and manage the estate to the best possible advantage until her death or marriage," means something more than that the support of the widow shall be a mere charge or burden upon the estate. Its meaning is an estate to her for life or widowhood in the property devised, although the son is to hold and manage it as her trustee, devoting the income of the estate to her use and to the support of such of the daughters as may live with her and constitute a part of the family. If such was not the intention of the testator, what meaning can be given the following language as to the disposition of the estate after the death of the widow, "when property shall pass as in item one," namely, to the appellant, W. T. Patrick? While the language of the second clause of the will does not in express terms declare that appellant is to take and hold as trustee for appellee, during her life or widowhood, the title to the entire estate devised by the first clause of the will, it obviously does so by implication, and as obviously makes the widow of the testator the cestui que trust. It is not clear that the daughters are also to be regarded as cestui que trust, but such of them as may remain with their mother, as a part of the family, are, we think, to be supported from the estate as long as she lives and continues a widow; but, with her death or marriage, the right of the daughters to live upon or receive a support from the estate will cease, as will the trust itself. Not only does appellant take the prop-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

erty devised by the will subject to the life estate or widowhood of appellee, though holding in trust the title and possession thereof during that period, but he also takes it upon the condition that he shall pay to each of his seven sisters \$100. We think it was contemplated by the testator that the \$100 to each of his daughters should be paid by appellant at his death, not from the estate, but out of his own means, for the will provides: "If any of my said daughters shall be dead at my death, then the \$100.00, shall be paid to her bodily heirs, if any; if none, the \$100.00 shall belong to said W. T. Patrick." It appears that all the daughters were living at the testator's death and are still living, but does not appear whether they have been paid the \$100. If not, the amount due each should be a charge upon appellant's remainder interest in the testator's estate, with interest from the end of the year succeeding the testator's death.

Our conclusion that appellee took under the will a life estate in the property of the testator seems to us to be consistent with all of the provisions of that instrument, and not less consistent with its provisions do we regard the further conclusion as to the creation of the trust under which appellant is to preserve the estate and apply its net proceeds or income to appellee's use. The language of the will from which the trust is to be implied is not merely suggestive, recommendatory, or in the form of a request from the testator, with which appellant might or might not in his discretion have complied, but is of such a precatory character as to reasonably satisfy us from the language itself, taken in connection with its effect upon the disposition of the testator's property, that the latter's intention to create a trust beneficial to his widow is as complete as if he had given the property to hold upon a trust declared in express terms and in the customary manner. *Pomeroy's Eq. § 1016*. If correct in our conclusion that the property devised appellant in trust for appellee is an estate for life or during her widowhood, in all the property left by the testator, it would seem to follow that she is entitled to receive, year by year, from the trustee the entire net profits of the estate as long as she lives and continues a widow. The fact that appellant has removed from the property of which he is trustee does not affect the trust or the rights of appellee, if he continues to faithfully execute the trust. As the will does not declare appellant shall not be compensated for the services he renders in executing the trust committed to him, we think the circuit court should allow him reasonable compensation therefor, and, as appellee has not taken a cross-appeal from that part of the judgment declaring appellant entitled to a reasonable compensation, the question will not be considered by us.

The third clause of the will was not construed by the circuit court; but, the entire will being before us, we will give our interpretation of that clause, as it may prevent further controversy between the parties. The question suggested by the reading of the clause is: At what time would the death of appellant without "bodily heirs" cause "his share" of the testator's estate to "go to his (appellant's) surviving sisters, or to their bodily heirs, if any shall be dead, leaving bodily heirs"? Numerous cases may be found in which this court held that where an estate is given by will which may be defeated upon the happening of a contingency, and there is no other period apparent or intended in which the event shall occur, it shall refer to an event happening within the lifetime of the testator; but this rule does not obtain when the will shows on its face with reasonable certainty that the event to which the contingency refers is, in contemplation of the testator, to occur after his own death. We think the clause under consideration has reference to the death of appellant before the death or marriage of his mother, the life tenant. If the testator had had in mind the death of appellant before his own death, he doubtless would have said so in clause 3, as he did in clause 1 with respect to the bequest to his daughters of \$100 each to be paid by appellant; it being therein declared: "If any of my said daughters be dead at my death, then the \$100.00 shall be paid to her bodily heirs, if any; if none, the \$100.00 shall belong to said W. T. Patrick." But the third clause simply provides: "If my son shall die without bodily heirs his share of my estate [i. e., the remainder] shall go to his surviving sisters," etc. In our opinion the testator here meant that, if appellant should die childless before the death or marriage of his mother, in that event his sisters, or the children of such of them as may then be dead, will take the estate devised him; that is, the will gives appellant a defeasible fee in the entire estate devised; in other words, the fee in remainder to the whole, subject to be defeated by his death, without living issue, before the death or marriage of his mother. *Baxter v. Isaacs*, 71 S. W. 907, 24 Ky. Law Rep. 1618; *Lewis v. Shropshire's Trustee*, 68 S. W. 426, 24 Ky. Law Rep. 332; *Birney v. Richardson*, 5 Dana, 424.

As the judgment of the circuit court in all essential particulars conforms to the conclusions herein expressed, it is hereby affirmed.

COMMONWEALTH, for Use of CITY OF LOUISVILLE, v. ROSS et al.

(Court of Appeals of Kentucky. Nov. 5, 1909.)

1. STATUTES (§ 190*)—CONSTRUCTION—EXISTENCE OF AMBIGUITY.

The doctrine of practical construction cannot be applied unless the language of the stat-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ute is so ambiguous as to leave the judicial mind in doubt.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 269; Dec. Dig. § 190.*]

2. STATUTES (§ 224*) — CONSTRUCTION — AND FROM OTHER STATUTES.

To aid the construction of a statute as to when a bond recorder in a city should account, the court may look to all other statutes relating to public officers receiving public revenue for which they are required to account.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 302; Dec. Dig. § 224.*]

3. MUNICIPAL CORPORATIONS (§ 162*) — BOND RECORDERS—FEES—ACCOUNTING—STATUTES.

Ky. St. § 2947 (Russell's St. § 626), authorizes the appointment of a bond recorder in a city of the first class by circuit court judges for a term of four years; qualifications, oath and bond to be as required of county clerks, compensation to be the same as allowed to justices of the peace in trials for breach of the peace, to be paid by the party for whom the services are rendered, two deputies to be appointed to be paid out of fees collected, a record of bonds to be kept by him, and all moneys received over \$4,000, exclusive of the deputy's salary, to be paid to the city treasurer. *Held*, that since all other statutes relating to officers receiving public revenue required an accounting of moneys collected at least once a year, and the recorder's fees and expenses are on an annual basis, the bond recorder must make at least annual settlements with such officials as the city shall designate, keep an accurate record of all amounts collected by him, and, when he is shown to have collected enough to pay his salary and his deputies and other legal expenses for the current year, he must account to the city for the balance every month, if so desired by the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 306; Dec. Dig. § 162.*]

4. STATUTES (§ 215*) — CONTEMPORANEOUS CONSTRUCTION—WHEN ALLOWABLE.

Contemporaneous construction will not be allowed where to apply it will override a fixed legislative purpose.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 291; Dec. Dig. § 215.*]

5. MUNICIPAL CORPORATIONS (§ 162*)—BOND RECORDERS—COMPENSATION—STATUTES.

Such section of the statute imports that the bond recorder is to receive \$4,000 a year, and \$1,000 a year for each deputy actually employed, not exceeding two.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 306; Dec. Dig. § 162.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Suit by the Commonwealth, for the use of the City of Louisville, against Joseph Hunter Ross and others, for an accounting. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Jas. Breathitt, Atty. Gen., C. B. Blakey, Asst. Atty. Gen., and J. M. Chilton, for appellant. Kohn, Baird, Sloss & Kohn, Arthur B. Bensinger, and Fairleigh, Straus & Fairleigh, for appellees.

O'REAR, J. This suit was instituted against appellees Joseph Hunter Ross and his surety upon the former's bond as bond recorder for

the city of Louisville, for an accounting by Ross of the fees collected by him during his term, and for judgment for balance in his hands. Ross was elected to his office in December of 1905, for a term of four years, and on December 2, 1905, executed the bond and entered upon the discharge of his official duties. The petition charges: That in the month of December, 1905, he collected as fees for accepting and recording appearance and peace bonds, at \$2 for each bond, \$430. That during the year ending December 31, 1906, he likewise collected as fees, \$6,330; for the year ending December 31, 1907, \$8,050; for the year ending December 31, 1908, \$9,663; and for taking other bonds in criminal proceedings (in the Jefferson circuit court), \$1,619, during the three years and one month named. That he had upon demand by the city of Louisville for an accounting refused to account or pay over to the city any of these sums, or any part of them, but had taken his records from his office and concealed them, refusing to allow the city's authorities access to them. That he had collected large sums in addition as fees, which the plaintiffs were unable to state because of his conduct in secreting his records. The prayer was for a judgment for the sums stated, less his salary and deputies' salaries, and for a reference to the commissioner of the court to ascertain the further amount collected by him as fees, and for a full accounting by him. Interest at 6 per cent. per annum and penalties of 20 per cent. on the sums due the city at the end of each settlement period were also sought.

The statute under which appellee Ross was elected, which governs in fixing the times of settlement and payment by him, as well as fixes his salary, is section 2947, Carroll's Ky. St. (Russell's St. § 626), a part of the act of 1893, governing cities of the first class, and is as follows: "There shall be appointed by a majority of the judges of the circuit court having jurisdiction in said cities, a bond recorder for said cities. He shall be appointed for a term of four years, and shall have the qualifications, take the oath, and give the bond required of the county clerks, and he shall be subject to the same fines and penalties to which they are subject; and for neglect and violation of his duty he may be prosecuted, punished or removed, in the same manner in which said clerks may be prosecuted, punished or removed. The bond furnished by said recorder, and the requisite surety thereon, must be approved by said judges. Said bond recorder shall have exclusive right to take all bonds required by law to be taken or given by persons arrested in the city in and for which he is appointed, for their appearance before the proper tribunal; also all bonds or recognizances required by law to be taken or given by or in the police court of said city; and no per-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

son in custody shall be released therefrom, before trial, unless bond be first given as herein required. Said bond recorder shall be allowed for his services the same compensation as now allowed by law to justices of the peace in trials for breach of the peace, to be paid by the party for whom the services are rendered. He may appoint two deputies, and the salary of each of said deputies shall be \$1,000.00 per annum, and shall be paid from the fees collected by the said bond recorder. Said deputies shall give bond the same as the recorder, and he is hereby given power to administer oaths to parties offering as sureties on bonds, and for all purposes necessary for the proper conduct of his office, to carry into effect the provisions of this act, and enable him to properly execute his duty. And no officer or other persons shall have power to take any bond or administer any oath herein mentioned, except said recorder. Said bond recorder shall keep a record of all the bonds taken by himself or his deputy, showing the date, amount of bail, the name of defendant, and the charge under which arrest was made; and all money received by the bond recorder, over and above the amount of four thousand dollars, exclusive of the deputy's salary, shall be paid into the treasury of the city for which the recorder is appointed. Said recorder, or one of his deputies, shall be in his office at all hours, for the purpose of taking bonds. All bonds and affidavits shall be returned within twenty-four hours to the proper tribunal. In continued cases, the bond recorder may require a memorandum from the clerk of the court, showing the charge, amount of bail, and date of continuance."

The defense to this suit is that it was brought prematurely. The answer is styled a "plea in abatement." It assumes, as the proper construction of the foregoing statute, that the bond recorder of the city of Louisville is not required to settle his accounts, or to pay over to the city any balance in his hands from the fees of his office, except at the end of his term. The chancellor, in an opinion delivered in overruling a general demurrer to the petition, indicated that, reading the statute alone, he could not say that the time of settlement and payment was at the end of the term, but, evidently in response to argument, that the statute was ambiguous on that point, and if the officers of the city had, by a practical contemporaneous construction during the 15 years since its enactment, construed it so, that was a fact to be pleaded. Thereupon the defendants filed their answer, or plea in abatement, in which they asserted that such had been the practical contemporaneous construction by the city officials, and of appellee Ross and his predecessors in office. A demurrer to this answer was overruled. The city declined to plead further, and its petition was dismissed. This appeal is prosecuted from that judgment.

Before the doctrine of practical contemporaneous construction can be applied to the interpretation of a statute, the language of the enactment must be so ambiguous as to leave the judicial mind in doubt as to the legislative purpose. The statute in question deals with the duties and compensation of a collector of public revenues. By the terms of the section he is placed on the plane of county court clerks—public officials who are paid out of the fees of their offices, and whose duties include the collection of public moneys. Turning to the statute bearing on the duty and liabilities of county court clerks when their duties are analogous to those to be performed by the bond recorder, we find that by section 4242, Ky. St. (Russell's St. § 6171), county court clerks are required on the first day of each circuit court to make out and file with the court an account showing all public money received by them, and pay it over to the trustee of the jury fund on the order of the court. By section 4248, a failure is penalized by fine of from \$200 to \$300. Section 4255 requires the clerks to keep a well-bound book in their offices showing all money received by them for the commonwealth. Section 1761 (Russell's St. § 2732) requires county court clerks in all counties having a population of 75,000 or more to pay over to the auditor of public accounts on the first of each month the money due the state from them, and to file a statement showing the amount due. Every officer who collects or holds money for the state or county is required to make frequent settlements—none less often than once a year—and to then, or oftener, pay over the public funds in their hands. The State Auditor and Treasurer are required to have their accounts examined monthly (section 4630 [Russell's St. § 4930]); the sheriff is required to settle annually (section 4143, Ky. St.); county court clerks and circuit clerks monthly (section 1761). The jailers are required to pay over monthly (section 1773); the Clerk of the Court of Appeals and the assessor in counties having population of 75,000 or over, in January of each year; sheriffs, clerks, county judges, police judges, constables, justices of the peace, marshals, and other officers authorized to receive money due the commonwealth are required to report on the first day of each circuit court (three times a year). Section 4252, Ky. St. It appears the bond recorder collects money, which is due the city, amounting to \$5,000 or more annually. The settled policy of the state is to require frequent settlements of all of its collecting officers. These various statutes may be looked to to ascertain the legislative purpose in the statute under examination, as to when the recorder should settle his accounts. The allusion in the statute to the duties and liabilities of county court clerks clearly meant to embody those provisions so far as applicable to the bond recorder. While the reports to and settlements with the same officers are not, of course, re-

quired, settlements with the proper officials of the city are as clearly indicated by the allusion; but his fees and office expenses are to be deducted from his collections. They are based upon an annual basis. It cannot be known before the expiration of the year, possibly, whether anything would be due from the office, as it is possible that for the first 11 months not enough would be collected to defray its expenses. From the scope of the section, and its allusions to other statutes, so far as applicable, we think the proper construction is: That the bond recorder must make at least annual settlements with such officials as the city council may designate; that he must keep an accurate record at all times in the book in his office, which shall be a public record, of the amounts collected by him; that when he is shown to have collected as much as will pay his salary, and his deputies', and other legal expenses for the current year, the balance is due to the city, and may be required to be paid over each 30 days if the city so demands; but that, until there is a demand and a failure to settle and pay, there is not a default, and no penalty could be attached till after such demand and default.

The plea of contemporaneous construction, one always of last resort, at least always deferred as a source of information until the interpretation put upon the language by the Legislature itself is applied, if it has given such interpretation, cannot avail in this case. To allow it would be to override the fixed legislative purpose, as indicated by a great number of provisions, applicable to every class of collecting officers, by a kind of surference of administrative officials. It is not probable—there is no reason for supposing it likely—that the Legislature intended to make an exception of this official and to allow him to hold in his hands many thousands of the public dues for four years, while the public was being taxed to pay indebtedness to which the fees on hand were applicable. Something more than mere passivity of the city officials, and of the course pursued by the predecessors in the office of the recorder, must concur to authorize the courts to adopt that construction as the one the Legislature intended.

As to the compensation of the bond recorder, we think that the language of the section imports that he is to receive \$4,000 a year, and \$1,000 a year for each deputy actually employed, not exceeding two.

The case should have been referred to the commissioner to ascertain the true amount due by the bond recorder for each year of his term, and the judgment should be for the balance found due each year after deducting the salaries alluded to, plus 6 per cent. per annum interest on each balance.

Reversed and remanded for proceedings consistent herewith.

**COMMONWEALTH ex rel. AUDITOR'S
AGENT v. LOUISVILLE GAS CO.**

(Court of Appeals of Kentucky. Nov. 5, 1909.)

1. TAXATION (§ 45*)—UNIFORMITY—TAXATION OF CORPORATIONS AND INDIVIDUALS—"PROPERTY TAX"—"PRIVILEGE TAX."

Ky. St. 1909, §§ 4077, 4082 (Russell's St. §§ 6050, 6055), provide that certain corporations, including gas companies, shall, in addition to other taxes, annually pay a tax on their franchise to the state and a local tax thereon to the county, town, etc., where the franchise is exercised; and each corporation shall report the amount of tangible property in the state, and where situated, and assessed and the fair cash value thereof; and the board of valuation and assessment is required to fix the value of the capital stock of each corporation and from such amount deduct the assessed value of all tangible property assessed in the state; the remainder to be the value of its corporate franchise subject to taxation, etc. By another provision all the property of domestic corporations, including intangible property considered in determining the value of the franchises, shall be subject to taxation unless exempt by the Constitution. *Held*, that within Const. § 174, requiring the property of corporations and natural persons to be similarly taxed, and allowing such further license, income and franchise taxes as the Legislature may deem proper, the tax on the franchise of a gas company was a "property tax" on the intangible property, and not a "privilege tax" for engaging in a business that natural persons could not, since under section 4082 natural persons engaged in such business are taxed as such corporations are.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 100-103; Dec. Dig. § 45.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5729, 5730; 5590, 5591.]

2. TAXATION (§ 45*)—UNIFORMITY—TAXATION OF CORPORATIONS AND INDIVIDUALS.

Held, also, that the franchise tax is not a privilege tax imposed on the right to be a corporation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 100-103; Dec. Dig. § 45.*]

3. TAXATION (§ 122*)—SHARES OF STOCKHOLDERS—EFFECT OF TAX ON CORPORATE PROPERTY.

Under such statute, where the corporation does report and pay taxes on all its property as required, then the stockholders of the corporation are not required to list their shares in the company for taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 221; Dec. Dig. § 122.*]

4. TAXATION (§ 122*)—SHARES OF STOCKHOLDERS—EFFECT OF TAX ON CORPORATE PROPERTY—SHARES OWNED BY OTHER CORPORATION.

Where a gas company is a shareholder in an electric company, all the property of which has been reported and taxed, including its franchise under such statute, the gas company's liability for taxation on its shares are precisely as any other shareholder, and hence the shares are not assessable.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 221; Dec. Dig. § 122.*]

5. TAXATION (§ 376*)—CORPORATE FRANCHISE—MODE OF VALUATION.

Held, also, that the bonds of the electric company owned by the gas company were to be computed in determining the value of the latter's franchise as any other property.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 625, 629-631; Dec. Dig. § 376.*]

6. TAXATION (§ 406*)—CORPORATIONS—OMITTED PROPERTY—BURDEN OF PROOF.

Under said statutes, in a proceeding to assess omitted property, the burden of proof is on the state to show that the bonds of the electric company held by a gas company were omitted from the latter's report of its taxable property.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 406.*]

7. TAXATION (§ 406*)—CORPORATION—OMITTED PROPERTY—SUFFICIENCY OF REPORT.

Under such statutes, where the gas company reports what it claims to be all its taxable property, but the report does not specifically show that bonds of an electric company which the gas company owns are listed, the bonds cannot be taxed as omitted property, where the board of assessment does not require a further report.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 406.*]

8. COURTS (§ 89*)—PRECEDENTS—STARE DECISIS.

Where ruling precedents as to the construction of a statute are long and definitely settled, and the business of the state has become adapted to it, the construction will not be departed from.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 311, 312; Dec. Dig. § 89.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Proceeding by the Commonwealth, on relation of the Auditor's Agent, against the Louisville Gas Company. From a judgment for the Gas Company, the Commonwealth appeals. Affirmed.

M. J. Holt, for appellant. Humphrey, Davis & Humphrey, for appellee.

O'REAR, J. This is a proceeding begun in the Jefferson county court to assess as omitted property certain stocks and bonds of another corporation owned by appellee gas company. The judgment was for the taxpayer. Formerly the Louisville Gas Company operated in Louisville, in addition to its plant for the manufacture of gas, an electric light plant. In 1902 it sold the light plant, and took in part payment \$1,500,000 5 per cent. bonds of the purchasing company, called the Louisville Lighting Company, and 16,667 shares of the capital stock of the latter company of the par value of \$100 a share. These bonds and stock were owned by appellee for the tax year of 1904. In August, 1904, it sold all the bonds except \$670,000 worth, par value, since which date it has owned that amount of bonds and the stock named. The capital stock of appellee is \$3,600,000. The bonds of the lighting company had during the years in question (which are the years of 1904 and 1905) a market value of 102 and 103, and the stock paid regularly a dividend of 4 per cent. Appellee is what is called a "public service corporation." It is, by the provisions of section 4077, Ky. St. (Russell's St. § 6050), required to pay, "in addition to the other taxes imposed on it by

law," "annually a tax on its franchise" to the state, and "a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised."

The first question is, What is the franchise to be taxed? the second is, How is its value to be ascertained? the third is, Has it been done in the manner provided by the statute?

Appellant contends that the franchise to be taxed is not the intangible property of the corporation, but is a privilege tax; that is, it is a tax imposed upon the privilege of engaging in a business that a natural person could not engage in. But that position cannot be maintained of the Kentucky Statutes. Natural persons may engage in the business of manufacturing and selling gas, as well as in some of the other business that is subjected to this tax. When they do, they are taxed upon the same principle as corporations are that are engaged in like business. Section 4082, Ky. St. (Russell's St. § 6055); Providence Bk. Co. v. Webster Co., 108 Ky. 527, 57 S. W. 14, 22 Ky. Law Rep. 214. Nor is a tax imposed upon the right to be such a corporation. The organization tax imposed by section 4225, Ky. St., which is one-tenth of 1 per cent. of the authorized capital of such corporation, is the only tax exacted of a corporation for being and exercising the trade allowed by its charter. The Constitution requires taxes to be imposed alike upon the property of corporations and natural persons (section 174), and it allows in addition the imposition of a license tax, an income tax, and a franchise tax, as the Legislature may determine upon. So far the Legislature of this state has not provided for an income tax, and license taxes are imposed upon certain kinds of business, but not upon that of serving the public as do corporations like appellee gas company. The assessing board created and empowered by the statute (section 4077, supra) to value the franchises subjected to the tax is given a large discretion in the manner of its procedure; but it is required of the property owner subjected to the tax to make a report showing, among other things, the amount of the capital stock of the corporation, the nature of its business, how its shares are divided, the amount of paid-up stock, its par and market values, the highest price at which the stock has been sold at a bona fide sale in the preceding 12 months, the amount of surplus fund and undivided profits, "and all other assets"; the total indebtedness as principal; the gross and net income, "and including interest on investments"; the value of its tangible property, "and such other facts as the auditor may require" (section 4078, Ky. St.); the length of line of railroads and other common carriers, and other provisions especially applicable to corporations doing an interstate business. The direction

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to the board is then summed up (section 4079, Ky. St.): "Said board from said statement, and from such other evidence as it may have, if such company, corporation or association be organized under the laws of this state, shall fix the value of the capital stock of the corporation, company or association as provided in the next preceding section (4078), and from the amount thus fixed shall deduct the value of all tangible property assessed in this state, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid."

It is thus made clear that the tax imposed is a property tax, pure and simple. It groups all the property of the corporation, and values it according to its earning or producing capacity. In a sense the capital stock of the corporation represents all its property; but it was known that sometimes the market value of such stock differs from its actual or earning value. The franchise value takes into consideration all these elements which go to make the real value of the corporation property considered as an entirety. It has been so construed and held in *Henderson Bridge Co. v. Commonwealth*, 99 Ky. 623, 31 S. W. 486, 17 Ky. Law Rep. 389, 29 L. R. A. 73; *Hager v. American Surety Co.*, 121 Ky. 791, 90 S. W. 550, 28 Ky. Law Rep. 782; *Commonwealth v. Cumberland Tel. Co.*, 124 Ky. 533, 99 S. W. 604, 30 Ky. Law Rep. 723; *Henderson Bridge Co. v. Kentucky*, 106 U. S. 154, 17 Sup. Ct. 532, 41 L. Ed. 953; *Louisville Tobacco Warehouse Co. v. Commonwealth*, 106 Ky. 165, 49 S. W. 1069, 57 L. R. A. 33; *Ætna Life Insurance Co. v. Coulter, Auditor*, 115 Ky. 803, 74 S. W. 1050; *Marion National Bank of Lebanon v. Burton, Sheriff*, 121 Ky. 876, 90 S. W. 948, 10 L. R. A. (N. S.) 947; *Commonwealth v. Walsh's Trustee (Ky.)* 117 S. W. 398. Had we doubt of the correctness of that construction, we should not feel at liberty to depart from it after it has been so long and definitely settled, and the business of the state has become adapted to it.

The corporation in this state is required to pay taxes on all its property, not specifically exempt by the Constitution from taxation. When the corporation does report and pay the tax on all its property, as required by the statute, then the stockholders of the corporation are not required to list their shares in the company for taxation. Section 4088, Ky. St.; *Commonwealth v. Walsh's Trustee*, supra. The Louisville Lighting Company is a domestic franchise-taxed corporation. Appellee gas company is a shareholder in the lighting company. The gas company's liability to taxation upon the shares of the lighting company owned by it are precisely the same as on other shareholders. It is conceded that the lighting company was assessed and paid its franchise tax. Being so, the shareholders are not assessable. So appellee

was not required to pay upon so much of its intangible property as was represented by those shares, a fact doubtless taken into consideration by the State Board in fixing the value of appellee's franchise. *Commonwealth v. Steele*, 126 Ky. 670, 104 S. W. 687, 31 Ky. Law Rep. 1033; *Commonwealth v. Ledman*, 127 Ky. 603, 106 S. W. 247, 32 Ky. Law Rep. 452; *Commonwealth v. Ames*, 106 S. W. 306, 32 Ky. Law Rep. 569. But upon the bonds appellee was required to pay precisely as it did upon its other intangible property; that is, the bonds, and their market value and earning quality were pertinent facts to be reported to the State Board, and in estimating the value of appellee's franchise those bonds were considered, or ought to have been, as any other chose in action owned by appellee.

Appellee contends that the action of the State Board of Valuation and Assessment in valuing a franchise for taxation is one act, not severable, and whether it considered all the evidence bearing upon the value of the franchise, or omitted to take some evidence that it might have required, cannot be reviewed by the courts in a proceeding to list omitted property; that the thing being now considered, i. e., whether the bonds were included in the gas company's report and the board's estimate, might be omitted evidence, but not omitted property, as there was no warrant for the board to assess the bonds in any event as property. This franchise tax is new. It is substitutional as a method of valuation only. Its like existed under the old statutes of this state where choses in action and the like were grouped as "miscellany." Then a taxpayer could have reported, say, \$10,000 in "miscellany," which was supposed to embrace all his notes and accounts; but suppose he had notes to the amount, and solvent, of \$20,000, not an erroneous valuation of those reported as \$10,000, but \$10,000 in addition. It would scarcely have been contended that the failure to list C. D.'s notes for \$10,000 was merged in the listing of the A. B. notes. The Legislature could have required corporations to pay on each item of their intangible property, on their notes, bonds, accounts, capital stock, and so forth, in detail; but it allowed all these properties to be grouped for purposes of taxation, as a more convenient and just method of assessing. It was not contemplated that the privilege thus accorded the taxpayer was to be a shield for his neglect or fraud in omitting a material part of his property. If, for example, a railroad corporation owns two different lines of railroad in this state, but reports only one of them, and the earnings of but one, it must be apparent that the failure to report the other is something more than an omission of evidence. It would be an omission of property. It is not true that the bonds in appellee's hands are not taxable. They are. The Constitution prohibits their

exemption. Section 174. But the manner of assessing them is to have them reported to the State Board, and there valued as a part of the owner's "franchise." When they are omitted, property liable to taxation is omitted. It may be brought in and assessed as omitted property under section 424, Ky. St. (Russell's St. § 4815).

But were the bonds omitted? Appellant took the burden of showing that they were. He produced the reports filed with the Auditor of State by the gas company. The reports did not name the bonds; but the reports did show that the company reported its gross income from "coke, tar, ammonia, etc.," at \$187,886.18 for one of the years, and approximately the same for the other, while it reported "gross earnings from gas" at \$391,569.45. The reports did not disclose the facts as they should have done, and as the State Board might have required. Appellee's bookkeeper testified that the bonds were reported by and included in that item. The books of the company would have shown. Appellant might have compelled their production; but it did not. The evidence in the record then is that the bonds were not omitted from the report, and actually went into the consideration of the board in fixing the value of the franchise; that is to say, the income produced by the interest on the bonds was treated as part of the company's gross earnings, and, whether from bonds or the sale of gas, went to enhance the value of the company's money earning capital by that much. So that it appears that the bonds were in fact, though perhaps not in name, as effectually valued in making the franchise assessment as if they had been reported specifically as they should have been.

Finding no prejudicial error in the record, the judgment must be affirmed.

LOW v. RAMSEY et al.

(Court of Appeals of Kentucky. Nov. 10, 1909.)

1. WILLS (§ 821*)—CHARGE ON DEVISE—CARE OF CHILDREN—LIEN ON LAND.

A provision in a will, charging a son to whom all the property was given with the duty of caring for two younger children of the testatrix till they reached a certain age, created a lien on the land in their favor for this purpose.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2118; Dec. Dig. § 821.*]

2. WILLS (§ 824*)—LIABILITIES OF PURCHASER FROM DEVISEE.

A purchaser from a devisee is charged with notice of provisions of the recorded will, and holds the land subject to the liabilities imposed on the devisee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1913, 2122; Dec. Dig. § 824.*]

3. WILLS (§ 639*)—CONSTRUCTION—VESTING OF DEVISE—CONDITION PRECEDENT OR SUBSEQUENT.

A provision in a will imposing on a son, to whom all the property was given, the duty

of supporting and caring for other children of the testatrix, was neither a condition precedent to the vesting of a devise in him, nor a condition subsequent, which by failure to perform would forfeit the estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1524; Dec. Dig. § 639.*]

4. LIMITATION OF ACTIONS (§ 72*)—ACCRUAL OF CAUSE OF ACTION—INFANT'S RIGHTS UNDER WILL.

Where an infant was entitled under the terms of a will to support and maintenance by a devisee till she reached the age of 15, her cause of action thereunder to enforce a lien on the land first accrued when the devisee failed to furnish her support, and her full cause of action was protected when she reached that age.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 390; Dec. Dig. § 72.*]

5. LIMITATION OF ACTIONS (§ 72*)—COMPUTATION OF PERIOD—EFFECT OF INFANT'S DISABILITY.

One who was an infant when a right of action accrued had the same length of time to sue after becoming of age that she would have had had she been of age when the cause of action accrued; Ky. St. § 2525 (Russell's St. § 191), expressly providing as to infants entitled to sue that action may be brought within a like number of years after removal of their disability that is allowed to a person having no such impediment.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 390; Dec. Dig. § 72.*]

6. LIMITATION OF ACTIONS (§ 28*)—LIMITATIONS APPLICABLE—ACTION ON CONTRACT NOT IN WRITING.

An action to enforce an undertaking to support a minor assumed by one accepting property under a will providing therefor is governed by the five-year limitation of Ky. St. § 2515 (Russell's St. § 224), as to actions on contracts not in writing, and the mere fact that the acceptance of the devise charged the property with the liability undertaken by him does not extend the time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 134; Dec. Dig. § 28.*]

7. LIMITATION OF ACTIONS (§§ 180, 182*)—PLEADING—DEMURRER RAISING DEFENSE.

The statute of limitations must be pleaded, unless the petition shows not only a sufficient lapse of time, but nonexistence of any ground of avoidance; but when the petition shows that the action is barred, and that plaintiff is not within any exception contained in the statute which saved his right to sue, the question may be raised by demurrer.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 671, 678, 679; Dec. Dig. §§ 180, 182.*]

Appeal from Circuit Court, Garrard County.

"To be officially reported."

Action by Josie Low against Charlie Ramsey and others. From a judgment for defendants, plaintiff appeals. Affirmed.

W. I. Williams and Jas. I. Hamilton, for appellant. Lewis L. Walker, for appellees.

CARROLL, J. Mrs. Mary L. Low died, after making her last will, which was probated in January, 1888. By this will the testatrix gave to her son Wiatt Low all of her personal and real estate, declaring that he should pay \$1 to each of her children,

viz., Mary E. Jordan, Harry, Josie, Aaron, Elgie, and Samuel. The balance of her estate, both real and personal, she devised and bequeathed to him "with the understanding that he is to take and raise my children Harry and Josie until they are 15 years old." At the time the testatrix died, Josie Low was between seven and eight years old. Shortly after the probate of the will Wiatt Low sold the real estate devised to him to James Ramsey, and moved out of the state, taking with him Harry Low. Ramsey remained in possession of the land from the time he bought it from Wiatt until his death in 1908, when it descended to his widow and children, the appellees herein. In 1908 Josie brought this suit against the Ramsey heirs, charging that Wiatt Low immediately after the death of the testatrix abandoned her, and did not at any time provide her with food, clothing, money, or property of any sort. She alleged that she was entitled to a lien on the land for the reasonable cost of her care and support from the time of her mother's death until she became 15 years of age, and that the reasonable cost of caring for and supporting her during this period would be \$1,000. She further alleged that when Ramsey bought the land from Wiatt he had actual and constructive knowledge of the contents of the will. She asked that she be adjudged a lien on the land, and that it be subjected to the payment of her demand of \$1,000. The lower court sustained a general demurrer to her petition as amended, and, declining to plead further, her action was dismissed, and she appeals.

In our opinion the provision in the will charging Wiatt Low with the duty of caring for Josie and Harry until they were 15 years old created a lien upon the land in their favor and for this purpose, and as the will was put to record the vendee of Wiatt was charged with notice of its provisions and held it subject to the liabilities imposed upon Wiatt.

It is insisted by counsel for appellant that the provisions in the will imposing upon Wiatt the duty of supporting and caring for these children was either a condition precedent to the vesting of the devise in him, or a condition subsequent, that by his failure to perform forfeited the estate; but in this view we do not agree. Giving to the provision in the will the same effect that was given to similar provisions in the wills construed in the cases of *Pearcy v. Greenwell*, 80 Ky. 616, and *Bryant v. Dungan*, 92 Ky. 627, 18 S. W. 636, 36 Am. St. Rep. 618, we hold, as did the court in *Pearcy v. Greenwell*, that Wiatt took the estate subject to the charge upon it in favor of Harry and Josie.

Assuming then that it was the duty of Wiatt to support and care for these beneficiaries, the question remains whether or not the appellant has not surrendered her claim by the long delay before attempting to enforce it. Her cause of action first accrued

when Wiatt failed to furnish her support, and her full cause of action was perfected when she became 15 years of age. She might then, under the facts stated in the petition, have recovered everything that was due her under the will; but, as she was an infant when her right accrued, she had the same length of time after becoming of age to bring the suit that she would have if she had been of age when her cause of action accrued—section 2525 of the Kentucky Statutes (Russell's St. § 191), reading: "If a person entitled to bring any of the actions mentioned in the third article of this chapter, except for a penalty or forfeiture, was, at the time the cause of action accrued, an infant, * * * the action may be brought within the like number of years after the removal of such disability, * * * that is allowed to a person having no such impediment to bring the same after the right accrued."

The next question is: How many years did she have after becoming of age to bring the action? Section 2515 of the Kentucky Statutes (Russell's St. § 224) provides in part that "an action upon a contract not in writing signed by the party * * * shall be commenced within five years next after the cause of action accrued," and we have no question that this statute applies. The contract attempted to be enforced was not signed by Wiatt. He merely accepted the provisions of a will that imposed upon him an obligation. The undertaking to support and care for appellant was assumed by Wiatt as a personal obligation when he took the devise, and the mere fact that the acceptance of the devise charged the property with the liability undertaken by him does not have the effect of extending the time in which an action to enforce it may be brought beyond five years. This point was adjudged in *Collings v. Collings*, 92 S. W. 577, 29 Ky. Law Rep. 51. In that case Elisha Collings conveyed to his daughter certain lands in consideration of her agreement to pay specified debts then owing by Collings. In the course of the opinion the court said: "While it is true the deed imposed on the grantee the payment of the debts named in it, which became thereby a lien on the land in favor of the respective creditors to whom owing. It was an express assumpsit, barred by limitation after five years, so far as the grantee was concerned, although as between the original debtor, Elisha Collings, and his creditors, the debts may not have been barred. When the debts became outlawed, so far as they affected the grantee, the lien was likewise discharged. It was not competent for Elisha Collings and his creditors by any subsequent agreement between themselves to prolong the lives of these debts so as to affect Mrs. Alloway, the grantee of the land, without her consent."

As the claim of appellant is barred by the statute, can this defense be presented by a

general demurrer? The rule is that the statute of limitations must be pleaded, unless the petition shows not only a sufficient lapse of time but the nonexistence of any ground of avoidance; but when the petition shows that the action is barred, and that plaintiff is not within any of the exceptions contained in the statute which saved his right to sue, the question may be raised by demurrer. *Stillwell v. Leavy*, 84 Ky. 379, 1 S. W. 590, 8 Ky. Law Rep. 321. The only relief sought is the subjection of the land in the hands of the appellees to the payment of appellant's claim. There is no averment that the appellees in any manner or form assumed the payment of appellant's claim or any part of it. The petition does not seek any relief against the appellees personally, and so it follows that she could not be entitled to any of the exceptions contained in the statute of limitations that would save it from running against her. Under these circumstances we think the question that the claim was barred by limitation could be raised by demurrer.

Wherefore the judgment of the lower court is affirmed.

PATTERSON et al v. PATTERSON et al.

(Court of Appeals of Kentucky. Nov. 9, 1909.)

1. PERPETUITIES (§ 6*)—CONSTRUCTION OF DEED.

A deed conveying land to a turnpike company for a tollhouse, and providing that, when the house should cease to be used for such purpose, the land and building should revert to certain persons named, did not create a perpetuity in violation of Ky. St. 1909, § 2360 (Russell's St. § 2055), since the grantee might at any time with the sale of its turnpike convey the use of the tollhouse and ground to its vendee, and under section 2359 (section 2054) the reversioners might at pleasure sell their reversionary interest.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 8-30; Dec. Dig. § 6.*]

2. DEEDS (§ 145*)—CONSTRUCTION—CONDITION SUBSEQUENT—COVENANT.

Conditions subsequent are not favored, and, if it be doubtful whether a clause in a deed be a condition or a covenant, courts will incline to the latter construction.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 471; Dec. Dig. § 145.*]

3. PERPETUITIES (§ 6*)—CONVEYANCE FOR HIGHWAY.

The statute against perpetuities (Ky. St. 1909, § 2360 [Russell's St. § 2055]) does not apply to a conveyance of land for a public highway, or for use in connection with the operation of a turnpike, which is a public highway.

[Ed. Note.—For other cases, see Perpetuities, Dec. Dig. § 6.*]

4. PERPETUITIES (§ 4*)—REVERSIONS—CONSTRUCTION.

Where a deed conveyed land to a turnpike company for use for a tollhouse, a provision that on cessation of such use the land should revert to certain named persons, instead of the grantor, was valid.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 8-30; Dec. Dig. § 4.*]

5. PLEADING (§ 214*)—DEMURRER—EFFECT.

On demurrer to the petition the facts therein alleged must be accepted as true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.*]

Appeal from Circuit Court, Fayette County.

"To be officially reported."

Action by John Patterson and others against Jacob S. Patterson and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with directions.

G. Allison Holland and Wallace Muir, for appellants. Allen & Duncan, for appellees.

SETTLE, J. On October 27, 1891, Nannie C. Smedley, spinster, in consideration of \$1 in hand paid, sold and by deed conveyed to the Ft. Spring & Pinkard Turnpike Company, a corporation owning and operating a turnpike in Fayette county, a quarter of an acre of ground "for the purpose of building a house for collecting toll for said pike." The deed also provides: "Now, it is further agreed that when said house ceases to be used for collecting toll for said pike, then and at that time the above tract of land with all buildings and fixtures to revert back to Jacob Smedley, Will Waltz, and John Patterson or their heirs." Jacob Smedley was a brother, John Patterson and Will Waltz, brothers-in-law, of Nannie Smedley. On May 9, 1894, the turnpike company, grantee in the deed referred to, sold and conveyed its turnpike to the fiscal court of Fayette county, and that court at once made it a free turnpike and ceased to collect tolls thereon, and to use the tollhouse on the lot conveyed by Nannie Smedley to the turnpike company. Thereupon Jacob Smedley, Will Waltz, and John Patterson without objection from any source took possession of the tollhouse and ground in question, and they, or Patterson and the heirs at law of Jacob Smedley and Will Waltz, have since continuously had and held the actual adverse possession thereof, claiming it as against all others. Nannie Smedley, the grantor in the deed to the turnpike company, was living at the time Jacob Smedley, Will Waltz, and John Patterson took possession of the tollhouse and for ten years thereafter, and all the while residing near the property in question. Nannie Smedley died in 1904, childless, but left a will which was duly probated, following which her estate was in due course settled and distributed as by the will directed. Jacob Smedley and Will Waltz both died after they and John Patterson took possession of the tollhouse and ground, but both left children who are their heirs at law, respectively. Some years after Nannie Smedley's death, and after the distribution of her estate, the appellees, Fanny Hickey and John B. Smedley, the former a sister and the latter a brother of the decedent, set up claim to the lot and tollhouse as her heirs at law, whereupon John Patterson and the heirs at

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

law of Jacob Smedley and Will Waltz, deceased, brought this action in the Fayette circuit court to quiet their title to the tollhouse and lot, alleging their ownership and possession of same under the deed from Nannie Smedley to the turnpike company and its reversion to them by reason of the purchase and freeing of the turnpike by the fiscal court of Fayette county. The devisees and heirs at law of Nannie Smedley, deceased, were made parties defendant to the action, and were duly summoned. But only two of them, Fanny Hickey and John B. Smedley, made defense to the action. This they did by filing a general demurrer to the petition, and without waiving same, later filing an answer.

By the demurrer and answer they resisted appellants' right to the property in question on the ground that the deed from Nannie Smedley to the turnpike company, in so far as it provided that the tollhouse and lot should revert to and become the property of Jacob Smedley, Will Waltz, and the appellant, John Patterson, upon the turnpike company ceasing to use it for collecting toll, was and is void for remoteness and by reason of the statute against perpetuities, and that, therefore, the title, following the abandonment of the use of the property for collecting toll, reverted to the grantor, Nannie Smedley, upon whose death it descended to appellees and the other heirs at law of the decedent. Accepting this view of the matter, the circuit court sustained the demurrer to the petition and dismissed the action at appellants' cost. Appellants, being dissatisfied with the judgment, have appealed.

For appellants it is urged that the circuit court erred in adjudging that the reversion or limitation over contained in the deed from Nannie Smedley to the turnpike company created a perpetuity in violation of section 2360, Ky. St. (Russell's St. § 2055). The section reads as follows: "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter." Without entering upon a dissertation as to the meaning of the legal term, "perpetuity," it is sufficient to say that the purpose of the statute is not to compel the vesting of estates, but to prohibit unreasonable restraints upon alienation. Neither in law nor fact did the deed under consideration create or seek to create a perpetuity. It conveyed to the turnpike company for a specific purpose, namely, for use in the collecting of tolls on the pike, the ground described. The deed did not render the property inalienable, for the turnpike company, after receiving it, had at any time the right to sell its turnpike to an individual, company, or the fiscal court, and with such sale convey the use of the ground and tollhouse to its vendee, and that vendee to another, ad libitum, so long as the property was used for the single purpose to

which it was devoted by the Smedley deed. On the other hand, appellants had like power to sell and convey at any time the reversionary interest in the tollhouse and ground conveyed them by the deed. Section 2359, Ky. St. (Russell's St. § 2054). The deed contains no language which imports that the grant was to become void in case the purpose for which the land was conveyed was not carried out, nor does it reserve to the grantor the right, in that event, to re-enter upon the land and resume possession of it as of her former estate. On the contrary, its language leaves no doubt of the intention of the grantor to give the property to her brother and brothers-in-law named therein when its use as a tollhouse shall cease. "It is a rule of law that conditions subsequent are not favored because they tend to destroy estates, and, if it be doubtful whether a clause in a deed be a condition or a covenant, courts will incline to the latter construction." *Carroll County Academy v. Gallatin Academy*, 104 Ky. 621, 47 S. W. 617, 20 Ky. Law Rep. 824.

There is another thing aside from the deed itself that has an important bearing on the case. The contingency entitling appellants to the land in controversy matured during the lifetime of the grantor. We think it safe to say that a limitation that would have been void under conditions existing when the deed was executed will not affect the ability of such a limitation, if by reason of circumstances happening subsequent to the execution of the deed but before the death of the grantor it does not offend the rule. The facts averred in the petition and admitted by the demurrer are that the deed from Nannie Smedley to the turnpike company was made in 1891; that the turnpike company conveyed its road and property to the fiscal court of Fayette county May 9, 1894; that upon that day appellants took possession of the tollhouse and ground by virtue of the reversionary interest conveyed them by the deed from Nannie Smedley to the turnpike company, and have ever since been in the actual, adverse possession thereof; and that the grantor, Nannie Smedley, died in 1904, 10 years after appellants took possession of the property, and during the whole of that time set up no claim that it had reverted to her. These facts show that she had knowledge of their taking possession of and retaining the property, and that it was done with her acquiescence, if not actual consent.

Finally, we are of opinion that the statute against perpetuities does not apply to a conveyance of land for a public highway, or for use in connection with the operation of a turnpike, which is a public highway. *Gass & Bonta v. Wilhite, etc.*, 2 Dana, 170, 26 Am. Dec. 446. If the deed from Nannie Smedley to the turnpike company had not provided for the reversion of the title upon the abandonment of the use of the land for tollhouse purposes, nevertheless, under the law of this

state, it would in consequence of such abandonment have reverted to the grantor, and, this being true, neither the statute against perpetuities nor other obstacle stood in the way of her providing in the deed for its reversion to another or others instead of herself.

Accepting as true the facts alleged in the petition, and this we must do on demurrer, we think they entitled appellants to the relief asked. Therefore the circuit court erred in sustaining the demurrer.

For the reasons indicated, the judgment is reversed and cause remanded, with directions to the circuit court to overrule the demurrer, and for further proceedings consistent with the opinion.

CINCINNATI, N. O. & T. P. RY. CO. v.
CHAVASSE'S ADM'R.†

(Court of Appeals of Kentucky. Nov. 10, 1900.)

1. RAILROADS (§ 340*)—COLLISIONS AT CROSSING—NEGLIGENCE.

A railroad maintained three tracks crossing a street maintained a watchman at the crossing. A pedestrian passed over the main and middle tracks, and came to the third track, on which a freight train was passing. A passenger train on the main track was late. The pedestrian passed the watchman, who said nothing to him, and, on seeing the passenger train approaching, he attempted to recross the main track, and was killed by the passenger train. The watchman, when the pedestrian first passed over the tracks, did not know how late the passenger train was. *Held*, that the watchman was not negligent in allowing the pedestrian to walk over the crossing without warning him of the approach of the passenger train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1102; Dec. Dig. § 340.*]

2. RAILROADS (§ 335*)—COLLISION AT CROSSING—NEGLIGENCE.

A pedestrian while standing in the space between the main track and a third track was in a safe position, but, on a passenger train on the main track flashing its headlight over the crossing, he determined to cross in front of the train, and was struck by it and killed. *Held*, that the railroad was not liable because the passenger train ran over the crossing at a dangerous rate of speed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1086-1088; Dec. Dig. § 335.*]

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Action by E. L. Chavasse's administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Thornton & Johnson, Edward Colston, and John Galvin, for appellant. Walton, Dickson & Walton and F. S. Spruill, for appellee.

BARKER, J. On the 17th day of March, 1908, at about 6:15 p. m. o'clock, Ernest L. Chavasse was struck by an engine attached to a passenger train of the Cincinnati, New Orleans & Texas Pacific Railway Company at the point where the tracks of the company

cross South Broadway street, in the city of Lexington, Ky. As a result of the injuries received in the collision Chavasse within a short time thereafter died. To recover damages for his death this action was instituted by the administrator of his estate, and in the petition it is alleged that his death was occasioned by the gross negligence of the employes of the company. The defendant filed an answer denying all the allegations of the petition, and pleading affirmatively that the decedent was himself guilty of contributory negligence. The affirmative allegations of the answer having been denied by reply, the issues were made up and a trial before a jury resulted in a verdict in favor of the plaintiff in the sum of \$10,000. Of the judgment predicated upon this verdict the railway company now complains.

The Cincinnati, New Orleans & Texas Pacific Railway Company crosses South Broadway street in Lexington, Ky., from a northerly to a southerly direction; but at the point of crossing the track runs from a southeasterly to a northwesterly direction. Broadway street is 50 feet wide and has three railroad tracks crossing it at the point where the accident occurred, each 4½ feet wide, with 5 feet space between the tracks. The tracks begin to curve very sharply when they leave Broadway street going toward the south. There is a watchman's stand in the corner between Scott's Hotel and Broadway street. On the right of Broadway street, going from the city, and on the north side of the track, the depot is situated.

The decedent, Ernest Chavasse, was boarding at Scott's Hotel, and on the evening of the accident he was proceeding from the hotel towards the city of Lexington. He approached South Broadway, which was occupied by three railroad tracks. The first called the "main" track, the second, being in the middle of the street, called "track No. 1," and the third, which was on the south side of the street, called "track No. 2." As this railroad crossing is used by many people, the company maintains there a watchman, whose business it is to prevent travelers from going upon the railroad crossing at a time when it is dangerous so to do because of the passing trains. On the evening of the accident which is involved in this litigation, Ernest L. Chavasse, as said before, left his hotel and started across South Broadway street. As he walked along the pavement, he passed the watchman, who was going from the street to his stand at the corner. Chavasse crossed the main or northerly track, then crossed track No. 1, which is in the middle of the street, and, when he reached track No. 2, which is on the southerly side of East Broadway street, he found it occupied by a long freight train which was slowly moving across the highway. At this time train No. 2 from the south was overdue;

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied December 17, 1909.

its schedule time being 6:08 p. m., and it was about 10 minutes late. When the decedent encountered the freight train crossing the street on track No. 2, he paused there in order to let it pass, so that he could pursue his journey. While the freight train was passing, the fast passenger train from the south, being No. 2, whistled for the crossing. Thereupon the watchman with his lantern in hand went upon the crossing, and cried out to all persons in the neighborhood "Look out for No. 2!" His attention was especially directed to one or more persons who were about to drive over the crossing. In order to stop this, he made the outcry above recited, and also waved his lantern. When he first made the outcry, "Look out for train No. 2!" Chavasse was standing quietly near the freight train which was slowly crossing the street on track No. 2. While he was thus standing, one Phil Donovan, who also wished to cross at the point the decedent did, was standing by his side. While this condition of things existed, the fast passenger train (No. 2) from the south approached the crossing at a speed of from 12 to 15 miles an hour. As the train neared the crossing it encountered quite a sharp curve, and as soon as it passed this curve it threw its headlight over the crossing. When this occurred, it seemed to attract the attention of the decedent, who at once turned to retrace his steps across the railroad tracks in the direction of his hotel on the north side of the street. He went in a great hurry; the witnesses saying that he ran. Just as he reached the main track, over which the approaching train was to pass, he looked in its direction, it being but a short distance from him, and then, seemingly calculating that he could cross in time, he sprang over the track, with the result that, although he nearly cleared it, the pilot beam on the far side of the engine struck him, inflicting injuries from which he almost immediately died.

The theory of the plaintiff is, first, that the railroad watchman was guilty of negligence in allowing the decedent to go upon the tracks when the fast passenger train from the south was overdue, without having warned him of its approach. The answer to this is that the watchman did not know at the time the decedent passed him when the fast train from the south would arrive. In the second place, it is said that the decedent, as he stood between the main track and track No. 2, was in a perfectly safe position, and, if he had remained in that position, he would not have been hurt, and therefore it was his own fault that he was injured.

The question, then, arises whether or not the company was negligent of any duty that it owed the decedent as a traveler rightfully occupying and crossing the highway at the time he was killed. When the decedent crossed the main track on the company's right of way, and as he stood beside the passing freight train on track No. 2, he was

in a perfectly safe position so far as the passing trains were concerned. He had voluntarily taken a position within a few feet of the freight train on track No. 2, and, as said before, was waiting for this to pass the crossing so that he could continue on his way. Behind him there was a space of from 12 to 15 feet before the main track was reached, along which the incoming train was being propelled, and in this space the decedent, Phil Donovan, and the watchman were standing in perfect security. When the headlight of the approaching passenger train was thrown upon the crossing, for some reason that is not explained in the record the decedent changed his mind with reference to crossing the street, and dashed back towards his hotel, evidently with the intention and desire of crossing the main track before the fast approaching train reached it. Just as he got to the main track he paused for a second, apparently considering whether or not he could make the crossing before the oncoming train. Believing that he could do so, he sprang across the main track, with the result that he nearly cleared it, but was struck by the pilot beam on the far side, receiving the injuries from which, as said before, he almost immediately died. It cannot be said with any show of reason that the watchman was guilty of negligence in allowing Chavasse to walk along the crossing as he did without warning him of the approach of the fast passenger train from the south. In the first place, at the time that Chavasse crossed the main track going into the city, the watchman did not know how late the train was, or when it would reach the crossing. He was not in danger from having crossed the main track. When he got between the main track and track No. 2, he was in a perfectly safe position, and all that he had to do was to maintain it. We conclude, therefore, that the company was guilty of no negligence in having allowed him to cross the main track without warning him of the approach of the train from the south.

The only question remaining, then, is whether or not the company was guilty of negligence because the passenger train from the south was running over the crossing at a dangerous rate of speed. We conclude that it was not. The passenger train before reaching Lexington ran a schedule rate of fifty miles an hour, but, when it reached the city limits, its speed was gradually checked until when it reached the crossing where the accident occurred it was running only 12 to 15 miles an hour. But it seems to us that the speed of the train was entirely immaterial. Chavasse knew the train was coming. He had been especially warned by the watchman of this fact, and the evidence leaves no doubt in our minds that, before he undertook to cross the main track, he saw the approaching train, and this when he was in a position of absolute safety. Having concluded that he could safely cross the

main track in front of the approaching train, he made the attempt with the result as above stated. It was immaterial whether the train was running at the rate of 5 miles per hour or 50 miles per hour. The decedent having jumped across the track immediately in front of the cow catcher, nothing could have been done to save him by those in charge of the engine. It is not pretended that the engineer or fireman saw, or could by the exercise of the utmost diligence have seen, the decedent before he sprang across the track in front of the engine; and, this being true, the speed of the engine was immaterial.

As said before, it is not explained in the record why Chavassee changed his mind and undertook to retrace his steps over the main track. It is certain that the watchman warned him twice of the approach of train No. 2, and plaintiff's own witness, Donovan, who stood beside Chavassee, heard the warning. If Chavassee had attempted to recross the main track when the first warning was given him, he undoubtedly could have done so in safety; but he seems not to have heeded either the first or second warning to look out for train No. 2, and it was only when the headlight flashed over the crossing that he suddenly determined to cross in front of the train. He was standing in perfect security, and there was nothing in his demeanor which indicated that he did not intend so to do until after the freight train in front of him got out of his way so that he could pursue his journey. Whether Chavassee merely changed his mind and determined to go back to his hotel, or whether he was overcome by fear when he found himself about to be inclosed between two passing trains, cannot now be told; but in either case the company was not responsible for what he did. All that the company owed him was the duty not to permit him to get into a place of danger on the crossing by reason of its negligence; and we are unable to see how anything that the company's agents did or omitted to do contributed to the decedent's injury. If he had stood with the watchman and Donovan, he would have been perfectly safe and no harm would have come to him. The company's servants were not able to know what was passing in his mind, or to anticipate his sudden determination to jump across the track immediately in front of the engine. It is immaterial whether train No. 2 was running fast or slow, or whether those in charge of it gave all or any of the statutory signals of its approach. The watchman had told Chavassee it was coming, and plaintiff shows that he saw it before he jumped to a place of danger. The case readily falls within the principle of *C., N. O. & T. P. Ry. Co. v. Harrod's Adm'r* (Ky.) 115 S. W. 690; *L. & N. R. R. Co. v. Tower's Adm'r* (Ky.) 115 S. W. 719, 20 L. R. A. (N. S.) 380; *L. & N. R. R. Co. v. Gilmore's Adm'r*,

109 S. W. 321, 32 Ky. Law Rep. 74; *Hummer's Ex'r v. L. & N. R. R. Co.*, 128 Ky. 486, 108 S. W. 885, 32 Ky. Law Rep. 1315; *L. & N. R. R. Co. v. Taaffe's Adm'r*, 106 Ky. 535, 50 S. W. 850, 21 Ky. Law Rep. 64; *Craddock v. L. & N. R. R. Co.*, 16 S. W. 125, 13 Ky. Law Rep. 18; *Helm v. L. & N. R. R. Co.*, 33 S. W. 396, 17 Ky. Law Rep. 1004; *Gresham's Adm'r v. L. & N. R. Co.*, 24 S. W. 809, 15 Ky. Law Rep. 599—and the defendant company was entitled to a peremptory instruction to the jury to find for it at the close of plaintiff's testimony. This conclusion renders it unnecessary that we should consider any other instruction either given or refused by the trial court.

Judgment reversed for proceedings consistent with this opinion.

HOWERTON et al. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 4, 1900.)

1. BAIL (§ 45*)—CRIMINAL PROSECUTIONS—AFTER REVERSAL ON APPEAL.

Where a judgment of conviction was reversed by the Supreme Court on September 29th, the judgment was not vacated until the decision on appeal became final when the mandate was lodged in the trial court on November 5th, pursuant to Cr. Code Prac. § 360, as amended by Act March 21, 1904 (Acts 1904, p. 144, c. 64), providing that no mandate shall issue or decision become final until after 30 days, excluding Sundays, from the day the decision was rendered, so that under Cr. Code Prac. § 75, prohibiting admitting defendant to bail after conviction, accused could not be admitted to bail on September 30th.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 146; Dec. Dig. § 45.*]

2. BAIL (§ 44*)—BOND—VALIDITY—BOND GIVEN AFTER CONVICTION.

Under Cr. Code Prac. § 75, prohibiting admitting a defendant to bail after conviction, the trial court could not admit an accused to bail after conviction, and before the mandate reversing the judgment was filed, and the bail bond given on its attempt to do so was void.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 145; Dec. Dig. § 44.*]

Appeal from Circuit Court, Crittenden County.

"To be officially reported."

Proceeding by the Commonwealth against P. A. Howerton and another to enforce the forfeiture of a bail bond. From a judgment for the Commonwealth, defendants appeal. Reversed with directions to quash recognizance.

Jas. A. & John A. Moore, James & James, and L. H. James, for appellants. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, for the Commonwealth.

BARKER, J. Percy Howerton was convicted in the Crittenden circuit court of a felony. From the judgment based upon the verdict

of the jury, finding him guilty as charged in the indictment against him, he appealed to this court, where the judgment was reversed on the 29th day of September, 1908. 112 S. W. 606, 33 Ky. Law Rep. 1008. On September 30, 1908, the clerk of the Crittenden circuit court, in obedience to a long-distance telephone message from the circuit judge, admitted the defendant to bail in the sum of \$1,000, with the appellants, P. A. and G. W. Howerton, as sureties. Afterwards, on November 5, 1908, the mandate of this court was issued directing the judgment against the defendant to be set aside and awarding him a new trial. The case was then assigned on the docket of the circuit court for another trial. When the trial day arrived, the defendant, having been called, made default and forfeited his bond, and so far as we are advised he is still at large. This procedure is to enforce the forfeiture of the bond against the sureties, the appellants.

The question arising upon the foregoing statement is whether the bond executed by the original defendant, with appellants as sureties, was or not void. Section 75 of the Criminal Code of Practice is as follows: "After conviction, the defendant cannot be admitted to bail." Section 360, as amended by Act March 21, 1904 (Acts 1904, p. 144, c. 64) provides: "That no mandate shall issue, nor decision become final, until after thirty days, excluding Sundays, from the day on which the decision is rendered, unless the court, in delay cases, otherwise direct. * * * After the conviction of the defendant he could not be admitted to bail while the judgment of conviction remained in full force and effect. It was not vacated until the decision of this court became final, under the provisions of section 360, supra, and this could not be done until the 5th day of November, 1908, when the mandate was issued and lodged in the circuit court. It seems to us therefore to follow that the admission to bail of the defendant Howerton by the clerk of the circuit court was without any authority, and the bond taken was void. The learned circuit judge was without jurisdiction to authorize the clerk to admit the defendant to bail until the filing of the mandate of this court and the setting aside of the judgment of conviction.

In *Commonwealth v. Phillips*, 116 Ky. 329, 76 S. W. 118, 25 Ky. Law Rep. 544, it was held that, while under section 74, Cr. Code Prac., a person charged with a felony may not be admitted to bail before being brought before a magistrate, and, though the magistrate issuing the warrant indorsed upon it that the defendant might be admitted to bail, the bond accepted by the sheriff was void. In the cases of *Commonwealth v. Ball*, 6 Bush, 291, and *Covington v. Commonwealth*, 3 Bush, 478, it was held that bonds such as involved here, taken by an officer or person

unauthorized so to do, are void and impose no obligation on the sureties to the commonwealth. See, also, *Branham v. Commonwealth*, 2 Bush, 3; *Creekmore v. Commonwealth*, 5 Bush, 312; *Commonwealth v. Roberts*, 1 Duv. 199; *Morgan v. Commonwealth*, 12 Bush, 84.

Judgment reversed, with directions to quash the recognizance upon which the appellants are sureties.

CITY OF LOUISVILLE v. TOMPKINS.† (Court of Appeals of Kentucky. Nov. 5, 1909.)

1. EASEMENTS (§ 10*)—ESTABLISHMENT—ADVERSE USER.

The granting of a right of way and its acceptance by the proper authority and in a proper manner will be conclusively presumed from an uninterrupted adverse use by the public as of right for 15 years or more.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 27-32; Dec. Dig. § 10.*]

2. TRIAL (§ 140*)—CREDIBILITY OF WITNESSES—WEIGHT OF EVIDENCE—QUESTION FOR JURY.

Facts indicating that plaintiff's witnesses were unworthy of belief were for the jury's consideration alone.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

3. DAMAGES (§ 132*)—PERSONAL INJURIES—EXCESSIVENESS.

Plaintiff, a married woman, who was a housekeeper, was thrown from her carriage by an obstruction in a city street. She was confined to her bed for several days as she testified, though only for one day as testified by witnesses for the city. She sustained a severe cut over the left eye, which caused a permanent drooping of the eyelid and suffered great pain and became neurasthenic. Physicians testified that her injuries were permanent and that her power to earn money was seriously impaired. Held, that a verdict awarding her \$3,000 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

4. DAMAGES (§ 187*)—INJURIES TO MARRIED WOMAN—EARNING POWER.

In an action for injuries to a married woman who is a housekeeper, it is not necessary to prove her earning power in order to entitle her to damages for permanent injuries.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 509; Dec. Dig. § 187.*]

5. DAMAGES (§ 208*)—PERMANENT INJURIES—MARRIED WOMEN—IMPAIRMENT OF EARNING POWER—QUESTION FOR JURY.

Where a married woman who is a housekeeper is injured, the extent of impairment of her earning power is for the jury, to be determined by application of their common knowledge and experience to all the facts in the case.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 533, 534; Dec. Dig. § 208.*]

6. MUNICIPAL CORPORATIONS (§ 775*)—STREETS—CONSTRUCTION—PAVING MATERIAL.

A city has no authority to incur one of its streets with paving material to be used in the improvement of another street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1630; Dec. Dig. § 775.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied December 10, 1909.

7. MUNICIPAL CORPORATIONS (§ 821*)—DEFECTIVE STREETS—INJURIES TO TRAVELERS—CONTRIBUTORY NEGLIGENCE.

That plaintiff, who was seated in a wagon during a severe rainstorm, failed to observe a paving stone with which the street was obstructed which came in contact with the wagon wheel and threw plaintiff to the ground, did not constitute contributory negligence as a matter of law.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1754-1756; Dec. Dig. § 821.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Ella M. Tompkins against the City of Louisville. Judgment for plaintiff, and defendant appeals. Affirmed.

Clayton B. Blakey, Leon P. Lewis, and J. M. Chilton, for appellant. Edward G. Hill, for appellee.

CLAY, C. Appellee, Ella M. Tompkins, instituted this action against appellant, city of Louisville, to recover damages for personal injuries. The jury awarded her \$3,000, and the city appeals.

The accident occurred on May 29, 1908, between 5 and 6 o'clock in the evening. At that time a severe rainstorm was in progress. Appellee lived in a tenement house on Poplar street. She left her home and proceeded to a point on that street where her husband had left a mule and wagon. Appellant had caused or allowed to be placed on each side of the roadway of Poplar street piles of granite paving blocks. Some of these blocks were directly in the roadway or travel part of the street. According to the evidence for appellee, there were piles of blocks so near together that only one vehicle at a time could pass between them. According to the evidence for appellant, at least two vehicles could pass between the piles of granite blocks. When appellee reached the wagon she climbed in and started to drive up Poplar street towards her home. When the mule had taken but a few steps, the left front wheel of the wagon came in contact with one of the granite blocks which was lying directly in the roadway. This caused the wagon to careen, and appellee was thrown therefrom to one of the piles of granite blocks and rendered unconscious. She received a severe cut over her left eye, which caused a phosia or permanent drooping of the left eyelid. She was also injured in the lower dorsal and upper lumbar region of the spine and nerves of the hip. Her left side and knee were bruised. In the opinion of the physician who treated her, and of the physician appointed by the court to examine her, her injuries were permanent.

At the conclusion of appellee's evidence, appellant asked for a peremptory instruction on the ground that there was no evidence tending to establish the fact that Poplar street

was a public highway. The evidence upon this point was that Poplar street had been used as a public highway for 15 or 20 years. There was also evidence to the effect that the police patrolled Poplar street, although it was also shown that they patrolled private property as well. It is now the settled rule that a grant of a right of way and its acceptance by the proper authority and in the proper manner will be conclusively presumed from an uninterrupted and adverse use by the public as a right, and not the effect of indulgence or permission, for the period of 15 years or more. *Greenup County v. Maysville & Big Sandy R. R. Co.*, 21 S. W. 351, 14 Ky. Law Rep. 699. In the case of *City of Louisville v. Brewer's Adm'r*, 72 S. W. 9, 24 Ky. Law Rep. 1671, the rule is thus stated: "It may now be considered the prevailing opinion that an acceptance may be implied from a long-continued use by the public as a right." To the same effect is *Riley v. Buchanan*, 118 Ky. 625, 76 S. W. 527, 25 Ky. Law Rep. 863, 63 L. R. A. 642, where it is said: "A dedication of a highway may be impliedly accepted by long-continued user by the public." In view of the foregoing principles, we conclude that the court did not err in failing to award appellant a peremptory instruction. Nor did he err in assuming, in the instructions given to the jury, that Poplar street was a public highway. No serious attempt was made by the city to rebut the presumption arising from the long-continued use of Poplar street as a public highway. After the fact that Poplar street had been used for 15 years or more as a public highway had been established, the court had a right to assume its dedication and acceptance as a highway, in the absence of any proof to the contrary.

It is next argued that the verdict is against the evidence. The only two eyewitnesses of the accident were Mrs. Tompkins and Mrs. Nellie Schuler. While there are some slight discrepancies in their testimony, they are not more than usually occur in such cases. The fact that appellee and her husband are nomads of the Louisville Point is by no means conclusive that they are not worthy of belief. Besides, any facts tending to show that appellee's witnesses were unworthy of belief were matters for the consideration of the jury alone. We are unable to say that the finding of the jury is flagrantly against the weight of the evidence.

It is next insisted that the verdict is excessive. While appellee claims to have been confined to her bed for several days, a number of witnesses for appellant stated that she was not confined to bed after the day of the injury. Whether this be true or not, the evidence shows that she had a severe cut over her left eye which caused a permanent drooping of the eyelid. This drooping would produce a disfigurement which would necessarily cause

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

any one great mental suffering. Dr. Davidson, who treated appellee, stated that her injuries were permanent, and that her power to earn money was seriously impaired. Dr. Boggess, who was appointed by the court to examine appellee, said he was of opinion that she suffered a great deal of pain. She was still suffering pain at the time of the trial. The witness was also of opinion that, if her condition remained the same as it was at the time of the examination, her earning capacity would be practically nothing. Thus it will be seen that there is no evidence to the effect that her injuries are not permanent. Furthermore, it was not necessary to prove the earning power of appellee, in order to show her entitled to damages for permanent injuries. It was shown that she was a housekeeper. In this capacity she had to do the necessary work around the home. She had the right to earn money. Her power to do so was impaired. To what extent was a question for the jury, to be determined by the application of their common knowledge and experience to all the facts and circumstances of the case. *Cumberland Telephone & Telegraph Company v. Overfield*, 127 Ky. 548, 106 S. W. 242, 32 Ky. Law Rep. 421. In view of the character of appellee's injuries, and of the pain which she must have endured, and of the fact that at the time of the trial, which occurred about a year after the accident, she was still suffering from neurasthenia, a condition which in the opinion of the physicians would thereafter continue and permanently impair her power to earn money, we cannot say that a verdict for \$3,000 is so excessive as to strike the mind as being the result of passion or prejudice on the part of the jury. That being the case, the verdict will not be disturbed on that ground.

As another ground for reversal, it is urged that the court erred in failing to give the following instruction: "That the defendant, the city of Louisville, in repairing and constructing and reconstructing its streets and highways has the right to place such ma-

terials as may be necessary for said purpose on the sides of its highways, including Poplar street at the place mentioned in the petition, that when said materials were so placed the defendant was not required to anticipate any of said stones being taken or removed from the place where they were piled and put in the driveway, and that the defendant is not required to foresee or provide for or against every possible accident or danger that might occur to persons driving upon its streets, but is only required to exercise reasonable prudence or care in keeping its highways free from obstructions." We deem it unnecessary to copy the instructions given by the court. Suffice it to say that the issue whether or not Poplar street, at the place of the accident, was reasonably safe for public travel, was properly presented in the instructions. It was not error to refuse the instruction offered by the city. The principle announced in the case of *Elam v. City of Mt. Sterling* (Ky.) 117 S. W. 250, 20 L. R. A. (N. S.) 512, has no application to the facts of the case at bar. In that case the material was necessary for the construction or improvement of the street upon which it was located. It is not contended in this case that the piles of granite were to be used by the city in the construction or improvement of Poplar street. It is insisted, however, in the brief of appellant, that the materials were to be used in the improvement of a nearby street. Even if that were the case (although there is no satisfactory proof of it), it would not justify the giving of the instruction refused. It is only where the material is piled upon the street to be constructed and improved that the principle announced in the *Elam* Case becomes applicable.

The question of contributory negligence by appellee was properly submitted to the jury. We cannot say, as a matter of law, that her failure, when seated in the wagon during a severe rainstorm, to observe the rock which came in contact with the wheel of the wagon, constituted contributory negligence.

Judgment affirmed.

DERSCH et al. v. MILLER.

(Court of Appeals of Kentucky. Nov. 19, 1909.)

1. MECHANICS' LIENS (§ 304*)—CONSTRUCTING SIDEWALKS—PERSONAL LIABILITY OF ABUTTING OWNER.

A contract between an owner of property abutting on a street and a contractor for the construction by the latter of a sidewalk in front of the property and steps leading into the property personally binds the owner, and a personal judgment may be rendered against him thereon, though the contractor, under Ky. St. § 2463 (Russell's St. § 2383), acquired a lien on the property in question.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 632-635; Dec. Dig. § 304.*]

2. APPEAL AND ERROR (§ 934*)—PRESUMPTIONS—VALIDITY OF JUDGMENT.

In the absence of a showing to the contrary, the court on appeal must presume that the judgment justified by the petition was proper.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3777-3781; Dec. Dig. § 934.*]

Appeal from Circuit Court, Kenton County, Common Law and Equity Division.

"To be officially reported."

Action by Charles C. Miller against Henry Dersch and others, consolidated with an action by Henry Dersch against the Cottage Building Association No. 2, of Covington, and others. From a judgment for plaintiff Charles C. Miller, defendant Henry Dersch and another appeal. Affirmed.

J. M. Dial, for appellants. A. E. Stricklett, for appellee.

SETTLE, J. The appellee, Charles C. Miller, under a contract made with the appellant Louis Noble, constructed in front of the latter's lot, in the city of Latonia, a sidewalk and steps leading into the lot, at a cost of \$117.93. Upon the completion of the work appellee, by filing in the office of the clerk of the Kenton county court the statement required by section 2463, Ky. St. (section 2383, Russell's St.), duly acquired a lien upon the lot in question. Noble having failed to pay the debt, appellee, within the time fixed by the statute, instituted suit thereon in the court below to recover personal judgment of Noble and obtain the enforcement of his mechanic's lien upon the lot mentioned. The petition contained an accurate description of the lot and the usual statements of fact necessary in such cases to manifest the lien. The Cottage Building Association No. 2, of Covington, and the appellant Henry Dersch were made defendants; it being alleged in the petition that each claimed a lien of some sort upon the lot in question, which they were called upon to assert.

Shortly after the institution of appellee's action, the appellant Dersch brought an action in the Kenton circuit court—but whether in the same division in which appellee's action was brought does not appear from the record—to enforce a mortgage lien for \$225,

claimed to exist in his favor upon the same lot. In the latter action the Cottage Building Association No. 2, of Covington, seems to have filed an answer, which was made a cross-petition against Noble, also asserting a lien upon the same property; but neither the building association nor the appellant Dersch appears to have filed an answer in the action brought by the appellee. It does appear, however, from an order found in the record, that on motion of the Cottage Building Association the action brought by the appellant Dersch was consolidated with that of appellee, and that by a further order the answer and cross-petition of the building association was taken and to be considered as its answer and cross-petition in the latter case; but no order was entered allowing the petition in the suit brought by appellant Dersch to be taken as his answer to the petition in the action brought by appellee. No defense was interposed by the appellant Noble in either action.

Judgment was rendered in the court below in appellee's favor against Noble for the amount of his debt and costs. In addition, appellee and the Cottage Building Association were given judgment for the enforcement of their lien; that of the building association being given priority. The appellant Dersch was also given judgment for the enforcement of his lien upon the same property; but his lien was adjudged inferior to those of appellee and the Cottage Building Association. From the judgment in question both Dersch and Noble have appealed.

It is contended by Noble that the court below erred in giving appellee a personal judgment against him for the amount of his debt; and this is his sole complaint, which rests upon the theory that as to such a claim only a judgment in appellee's favor enforcing the lien was proper. The contention is untenable. It is true that in the matter of improvement liens made under the ordinances of a city this court has held that a personal judgment against the property owner is not allowable, the contractor being, in such cases, restricted to the enforcement of his lien; but this rule does not obtain where the improvement is made under a contract between the maker of the improvement and the owner of the property. In the latter case the contract, like any other, personally binds the property owner and renders him liable for the cost of the improvement. Therefore the personal judgment against him was proper.

It is complained by the appellant Dersch that his mortgage lien was created before the filing by appellee of the statement for his mechanic's lien in the clerk's office, and therefore the circuit court erred in giving appellee priority. If this were true, Dersch would seem to be entitled to the priority claimed; but it does not so appear from the record. Though made a defendant in the action

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

brought by appellee, Dersch did not, by answer or otherwise, set up his mortgage lien in that action or claim priority over that of appellee. The petition in his action was not made an answer to appellee's petition, and no defense or objection was made by him to appellee's lien, or as to the priority thereof. Indeed, the record is incomplete, presenting only a partial showing of the proceedings had in the two cases in the court below. In the absence of a complete record, and the petition of appellee being sufficient to support the judgment in his behalf, we must take it for granted that the court had before it all the facts sufficient to justify it in giving appellee's lien priority over that of the appellant Dersch. In other words, in the absence of a showing to the contrary, we must conclude that the judgment of the circuit court is in all respects such a judgment as should have been rendered in the case.

As the appellants did not file a schedule in the office of the clerk of the circuit court within the time required by the Code, we might have summarily disposed of the appeal by dismissing it; but, its dismissal not being asked upon that ground, we have concluded to dispose of the case as otherwise presented by the record, upon its merits.

Judgment affirmed.

CITY OF OWENSBORO v. GABBERT.

(Court of Appeals of Kentucky. Nov. 4, 1900.)

1. MASTER AND SERVANT (§ 219*)—ASSUMED RISK—OBVIOUS DANGERS.

A ditch two feet wide and six feet deep, which a servant was digging through sandy soil when the sides caved and injured him, was not such an obviously dangerous place of work that one of common understanding would not have continued to work therein, though its walls were not supported in any way.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.*]

2. MASTER AND SERVANT (§ 222*)—PLACE OF WORK—ASSUMPTION OF RISK.

Where the place of work is not such as to impose upon the master the full duty of providing a safe place, and, though somewhat dangerous, it is not so obviously so that one of ordinary intelligence would not work there, and a servant is assured by the master or his representative that there is no danger, or is directed to continue the work, he may recover for injuries caused by the dangerous place of work, though the risk is as open to him as to the master; the doctrine of assumption of risk in case of equal knowledge of the danger not being strictly implied when the servant acts under the master's direction, as he may then rely on the master's judgment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648-651; Dec. Dig. § 222.*]

3. MASTER AND SERVANT (§ 222*)—INJURIES—ASSUMPTION OF RISK—PLACE OF WORK—WORK UNDER MASTER'S DIRECTION.

Where a ditch which plaintiff was digging when it caved was not so obviously dangerous

for want of shoring up that one of ordinary intelligence would have quit the work, the master was liable for injuries caused by its caving, where he impliedly directed plaintiff to continue work after plaintiff had called his attention to the probable danger and necessity of bracing it, even if the place was such that plaintiff created the danger in the progress of the work, so that the rule as to a safe place of work would not apply.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 648-651; Dec. Dig. § 222.*]

4. MASTER AND SERVANT (§ 107*)—INJURIES—SAFE PLACE OF WORK—DUTY TO MAKE SAFE—EXCAVATING WORK.

While the rule requiring a master to furnish a safe place of work does not apply to many works of construction where the unsafe condition is necessarily made during the progress of the work, the master was bound to make reasonably safe, by shoring the walls, a ditch two feet wide and six feet deep which was being built through sandy soil; such precaution being possible at a slight expense, and the danger from working without it not being obvious.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 107.*]

Appeal from Circuit Court, Daviess County.
"To be officially reported."

Action by G. M. Gabbert against the City of Owensboro. From a judgment for plaintiff, defendant appeals. Affirmed.

R. W. Slack, for appellant. Le Vega Clements and Ben D. Ringo, for appellee.

CARROLL, J. This appeal is prosecuted from a judgment in favor of appellee in an action brought by him against the appellant to recover damages for injuries sustained while in its employment as a laborer digging a ditch.

It appears from the evidence that appellee, under the direction of a superior servant of the city, was engaged in digging a ditch two feet wide and six feet deep in a sandy soil. The ditch was not braced or supported in any way, although it could have been shored up and made safe at little expense, and the sand in the side of the ditch gave way, causing the solid earth on the surface to cave in and fall on appellee. The argument is made in behalf of the city that appellee, who was a man of mature years and ordinary intelligence, knew, or by the exercise of ordinary care could have known, the dangers incident to the employment, which it is said were obvious, and that he assumed the risk of being injured in the manner he was; and it is further insisted that, as this was a work of construction, and the dangerous place was being made by appellee in the course of his labors, the rule putting on the master the duty of furnishing reasonably safe places for the servant to work in does not apply. Complaint is also made of alleged errors committed by the court in giving and refusing instructions.

Excepting appellee and the physicians who

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

testified in his behalf, no witnesses were introduced by either party. During the examination of appellee, he was asked the following questions: "Q. Now, Mr. Gabbert, at the time the walls of the ditch caved in, you knew it was going to cave in? A. Certainly not, or I would not have been in there. Q. Did you know the danger of its caving in? A. No, sir; I never worked in such sand and dirt as that before. Q. Upon whose judgment did you rely in that matter? A. Doc Woods. Q. You knew Mr. Woods well? A. Certainly. Q. And you had been working under him? A. Yes, sir. Q. You knew he was an experienced man? A. Yes, sir. Q. How long had you been digging ditches of that kind and depth? A. I don't know as I ever dug any besides that of that kind and depth. Q. How long had you been digging at six feet in that place? A. Something like two days, I guess. It was deeper out there where it caved in than where we commenced. Q. It hadn't caved in anywhere else, had it? A. No, sir; that was the first cave-in in that ditch. Q. Could you see anything more about that soil than the shape of that ditch, or know anything more about it than Mr. Woods could see? Was there anything he could see or know about it that you could not see or know? A. I can't say anything about that. Mr. Woods should have understood his business and knew the disposition of the soil. Q. Did you see that sand crumbling? A. No, sir; I didn't see any sand crumbling. I was cleaning up the bottom of the ditch when it caved in, and I don't remember watching it. Q. You received all of your orders from Mr. Woods, did you? A. Certainly. Q. Did anybody else about the work have authority to give orders to the men except Mr. Woods? A. No, sir. Q. Did you have any warning at all before it caught you? A. No, sir; none at all. Q. What, if anything, had you said to the foreman about the ditch? A. I just remarked to Mr. Woods, who was 10 or 12 feet behind me, awhile before that happened, that I thought it ought to be braced, that there was sand there, and he said, 'Maybe we will get through without it,' and just went on that way."

It thus appears that appellee, although not sure that the place was dangerous, felt some uneasiness about it and made the inquiry above set out to his foreman, Woods, who, in effect, assured him that there was no danger. It cannot be said that the place was so obviously dangerous that no person of common understanding would have continued to work in it, and so the principle announced in *Wilson v. Chess-Wymond Co.*, 117 Ky. 567, 78 S. W. 453, 25 Ky. Law Rep. 1655, *Shemwell v. Owensboro & Nashville R. Co.*, 117 Ky. 556, 78 S. W. 448, 25 Ky. Law Rep. 1671, *Duncan v. Gernett Bros. Lumber Co.*, 87 S. W. 762, 27 Ky. Law Rep. 1039, and other like cases, does not apply. The rule in this state is that when the place in

which the servant is engaged in working is not such as imposes upon the master the full duty of providing a safe place, but is somewhat hazardous or dangerous, although not obviously so, or the danger of continuing is not so apparent that a person of ordinary intelligence would not undertake it, and the servant is assured, in substance or effect, by the master, who is present, that it is reasonably safe, or that there is no danger, or is directed by him to go on with the work, the servant may recover for injuries received, although the risk or hazard in prosecuting the work is as well known to the servant as it is to the master. When the master is present, the doctrine of equal knowledge and assumed risk, that is sometimes invoked in cases like this to relieve the master, should be sparingly applied. The position of the two is very different, and out of this difference grows the right of the servant to depend upon the master, if he be present directing the work, as he has a right to presume he will warn him of danger and save him from needless exposure to injury or death. In *Shearman & Redfield on Negligence*, § 186, this idea is well expressed in the following language: "The true rule in this as in all other cases is that, if the master gives the servant to understand that, he does not consider the risk one which a prudent person should refuse to undertake, the servant has the right to rely upon his master's judgment, unless his own is so clearly opposed thereto that in fact he does not rely upon the master's opinion. So, if the peculiar risk of the act commanded by the master is not obvious, the servant has the right to assume that he is not sent into any unusual peril, and is not bound to investigate into the risk, before obeying his orders. A servant is not called upon to set up his own unaided judgment against that of his superiors, and he may rely upon their advice, and still more upon their orders, notwithstanding many misgivings of his own. * * * The servant's dependent and inferior position is to be taken into consideration, and if the master gives him positive orders to go on with the work, under perilous circumstances, the servant may recover for an injury thus incurred, if the work was not inevitably or immediately dangerous." So that, if we should put this case upon the ground that the servant was engaged in a work of construction, and was himself by his labor making the danger, and hence the strict rule for the protection of the servant in respect to safe places should not be applied, we would yet feel obliged to say that the master in this case made himself liable by his implied direction to the servant to go on with the work after his attention was directed by the servant to the probable danger and the necessity for shoring or bracing. As said in *Western Union Telegraph Co. v. Holtby*, 93 S. W. 652, 29 Ky. Law Rep. 523, a

case in many respects like the one at bar: "There are exceptions to the rule that relieved the master from liability when the servant is injured by appliances or tools or unsafe places, when the danger is one that might have been discovered by the servant by the exercise of ordinary care. Among them, and applicable to the facts in this case, is the doctrine that, although an appliance, tool, or place may be unsafe, and the danger discoverable by reasonable or ordinary inspection, yet if the master is present and orders the servant to perform the duty, or the servant depends on the master's presumed knowledge of the defective appliance or unsafe place, or relies on the master's inspection of the premises, and acts under his immediate direction, the master will be liable."

But, aside from this, the character of the work, although constructive, was not such as to relieve the master from the duty of making it reasonably safe. There are a great many works of construction in which it would not be practicable for the master to keep a safe place in which the servant could work while engaged in the undertaking; the nature of the work being such that a continual change is going on with which the servant must familiarize himself and take such precautions as are necessary to avoid accident or injury. To this class of constructive work a lower standard of liability on the part of the master, and in many cases no liability, will be applied than in cases where the work has been finished and is being used in the ordinary conduct of the business. *Bailey on Master & Servant*, §§ 29, 267; *Ballard & Ballard Co. v. Lee* (Ky.) 115 S. W. 732. But where an excavation like the one involved in this case is being made, and there is danger that the walls may cave in, and this is or should be in the exercise of ordinary care known to the master, and can easily and with little expense be obviated by shoring them up, there is no reason why the duty of the master to furnish the servant a reasonably safe place in which to work should not be applied in its fullest extent, unless the danger is so obvious that a person of ordinary intelligence would not undertake it. This doctrine is well supported by numerous authorities, among which we may mention *Thompson on Negligence*, §§ 3912, 3913; *Bailey on Master & Servant*, § 98; *American & English Encyclopedia of Law*, vol. 20, p. 59; 26 Cyc. 1178; *Welch v. Carlucci Stone Co.*, 215 Pa. 34, 64 Atl. 302, 7 Am. & Eng. Ann. Cas. 209.

As the instructions given by the court conformed to our views of the law applicable to the case as we have expressed them in this opinion, and the verdict is not excessive, the judgment of the lower court must be affirmed, and it is so ordered.

BENTLEY et al. v. NAPIER.

(Court of Appeals of Kentucky. Nov. 11. 1906.)

1. DEEDS (§ 111*)—CONSTRUCTION—DESCRIPTION OF PROPERTY.

The whole description of a deed, inartificially drawn, should be read without giving special prominence to any one expression.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 309; Dec. Dig. § 111.*]

2. BOUNDARIES (§ 3*)—DESCRIPTION—CONSTRUCTION—REFERENCE TO MARKED LINE.

A marked line, referred to in a deed, being indisputably established, the other part of the description should be read to harmonize with it.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 25-29; Dec. Dig. § 3.*]

3. EVIDENCE (§ 460*)—PAROL EVIDENCE—LOCATION OF CALLS IN DEED.

Parol proof is always admissible to show where the objects called for in a deed are located on the ground.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2120; Dec. Dig. § 460.*]

4. BOUNDARIES (§ 49*)—LOCATION MADE BY PARTIES TO DEED AS CONTROLLING.

When the location as actually made by the parties to a deed is established, this must control.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 243-248; Dec. Dig. § 49.*]

5. BOUNDARIES (§ 37*)—EVIDENCE—LINE REFERRED TO IN DEED—LOCATION.

Evidence held to show the location of a marked line, referred to in the description in a deed, was the line intended by the parties.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Action between John H. Napier and Mack Bentley and others. There was a judgment in favor of the former, and the latter appeal. Affirmed.

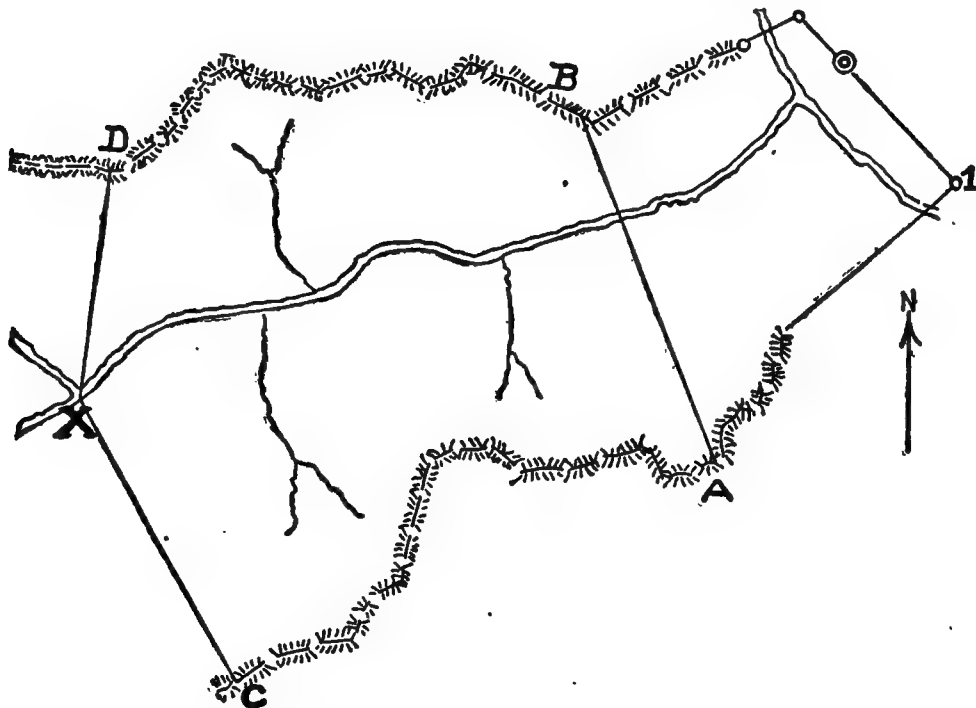
Jno. B. Minlard, Wootton & Morgan, and Greene, Van Winkle & Schoolfield, for appellants. J. G. Begley, O. K. Calvert, J. W. Wright, and W. W. Rawlings, for appellee.

HOBSON, J. Many years ago William Sizemore lived on Rock House creek in Leslie county. He laid off to his son, Joe Sizemore, a boundary of land. Before a deed was made, Joe Sizemore sold the land to John H. Napier, and then William Sizemore made Napier the deed in the year 1879. Napier entered upon the land, claiming to the line which was shown him, and held up to this line until this controversy arose, in the year 1907, between him and the heirs at law of William Sizemore, who had died previous to the year 1890. The only question in the case is what land is embraced by the calls of the deed from William Sizemore to John H. Napier. The calls of the deed are as follows: "Beginning at a rock near the forks of the Rock House creek on the east side of said creek; thence up said Rock House with the calls of the patent to the second ford of said creek to a marked line; thence square

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

across said creek each way down to the beginning, containing 125 acres, be the same more or less together, with all and singular the appurtenances and improvements therewith belonging." William Sizemore owned a body of land lying on the waters of Rock House creek and extending out on each side to the crest of the ridge. The figure 1 on the following plot, which roughly represents the situation, is at the beginning point of the deed; the line A B being the upper line of the tract as claimed by the heirs of Sizemore and the line C X D being the upper line of the tract as claimed by Napier.

Napier, and that he had conveyed to Napier to this line. Napier also showed that in the year 1890 William Sizemore's heirs sold to El. H. Patterson, trustee, a large body of land which they owned, and that by this sale they sold and conveyed to the line C X D; that he was at home when the surveying was done, and they sent for him and had him bring his deed, and the line was then run and re-marked as his line. After this some of the Sizemore heirs held some of the land under Napier, and another pointed out to persons cutting timber under Patterson where Napier's line ran, so that he would



The proof for the heirs of Sizemore is to the effect that the second ford on the creek, counting from its mouth, is where the line A B crosses the creek; that this is a marked line, and that the land below this line amounts to 99.6 acres. The proof for Napier is that when he bought the land he was shown the line C X D, which was then marked; that he settled upon the land when he bought it, and has since claimed to this line. Joe Sizemore also testified that his father laid off the land to him before he sold it to Napier, and marked to him the line C X D; that the land was not surveyed, and they had little idea how much land was in the boundary within the crest of the hills. A survey shows now that there are something like 385 acres below the line C X D. In addition to this Napier proved by four witnesses, who were neighbors and friends of William Sizemore, that he had shown them the line C X D, telling them that he had marked this line off for Joe; that Joe had sold to

not get over the line on Napier. In addition to this, previous to the year 1890, there had been no dispute between Napier and William Sizemore or his heirs as to the line C X D being the true line, and after 1890, when they sold to Patterson, trustee, they gave in no land for taxation on Rock House creek, and set up no claim to any land there; there being no controversy until about the year 1907, when this suit was brought. On these facts the court gave judgment in favor of Napier and the Sizemore heirs appeal.

It is earnestly insisted for the appellants that the deed which Napier accepted is conclusive for them that only the land up to the line A B was conveyed to Napier because it is said the proof clearly shows that this is a marked line, and crosses the creek at the second ford. The deed is very inartificially drawn, and we are to read the whole description without giving special prominence to any one expression. It is evident from the whole description that William Sizemore

conveyed to Napier a body of land lying on both sides of Rock House creek and extending up to a marked line. There is not sufficient proof in the record that William Sizemore made a marked line at A B, or that he ever recognized this line for any purpose. On the other hand, the proof is conclusive that the marked line which he referred to was the marked line when he had marked off the land to Joe Sizemore a short time before, and which they had pointed out to Napier shortly before the deed was made. The proof shows that there was a ford at X, and a short distance below it another ford; these fords being above what was known as Buffalo Hill. When he used the expression "the second ford," he evidently had in mind the upper of these two fords, which were close together and in the same vicinity. What was then known as the second ford is a matter of proof; and, while this may not have been the second ford across the creek counting from its mouth, it may have been known colloquially as the second ford. The marked line being here, and being indisputably established, the other part of the description should be read to harmonize with it. Parol proof is always admissible to show where the objects called for in a deed are located on the ground; and, where the location as actually made by the parties is established, this must control. In view of the subsequent conduct of all the parties, we have no doubt that the line C X D is the true line. It is true that this line gives Napier three times as much land as his deed calls for, but when he bought the land, land was selling very cheap, or at from \$1 to \$2 an acre. The parties made no survey, and really had no adequate idea what the distance was from the crest of one hill to the crest of the other, and perhaps, when they put the quantity at 125 acres, they had in mind the land below the cliffs. But however this may be, it being plain that the line was marked and established as called for by Napier, he cannot now be disturbed.

Judgment affirmed.

BURNES et al. v. DAVIESS COUNTY BANK & TRUST CO.'S ASSIGNEE et al.

FRANKE et al. v. SAME.

(Court of Appeals of Kentucky. Nov. 9, 1909.)

1. PLEDGES (§ 23*)—DELIVERY AND POSSESSION—WRITTEN INSTRUMENTS—BONDS—VALIDITY.

A bank issued to depositors certificates termed "mortgage certificates of deposit," which recited the deposit, and that the certificate was secured by an equal amount of bonds or lien notes. When such certificates were issued, the bank would indorse on one of its mortgage bonds or lien notes the fact that it was pledged as security for certificates issued, and the bond or note so indorsed was placed in a box retained by it with others similarly indorsed, and a similar indorsement was made on the register op-

posite the entry of such bond or note, and, when such indorsed bonds or notes were paid, another bond or note belonging to the bank was indorsed and placed in the box with the others. The indorsements were not dated and ordinarily not signed by the bank officers. Ky. St. § 1908 (Russell's St. § 2102), makes every charge upon personality, unless actual possession in good faith accompanies it, void as to any creditor prior to the recording of the charge. *Held*, that a pledge of personality could only be created by actual or symbolic delivery of the property to the pledgee, and, while the pledge of the bonds, etc., was valid as between the bank and the certificate holders, the statute made it void as to other creditors.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 47; Dec. Dig. § 23.*]

2. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 178*)—REMEDIES OF ASSIGNEE—SETTING ASIDE ASSIGNMENT—RIGHT.

Under Ky. St. § 84 (Russell's St. § 396), vesting in the assignee property fraudulently transferred by an assignor for the benefit of creditors before the assignment, if a transfer by the assignor is void as to his creditors, it is void as to the assignee, since he represents them, and holds the property in trust for their benefit, so that the fact that a pledge of property by an assignor for the benefit of creditors without delivering possession was good as between it and the pledgees would not prevent the assignee from setting it aside as void against the assignor's creditors.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 525; Dec. Dig. § 178.*]

Appeal from Circuit Court, Daviess County.

"To be officially reported."

Proceedings by E. B. Anderson to settle his accounts as assignee for the benefit of creditors of the Daviess County Bank & Trust Company. From the judgment entered, Edward Franke and Sam Burnes appeal. Affirmed.

Sweeney, Ellis & Sweeney, Miller & Todd, J. D. Atchison, and Geo. W. Jolly, for appellants. Le Vega Clements, Ben D. Ringo, C. M. Finn, J. R. Hays, W. F. Hays, and C. W. Wells, for appellees.

HOBSON, J. The Daviess County Bank & Trust Company began business in Owensboro, Ky., on August 7, 1900. On April 28, 1908, it made a general deed of assignment for the benefit of its creditors, and E. B. Anderson was appointed as trustee. He filed this action in the Daviess circuit court for a settlement of his accounts. There were a large number of depositors in the bank, some of whom held the ordinary certificates of deposit. Others held what is denominated in the record "mortgage certificates of deposit." The latter were in these words: "Owensboro, Ky., ———, \$——. This is to certify that ——— has deposited in the Daviess Bank & Trust Company ——— dollars payable to his order on return of this certificate properly indorsed twelve months after date with interest thereon at ——— per cent. per annum, interest to cease on the ——— day

of — 19—. This certificate of deposit is one of a series of similar certificates, and is secured by an equal amount of first mortgage bonds or lien notes on real estate in Daviess county, Kentucky, worth at least double the amount loaned." These certificates were issued pursuant to an order of the board of directors made on March 26, 1903, which was as follows: "At a meeting of the directors of the Daviess County Bank & Trust Company held to-day in the directors' room there were present T. S. Venable, J. J. Griffin, and T. S. Anderson. T. S. Anderson laid before the board a plan for issuing certificates of deposit secured especially by first mortgage bonds or lien notes set aside for that purpose, all money coming in on said certificates to be invested in said class of securities and held as a special fund. Mr. Venable moved that the bank issue such certificates of deposit to be known as mortgage certificates of deposit. His motion was seconded by Mr. Griffin and carried. Board adjourned." The plan adopted by the bank for the issue of these mortgage certificates was this: The bank would issue a certificate of this kind to a person who deposited money with the bank, and it would take from among the mortgage bonds or lien notes a note or bond and indorse upon it in stencil these words: "This bond (or note) is pledged as security for the series of mortgage certificates of deposit issued by the Daviess County Bank & Trust Company." The bond or note thus stamped was then placed in a box with the others so stamped, and an indorsement in stencil was made on the register of the bank opposite the entry of this bond or note similar to the indorsement stamped on it. The indorsements were not dated, and were not ordinarily signed by the bank or any officer of it. When a bond or note thus stamped or an interest coupon was paid, it was paid to the bank in the regular course of its business and delivered to the payor, and another bond or note belonging to the bank was taken from the notes or bonds of the bank, stamped as above, and placed among those previously stamped in the box kept for that purpose. At the time the bank failed it held bonds secured by mortgage of the par value of \$206,066. It also held real estate notes to the amount of \$23,084. On these mortgage bonds and real estate notes the holders of the mortgage certificates claimed a lien on \$74,000 to secure their certificates which amounted to the sum of \$73,463.44. These bonds and notes were in the box referred to with indorsements as stated at the time they came to the hands of the assignee, and that they were placed there at the time the mortgage certificates were issued or when other notes previously placed there were withdrawn is conceded. In other words, it is conceded that the bank in good faith undertook to secure these depositors in this way at the time they deposited their money with it;

and the only question we are to determine is whether a valid lien may be thus created on notes and bonds to the prejudice of other creditors.

Section 1908, Ky. St. (Russell's St. § 2102), is in these words: "Every voluntary alienation of or charge upon personal property, unless the actual possession, in good faith, accompanies the same, shall be void as to a purchaser without notice, or any creditor, prior to the lodging for record of such transfer or charge in the office of the county court for the county where the alienor or person creating the charge resides." Under this statute, it has been held in an unbroken line of decisions that an absolute sale of personal property is per se void as to the purchasers and creditors unless the possession of the property accompanies the title, and that a lien on the property can only be created by a writing recorded in the county clerk's office, where the owner retains possession. *Enders v. Williams*, 1 Metc. 346, and cases cited. In the case at bar the bank did not surrender possession of the notes and bonds put in the box to secure the mortgage certificates. These notes and bonds were not delivered to the holders of these certificates. If the maker of a note had a set-off against the bank, it was available against the note; but, if he had a set-off against the holder of a mortgage certificate, this could not have been asserted against the note in the hands of the bank and a payment to the holder of one of these certificates would have been no defense to an action by the bank on the note, if the bank had without notice of the payment, settled with the certificate holder. A pledge of personal property can only be created by actual or symbolic delivery of the property by the pledgor to the pledgee. If the property remains in the possession and under the control of the pledgor, the transaction falls within the statute, and is void as to creditors and purchasers. A bank has no greater rights than an individual, and to hold that an individual can create pocket liens upon his property in such a way as this that are valid against purchasers and creditors would be to nullify the statute and entirely defeat the legislative purpose in its enactment. It is said that the assignee for the benefit of the creditors simply stands in the shoes of his assignor, and that the arrangement in contest was good as between the certificate holders and the bank; but by section 84, Ky. St. (Russell's St. § 396), if the assignor before making the deed of assignment shall have made a fraudulent transfer of his property, the property so fraudulently transferred vests in the assignee. The assignee holds the property for the benefit of the creditors and as their trustee. If the transfer is void as to the creditors whom he represents, it is void also as to him as their representative. A trustee may always assert the rights of his cestui que trust, and take such steps as

are necessary to protect them in a court of equity. Practically the same question we have before us was before the Supreme Court of Louisiana in Succession of Lanaux, 46 La. Ann. 1086, 15 South. 708, 25 L. R. A. 580, and before the United States Supreme Court in *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779, and we concur in the reasoning of those opinions denying a lien to creditors attempted to be created between debtor and creditor by a private arrangement like this. See, also, *Grand Avenue Bank v. St. Louis Union Trust Co.*, 135 Mo. App. 366, 115 S. W. 1074.

It is insisted for the appellants that the bank held the bonds and notes as trustee for the holders of the mortgage certificates, and we are referred to a number of cases in which such trusts have been enforced as between trustee and cestui que trusts; but it will be seen from an examination of these cases that in none of them were the rights of creditors or purchasers involved. The arrangement here was valid as between the bank and the depositor if the bank had remained solvent, and the rights of other creditors were not involved; but it would entirely defeat the statute to say that a trust of this sort could be enforced against purchasers or creditors. The purpose of the statute was to declare inoperative and void such transactions as to purchasers and creditors.

We therefore conclude that the circuit court properly held that the holders of the mortgage certificates had no superior lien on the bonds and notes referred to.

Judgment affirmed.

LEWIS v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Nov. 10, 1909.)

1. CARRIERS (§ 108*)—LOSS OR DAMAGE TO GOODS—NATURE OF LIABILITY.

A common carrier is an insurer of freight delivered to it for carriage, and can only escape liability for loss or damage by showing it was caused by the act of God, or the public enemy, or by inherent defects in the goods.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 471-495; Dec. Dig. § 108.*]

2. WAREHOUSEMEN (§ 24*)—NATURE OF LIABILITY.

A warehouseman is not an insurer of goods placed in his warehouse, and is only liable for such loss or damage thereto as is caused by his negligence for failure to exercise ordinary care.

[Ed. Note.—For other cases, see *Warehousemen*, Cent. Dig. §§ 48, 49, 51-54; Dec. Dig. § 24.*]

3. CARRIERS (§ 114*)—DELIVERY OF GOODS—TIME FOR REMOVAL BY CONSIGNEE.

A consignee should have a reasonable time to remove goods after they have been placed in a carrier's warehouse at their destination.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 608-620; Dec. Dig. § 114.*]

4. CARRIERS (§ 84*) — TRANSPORTATION OF FREIGHT—DUTY AS TO CARRIAGE AND DELIVERY.

The duty of a carrier accepting freight for transportation does not end by merely carrying the goods in its cars to the point of destination, but it must deliver them at such place in or about its station as will enable the consignee to conveniently get them.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 290-298; Dec. Dig. § 84.*]

5. CARRIERS (§ 114*)—CARRIAGE OF GOODS—LIABILITY FOR LOSS OR INJURY—TERMINATION THEREOF.

A carrier may keep goods in its cars or place them in its warehouse, but wherever it keeps them, except against loss or damage by act of God, or the public enemy, or by inherent defect, it insures their safety till the consignee has a reasonable time to remove them after their arrival, as the delivery contemplated is not fully performed till then.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 608-620; Dec. Dig. § 114.*]

6. CARRIERS (§ 149½*)—CARRIAGE OF GOODS—LIMITATION OF LIABILITY.

In view of Const. § 196, forbidding a common carrier to contract for relief from its common-law liability, a common carrier cannot, by any stipulation in the contract or bill of lading, reduce its liability as an insurer of the safety of goods till the consignee has had a reasonable time to remove them after their arrival.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 651-653, 660-662; Dec. Dig. § 149½.*]

7. CARRIERS (§ 114*)—CARRIAGE OF GOODS—REMOVAL BY CONSIGNEE — "REASONABLE TIME."

The period of reasonable time for the removal of goods begins when the consignee knows, or, in the exercise of reasonable diligence should know, that they have arrived.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 608-620; Dec. Dig. § 114.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 5977-5983; vol. 8, p. 7780.]

8. CARRIERS (§ 136*)—CARRIAGE OF GOODS—ACTIONS FOR LOSS OR INJURY—QUESTIONS FOR JURY.

Reasonable time for removal of goods by a consignee, and reasonable diligence on his part to inform himself of their arrival, are in general questions for the jury.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 596; Dec. Dig. § 136.*]

Appeal from Circuit Court, Bell County.

"To be officially reported."

Action by R. J. Lewis against the Louisville & Nashville Railroad Company for loss of goods burned in defendant's warehouse. From a judgment for defendant, plaintiff appeals. Reversed.

Jas. H. Jeffries and N. R. Patterson, for appellant. C. W. Metcalf, Benjamin D. Warfield, and Chas. H. Moorman, for appellee.

CARROLL, J. The questions presented by this record are: When does the duty and liability of a common carrier of goods as a carrier cease upon the arrival of the goods at the point of destination, and when does its duty and liability as a warehouseman begin?

It is agreed that there was shipped to the appellant Lewis over the road of the appellee

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

company to Pineville, Ky., three packages of goods that were in its warehouse at Pineville on the night of September 16th, when the building and its contents, including this freight, was destroyed by fire; that the fire commenced at a late hour on the night of the 16th, or an early hour on the morning of the 17th, and was not caused either directly or indirectly by the negligence, fraud, or wrongdoing of the company or any of its agents, servants, or employes; that at the time of the fire, and for some five years prior thereto, Lewis was engaged in selling goods as a merchant at a point some 25 miles distant by the nearest traveled route from Pineville; that during this time all of the goods and merchandise that he sold was delivered to him by the company at its Pineville station, and this fact was known to its agent at Pineville, who also knew where Lewis lived and his postoffice address; that two of the packages of merchandise destroyed reached Pineville on the 13th of September, and were placed in the company's warehouse on that day, and the other package destroyed was placed in the warehouse at noon on September 16th; that neither Lewis nor any one for him made inquiry about or called at the warehouse for the goods, nor was any notice of the arrival of the goods or any of them sent or given by mail or otherwise to Lewis, and he did not at the time of the fire have any knowledge or notice that the goods or any of them were in the warehouse. It is further agreed that, on account of the heavy traffic on the road, it was impossible for Lewis to know with reasonable certainty when the goods which were shipped from distant points would reach Pineville, and that the goods in question were transported without unreasonable delay, although it appears that one shipment that left Louisville on August 28th did not reach Pineville until September 13th, while another package that left Louisville on September 14th reached Pineville on September 16th, and the package that was sent from Knoxville, which is only about half the distance from Pineville that Louisville is, did not arrive at Pineville until September 13th, although it was shipped on September 6th. Upon these facts the trial court held as matter of law that the company was not liable.

There is really no contrariety of opinion as to the difference between the liability of a common carrier and the liability of a warehouseman; it being everywhere agreed that a common carrier is an insurer of the freight delivered to it for carriage, and can only escape liability for loss or damage to the goods by showing that the loss or damage was caused by the act of God, or the public enemy, or by inherent defects in the goods. It is equally as well established that a warehouseman is not an insurer of goods placed in his warehouse, and is only liable for such loss or damage to the goods as is caused by his negligence or failure to exercise ordinary care.

From these rules it will be seen that, if the goods in controversy were in the custody of the company as a common carrier at the time of their destruction, it would nevertheless be liable for their value; while, if they were in its custody as a warehouseman, it would not be liable, as the loss was not occasioned by its fault or negligence. Although the liability of a carrier and that of a warehouseman is well defined, and the distinction between them in this respect clearly pointed out in all the authorities, there is wide and irreconcilable conflict concerning when the liability of a common carrier as a common carrier ceases, and its liability as a warehouseman begins. In Massachusetts and other states the rule is that when the carrier has delivered the goods at the point of destination, removed them from its cars and placed them in its warehouse, its liability as a carrier immediately ceases, and thereafter it holds the goods as a warehouseman. In New Hampshire and other jurisdictions the rule is that the carrier continues liable as a carrier after the goods have reached their destination and have been placed in the warehouse, and for a reasonable time thereafter, in which time the consignee must remove them or otherwise the carrier will hold them as a warehouseman. While the Supreme Court of New York and other state courts of last resort hold that unless the consignee is present when the goods arrive, he must be notified of their arrival and have a reasonable time after notice in which to remove them before the liability of the carrier as a carrier ceases. *Hutchinson on Carriers* (3d Ed.) §§ 701, 710; *Elliott on Railroads* (2d Ed.) § 1527; note to *Denver, etc., R. Co. v. Peterson*, 97 Am. St. Rep. 76; *East Tenn., etc., R. Co. v. Kelly*, 91 Tenn. 699, 20 S. W. 312, 17 L. R. A. 691, 30 Am. St. Rep. 902. In this state we have no statute on the subject, but the question we are considering has been before this court in three cases. In *Louisville, C. & L. R. Co. v. Mahan*, 8 Bush, 184, and *Wald & Co. v. Louisville, etc., R. Co.*, 92 Ky. 645, 18 S. W. 850, 13 Ky. Law Rep. 850, the point involved was what constituted a reasonable time in which a passenger might remove from the depot the baggage that came on the train with him. In *Jeffersonville R. Co. v. Cleveland*, 2 Bush, 468, the question presented was in many respects like the one now before us, and the court in delivering the opinion followed what may be called the New Hampshire rule. In that case suit was brought to recover the value of goods shipped by freight and destroyed by fire on the night of April 26th, while they were in the warehouse of the carrier at the place of destination. The goods in the ordinary course of transportation should have arrived on the 20th, but, on account of delays, they did not arrive until the evening of the 25th; and the owner inquired at the warehouse for them on each day from the 20th to and including the morning of the 25th. On the morning of the

28th a notice to the owner of the fact that his goods had arrived, was deposited in the post office, but not received. In the course of the opinion the court said: "Whether the responsibility of the company, after the arrival and storage of the goods in Detroit, was that devolved by law on carriers or only that of depositaries, it was not necessary in our opinion that the company should either give notice of the arrival of the goods or make actual delivery of them, as is now done by express companies, in order that the liability of carriers should cease after reasonable time had elapsed for the owner to attend and remove the goods. * * * But the liability of railroad corporations as common carriers for goods transported on their railroads continues until the goods are ready to be delivered at their place of destination, and the owner or consignee has had reasonable opportunity of receiving and removing them. * * * What such reasonable time should be must in the nature of the case when not provided for by express contract depend on the character of the freight, the distance to which it is to be carried, and the capacity and business of the road, with such other circumstances as would serve to notify the consignee of the probable time when the goods would reach their destination, so that, with proper watchfulness, he might receive them, and thus terminate the carrier's responsibility as soon as practicable." Upon the facts stated, the court held that the owner did not have a reasonable time in which to remove the goods after their arrival, and that the carrier at the time of their destruction was holding them as a carrier and hence liable. The liability was put upon the ground that the owner had exercised reasonable diligence to ascertain when the goods would arrive, and, as their arrival was delayed several days after the time when they should have reached their destination, the owner was not obliged to continue his inquiries as to when they would come, and the notice was not sufficient to enable him by reasonable diligence to remove the goods during the day on which the notice was sent.

Although disposed towards the view that the carrier should give notice if it desires to be relieved of its duty as a carrier, yet we are not fully prepared to overrule the Cleveland Case on this point. This being so, the only question left open is the one relating to reasonable time in which to remove the goods. That the consignee should have such time after the goods have been placed in the warehouse we have no doubt. When a carrier accepts freight for transportation, its duty as a carrier does not end by merely carrying the goods in its cars to the point of destination. It must deliver as well as carry, although by this we do not mean that it must deliver them as express companies do to the home or place of business of the consignee, but it must deliver them at such place in or about its station as will enable

the consignee to conveniently get them. It may, if it desires, keep them in its cars or place them in its warehouse, but, wherever it keeps them, it insures their safety except against the causes mentioned until the consignee has reasonable time to remove them, as the delivery contemplated is not fully performed until the consignee has had this time after the arrival of the goods in which to remove them. And this is true, although the bill of lading or contract for carriage, as in this case, provides "property shall be at the risk of the owner from the time of its arrival at destination whether in the vessel, car, depot or place of delivery; if not taken possession of and removed by the party entitled thereto within twenty-four hours thereafter, shall be subject to a reasonable charge for storage, or at the option of the carrier may be removed or otherwise stored at the owner's risk and cost," as neither this nor any other stipulation in the contract or bill of lading will be allowed to reduce the liability of the carrier below what it was at common law. Our Constitution (section 196) provides in part that "no common carrier shall be permitted to contract for relief from its common-law liability"; and, under the common law, the duty and liability of the common carrier was not terminated until the goods after the carriage were delivered to the consignee. 2 Kent, Com. 604; *Moses v. Boston & Maine R. Co.*, 24 N. H. 71, 55 Am. Dec. 222. But, as it is not deemed reasonable to require a railway carrier of freight to deliver the goods to the consignee at his residence or place of business, the rule of the common law in the interest of and for the convenience of this class of carriers has been modified, and now it is only required that the delivery shall be at the point of destination, and at this place the consignee must come for and remove his goods within a reasonable time after their arrival during which time the common-law liability of the carrier continues.

The question then comes up: What is a reasonable time? How is it to be determined? Is it to be decided by the court as a matter of law or by the jury as a matter of fact? Some courts hold that a reasonable time for the consignee to remove the goods is not to be measured by any peculiar circumstances in his own condition or situation rendering it necessary for his own convenience and accommodation that he should have a longer time or better opportunity than if he resided in the vicinity of the warehouse and was prepared with the means and facilities for taking the goods away; or, to put it in another way, a reasonable time is such time as will enable one living in the vicinity of the place of delivery in the ordinary course of business and in the usual hours of business to remove the goods. *Moses v. Boston & Maine R. Co.*, 32 N. H. 523, 64 Am. Dec. 381; *L. L. & G. R. Co. v. Maris*, 16 Kan. 333; *Wood v. Crocker*, 19

Wis. 363, 86 Am. Dec. 773; United Fruit Co. v. New York Transportation Co., 104 Md. 567, 65 Atl. 415, 8 L. R. A. (N. S.) 240, 10 Am. & Eng. Ann. Cas. 437; Columbus R. Co. v. Luden, 89 Ala. 612, 7 South. 471; 5 Am. & Eng. Ency. of Law, pp. 263-274; 6 Cyc. 445. It must be conceded that this rule has at least the merit of easy application, and that its adoption would solve the question of what is a reasonable time with little difficulty. Under it the only issue of fact left open would be the time of day the goods arrived at the station, as, if they arrived in time to remove them on that day in the usual hours of business, then they must be removed on that day or afterwards the carrier would hold them as a warehouseman; and so, if they arrived in the night, they must be removed in the hours of business on the following day. And it is manifest that, if this rule should be applied to the case before us, the carrier would be relieved of responsibility, even as to the package of goods that arrived at noon on the 16th, as a person living in the vicinity of the depot could have removed this package as well as the ones that came on the 13th, during the afternoon of the 16th. But we do not feel disposed to follow the rule announced. Nor was it observed in the *Cleveland Case*, supra. There the goods, although they arrived on the 25th, were not destroyed until the night of the 26th, and yet, notwithstanding the fact that the consignee had the entire day of the 26th in which to remove them, the carrier was held liable as a carrier. In our opinion the true test of what is a reasonable time depends, not on whether the consignee lives in the vicinity of the station, or whether he could remove the goods in the usual hours of business on the day of their arrival, but on the question whether or not he exercised reasonable diligence to ascertain when the goods would or did arrive, and reasonable diligence in their removal, after he received, or in the exercise of reasonable care should have received notice of their arrival. If the consignee is present, or if he has notice of the time of the arrival of his goods, or if he is notified by the consignee that his goods have been shipped on a certain day, and the train upon which they are shipped arrives on schedule time, he should remove them within a reasonable time thereafter, and, if he fails to do so, the liability of the carrier will be reduced to that of a warehouseman. On the other hand, if he is not present, and has no notice of when they arrive, or there is delay in the transportation of the goods, he should exercise reasonable diligence to inform himself of their arrival and have a reasonable time thereafter to remove them. In other words, the period at which the reasonable time for removal begins is when the consignee knows or in the exercise of reasonable diligence should know that his goods have arrived.

In every state of case the consignee must

exercise reasonable diligence to inform himself of the arrival of the goods, and, if he wishes to hold the carrier liable as a carrier, must remove them within a reasonable time thereafter, whether it be a day or a week. What is reasonable diligence being, like reasonable time, a question of fact varying with each case, it is manifest that no fixed rule can be laid down to measure reasonable time or reasonable diligence. What would be reasonable in one instance would be unreasonable in another, and so in these particulars each case must be adjudged upon the facts it presents. If the consignee is to have a reasonable time in which to remove the goods, then it is not just that this should be measured by his proximity to the depot, or his ability to remove the goods on the day of their arrival. All consignees should be treated alike, no matter whether they live close to or far from the depot. If the consignee has exercised reasonable diligence in ascertaining when his goods arrived and in removing them, then he has removed them in a reasonable time. If he has not exercised reasonable diligence in finding out when his goods have or should have arrived, and in removing them, he has not removed them in a reasonable time. This, notwithstanding the respect we have for the courts that define reasonable time in the manner before stated, is, we submit, the true rule, and that the other definition is both illogical and unsound. How can it be said that a consignee who does not know, and in the exercise of reasonable care cannot know, that his goods had arrived, has had a reasonable time to remove them? How can it be said that a person has failed to do a thing within a reasonable time when he has no notice that he will be required to do it? It would be just as well to abolish the rule of reasonable time as to say that the time when reasonable time commences to run is the time when the consignee had not and could not in the exercise of reasonable diligence know of its beginning. The test of reasonable time should not be made to turn on whether or not the consignee might remove them on the day of their arrival if he can do this in the business hours of that day. To illustrate, under this rule if a box of goods arrived at noon, and the warehouse was open in the afternoon, the consignee, if present, or notified that his goods would be sent on the train that arrived at noon, and the train reached the station on schedule time, would have a reasonable time in the business hours of that day to remove them. But, let us suppose that he is not present, and has no notice that his goods have arrived, or are expected to arrive, how can it be said that he has had a reasonable time to remove them on the day of their arrival, when he does not and by the exercise of reasonable diligence, could not learn of their arrival until the following day or the day thereafter? Or let us

suppose that the consignee has notice that his goods have been shipped at a certain time, and that in the ordinary course will reach their destination at a certain hour, and the consignee is at the station when the train is due, but it is delayed and does not come until the next day or the day following, must the consignee wait until its arrival? Or let us suppose that the goods in the course of shipment are in some way delayed and do not come for a week, must he wait in attendance at the depot? These examples, which are of common occurrence, illustrate that the rule requiring the goods to be removed on the day of their arrival, if this can be done in the usual business hours, is not the proper test of what constitutes a reasonable time in which the consignee must remove his goods after their arrival. Nor are we wanting in authority for the views we have expressed as to what constitutes reasonable time. In *Redfield on the Law of Railways* (6th Ed.) § 175, the learned author, speaking upon this point, says: "Upon principle it seems more reasonable to conclude that the responsibility does not terminate until the owner or consignee, by watchfulness, has had, or might have had, an opportunity to remove them. * * * There is then no very good reason, as it seems to us, why the responsibility of the carrier should not continue until the owner or consignee by the use of diligence might have removed the goods. The warehousing seems to be with that intent, and for that purpose. And, if we assume, as we must, we think that there is no obligation upon railway carriers to give notice of the arrival of the goods, there does still seem to be reason and justice in giving the consignee time and opportunity to remove the goods by the exercise of the proper watchfulness, before the responsibility of the carrier ends." We appreciate the fact that the rule we have announced is open to objection on account of its uncertainty and the difficulty of its application; but it is not more uncertain or difficult of application than any other matter involving like questions of fact. The decisions of many of the most important business affairs that come before the courts turn upon the question of what is reasonable time, and what is reasonable diligence. These two factors enter into cases that come up every day. Nor does the rule impose any particular hardship on the carrier, as it can, by giving notice to the consignee of the arrival of his goods, reduce its liability to that of a warehouseman, if the consignee within a reasonable time after the reception of the notice does not remove them. We may also add that what is reasonable time and reasonable diligence is, except in rare cases, a question for the jury, although it might become, as any other question of fact about which there was no dis-

pute, an issue to be decided by the court.

In conformity with these views, the court should on another trial of the case submit the issues of fact to a jury, and instruct them in substance that if they believe from the evidence that Lewis knew, or in the exercise of reasonable diligence could have known, when his goods arrived, they should find for the railroad company if he failed to remove them from the warehouse within a reasonable time after he knew or by the exercise of reasonable diligence could have known of their arrival. But if he did not, or in the exercise of reasonable diligence could not have known the time of the arrival of the goods, and did not fail to remove them within a reasonable time after he so knew or could have known, they should find for Lewis.

In the trial each party should be permitted to introduce all pertinent evidence throwing light upon the question of whether or not Lewis exercised reasonable diligence, and failed to remove the goods in a reasonable time.

The judgment of the lower court is reversed, with directions to grant appellant a new trial in conformity with this opinion.

CALOR OIL & GAS CO. v. FRANZELL et al. (Court of Appeals of Kentucky. Nov. 4, 1909.)

1. EMINENT DOMAIN (§ 93*)—COMPENSATION—GROUNDS—RIGHT OF WAY FOR PIPE LINE.

The owner of land sought to be condemned by a gas company for a pipe line may not add to the value of the property to be taken the damages arising from the supposed exhaustion of a gas reservoir under his property by the use which the gas company intends to make of its gas wells, for the destruction of the gas reservoir will not arise from the mere fact that the pipe line is laid through his land.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 237, 238; Dec. Dig. § 93.*]

2. EMINENT DOMAIN (§ 238*)—ASSESSMENT OF DAMAGES—BURDEN OF PROOF.

On appeal in condemnation proceedings, the condemnor has the burden of proof, and is entitled to the concluding argument.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 238.*]

3. EMINENT DOMAIN (§ 136*)—MEASURE OF COMPENSATION—LAND FOR PIPE LINE.

The measure of compensation for the right to lay and maintain a pipe line along a railroad right of way across the owner's land is, in the absence of evidence that the strip has peculiar adaptability for a pipe line, the fair market value of the property at a fair and voluntary sale.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 363-366; Dec. Dig. § 136.*]

4. EMINENT DOMAIN (§ 203*)—ASSESSMENT OF COMPENSATION—EVIDENCE—ADMISSIBILITY.

Where, in proceedings to condemn a right of way for a pipe line, the strip sought to be taken had no peculiar adaptability for a pipe line, evidence of the value of the land, based on any supposedly peculiar adaptability for pipe line purposes, was inadmissible.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 542; Dec. Dig. § 203.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Meade County.
"Not to be officially reported."

Condemnation proceedings by the Calor Oil & Gas Company against Nicholas Franzell and others. From a judgment awarding compensation, petitioner appeals, and defendants file cross-appeal. Affirmed on cross-appeal, and reversed and remanded on original appeal.

L. A. Faurest and E. P. Humphrey, for appellant. J. W. Lewis, J. M. Richardson, Matt O'Doherty, and McQuown & Beckham, for appellees.

BARKER, J. This is the second appeal of this case. The opinion upon the first is to be found in 128 Ky. 715, 109 S. W. 328, 33 Ky. Law Rep. 98. The question involved on this appeal is whether or not the verdict fixing the value of the piece of property sought to be condemned at \$700 is or not excessive. We shall not undertake to restate the facts of this case. They are minutely set forth in the opinion on the first appeal, and we refer to that for a more complete statement of them and of the questions heretofore adjudicated. When the case returned to the lower court for another trial consistent with the opinion on the first appeal, there was really but one question to be determined—the value of the strip of ground sought to be condemned. All others had been adjudicated. There is, however, now a new question arising on the cross-appeal, which will be discussed further along.

We decided on the first appeal that the strip of land sought to be condemned had no peculiar adaptability for a pipe line which would bring it within the principle enunciated in *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206, and we said that the measure of damages was what the property would bring at a fair, voluntary sale, where the seller was not obliged to part with his property and the buyer was not forced to purchase it. The owner of the ground had no right to add to the value of the property sought to be condemned the damages arising from the supposed exhaustion of the gas reservoir under his property by the use which the condemning corporation intends to make of its gas wells in Meade county. We held on the first appeal that the Calor Oil & Gas Company had a right to make a legitimate use of the gas flowing from its wells, and if in so using them the gas field as a whole was exhausted, this was a loss which all the parties interested would suffer in common. The destruction of Franzell's reservoir of gas, supposed to be under his farm, will not arise from the fact that the pipe is laid through his land, and his injury as to this will be the same whether the pipe line runs over his farm or over the farm of another; and it cannot be maintained that he has a

right to add to the value of the land taken for the purpose of laying the pipe the damages arising from the supposed destruction of his gas reservoir by the use of which the Calor Oil & Gas Company proposes to make of its wells in Meade county. If Franzell would have no cause of action against the Calor Oil & Gas Company for the destruction of his reservoir if the pipe line did not run over his land, the fact that it does so will not give him a cause of action. This proposition is so plain that it needs no further elucidation, nor does it need any citation of authority to sustain it.

The court properly held that the burden of proof was upon the condemnor, and awarded it the concluding argument. *Shelbyville & Eminence Turnpike Co. v. Louisville & Nashville R. R. Co.*, 51 S. W. 805, 21 Ky. Law Rep. 548. In the case cited it was held that, where both parties file exceptions to the amount awarded by the viewers or commissioners, the burden of proof is upon the condemning company.

The strip of ground sought to be condemned in this case is about an acre of land. It is a part of the right of way of the Louisville, Henderson & St. Louis Railroad, which runs through the Franzell farm. The railroad owns a perpetual and exclusive right of way through the farm, and the strip of ground in question is within this easement, and is 1,450 feet long by 27 feet wide. In this strip a pipe line 10 inches in diameter is to be buried. The jury awarded the owner of the land \$700 as damages. The commissioners appointed to assess the damages, in their report, fixed it at \$21.75. Franzell himself testified that his land was worth \$40 an acre. The additional servitude placed upon one acre of the right of way of the railroad cannot be worth as much as an acre of the land with no easement upon it; and yet the jury awarded the owner \$700 for an additional servitude on one acre, when the owner would have sold it at \$40 without any easement at all upon it. The amount assessed is flagrantly excessive, and the judgment will have to be reversed for this reason.

Upon another trial the court will not permit any questions as to the value of the land based upon any supposedly peculiar adaptability for pipe line purposes, as we decided on the former appeal that it has no such peculiar adaptability. Nor will counsel be permitted to interrogate witnesses concerning the lamp black factory, or any other extraneous question. The instruction given by the court to the jury is in accord with the principles enunciated on the first appeal, and will be given on another trial as upon the first.

For these reasons, the judgment is affirmed on the cross-appeal, and reversed on the original appeal, for proceedings consistent herewith.

SEELBACH HOTEL CO. v. COMMON-WEALTH.

(Court of Appeals of Kentucky. Nov. 11, 1909.)
INTOXICATING LIQUORS (§ 163*)—SUNDAY SALES—INNKEEPERS.

An innkeeper, not being exempt from Ky. St. § 1304 (Russell's St. § 3631), by which no one can sell intoxicating liquors without a license, violates section 1303 (section 3630), declaring it an offense to sell such liquor on Sunday, by serving it with a Sunday meal, though an innkeeper's ordinary business is one of necessity within Sunday closing acts.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 179; Dec. Dig. § 163.*]

Appeal from Circuit Court, Jefferson County, Criminal Division.

"To be officially reported."

The Seelbach Hotel Company appeals from a conviction. Affirmed.

Gibson, Marshall & Gibson and Kohn, Baird, Sloss & Kohn, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

O'REAR, J. This is an appeal from a judgment of conviction against appellant in a penal action instituted for four alleged violations of section 1303, Ky. St. (Russell's St. § 3630), which section reads as follows: "Any person who shall, on Sunday, keep open a barroom or other place for the sale of liquors, or who shall sell or otherwise dispose of such liquors, or any of them on Sunday, shall be fined not less than ten nor more than fifty dollars for each offense." The case was submitted and decided in the circuit court upon an agreed state of facts, disclosing: That the appellant was at the time mentioned in the petition (on a Sunday) a duly licensed hotel and inn keeper in the city of Louisville, and operating its hotel in good faith, having all the essentials and conveniences to enable it to do so. That appellant also had a bar attached to its hotel, but that on the occasions named its bar was closed. That appellant furnished a guest at its hotel, who was a citizen of Louisville and came to the hotel for his dinner, a quart of champagne as a part of his dinner, partaken of by him and his friends who accompanied him; to another guest, who was a traveling salesman from New York, a cock-tail and a pint of white wine as part of his dinner; to another guest, who was then living in the hotel, as part of his dinner, a pint of claret; to another guest, then living in the hotel as a guest, as a part of his supper, a mug of beer. That the liquors were ordered by the guests as parts of their meals, and were served to them in good faith as parts of their entertainment, "and that said persons, according to their mode of living, manner, and habits, required and generally took for and as part of their meals as a beverage liquors, and they had acquired the

habit of drinking, instead of coffee or tea, such liquors with their meals, and it was necessary for them to have the same for their comfort and habits." It was further agreed that such habits and customs existed with a large number of people who patronized that hotel, became its guests, and took their meals therein. This additional statement was incorporated in the stipulation of facts: "That there has been a statute in this state, differing in character, forbidding labor and doing of business on the Lord's Day, or Sunday, for more than 100 years, and that under all the statutes in this state, during all of said time, hotels and innkeepers have been permitted to serve their guests with liquors at their meals, and it was never attempted to enforce any statute against them, exercising such rights, although several statutes of this state on this subject have been enforced at various times that they never have been considered as applicable to hotels and innkeepers and never have been sought to be enforced against them until recently within a year or 18 months past."

That the sale of intoxicating liquors is a subject for the state's police regulation is no longer an open question. *Anderson v. Commonwealth*, 13 Bush, 485. In this state no person has the right to sell such liquors at all as a matter of right, nor until they shall have been granted a license by the state to do so. Section 1304, Ky. St. (Russell's St. § 3631). This regulation applies as well to innkeepers as to other people. If the state may regulate the sale, and to that end may require a license to be obtained by the vendor as a prerequisite to his engaging in the business, it is equally competent for the state to regulate the times during which the privilege secured by the license may be exercised, and the places where liquors may be sold, and the persons to whom they may not be sold. It is probably true that the reason Sunday is excepted from the times when liquors may be sold in this state was in deference to the religious views of a vast number of people; but whether that was the reason, or not, or whether it was to enforce a day of rest and quiet as tending to enhance public health and peace, or whatever the reason, it was competent for the Legislature to prohibit the sale on that day in the exercise of the police power of the state. For that matter it was equally competent to have prohibited the sale on Monday, or Saturday, or election days, as is done (section 1575, Ky. St. [Russell's St. § 3430]), or to require the selling to cease at midnight of every day (*McNulty v. Toof*, 116 Ky. 202, 75 S. W. 258, 25 Ky. Law Rep. 430). Sales to minors are forbidden (section 1306, Ky. St. [Russell's St. § 3633]), as are sales to inebriates (section 1307 [section 3634]). Could it be successfully urged that these provisions against selling to minors and inebriates are

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not applicable to tavern keepers? In this state local option may be voted by any town, county, or precinct. Section 61, Const. If such territory votes "dry," and if by the terms of the vote druggists are included, then no one can sell liquors in such territory by retail. Such is the unqualified prohibition of the statute. Section 2557a, Ky. St. (Russell's St. § 3636). In none of these statutes are innkeepers excepted. Wholesale dealers selling their own product at place of manufacture by wholesale and physicians are expressly excepted. If the Legislature had intended to except others, they would have been named.

It is idle to argue that as some people habitually drink wines, beer, or other liquors with their meals, instead of coffee or tea, the innkeeper must provide these guests with what they demand. Unless the innkeeper is licensed to sell liquors, he cannot lawfully do it, no matter what the tastes or habits of his guests may be; and, if his license does not permit him to sell liquors on Sunday (and it does not), it is as unlawful for him to do so as it would be to sell them on Monday without any license. Appellant's contention is, in short, that innkeepers are, by reason of the customary requirements of their calling, excepted from the operation of the Sunday statute (section 1303, *supra*), because their guests are themselves not prohibited from drinking liquors at their own tables on Sunday; but it does not follow. Granted that a man may drink what he pleases at his own table on Sunday, nevertheless sales to him of liquors on that day are prohibited. Whether he buys from the bar, or the merchant, or the druggist, or the tavern, the sale is forbidden. The drinking is not. When the tavern keeper sells his guest a mug of beer on Sunday, the act is as clearly within the prohibition of the letter and terms of the statute as if the sale had been by the barkeeper.

Nor do we regard the fact set out in the stipulation as to the construction of the Sunday closing statute for the past hundred years of any significance in this case. If one's ordinary business is a necessity (which a tavern keeper's is), he is not within such statute. If his business is not prohibited, the statute would not apply at all. For example, some sorts of traveling on Sunday are regarded as necessary. On that ground the operation of a railroad train was allowed as not contravening the Sunday closing statute. *Commonwealth v. L. & N. R. R. Co.*, 80 Ky. 298, 44 Am. Rep. 475. But if the railroad company carried passengers upon whom there was no urgency for going on that day, it would not be liable under the statute. If innkeepers are, by virtue of their calling and the habits and wants of their customers, bound to furnish their guests food and drink as called for, and on that ground, and that

the usage and customs of hospitality here and abroad in the past have included the furnishing of intoxicating drinks as part of the entertainment of hotel guests, exceptions by implication to the sweeping prohibition of our liquor statutes, then, on the same ground, it would follow that they are excepted from the statutes requiring license to liquor sellers, and from the statutes forbidding sales to minors (who may also be guests at inns), and that in local-option territory they would be excepted from the operation of the vote, and that dining-car companies, pullman-car companies, restaurants, cafés, lunch counters, and all places where eating is provided, drinking also might be provided, regardless of license, Sunday closing, or any other regulation. We find no warrant for such sweeping construction. The Legislature did not intend to except hotel keepers from the operation of the statutes aimed to stop the liquor traffic for one day in seven. At least no such intention is manifested.

The judgment is affirmed.

LOUISVILLE & N. R. CO. v. CRUTCHER. (Court of Appeals of Kentucky. Nov. 10, 1909.)

1. MASTER AND SERVANT (§ 286*)—INJURIES—ACTION—JURY QUESTION—GROSS NEGLIGENCE.

In a switchman's action for injuries caused by being thrown from a switch engine cab, whether plaintiff was thrown from the engine by the gross negligence of the engineer in running it at a dangerous rate of speed *held* for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001-1050; Dec. Dig. § 286.*]

2. RELEASE (§§ 16, 17*)—VALIDITY—MISTAKE.

If an injured servant signed a release of a claim for injuries believing it to be a receipt for wages due him, and the question of a settlement was not mentioned at the time, the release was invalid as being obtained by fraud or mistake.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 31, 32; Dec. Dig. §§ 16, 17.*]

3. RELEASE (§ 58*)—JURY QUESTION—CONFLICTING EVIDENCE.

Where the testimony was conflicting as to whether a release was signed under the belief that it was a receipt for wages, as claimed by one party thereto, the question was for the jury.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 109-114; Dec. Dig. § 58.*]

4. RELEASE (§ 55*)—ACTIONS—BURDEN OF PROOF.

A written release of all claims for injuries, signed by plaintiff, made out a *prima facie* defense when introduced in a personal injury action, and the burden was on plaintiff to avoid the release by showing its invalidity.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 94-100; Dec. Dig. § 55.*]

5. MASTER AND SERVANT (§ 293*)—INSTRUCTIONS—CONCRETE INSTRUCTIONS—SUFFICIENCY.

In a switchman's action for injuries by being thrown from a switch engine cab, where plaintiff claimed that the engine swayed violent-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ly when running at a high speed, and was being so run when he was thrown out, an instruction that if plaintiff was injured by the gross negligence of defendant's engineer in operating a certain engine in its yards, by which negligence plaintiff was thrown from the engine and injured, the jury should find for him in such sum as would compensate him for pain and mental anguish suffered, if any, and which it is reasonably certain that he will suffer hereafter, and for impairment of his earning power, if any, was not sufficiently concrete as to plaintiff's contention, and the court should have instructed that, if the jury believed that by the engineer's gross negligence in operating the engine at a high and dangerous rate of speed plaintiff was thrown from the engine and injured, they should allow him such sum as would compensate him for pain of body and mind suffered, if any, or which he is reasonably certain to suffer hereafter, and for impairment of earning power, if any, resulting directly and proximately from the injury, not exceeding the amount demanded.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1148-1168; Dec. Dig. § 293.*]

6. RELEASE (§ 59*)—INSTRUCTIONS—SUFFICIENT—CONCRETE INSTRUCTIONS.

In a switchman's action for injuries by being thrown from a switch engine cab, in which defendant offered a release, which plaintiff claimed was signed by him under the belief that it was a receipt for wages, an instruction that if the jury believed the paper relied on by defendant as a release was executed by the parties, each understanding that it was a release of all of plaintiff's claims against defendant on account of the injury, they should find for defendant, but, if they believed that it was executed by the parties under a mutual understanding that it was for the time lost by plaintiff for 12 days on account of his injuries, the jury should regard the paper as a release, was not sufficiently concrete, and the court should have instructed, in connection with an instruction authorizing a recovery if plaintiff was thrown from the engine by the gross negligence of defendant's engineer, that plaintiff could recover if the jury believed that the paper read in evidence as the release was executed upon the mutual understanding of both plaintiff and defendant that it was for time lost by the plaintiff for 12 days on account of his having been injured, and that plaintiff executed the release by mistake, or fraud of defendant.

[Ed. Note.—For other cases, see Release, Dec. Dig. § 59.*]

7. MASTER AND SERVANT (§ 295*)—INJURIES—ASSUMPTION OF RISK—CONCRETE INSTRUCTIONS.

In a switchman's action for injuries by being thrown from a switch engine cab, where plaintiff claimed that the accident was caused by the swaying of the engine while it was run at a dangerous speed, an instruction that when plaintiff entered defendant's service he assumed all the risks ordinarily incident to his employment, and, if the injury received by him was in his ordinary employment and in the ordinary operation of the engine he was on, the jury should find for defendant, was not sufficiently concrete, and the court should have instructed that when plaintiff entered defendant's service he assumed all risks ordinarily incident to the business conducted with ordinary care, including the danger from operating the engine on which plaintiff was when injured, unless the engineer was guilty of gross negligence in running it at a dangerous rate of speed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

8. MASTER AND SERVANT (§ 296*)—INJURIES—INSTRUCTIONS—CONTRIBUTORY NEGLIGENCE—CONCRETE INSTRUCTIONS.

In a switchman's action for injuries by being thrown from an engine cab, where defendant claimed that the engine was running at an ordinary rate of speed, and plaintiff was starting to get off when he fell and his foot turned on a lump of coal, but plaintiff claimed that he was thrown out by the swaying motion of the engine, which was running at a high speed, an instruction that, though defendant's agents were negligent, yet, if plaintiff was himself negligent, and such negligence, if any, contributed to the injury, which would not have occurred without it, the jury should find for defendant, was not sufficiently concrete upon the issues, and the court should have instructed that if plaintiff's fall was caused by his negligently undertaking to step from the engine when it was running at a dangerous speed, or by stepping upon a lump of coal and losing his balance, and not by the speed of the engine, or if he failed to exercise such care for his own safety as a person of ordinary prudence similarly situated would usually exercise, and but for which omission he would not have been injured, the jury should find for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1180-1194; Dec. Dig. § 296.*]

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by Justus Crutcher against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

McQuown & Beckham, Chas. H. Moorman, and Benjamin D. Warfield, for appellant. Leslie W. Morris, Wm. Lindsay, and T. L. Edelen, for appellee.

HOBSON, J. Justus Crutcher was a switchman in the service of the Louisville & Nashville Railroad Company in its yard at Paris, Ky. The crew to which he belonged used an engine known as "No. 603." It was a road engine, and had been converted into what is known as a "yard engine." When used as a road engine it had three driving wheels on each side, and a truck composed of four small wheels supporting the front of the engine. To change it from a road engine to a yard engine, the pilot was taken off, a step being put in its place, and the truck of four small wheels was removed. These small wheels served to steady the engine when running, and, to compensate for taking them out, the position of the boiler was changed to balance the machinery upon the three pairs of driving wheels so as to steady it for use in the yards. In January, 1908, the crew were going with the engine up in the yard to move a car, Crutcher being in the cab of the engine. As to what happened the proof is conflicting. The proof for him is to the effect: That the attempt to steady the engine had been unsuccessful. That it rocked as it went to such an extent that it had ac-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

quired the name "Ocean Wave," and this was known to all of them. That the engineer, as they were going up after this car, being in a hurry to get out of the way of a train that was about due, was running about 15 or 20 miles an hour. This caused the engine to oscillate violently, and by reason of this oscillation Crutcher was thrown from the cab. He caught the handhold as he was thrown out, which caused him to swing around with great violence against the step, which struck him in the side, causing violent hemorrhages from the lungs, and by reason of his injuries his capacity to earn money was practically destroyed. The proof for the defendant is to the effect that the engine was running only at its ordinary rate of speed at 4 or 5 miles an hour, that Crutcher started to get down off the engine for the purpose of throwing the switch while the engine was in motion, and that as he stepped his foot turned on a lump of coal, and he lost his balance and fell for this reason. After he had been laid up for 12 days with his injuries, and when they were not regarded as serious, as they afterward appeared, the defendant paid him \$28.80, and he executed to it a release of all claims on account of his injuries. Afterwards he brought this suit to recover damages, and the defendant pleaded the written release in bar of a recovery. It also traversed the allegations of the petition and pleaded contributory negligence. A reply was filed by him, and the issue was made up. The case was submitted to a jury, who found a verdict for him in the sum of \$6,000, and the defendant appeals.

The court did not err in refusing to instruct the jury peremptorily to find for the defendant. If this engine wobbled as much as the proof for the plaintiff tends to show when run over 6 miles an hour, there was evidence of gross negligence on the part of the engineer in running it 15 or 20 miles an hour; and, if by reason of this dangerous speed Crutcher was thrown from the engine, the question of gross negligence should be submitted to the jury.

Crutcher was making \$2.40 a day. He had been unable to work for 12 days, and he was paid \$28.80. This he testified was paid him for his lost time, and that the question of a settlement for his injuries was not mentioned. He signed the paper in ignorance of its being a release, and believing it to be simply a receipt for his wages. If his evidence was true, the settlement was obtained by fraud or mistake, and this question was for the jury.

The court, at the conclusion of all the evidence, gave the jury these instructions: "Instruction No. 1. The court instructs the jury that if they believe from the evidence that the plaintiff was injured on January 11, 1906, by the gross negligence of the defendant's engineer in the operation of en-

gine No. 608, in the yards at Paris, by which negligence he, the plaintiff, was thrown from the said engine, injuring him, then they will find for the plaintiff such sum as will compensate him for his pain and mental anguish, if any, which he has heretofore suffered, and which from the evidence it is reasonably certain that he will hereafter suffer, if any, for the impairment of his power to earn money, if any, not exceeding in all \$10,000, and, unless they so believe, they will find for the defendant. Instruction No. 2. The court instructs the jury that if they believe from the evidence that the paper relied on by the defendant as a release was executed both by the plaintiff and the defendant, each understanding and agreeing that the said paper was a release for all claims which the plaintiff had or might have against the defendant on account of the injury received by the plaintiff, then the jury are instructed to find for the defendant; but, if they believe that the paper produced in evidence was signed and executed both by plaintiff and defendant with the mutual understanding that it was for the time lost by the plaintiff for 12 days on account of his having received the injury complained of, then the jury shall not regard the paper as a release of all claims by the plaintiff against the defendant, but it shall be wholly disregarded by them. Instruction No. 3. The court instructs the jury that, when the plaintiff entered the services of the defendant, he assumed all the risks which are ordinarily incident to his employment, and if the jury believe that the injury received by the plaintiff was received in the ordinary employment of the plaintiff by the defendant, and in the ordinary operation of engine No. 608, then they ought to find for the defendant. Instruction No. 4. Even though the jury may believe that the defendant, by its agents and servants then in charge of the engine mentioned herein, was careless and negligent, yet, if they further believe that the plaintiff himself was careless and negligent, and that such carelessness and negligence on his part, if any, contributed to the injury received by him, but for which contributory negligence on his part, if there was any, the injury would not have been received, then the jury ought to find for the defendant." The defendant, among others, asked this instruction: "The court instructs the jury that if they shall believe from the evidence that the plaintiff, Crutcher, while riding on defendant's engine, leaped or stepped from said engine while it was in motion, and thereby received the injury complained of, the jury should find for the defendant."

The written release barred the plaintiff's action unless the evidence offered by the plaintiff was sufficient to relieve him from it. It made out *prima facie* a defense for the defendant. The instructions do not so

present the matter. The defendant was not required to offer any evidence except the writing to make out its defense. The burden was on the plaintiff to avoid the writing, and the instructions of the court should be so framed as to show this. Another objection to the instructions is that they do not present to the jury in a sufficiently concrete form the plaintiff's case or the defendant's defense. *L. & N. R. R. Co. v. King* (Ky.) 115 S. W. 196.

In lieu of instructions No. 1 and No. 2, the court should have told the jury that if they believed from the evidence that, by the gross negligence of the engineer in the operation of the engine at a high and dangerous rate of speed, the plaintiff was thrown from the engine and injured, and if they further believe from the evidence that the paper read in evidence as a release was executed upon the mutual understanding of both the plaintiff and the defendant that it was for the time lost by the plaintiff for 12 days on account of his having been injured, and that the plaintiff executed the release by mistake, or by fraud of the defendant, then they should find for the plaintiff such sum as would compensate him for the pain of body and mind, if any, which he has heretofore suffered, or which it is reasonably certain he will thereafter suffer, if any, and of the impairment of his power to earn money, if any, resulting directly and proximately from his said injury, not exceeding in all \$10,000, and unless they so believe they will find for the defendant.

In lieu of instruction No. 3, the court should have told the jury that when the plaintiff entered the service of the defendant he assumed all the risks which were ordinarily incident to the business conducted with ordinary care, including the danger from the operation of engine No. 603, unless the engineer was guilty of gross negligence in running it at a high and dangerous rate of speed as set out in No. 1.

In lieu of instruction No. 4, the court should have told the jury that if they believe from the evidence that the plaintiff, Crutcher, while riding on the engine, negligently undertook to leap or step from it when it was running at a rapid and dangerous rate of speed, or if he stepped upon a lump of coal, and his foot slipped, and he thus lost his balance, and this, and not the speed of the engine, was the proximate cause of his fall, or if while riding on the engine he failed to exercise such care for his own safety as a person of ordinary prudence situated as he was would usually exercise, and but for this would not have been injured, then, in any of these events, they should find for the defendant.

We see no other error in the record.

Judgment reversed, and cause remanded for a new trial.

STIRMAN v. CRABTREE.

(Court of Appeals of Kentucky. Nov. 12, 1909.)

1. EVIDENCE (§ 419*)—PAROL EVIDENCE—CONSIDERATION FOR DEED.

The recital of a deed as to the consideration being explainable by parol, in a suit for possession of a farm occupied by defendant after plaintiff purchased it, it was competent for defendant to show by parol that, as part of the consideration for the sale of other real estate by defendant to plaintiff by a deed reciting that the conveyance was for a good, valuable, and adequate consideration in cash, plaintiff agreed to buy a farm for defendant.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.*]

2. EQUITY (§§ 377, 381*)—SUBMISSION OF ISSUES TO JURY.

Though, in a suit involving matters of equitable cognizance, the chancellor may properly decline to submit issues to a jury, he may do so on his own motion, though he need not follow their findings in adjudging the rights of the parties.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 788-793, 813-817; Dec. Dig. §§ 377, 381.*]

3. EQUITY (§ 379*)—SUBMISSION OF ISSUES TO JURY.

If a chancellor is to accept the findings of a jury in an equity case, they should be advised, by the issues submitted, of the contention of both parties, so that when they come to consider their verdict they may have before them the case of each.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 800-808; Dec. Dig. § 379.*]

Appeal from Circuit Court, McLean County.
"Not to be officially reported."

Suit by Wilbur F. Stirman against George W. Crabtree to recover land. From a judgment for defendant, plaintiff appeals. Reversed.

Little & Slack, W. A. Taylor, and J. H. Miller, for appellant. W. B. Noe and L. P. Tanner, for appellee.

CARROLL, J. In 1904 the appellee, Crabtree, owned some real estate in Owensboro that he purchased for \$9,500, paying in cash \$3,500 and executing for the deferred payments six notes of \$1,000 each, due, respectively, on the 1st day of March, 1904, 1905, 1906, 1907, 1908, and 1909. There was a condition in the notes that all of them should become due at the option of the holder if there was default in the payment of any of them at maturity. In the early part of 1904 the appellant, Stirman, became the purchaser of these six notes, and some time before September 1st of that year he notified Crabtree, who had not paid anything on the note due March 1, 1904, that unless the note was paid, or some better security given, he would bring suit upon all the notes. As the result of various conferences between the parties that will be stated more fully in the course of the opinion, Crabtree conveyed all the Owensboro property to Stirman, and Stirman surrendered to Crabtree all the notes he held against him. The consideration is not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stated in the deed; but it recites that the conveyance was made for "a good, valuable and adequate consideration to them in cash paid by the party of the second part, the receipt of which is hereby acknowledged." By the consent of Stirman, Crabtree was permitted to remain in the occupancy of the property, a part of which was a livery stable, until January 1, 1905. In January, 1905, Stirman purchased 173 acres of land in McLean county from Neal and wife for \$2,600. Six hundred dollars of this amount he paid in cash, and executed five notes of \$400 each for the remainder of the purchase money, due, respectively, on the 1st day of January, 1906, 1907, 1908, 1909, and 1910; each bearing interest from date. The deed conveying this land was made to Stirman. In the early part of 1905, Crabtree moved on this land, and was in possession of it in October, 1907, when Stirman brought suit against him for the recovery of the land and \$600, the reasonable rental for the years 1906-7. In the pleadings in this suit he alleged, in substance: That at the time he purchased the notes the property was not worth as much as \$6,000, but Crabtree assured him he had made arrangements to pay the note due March 1, 1904, at its maturity. That, as Crabtree failed to pay any part, he notified him he would bring suit upon all of the notes in the October term, 1904, of the Daviess circuit court and enforce his lien upon the property. That thereupon Crabtree besought him not to do so, saying that if the property was sold under a judgment it would not bring his debt, and that if he would not sue him he would surrender the property and convey it to him, which he did. He said that, after Crabtree consented to make the conveyance, he agreed with him in parol that he might occupy the property, rent free, until January 1, 1905, and that in the meantime, if he could find a purchaser for it who would pay more than the amount of the notes and interest, he (Crabtree) could have the excess. That there was no consideration for this agreement on his part, and he was induced to make it out of sympathy for Crabtree. That in December, 1904, Crabtree informed him he could not find any purchaser for the stable and would surrender possession on January 1, 1905, and then appealed to him to help him get a farm. That shortly afterwards Crabtree reported that he had found a farm in McLean county that could be bought for \$2,600, and, if he (Stirman) would buy it and allow him to occupy it, he would be able to pay for it out of the proceeds of his crops; and that as an accommodation to him he agreed to, and did, purchase the farm, taking the deed to himself. And, further, that Crabtree had failed to pay either of the notes due January 1, 1906 and 1907, or any part of the consideration, and that he had been compelled to take up the notes.

To this suit, Crabtree filed an answer, set-

off, and counterclaim, in which he said, in substance, that in August, 1904, it was agreed in parol between himself and Stirman that if he would convey to Stirman the Owensboro property Stirman would surrender to him the notes he held, and in addition thereto, and as a part of the consideration, would pay for and have deeded to him any farm he (Crabtree) might select in Daviess or McLean county, which could be purchased for \$3,000 or less, and that in pursuance of this agreement he selected the Neal land, consenting that the deed might be made to Stirman, but with the parol agreement between himself and Stirman that Stirman should pay off the purchase-money notes executed to Neal, and when these notes were paid convey the land to Crabtree. He further averred that Stirman, in pursuance of this parol agreement, did purchase the Neal farm and place him in possession thereof in 1905, and that during his occupancy he had made valuable and lasting improvements on the land that enhanced its value at least \$600, and the land was worth when the suit was brought \$5,200. He therefore prayed that he be adjudged the owner of the land, and that Stirman be required to pay for and convey it to him; or, if this could not be done, that he be given judgment against Stirman in damages for the sum of \$5,200. Other pleadings completed the issues, and the court upon its own motion transferred the action to the equity docket, but directed that an issue out of chancery be submitted to a jury. A trial resulted in a jury finding a verdict in favor of Crabtree for \$3,000. This verdict was set aside by the court, and a new trial ordered, when the court upon its own motion again submitted the following issues to a jury: "(1) The jury will find from the evidence and state in their verdict whether or not in the oral contract for the sale of the livery stable in Owensboro, Ky., by the defendant to the plaintiff, the plaintiff agreed to buy a farm for the defendant that cost not less than \$2,500, in addition to surrendering the notes the plaintiff held against the defendant, which were a lien on the stable conveyed by the defendant to the plaintiff; and the jury will also find from the evidence and state in the verdict whether or not the plaintiff did purchase the farm in controversy in this action for the defendant and place him in possession of it, with the understanding and agreement that the defendant accepted it in satisfaction of the \$2,500 difference, if any, between the lien notes and the value of the stable conveyed by defendant to the plaintiff. (2) The jury will find from the evidence and state in their verdict whether by a contract of sale by Crabtree to Stirman of real estate in Owensboro, Ky., that Stirman agreed, in addition to the \$6,000 in notes which he surrendered to Crabtree, that he would pay to Crabtree \$3,000, or pay for a farm for Crabtree of the value of \$3,000, or less." In response to these questions, the

jury found the following verdict: "We of the jury find from the evidence that, in the sale of the real estate in Owensboro by Crabtree to Stirman, Stirman did agree to buy a farm for Crabtree of the value of \$2,500; and we further find from the evidence that Stirman put Crabtree in possession of the farm described in the petition in this action under the agreement, and that Crabtree accepted it in satisfaction of the \$2,500 difference between the lien notes of Stirman and the value of the stable agreed on by the parties at the time of the trade." Thereupon the court adjudged that Stirman was the owner of the land, but that Crabtree had a lien on it for \$2,500, and was entitled to retain possession of it until this amount was paid to him by Stirman. Other questions in reference to rents and improvements were disposed of by the court; but we do not deem further mention of this part of the judgment necessary to a consideration of the question presented by this appeal.

In behalf of the appellant, it is urged: (1) That the parol contract set up by Crabtree was not enforceable; (2) that the verdict is palpably against the evidence; (3) that the court should not have submitted the issues of fact to a jury; and (4) that the issues submitted were insufficient and misleading.

It has been decided in a number of cases that the recital in a deed of the consideration paid is not conclusive, and that either party may show by parol evidence what the true consideration was. This being so, it was competent for Crabtree to make the defense, and establish it by parol evidence if he could, that as a part of the consideration for the sale of the Owensboro property Stirman agreed to buy a farm to cost \$3,000 or less. The fact that the agreement in respect to the consideration contemplated the purchase of a farm did not affect the right of Crabtree to show what the real consideration was. If, as a part of the consideration for the Owensboro property, Stirman agreed to buy a farm at a cost of \$3,000, and convey it to Crabtree, although Crabtree could not compel Stirman to purchase the land and convey it to him, he could yet bring a suit to recover the value of the farm; and so we think that Crabtree in his pleading presented a good cause of action.

In view of the fact that there will be another trial, we do not deem it proper to express any decided opinion upon the evidence; it being sufficient to say that, although the weight of it favors Stirman's contention, it was conflicting and sufficient in a common-law action to sustain the verdict of a properly instructed jury in favor of either party. Although this suit involves matters of equitable cognizance, and the chancellor might properly have declined to submit any issues to a jury, yet, under the settled practice, he had the right to do so, although he need not

have followed their findings in adjudging the rights of the parties. And so the chancellor acted within a sound discretion when he called in a jury to get their judgment upon the disputed questions of fact; but we are of the opinion that the issue submitted did not fairly present the case to the jury, and as it appears from the judgment entered that the chancellor felt himself bound by the finding of the jury, although he might have disregarded it, it seems to us that the jury should have been advised by the issues submitted to them of the contention of both the parties to the litigation, so that when they came to consider their verdict they might have before them the case of each of the parties. But the court in the two questions submitted really presented only Crabtree's theory of the case, ignoring Stirman's. Stirman's theory was that he did not agree to buy a farm for Crabtree or pay anything for the Owensboro property in addition to the notes he held against him, but that as a matter of accommodation he bought a farm and gave Crabtree the privilege of occupying and cultivating it with the understanding that he (Crabtree) would take up the purchase notes as they fell due, and in addition pay to Stirman what he had paid in cash on the place. This view of the case was not before the jury at all. Their attention was not directed to it by the question submitted.

Wherefore the judgment is reversed, with directions for a new trial, and, if upon a new trial issues of fact are submitted to a jury, they should cover the case as made out for each party, and the chancellor may or may not in his discretion enter a judgment in conformity to their verdict; in other words, the chancellor will decide the case as he thinks right and proper, giving to the findings of the jury such weight as he considers them entitled to.

HELM'S TRUSTEE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 18, 1909.)

1. DOMICILE (§ 1*)—INTENT.

The question of domicile is usually one of intent; slight circumstances often being sufficient to determine the question.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 1; Dec. Dig. § 1.*]

2. DOMICILE (§ 1*)—NECESSITY.

Every person has a legal domicile.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 1; Dec. Dig. § 1.*]

3. DOMICILE (§ 10*)—ABANDONMENT—INTENTION—EVIDENCE.

Where a domicile is once established, intent to abandon it and adopt a new one must be satisfactorily shown.

[Ed. Note.—For other cases, see Domicile, Cent. Dig. § 39; Dec. Dig. § 10.*]

4. DOMICILE (§ 1*)—EVIDENCE—ADMISSIBILITY.

In determining the domicile of a person, her sex, status as married or single, and all sur-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

rounding circumstances which tended to influence or explain her acts by which her residence is sought to be established, such as the fact that it was unnecessary for her to own a home because she was single and without family ties, or to engage in business because she was wealthy, should be considered.

[Ed. Note.—For other cases, see *Domicile*, Cent. Dig. § 1; Dec. Dig. § 1.*]

5. TAXATION (§ 254*) — EVIDENCE — SUFFICIENCY.

In a proceeding to require personalty to be listed for taxation in a certain county on the ground that the owner was there domiciled, evidence held to show that she was a resident of another county.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 425; Dec. Dig. § 254.*]

Appeal from Circuit Court, Fayette County.
"To be officially reported."

Proceeding by the Commonwealth, by the State Auditor's agent, against Margaret Helm's trustee. From a judgment for plaintiff in the circuit court, reversing a judgment for defendant in the county court, defendant appeals. Reversed, with directions to affirm the judgment of the county court dismissing the proceeding.

Geo. B. Kinkead and Wallace & Harris, for appellant. D. C. Hunter and Geo. C. Webb, for appellee.

BARKER, J. This is a proceeding commenced in the county court of Fayette county to require the appellant, as trustee for Margaret Helm, to list the personal property of the cestui que trust for taxation as omitted property for the years 1904, 1905, 1906, 1907, and 1908. The merits of the question involved here turn upon whether or not Margaret Helm was domiciled in Fayette county, Ky., during the years mentioned, as is claimed by appellee, or whether her domicile was in Woodford county, as claimed by appellant. This question is one wholly of fact, and is not altogether free from doubt. Margaret Helm's father and mother resided on a large farm in Woodford county, Ky., up to the time of the death of the father. After his death the mother, Mary L. Helm, and her daughter, Margaret, continued to reside in Woodford county, although they were absent therefrom a large part of the time. The farm was rented out, but the mother retained a room in the house which she kept furnished and occupied from time to time. After the death of her mother, Margaret Helm did not continue to keep a room in the house on the farm, but boarded in Lexington, Ky. She was unmarried, and able financially to live how and where she pleased. Her mother died in 1903, and since that time she has for the most part boarded in Lexington. Whether or not that was her domicile is the question for adjudication.

The will of the mother, Mary L. Helm, was probated in Woodford county, and the Security Trust Company was appointed and

qualified there as trustee under the will for the daughter, Margaret. It is conceded that each and every year since the appointment and qualification of appellant as trustee it has paid state and county taxes on the trust estate in Woodford county, Ky. The question of domicile is nearly, if not always, one of intent, and often very slight circumstances will serve to turn the judgment in favor of one or another of the different places claimed to be the domicile. It is a firmly settled rule of law that every person has a legal domicile somewhere; and it is equally well settled that, where the domicile is once established, an intent to abandon it and adopt a new one must be satisfactorily shown. Now, in the case before us, it is conceded that, up to the time of the death of the mother in 1903, the domicile of the mother and daughter was in Woodford county. To establish the fact that the daughter, after the death of the mother, changed her domicile from Woodford to Fayette county, the commonwealth proved that for the larger part, if not all, of the time since the death of the mother, the daughter has lived in a boarding house in Lexington, and evidence is given of certain statements of the cestui que trust relative to a proposed change of residence to avoid taxation; but this was after this procedure was commenced, and had reference to escape from city taxation. On the other hand, we have the undisputed fact that the trustee has regularly listed the whole estate for taxation in Woodford county, and paid the taxes due thereon each year. We find, also, that Margaret Helm retained her membership in the Episcopal Church at Versailles, and has never changed it to a church in Lexington; and it is shown that she told the officers of the trust company that she resided in Woodford county, she having been asked this question for the purpose of ascertaining where her estate should be taxed, and this long before any question of taxation in Fayette county arose. In reaching the proper conclusion as to the domicile of the cestui que trust, her sex and status and all her surroundings should be taken into consideration. Being single, with no family ties, it was not necessary for her to own a house; being wealthy, she was not required to go into any business; and, being a female, she might feel a delicacy in keeping a room in the home of her tenant. On the whole, we think that the fact that the estate was listed for taxation during all of the years involved herein in Woodford county, Ky., ought to establish, in the absence of stronger evidence, that Margaret Helm resides in Woodford county.

In the case of *City of Lebanon v. Biggers*, 117 Ky. 480, 78 S. W. 213, 25 Ky. Law Rep. 1528, the question we have here was discussed at considerable length. In the opinion it is said: "It is a maxim of the law that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

every person must have a domicile, and also that he can have but one, and that, when once established, it continues until he renounces it and takes up another in its stead. Nor can there be any question that a domicile is not lost by temporary absence. The question is one of fact, and it is often difficult to determine. The rule is laid down by Mr. Justice Cooley in volume one of his work on Taxation (3d Ed.) p. 641, quoting Shaw, C. J., as follows: 'No exact definition can be given of domicile. It depends upon no one fact or combination of circumstances, but from the whole, taken together, it must be determined in each particular case. It is a maxim that every man must have a domicile somewhere, and also that he can have but one. Of course, it follows that his existing domicile continues until he acquires another, and, vice versa, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of evidence in favor of two or more places; and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fixed it beyond question in another. So, on the contrary, very slight circumstances may fix one's domicile, if not controlled by more conclusive facts fixing it in another place.' So, in this case, taking the evidence for the Commonwealth and looking from that point of view, it would appear that Margaret Helm was domiciled in Lexington. Taking that for the appellant, it seems to us that her domicile was in Woodford county. Certain it is that she so believed and intended, and her trustee acted upon this view in giving in the estate for taxation.

For these reasons, the judgment is reversed, with directions to the circuit court to affirm the judgment of the county court dismissing the proceeding of the auditor's agent.

FAIRBANKS, MORSE & CO. v. S. W. HELTSLEY & CO.

(Court of Appeals of Kentucky. Nov. 17, 1909.)

1. SALES (§ 340*)—CONTRACT—BREACH—ACTION FOR PRICE.

Where the buyer of an engine from a manufacturer notified the seller before the engine had been seen, tendered, or delivered that he would not accept it, and for this reason there was no delivery and the title at all times remained in the seller, he could not maintain an action for the price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 933; Dec. Dig. § 340.*]

2. JUDGMENT (§ 570*)—RES JUDICATA—DISMISSAL—INSUFFICIENCY OF PLEADING.

Dismissal of a seller's action for the price because the petition was demurrable for want

of facts was no bar to another action for breach of contract.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1089; Dec. Dig. § 570.*]

Appeal from Circuit Court, Todd County.

"To be officially reported."

Action by Fairbanks, Morse & Co. against S. W. Heltsley & Co. Judgment for defendant, and plaintiffs appeal. Affirmed.

Trimble & Mallory, Jas. R. Mallory, Gifford & Steinfeld and Chas. R. Gowen, for appellants. C. A. Denny, for appellee.

HOBSON, J. Fairbanks, Morse & Co. brought this suit against S. W. Heltsley & Co. in the Todd circuit court. The defendants demurred to the petition; their demurrer was sustained. The plaintiff filed an amended petition. The defendants demurred to the petition as amended. The demurrer was sustained, and, the plaintiff failing to plead further, the petition was dismissed. The plaintiff appeals.

The facts stated in the petition are briefly these: The plaintiff is a corporation created by the laws of Illinois. On July 30, 1908, it entered into a written contract with the defendants by which it agreed to deliver on board the cars at Elkton, Ky., one 15 horse power gasoline engine, for which the defendants agreed to pay it \$660. The plaintiff immediately proceeded to build and equip an engine in compliance with the terms of the contract, and crated and prepared it for shipment from its factory to Elkton; but before it was shipped the defendants notified the plaintiff that they would not receive the engine if shipped, or pay for it, and for this reason it did not ship the engine, although ready and willing to do so. No part of the contract price was paid, and on these facts the plaintiff asked judgment for the contract price, \$660, and costs.

In Cook v. Brandeis, 3 Metc. 555, the plaintiff sold certain wheat to the defendants to be thereafter delivered, but the defendants, when the time came for delivery, refused to receive it. The plaintiff thereupon sold the wheat for less than the contract price, and brought a suit to recover damages. In defining his rights the court said: "In such case—that is, where the vendee refuses to receive the thing bargained for—the vendor may consider it as his own, as if there had been no delivery, and recover the difference between the value at the time and place of delivery and the contract price; or he may sell it with due precaution and diligence to satisfy his lien for the price, and then he may sue and recover only the unpaid balance of the contract price, or he may consider it as the property of the vendee subject to his call or order, and then he recovers the full price which the vendee was to pay. In either case the election rests with the vendor; the vendee having violated his contract." In

the subsequent case of *Bell v. Offutt*, 10 Bush, 632, Bell had sold certain hogs to Offutt to be thereafter delivered, and Offutt declined to take the hogs when tendered. Bell thereupon sold the hogs for less than the contract price, and brought suit for damages. The court there laid down the same rule as in *Cook v. Brandeis*. But it will be observed that in both of these cases the seller had sold the property in the open market for the best price attainable, and the court did not have before it the question what he must do to recover the contract price in order that the thing sold might be regarded as the property of the purchaser. This question was presented in *Webber v. Minor*, 6 Bush, 463, 99 Am. Dec. 688. In that case, the plaintiff had sold a lot of wood, which the defendant refused to receive, and brought an action for the price while he still had the wood. The court, holding that he could not recover the price, said: "According to the case of *Cook v. Brandeis* and *Crawford*, 3 Metc. 555, relied on for the appellee, and the authorities therein cited, the appellee might on the refusal of the appellant to receive and pay for the wood, if he was bound to do so by the contract, have either kept the wood and recovered by proper action the difference between its value at the time and place of delivery and the contract price, or he might have sold it with due precaution and diligence, and then have sued for and recovered the difference between the price received and the contract price, or he might upon making an actual or constructive delivery of the wood have recovered the full contract price, the measure of relief sought in this action. But, although the evidence conduces to sustain the plaintiff's averments of the contract, and his readiness and offer to deliver the one hundred and fifty-four cords of wood, and the refusal of the defendant to receive it, these facts do not in our opinion constitute, actually or constructively, a complete performance of the contract; for, conceding that a substantial compliance with his undertaking did not require that he should place the wood upon the brickyard against the will of the defendant, he should have set it apart for the defendant, and relinquished his own control of it at or as near to the place of delivery as was reasonably practicable. This would have been a constructive delivery of the wood, not merely an offer or tender of delivery. *Duckham v. Smith*, 5 T. B. Mon. 372; 2 Story on Contracts, § 800. And, as there would have remained nothing more for the plaintiff to do to vest the property in the defendant and render the sale absolute, he might then have recovered the contract price of the wood. But he was not entitled to a recovery to that extent upon the allegation and proof only of a tender or offer of delivery, which, if true, neither divested him of the legal title nor the possession of the wood."

This case followed the rule which had been previously announced in *Williams*, etc., v.

Jones, etc., 1 Bush, 621, and it has been followed in *Wells v. Maley*, 6 Ky. Law Rep. 77; *Miller v. Burch* (Ky.) 41 S. W. 307; *Singer Manufacturing Co. v. Cheney* (Ky.) 51 S. W. 813; *Hauser v. Tate*, 105 Ky. 701, 49 S. W. 475, 20 Ky. Law Rep. 1716. A contrary rule was not laid down in *Jones v. Strode*, 41 S. W. 562, 19 Ky. Law Rep. 1117, or in *Hollerbach and May Contract Company v. Wilkins* (Ky.) 112 S. W. 1126. In each of these cases the action was brought to recover damages for the breach of the contract. In *Benjamin on Sales*, § 1117, the rule is thus stated: "When the vendor has not transferred to the buyer the property in the goods which are the subject of the contract as has been explained in Book II, as where the agreement is for the sale of goods not specific, or of specific goods which are not in a deliverable state, or which are to be weighed or measured before delivery, the breach by the buyer of his promise to accept and pay can only affect the vendor by way of damages. The goods are still his. He may resell or not at his pleasure. But his only action against the buyer is for damages for nonacceptance. He can in general only recover the damage that he has sustained, not the full price of the goods. The law with the reason for it was thus stated by Tindal, C. J., in delivering the opinion of the Exchequer Chamber in *Barrow v. Arnaud*: 'Where a contract to deliver goods at a certain price is broken, the proper measure of damages in general is the difference between the contract price and the market price of such goods at the time when the contract is broken, because the purchaser, having the money in his hands, may go into the market and buy. So, if a contract to accept and pay for goods is broken, the same rule may be properly applied, for the seller may take his goods into the market and obtain the current price for them.'"

Here there was a contract to make a gasoline engine, and to deliver it on board the cars at Elkton, Ky. Before the manufacturer had shipped the engine, and before it had been seen, tendered, or delivered to the purchaser, he notified the seller that he would not take it. The property in the engine had not passed. The engine remained at the manufacturer's factory. It was its property, and was subject to its control. The plaintiff had in no manner released its control of the engine. If the engine had been destroyed, it would have been at the plaintiff's loss, and any insurance upon it would have belonged to the plaintiff. That in such a state of case an action for the price cannot be maintained is sustained by the great weight of American authority. *Mechem on Sales of Personal Property*, §§ 1091, 1092; *Newmark on Sales*, § 391; 24 Am. & Eng. Ency. of Law, 1118; *Note to Gardner v. Deeds*, 7 Am. & Eng. Ann. Cas. 1175, 1176; *Oklahoma Vinegar Company v. Carter*, 116 Ga. 140, 42 S. E. 378, 59 L. R. A. 122, 94 Am. St. Rep. 112; *McCormick v.*

Balfany, 78 Minn. 370, 81 N. W. 10, 79 Am. St. Rep. 893, and cases cited.

The plaintiff's petition states no facts to constitute a cause of action for damages for the breach of contract. It is simply an action for the price; no facts being stated upon which a judgment for damages could be rendered. The dismissal of this action will not bar another action for damages for the breach of the contract, as a judgment upon an insufficient petition is never a bar to another action.

Judgment affirmed.

STONE v. ADAMS EXPRESS CO.

(Court of Appeals of Kentucky. Nov. 17, 1909.)

1. CARRIERS (§ 135*)—DAMAGES—MEASURE—INJURY TO PERSONALTY.

The measure of actual damages for injury to a shaft while being transported, by falling out of the car and breaking, was the difference between the value of the shaft before and after the injury to it.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 135.*]

2. CARRIERS (§ 105*)—DELAY IN DELIVERY—SPECIAL DAMAGES.

Where a shaft used in an electric plant fell out of a car in transit and was broken, after which the express company had it repaired and forwarded to the owner, damages claimed for loss of profits in being prevented from running the plant while the shaft was being repaired were special damages, and hence could not be recovered unless the carrier had notice of the use for which the shaft was intended, either actually or by plain inference from the nature of the thing transported.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 459-462; Dec. Dig. § 105.*]

3. CARRIERS (§ 105*)—DELAY IN DELIVERY—SPECIAL DAMAGES—NOTICE.

That electric lights in the office of an express company at a place from which electric machinery was expressed for repairs, and to which it was returned under separate contract, were not burning while the machinery was away for repairs, did not give notice to the express company of the purpose for which the machinery was used, so as to make it liable for special damages by loss of profits caused by delay in returning the machinery; its agent making the return contract of carriage not knowing those facts.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 451-452; Dec. Dig. § 105.*]

4. CARRIERS (§ 98*)—CARRIAGE OF GOODS—DELAY—CAUSES OF DELAY.

A claim for loss of profits by being compelled to stop an electric plant because a shaft used therein was broken en route and returned to the repair shop by the express company to be repaired before it was forwarded to the plant was based upon the owner's being deprived of the use of the shaft, and whether the delay was caused by injury to the shaft or by other reasons was immaterial.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 396-426; Dec. Dig. § 98.*]

5. APPEAL AND ERROR (§ 1171*)—DISPOSITION—AFFIRMANCE—TECHNICAL ERROR.

Under the maxim, "De minimis non curat lex," a judgment for defendant will not be re-

versed on appeal because plaintiff was entitled to nominal damages.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4553; Dec. Dig. § 1171; Damages, Cent. Dig. § 16.]

Appeal from Circuit Court, Pike County. "Not to be officially reported."

Action by L. L. Stone against the Adams Express Company. From a judgment for defendant, plaintiff appeals. Affirmed.

N. J. Auxier, for appellant. Joseph D. Harkins and Walter S. Harkins, for appellee.

CLAY, C. Appellant, L. L. Stone, is the owner of the Pike Light & Power Company, which operates an electric light plant located at Pikeville, Ky. In the month of September, 1908, a shaft which was in use in the plant was broken. Appellant then shipped it over the line of the Adams Express Company to a machine shop at Ironton, Ohio, for the purpose of having it repaired. After the shaft was repaired, it was delivered to the Southern Express Company to be transported by it and connecting carriers to Pikeville, Ky. The Southern Express Company does not do business in the Big Sandy valley. Upon reaching Kenova, W. Va., it delivered the shaft to the Adams Express Company for transportation to Pikeville. The shaft was placed aboard the Adams Express Company car at Kenova and mounted on skids. To facilitate the handling of the shaft, rollers were placed under the skids and the shaft rolled into the center of the car. The roller nearest the door was removed, leaving one end of the skid upon which the shaft was mounted lying on the floor. A block was placed next to the other roller which was left under the skid. The door was closed by the messenger in charge of the car. While he was in another portion of the car preparing to deliver express at another station, and while the car was going around a sharp curve near Clyffeside Park, some two or three miles from Ashland, Ky., where the shaft was to be transferred to the Big Sandy Division of the Chesapeake & Ohio Railway Company, the door of the car opened, and in some way the shaft rolled out of the car. When the train reached Ashland, the messenger noticed the disappearance of the shaft. A man was immediately sent back to search for it. When found the shaft was broken. Thereupon it was again transported to Ironton, to the same machine shop from which it had been shipped, and was again repaired. In about 10 days it was delivered to the Adams Express Company and transported by it to appellant at Pikeville. The expense incidental to the repairs made necessary by the injury of the shaft while in the possession of appellee was \$112. This amount was paid by the Adams Express Company. Appellant instituted this action to recover damages by way of profits which

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

he could have realized by running the electric light plant during the 10 days he was deprived of the use of the shaft. At the conclusion of the evidence the circuit court held that the damages sought to be recovered were special damages, and as no notice was brought home to appellee, or the connecting carrier from which it received the shaft, of the special use which was to be made of the shaft, appellant had not shown himself entitled to recover such damages. The jury were therefore instructed to find for appellee.

There can be no doubt that the actual damage occurring when the shaft was injured was the difference between the value of the shaft before and after its injury. When appellee, however, repaired the shaft and restored it to its former condition and paid the expense incident thereto, it settled the actual damages resulting from the injury. The damages arising from loss of profits between the time when the shaft should have arrived and the time when it did arrive were special damages. *Illinois Central R. R. Co. et al. v. Hopkinsville Canning Co.*, 116 S. W. 758, and the cases therein cited; *Patterson v. Illinois Central R. R. Co.*, 123 Ky. 783, 97 S. W. 426, 30 Ky. Law Rep. 78. In the case of *Brand v. Illinois Central R. R. Co.*, 108 S. W. 356, 32 Ky. Law Rep. 1335, it was held that, in order to recover lost profits as special damages from a carrier for delay in the shipment of goods, the carrier at the time of the delivery of the shipment to it must have notice of the use for which the goods are intended, or the character of the goods must be such that such use may be reasonably inferred therefrom. There was nothing in the appearance of the shaft to indicate the special use that was to be made of it. The shaft, itself, did not therefore give the required notice. Nor did the fact that electric lights were used in the Adams Express Company office at Pikeville, and that they were not burning during the time the shaft was being repaired, bring home to the appellee notice of the use that was intended to be made of the shaft. In the case of *Louisville & Nashville R. R. Co. v. Mink*, 126 Ky. 837, 103 S. W. 294, 31 Ky. Law Rep. 833, it was held that where mill machinery was shipped to be repaired, and then by a separate contract shipped back, to give the carrier notice of special circumstances from which damage would arise from delay in transportation, so as to make it liable therefor, it is not enough that the agent with whom the first contract was made knew thereof, there having been no delay in the first shipment, but the agent with whom the second contract was made must have been informed of such circumstances.

But it is contended by appellant that the action in this case does not grow out of the delay, but arises from the fact that the shaft was injured and he was deprived of its use

during the time it was being repaired. In our opinion, however, no just distinction can be made between a case where the delay grows out of an injury to the freight and a case where it is delayed for other reasons. In either case the party seeking damages bases his right of recovery upon the fact that he was deprived of the use of the machinery. In this case the damages sought to be recovered were caused by the delay in transportation and delivery of the shaft. In order to recover damages other than the usual and ordinary damages, notice must be brought home to the shipper of the use for which the goods were intended, or the character of the goods must be such that the use may be reasonably inferred therefrom. The evidence before us is not sufficient to show either actual or constructive notice. While he did show himself entitled to nominal damages, we will not reverse the case on that ground. The maxim, "*De minimis non curat lex*," applies.

Judgment affirmed.

MADDOX et al. v. MADDOX et al.

(Court of Appeals of Kentucky. Nov. 18, 1909.)

DEEDS (§ 19*)—FAILURE OF CONSIDERATION—SUPPORT.

Grantors conveyed to their two sons their property, in consideration of support and payment of \$200 to another brother, which payment was made. After supporting grantors for a time, one of the sons died, and the other was unable to support them without the aid of the heirs of the other brother, who were also unable to furnish any support. Held that, as the grantees could not comply with the covenants of the deed, the deed should be set aside, on repayment to the grantees of the money paid and expense of support.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 38; Dec. Dig. § 19.*]

Appeal from Circuit Court, Ohio County.
"To be officially reported."

Suit by Mary F. Maddox and another against Mattie Maddox and others to set aside a deed. From a decree entered on sustaining a demurrer to the petition, complainants appeal. Reversed.

J. P. Sanderfur and J. E. Fogle, for appellants. J. S. Glenn and Glenn & Simmerman, for appellees.

BARKER, J. The appellants, J. L. R. Maddox and Mary F. Maddox, his wife, are very old people, who live in Ohio county, Ky. On the 30th day of July, 1900, they conveyed by deed to their two sons, Moses R. Maddox and J. L. R. Maddox, Jr., a tract of land in Ohio county, containing 243 acres, more or less, and which is set out by metes and bounds in the petition. The consideration for the conveyance was that the two sons agreed and undertook, first, to pay W. P. Maddox, a brother, \$200 for his interest

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the land conveyed; and, second, that the grantees would support their father and mother during their declining years and decently bury them after their death. It appears that the \$200 was paid to the brother, and the sons undertook to, and did for a while, support their parents. One of the sons, J. L. R. Maddox, Jr., afterwards became insane and was sent to the asylum, where he has since died, leaving a wife and two children, who are the appellees. After the death of J. L. R. Maddox, Jr., this suit was instituted by the grantors to have the deed set aside and annulled for a failure of consideration—it being alleged that J. L. R. Maddox, Jr., was dead; that the infant defendants and their mother, Mattie F. Maddox, were unable to support the grantors or carry out the covenant made by the husband and father; that they were without means of any sort, and had abandoned the place, and done nothing towards the support or maintenance of the grantors, for two years. The other son, Moses R. Maddox, in his pleading expressed a willingness to carry out the covenant in the deed so far as he is able, but alleges that he is unable to support his parents by himself without aid of the other covenantor. He states that he is willing to pay his brother's children \$450, and then take the whole land and carry out the covenant, and alleges that he has already paid to his brother, W. P. Maddox, the \$200 stipulated in the deed from his father and mother. To the petition a general demurrer was interposed, and sustained by the court; and, the plaintiffs having declined to plead further, the petition was dismissed.

We are of opinion that the court erred in sustaining the demurrer to the petition. So far as the defendants were concerned, it appears that they are not able to carry out the covenant of their deceased father and husband. They cannot, therefore, have the land without paying the consideration, and the old people are clearly entitled to their land back, unless the grantees are able and willing to comply with the covenant to support and maintain them throughout their lives and bury them at their death. But, inasmuch as J. L. R. Maddox, Jr., has paid a part of the consideration for the conveyance, it would be inequitable that his wife and children should lose the whole of that for which he had in part paid. The court should have overruled the demurrer, and required the defendants to plead, and, if it appeared that they were unwilling or unable to perform the covenant of J. L. R. Maddox, then the case should have been referred to a commissioner for the purpose of ascertaining what proportion of the whole consideration the father had paid, either in money or service, to be credited, of course, by the value of the use of the land, if any, during

the time the service was being rendered, and the balance so ascertained should be refunded to the widow and children of the dead grantee.

For these reasons the judgment is reversed, for further procedure in accordance with this opinion.

SCOTT v. ALPINE COAL CO.

(Court of Appeals of Kentucky. Nov. 19, 1909.)

1. BOUNDARIES (§ 3*)—WATER COURSES—CONCLUSIVENESS.

The name of a water course on which land is located, as a part of the description of its boundaries, is to be deemed no more conclusive than any other part of the description.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 6-13; Dec. Dig. § 3.*]

2. BOUNDARIES (§ 54*)—PATENT BOUNDARIES—LOCATION.

The question as to the true location of a patent boundary of land is one of fact, and if it appears that the entrant and surveyor actually located the particular tract in dispute at the point at present claimed, errors in the recitals of the patent would not invalidate it; the rule that that is certain which can be made certain applying, and the place where the original survey was made may be shown otherwise than by the testimony of those who participated in it.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 272, 273; Dec. Dig. § 54.*]

3. BOUNDARIES (§ 35*)—EVIDENCE—REPUTATION AS TO LOCATION OF LINES AND CORNERS.

Reputation as to the location of lines and corners of a survey is admissible as evidence; it being an exception to the rule against hearsay.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 154, 155; Dec. Dig. § 35.*]

Appeal from Circuit Court, Pulaski County.
"Not to be officially reported."

Action by W. F. Scott against the Alpine Coal Company. There was a directed verdict for defendant, and plaintiff appeals. Reversed, and remanded for new trial.

Denton & Wallace, for appellant. O. H. Waddle & Son, for appellee.

O'REAR, J. In this action of ejectment the main question at issue was the location of the plaintiff's boundary of land. It was described as being "in the county of Pulaski, on the waters of Miller's creek, near the head." The description in the patent, in addition, named the trees and other monuments, with courses and distances of lines. The survey upon which the patent was issued was made June 1, 1827. A stream now known as Miller's creek has its source in a small mountain. On the opposite side of the mountain the water flows into a branch, a tributary of what is now known as Martin's creek. The 50-acre patent in dispute is claimed to lie on this watershed, but on the Martin's creek side. There was evidence for the plaintiff on the trial that what is now known as Martin's

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creek was many years ago called Miller's creek. It was shown, too, or at least there was evidence tending to show, that the plot of land embraced in this survey, claimed by appellant (plaintiff) and his vendors for many years, and consistently throughout, with knowledge and acquiescence of appellee's vendors, was on Martin's creek side, where the trespass in dispute was committed. The trial court granted for the defendant a peremptory instruction at the close of the plaintiff's evidence, upon the notion that, as the patent showed on its face that the land embraced by it was on Miller's creek, it could not be the basis of title for land situated on Martin's creek.

Naming the water course on which the land is located is part of the description of the boundary of land. There is no apparent reason for holding that part of the description as conclusive, more than any other part of it. *Reid v. Langford*, 3 J. J. Marsh, 420. In a controversy over the true location of a patent boundary of land, the question is one of fact. A tree may be called for as a monument of the boundary. If it should not be there, or never was there, the patent is not void because of that fact. The fact is evidence, from which it may be deduced that the attempted location is not true. A concurrence of many such discrepancies between the recitals of the writing and the physical conditions on the ground would be more conclusive as basis for the deduction that the attempted location was erroneous. Yet, if the fact was that the entrant and surveyor actually located the particular tract in dispute at the point now claimed, and run its lines as is now done, and that fact was made to satisfactorily appear, an error or errors in the recitals of the patent would not invalidate it. While it might be so vague and uncertain as to be insusceptible of location, yet the rule, "That is certain which can be made certain," applies to descriptions in patents, as well as instruments inter partes. It is always relative to show where the original survey for a patent was actually made. After many years this cannot be done by the testimony of those who participated in it. Yet, if it can be shown otherwise, it may be. Reputation as to the location of the lines and corners is admissible as evidence, and is an exception to the rule against hearsay evidence. *Smith v. Nowells*, 2 Litt. 161; *Phillips v. Stewart*, 97 S. W. 6.

The circuit court should have admitted the evidence excluded of the reputation of the location of the patent lines and courses, as well as the names by which the streams were formerly known. It was then for the jury to say whether the patent boundary as located by the plaintiff coincided with its location when originally surveyed in 1827.

The judgment is reversed, and cause remanded for a new trial consistent herewith.

RISNER et al. v. DUNN.

(Court of Appeals of Kentucky. Nov. 19, 1909.)

LOGS AND LOGGING (§ 3*)—CONVEYANCE OF TIMBER—WANT OF CONSIDERATION.

An owner of land gave a bond for title for \$400, to be paid in merchantable timber suitable for a specified purpose, growing on the land sold and land of the purchaser, any balance to be paid within eight months. Subsequently, within the eight months, the timber not being suitable for the specified purpose, the vendor sold it to another for \$700. Thereafter the owner conveyed the land to the purchaser, who was illiterate, and the purchaser executed a deed to the vendor for all the timber on the two tracts of land. *Held*, that the conveyance of the timber, being in excess of the requirements of the bond for deed, was without consideration, and should be canceled, and the vendor therein was entitled to judgment for the value of timber removed in excess of \$400.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. § 6; Dec. Dig. § 3.*]

Appeal from Circuit Court, Magoffin County.

"Not to be officially reported."

Suit by Elizabeth Risner and others against John M. Dunn, to reform a deed and for other relief. From the decree rendered, complainants appeal. Reversed and remanded.

Byrd & Howard, for appellants. D. D. Sublett, for appellee.

O'REAR, J. On October 21, 1899, John M. Dunn, sold to Elijah Risner a tract of land in Magoffin county, containing 75 acres, for \$400. Risner was to pay for it in merchantable timber, white oak and pine, 22 inches in diameter 3 feet from the ground, growing upon that land and on an adjoining tract owned by Risner, at 40 cents a tree. The timber was to be such as the Moxley White Oak Timber Company of Tennessee was buying. Any balance left after the timber was applied was to be paid to Dunn by the Risners within eight months. The contract was evidenced by a bond for title. The Moxley White Oak Timber Company declined to buy the timber. Subsequently, but within the eight months, Dunn sold the timber to one Pischel, who branded it, and subsequently removed it, paying Dunn, it is said, about \$700 for the trees. A deed conveying the timber was executed by the Risners and Dunn on June 8, 1900. On June 29, 1900, Dunn and the Risners exchanged deeds, Dunn conveyed to Risner the 75 acres of land, and Risner conveyed to Dunn the timber on the two tracts. The Risners were illiterate, unable to read or write. Dunn prepared the deeds and sent them to the Risners by a deputy county court clerk, Dunn's deed to be delivered, and the Risners' to be executed. They were delivered and executed. Shortly afterward Elijah Risner died. Dunn cut and removed the Pischel timber and some additional trees. This suit was brought by Elizabeth (who was also Elijah's widow,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as well as one of the parties in the contract) and by the children of Elijah Risner for a reformation of the deeds, and to recover from Dunn the excess in value of the timber cut by Pischel and Dunn above the \$400 which was to be paid for the land.

The deeds as executed went far beyond the terms of the bond. The deed from the Risners to Dunn conveyed, not only all the pine and white oak trees 22 inches in diameter, but all the timber growing on both tracts 2 inches or more in diameter, with the privilege to Dunn to remove it at any time within 30 years. It bound Risner to protect the timber, and gave Dunn a lien on both tracts of land for any destroyed, save accidentally, and for any shortage in acreage of either tract. There were a number of other hard and oppressive conditions in the deed not found in the bond. Dunn claims that he and Risner made another trade respecting the land and timber after the Moxley White Oak Timber Company declined to buy, and that the deeds were in execution of the latter contract. There are charges of fraud and deceit made by the Risners against Dunn, and considerable evidence was introduced on that issue.

While Dunn and the Risners had the power to rescind the contract of May, 1899, and to make another in lieu of it, we find from the record that such was not the intention of the parties—at least, not of the Risners. To have effected a rescission, both parties to the original contract must have concurred in it. Risner had bought the land. He never consented to cancel the bond evidencing his purchase. When Pischel was substituted for the Moxley Company as vendee of the trees, it became immaterial what the Moxley standard was. The purpose of the stipulation was to insure Dunn's receiving the \$400 that he was to get for his land. When the trees were sold to Pischel for more than \$400, and Dunn was paid, he no longer had an interest in the matter. The trees of the kind and sizes originally set apart to pay Dunn had been sold by his consent and procurement to another, which satisfied the undertaking of the Risners in the bond. There was, then, no consideration to support the deed made by the Risners to Dunn June 29, 1900. Whether or not it was procured by the fraud of Dunn, it was executed by the Risners under a clear mistake of fact and of their legal liability. It should, therefore, have been canceled by the judgment of the chancellor in this action; but it was not. The sale to Pischel was of all the trees on both tracts of the dimension and kind named. They were branded and removed by Pischel, or on his behalf, and he has paid Dunn for them. Dunn has, for all above \$400 due him by the Risners, received that much of their money without consideration or right, and ought to have been adjudged

to pay it over to the Risners. But he was not. All the other timber cut or destroyed by Dunn, whatever its dimensions or kind, was the taking of that much of the Risners' property, and he ought to have been required to pay them, for it, its value at the time he cut it. But the court did not so adjudge.

The case ought to have been referred to the master commissioner to ascertain: First. The amount received by Dunn from Pischel above \$400. Such excess, and its interest from the date he received the money, should be adjudged against him in behalf of the appellants. Second. To ascertain the kind, quantity, and value of trees cut and destroyed by Dunn, other than that sold and delivered to Pischel. The value of that timber, and interest on the amount, should have been adjudged to appellants against Dunn. The judgment should also cancel the deed from the Risners to Dunn, executed June 29, 1900.

Reversed, and remanded for proceedings consistent herewith.

DIXON et al. v. DRISKILL et al.

LOWERY et al. v. SAME.

(Court of Appeals of Kentucky. Nov. 17, 1906.)

1. INJUNCTION (§ 46*)—TRESPASS TO LAND.

Under Ky. St. 1909, § 2361 (Russell's St. § 17), providing that the owner of land may maintain the appropriate action to recover damages for any trespass or injury committed thereon or to prevent or restrain any trespasses or other injury thereon, notwithstanding such owner may not have actual possession of the land at the time of the commission of the trespass, a landowner may sue in equity to restrain trespasses.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 98, 99; Dec. Dig. § 46.*]

2. INJUNCTION (§ 118*)—TRESPASS TO LAND.

A petition, alleging that plaintiffs were the legal owners and in actual possession of certain tracts of land described, that defendants were openly claiming to own the land, that they had been and were cutting timber therefrom, and were threatening to continue to cut and remove the timber, and unless restrained would continue to do so, thus causing irreparable injury to plaintiffs, stated a cause of action for an injunction to restrain a trespass as authorized by Ky. St. 1909, § 2361 (Russell's St. § 17).

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 223-242; Dec. Dig. § 118.*]

Appeal from Circuit Court, Livingston County.

"Not to be officially reported."

Suits by George Dixon and another against Limbert Driskill and others and by Walter Lowery and others against Limbert Driskill and others. Decrees for defendants, and plaintiffs appeal. Reversed and remanded.

C. C. Grasham and Wilson & Landrum, for appellants. William Marble, for appellees.

CLAY, C. These two cases involve the same questions, and will be considered together. In the case of George Dixon and Syd E. Sexton, partners trading and doing

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

business under the firm name and style of "Dixon & Sexton," against Limbert Driskill and others, the petition stated: That the plaintiffs were the owners by legal title and were in the actual possession of certain tracts of land described therein; that the defendants were openly claiming to be the owners of the lands in controversy; that they had been and were cutting the timber therefrom, and were threatening to continue to cut and remove the timber; that, unless restrained by the court, they would continue to cut and remove the timber—thus producing great and irreparable injury to the plaintiffs. In the case of Walter Lowrey, etc., against Limbert Driskill and others, the petition contains the same allegations with reference to other lands. It appears from the record that the plaintiffs below in each of the actions claim title under a 1,000-acre survey and patent issued to James Quarles. The defendants claim under a 3,000-acre survey and patent issued to McClurg. Both these actions were brought in equity. The chancellor, taking the view that the question involved was simply the location of a boundary line between two patents, and that whatever possession there was of the land in dispute was common to both, held that the action was not cognizable in equity. He further held that, the plaintiffs having elected to pursue their actions to quiet title, the cases presented no common-law question, and that the chancellor was without authority to settle the question of disputed boundary. In accordance with these views, he entered judgment dismissing the petition in each case. From the judgments below the plaintiffs appeal.

We deem it unnecessary to determine the question whether or not the chancellor erred in holding that plaintiffs did not show themselves entitled to relief under section 11 of the Kentucky Statutes, for the reason that the actions brought are authorized by section 2361, Ky. St. (Russell's St. § 17), which is as follows: "The owner of land may maintain the appropriate action to recover damages for any trespass or injury committed thereon, or to prevent or restrain any trespasses or other injury thereto or thereon, notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass." Under this section it has been held that an action will lie in equity to restrain trespass. *Daniel v. Trunnell*, 113 S. W. 51; *Bowling v. Breathitt Coal, Iron & Lumber Co.*, 120 S. W. 317. The allegations of each petition are sufficient to bring the cases within this statute. We therefore conclude that the chancellor erred in dismissing the petitions.

We express no opinion upon the merits of either case. We deem it best to have an adjudication below of the questions involved before undertaking to decide them here.

For the reasons given, the judgment in each case is reversed, and cause remanded for proceedings consistent with this opinion.

TROSPER v. EAST JELlico COAL CO.

(Court of Appeals of Kentucky. Nov. 18, 1909.)

1. MASTER AND SERVANT (§ 236*)—SAFE PLACE TO WORK.

A servant cannot recover for injuries if he knows of a danger and does not exercise ordinary care for his own safety; and, where a servant engaged in hauling rails on a car in a mine knew that certain cross-beams were not high enough to permit him to pass without stooping while riding on the car, and neglected to do so when passing under one of them, which he could have seen if he had looked, he could not recover for injuries resulting from such neglect.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 733; Dec. Dig. § 236.*]

2. MASTER AND SERVANT (§ 236*)—PERMANENT STRUCTURES NEAR TRACK—APPLICATION OF RULE.

The rule applicable to permanent structures by the side of railroad tracks or overhead bridges does not apply to employees in a mine who either walked or rode slowly behind a mule.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 733; Dec. Dig. § 236.*]

Appeal from Circuit Court, Knox County.
"To be officially reported."

Action by John Trosper against the East Jellico Coal Company. There was a directed verdict for defendant, and plaintiff appeals. Affirmed.

Edward W. Hines, B. B. Golden, and McChord, Hines & Norman, for appellant. Pitzer D. Black, James D. Black, and William R. Black, for appellee.

CLAY, C. Appellant, John Trosper, instituted this action against appellee, East Jellico Coal Company, to recover damages for personal injuries. Upon the conclusion of the evidence the court gave a peremptory instruction to find for appellee. To review the propriety of this ruling this appeal is prosecuted.

At the time appellant was injured he was employed in removing some steel rails and air pipe from appellant's mine, and was struck by an overhead timber. He had been in appellee's employment for seven or eight years, but during the greater part of that time he worked outside of the mine. While so employed he ran the locomotive engine for a while, and also a small dinky engine. He also ran the drum which pulls the coal up and down the hill, and the compressor which forces the air into the mine. A few days prior to the accident Trosper and an employé by the name of Franck Burch exchanged jobs. Burch was employed on the inside of the mine in some capacity necessitating the use of a car and mule in hauling water, slate, and other things. The ex-

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change was made at the request of Trosper and Burch, and was approved by the mine foreman. The accident occurred in what is known as the "7th left entry" of the mine. The coal had been practically exhausted when the work of "robbing the mine" (i. e., pulling the stumps, removing the rails, etc.) had commenced at the head of the entry. In order to save the piping and steel rails in said entry, it became the duty of appellant, his brother, Milton Trosper, and another employé of the name of James Curtis, to remove the piping and rails to the outside of the mine. It was in the performance of this duty that appellant was injured. The place at which he was injured was about midway between the two ends of the entry, which was several hundred feet in length. There were arranged in the mine certain cross-beams which were located $1\frac{1}{2}$ to 2 feet from the top of the mine. These cross-beams were set in hatches cut into the slate and supported the pipes which conveyed air from the compressor on the outside. At first appellant and his fellow workmen dragged the rails out on the ground. He then claims he was instructed by the mine foreman to use a car for that purpose. The steel rails were placed on the back of the car and fastened there with a chain; four rails being hauled at a time. It became necessary, according to the evidence for appellant, for him and his two fellow workmen to stand on the bumper in front of the car in order to hold it on the track. The bumper was about 10 inches above the rails of the track. While standing on the bumper, appellant claims that he turned his head to see whether or not the rails were going to catch in the ties behind the curve, and, as he did so, Curtis hallooed for him to look out. Appellant started to throw his head under the timber, but the timber struck his head and pressed him over the car, thus causing the injury complained of.

According to the evidence for appellant, the cross-beams were located about five feet and a half or a little over above the track. According to the testimony for appellee, the cross-beams were more than six feet distant from the track. Appellant is six feet three inches tall. While he had worked on the outside of the mine his evidence shows that he had frequently been in the mine. The evidence shows that Curtis and appellant's brother always stooped when walking under the cross-beams. On the evening of the accident appellant and his companions had made at least two trips into the seventh left entry, and had passed the cross-beams not less than four times. The mine was sufficiently lighted to enable appellant to see a distance of from 30 to 35 feet. Appellant was engaged as driver, and it was his duty to look after the mule. He was in charge of the work that was then being done. In answer to the question, "You knew as a matter of fact that there

were cross-beams along different places in the seventh left entry?" Appellant answered, "Yes." The further question was asked: "Then, if you had looked up there, you could have seen that cross-beam with which you came in contact? A. Yes." It is manifest from this evidence that appellant knew the cross-beams were there. They were right before his eyes and could be readily seen. All he had to do was to bend his head and avoid coming in contact with them. While it is the duty of the master to furnish the servant a reasonably safe place in which to work, yet the servant cannot recover if he knows of a danger, and does not exercise ordinary care for his own safety. Knowing of the location of the cross-beams, appellant could have escaped injury by the exercise of the slightest degree of care.

Appellant insists, however, that the rule applicable to permanent structures by the side of railroad tracks or overhead bridges should be applied in this case. There is, however, a wide distinction between the two cases. A train moves along at a high rate of speed. A trainman while engaged in the performance of his duty on the top or side of a car may be caught unawares. While his attention is fixed upon the performance of his duties, he may be suddenly carried under a bridge and thrown from the train. Here the employés either walked or rode slowly behind a mule. The cross-beams were a part of the general plan of the mine. Entries in mines are necessarily low, as there must be economy of space. This is not the case with reference to overhead or side structures along a railroad. There is plenty of room for them. There was no danger of being caught unawares by being carried rapidly beneath one of the cross-beams. Being there as a permanent part of the mine, it was necessary for appellant in the exercise of ordinary care to recognize their presence and avoid coming in contact with them. If it was necessary to stoop while walking in order to avoid the timber, as appellant's companions testified, it was all the more necessary to stoop when standing on the bumper, which was 10 inches above the track. As the proof shows the mine was well lighted, the cross-beams were right before his eyes. He could not close his eyes to their presence, and then recover for an injury which was entirely due to his failure to observe them.

The fact that the pipe had been removed from the cross-beams at the time of the accident has no bearing upon the case. Appellant knew this fact, because he was engaged at that very time in taking the air pipes out of the mine; and he knew from whence the air pipes had come. Having stated that he knew the cross-beams were there, it is immaterial that the air pipes were not resting on the cross-beams. Even though the place where appellant was working may not have been reasonably safe for

a person who did not know of the presence of the cross-beams, it cannot be said that the place was not reasonably safe for one who actually knew the cross-beams were there. We therefore conclude that the trial court properly instructed the jury to find for appellee.

Judgment affirmed.

BOARD OF EDUCATION FOR PIKE COUNTY v. A. H. ANDREWS CO.

(Court of Appeals of Kentucky. Oct. 29, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 41*)—ALTERATION OF DISTRICTS—RETROACTIVE OPERATION.

The act of March 24, 1908 (Laws 1908, p. 133, c. 56), for the government and regulation of the common schools, having been enacted long after judgment was rendered against a school district, could not affect the rights of the judgment creditor or the district's previous liabilities.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 73; Dec. Dig. § 41.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 41*)—ALTERATION OF DISTRICTS—CONSTITUTIONALITY.

The act is constitutional, though it does not provide for paying debts of school districts owing at the time of its adoption.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 73; Dec. Dig. § 41.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 41*)—ALTERATION OF DISTRICTS—DEBT FOR SCHOOL FURNITURE—LIABILITY OF DISTRICT OR COUNTY.

A school district having prior to the act created a debt for furniture, and used and enjoyed the same, the patrons and property of the district, as it stood prior to the act, and not the property of the entire county, should pay such debt.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 73; Dec. Dig. § 41.*]

Appeal from Circuit Court, Pike County.
"Not to be officially reported."

Action by the A. H. Andrews Company against School District No. 67 of Pike County. From a judgment requiring the county board of education to levy a tax to satisfy plaintiff's debt, interest, and costs, after it recovered judgment against the district, the board appeals. Affirmed.

A. F. Childress, for appellant. James M. Roberson, for appellee.

LASSING, J. The A. H. Andrews Company obtained a judgment in the Pike circuit court against the trustees of School District No. 67 for \$152.24 for school desks and supplies furnished to said district. The trustees were directed to levy a tax for the purpose of liquidating this debt. For some reason they failed to comply with the order, and, before steps were taken to compel them to do so, the school law passed March 24, 1908, went into effect. Laws 1908, p. 133, c. 56. Plaintiff thereupon filed an amended or sup-

plemental petition attacking the constitutionality of the act of March 24, 1908, in so far as it affected its right to collect its debt. The constitutionality of said act was assailed on the ground that it made no provision for the payment of debts owing by the various school districts at the time of its adoption. The board of education for Pike county filed a demurrer to this supplemental pleading, which was overruled, and thereupon the board declined to plead further, and the court entered a judgment declaring the act of 1908 unconstitutional and void in so far as the rights of plaintiff were affected by said act or by sections 9 or 11 thereof. The court further adjudged that the board of education had superseded the district trustees, and he directed said board to proceed to levy the tax under the provisions of the law as it existed prior to the adoption of the act of 1908 for the purpose of satisfying plaintiff's debt, interest, and costs. From said judgment the board of education prosecutes this appeal.

The judgment entered by the chancellor was in effect merely a direction to the county board of education, which under the act of 1908 superseded or took the place of the board of trustees for said district No. 67, to carry out the judgment that had theretofore been entered in this case. The act of 1908, having been passed and become operative long after the rendition of the judgment which fixed plaintiff's rights and determined the district's liability, could in no wise affect either. Its provisions were not intended in any wise to be retroactive, but they look to and deal with the present and for the future good of the various schools throughout the country. The act of 1908 is constitutional and has been so held by this court, but it does not apply to this case. District No. 67 had created this debt, used and enjoyed the furniture for which it was created, and it is but natural and right that the patrons and property of District No. 67, as it stood prior to the act of 1908, and not the property of the entire county, should pay this debt; and, the circuit judge having so adjudged and directed, the judgment is affirmed.

RELIANCE TEXTILE & DYE WORKS CO. v. WILLIAMS.

(Court of Appeals of Kentucky. Nov. 18, 1909.)

MASTER AND SERVANT (§ 177*)—INJURY TO SERVANT—FELLOW SERVANTS.

Where the undisputed evidence showed that a servant was injured in consequence of an act committed by a fellow servant, there could be no recovery from the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 352; Dec. Dig. § 177.*]

Appeal from Circuit Court, Kenton County, Common-Law and Equity Division.

"Not to be officially reported."

Action by John Williams against the Reliance Textile & Dye Works Company. From

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a judgment for plaintiff, defendant appeals. Reversed.

Galvin & Galvin and R. H. Gray, for appellant. B. F. Graziana, for appellee.

CARROLL, J. In January, 1907, the appellant company had stored in its warehouse several hundred bales of tightly compressed cotton goods. These bales, which weighed some 500 or 600 pounds each, were piled in the warehouse on top of each other in tiers. The appellee, Williams, was injured by one of these bales falling on his foot from the top of a tier in which it was placed. To recover for the injuries sustained he brought this action, and a jury assessed his damages at \$1,000.

A motion in behalf of the appellant for a peremptory instruction was made at the conclusion of the evidence for the appellee, and renewed when all the evidence was in. We have reached the conclusion that this request should have been granted. The appellee was entirely familiar with the arrangement and location of the bales in the warehouse, as he had been working in and about it some three months, and his duties as porter and laborer required him to handle and move the bales. He was the only witness in his behalf who testified as to the falling of the bale, its location immediately before it fell, and the position in which he was standing when it fell. He said repeatedly in the course of his examination that he did not know what caused the bale to fall, and further that several persons—one of them being Sidney Fox—were engaged as co-laborers with him at the time it fell, helping to remove the bales from the warehouse. Fox, being introduced by the appellant, testified that he toppled the bale over so that it might fall on the floor to be carried out, but that before doing so he notified Williams and others, who were present, to get out of the way, and supposed they had done so.

The uncontradicted evidence upon three vital points in the case is (1) that appellee did not know what caused the bale to fall; (2) that Fox intentionally threw it off the tier so that it might be carried out; and (3) that Fox was a fellow servant of Williams. With these three propositions undisputed, appellee had no case to submit to a jury.

Wherefore, the judgment is reversed, with directions for a new trial in conformity with this opinion.

MAY et al. v. FERGUSON et al.

(Court of Appeals of Kentucky. Nov. 18, 1909.)

1. INTOXICATING LIQUORS (§ 40*)—LOCAL OPTION ELECTIONS—STATUTES.

Under the Cammack act (Act March 14, 1906 [Acts 1906, p. 86, c. 21]), providing for local option elections for entire counties, except that cities of the first, second, third, or

fourth class may hold an election on the same day, the county is the absolute unit except in counties in which a city of the first, second, third, or fourth class is situated, and in such counties all of the territory outside of the city limits is an absolute unit, and the city is a separate unit, and, where a vote is ordered for an entire county in which there is situated a city of the first, second, third, or fourth class, unless a separate vote is asked for and had within the limits of the city, it is bound by the result of the election in the entire county, and it is only where the citizens of the city seek and are granted a separate vote on the same day that its right to be treated as a separate unit is recognized.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 34; Dec. Dig. § 40.*]

2. INTOXICATING LIQUORS (§ 40*)—LOCAL OPTION ELECTIONS—STATUTES.

Where prohibitory laws are not in force in a county, any magisterial district, voting precinct, or town of any class may vote to establish prohibition within the limits of such district, precinct, or town, but, where prohibition has been established in the entire county pursuant to the Cammack act (Act March 14, 1906 [Acts 1906, p. 86, c. 21]), a unit has been established, and the vote cannot again be taken in any subdivision of the county other than in a city of the first, second, third, or fourth class situated in the county, unless it is taken in the entire county, and, so long as a city of one of the designated classes in a county preserves its identity by taking a vote on the same day that the vote is taken in the entire county, its status is not changed by the will of the majority of the voting population of the county or of a magisterial district therein.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 34; Dec. Dig. § 40.*]

Appeal from Circuit Court, Muhlenberg County.

"To be officially reported."

Election contest by John T. May and others against J. B. Ferguson and others. From a judgment of the circuit court adverse to the contestants, they appeal. Reversed, with directions.

Willis & Meredith, Belcher & Sparks, and J. K. Freeman, Jr., for appellants. Walker Wilkins and Tom B. McGregor, Asst. Atty. Gen., for appellees.

LASSING, J. In August, 1903, a local option election was held under the law then in force for the entire county of Muhlenberg. At that election a separate vote was had within Central City. The county voted dry and the city wet. No election has been held in the entire county since that time. On October 6, 1906, another election was held in Central City, and the city again voted wet. In July, 1908, petitions were filed with the county judge, signed by the requisite number of voters residing in magisterial district No. 1, which is composed of six voting precincts, including Central City, asking for a local option election in said magisterial district. Petitions were thereafter filed, signed by the requisite number of citizens of Central City, asking for a separate vote at the same time. The election was on August 31st

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ordered to be held on December 7th, and it was so held; the officers who officiated at the regular November election, 1907, acting as the officers of this election, except in cases where they had removed from the precinct or otherwise disqualified themselves. In this election on December 7th the district went dry by something like 400 and the city by 23. The residents of the city were with few exceptions denied the right to participate in the election for the district; separate ballots being furnished to the voters for the district election from those for the city election. The wets contested the validity of the election before the county board, and, its decision being adverse to their contention, they prosecuted an appeal to the circuit court, where they were again unsuccessful, and the case is brought before us for review.

Many reasons are assigned why the election should be set aside, the principal of which is that there was no authority in law to warrant the county judge in ordering a local option election in magisterial district No. 1, and from the conclusion which we have reached this is the only question which we will consider. Under the Oammack act, which became a law March 14, 1906 (Acts 1906, p. 86, c. 21), the county is the absolute unit in all counties save those in which there is situated a city of the first, second, third, or fourth class, and in such counties all of the territory outside of such city limits is an absolute unit, and the city is made a separate unit. This was a complete reversal of the order of things that had theretofore existed, for under the law in force prior to the adoption of this act the precincts and incorporated towns of whatever class were recognized as separate units, and might take a separate vote upon the question as to whether or not local option should be enforced within a given boundary or territory. The old law was not satisfactory to the temperance or local option adherents, and, in order that the citizens in one part of a county might have a voice in determining whether or not prohibition should be enforced in another part of the county, the law was amended as above indicated so as to make the county the unit, and the only exception which the act recognizes is that cities of the first, second, third, and fourth class are made separate units, but in order for them to avail themselves of the right to be recognized as separate units, it is necessary that they should vote upon the same day upon which the vote is taken in the entire county when the question is submitted as to whether or not prohibition shall prevail in the county. So that, where a vote is ordered upon this question for the entire county in which there is situated a city of the first, second, third, or fourth class, unless a separate vote is asked for and had within the territorial limits of such city, it is bound by the result of the election in the entire county, and it is only where its citizens seek and are granted a separate vote on the

same day that its right to be treated as a separate unit is recognized. *Yates, County Judge, v. Nunnally*, 125 Ky. 644, 102 S. W. 292, 30 Ky. Law Rep. 984.

Central City is a city of the fourth class. It had on the 6th of October, 1906, voted wet. The entire county outside of said city was at that time dry. No vote had been taken in the entire county since 1903, at which time it voted dry. It is most earnestly insisted for appellant that, inasmuch as the law expressly provides that no election can be held upon this question oftener than once in three years, the county judge had no right to order an election upon this question at all unless he had ordered it for the entire county; that there is no authority in law whatever for ordering a vote in a subdivision of a county other than a city of the first, second, third, or fourth class where such county has theretofore voted dry. The whole object of temperance legislation has been to bring about prohibition and create dry territory, and courts in dealing with this class of legislation have borne in mind this primary object of the Legislature, and have construed such acts as far as possible so as to carry out this legislative intent. Hence it has been held that where territory is wet where prohibition has not theretofore been enforced, any subdivision of a county may vote upon the question of establishing prohibition therein, but no subdivision of a county other than cities of the first, second, third, or fourth class may take a vote upon the question at all when prohibition is already enforced within such territorial limit. In other words, where no prohibitory laws are in force in the county, any magisterial district, voting precinct, or town of any class may vote to establish prohibition within the limits of such magisterial district, voting precinct, or town; but, where prohibition has been established in the entire county, a different rule obtains. A unit has been established, and the vote can never again be taken in any subdivision of that county other than in some one of the cities belonging to the excepted class, unless it is taken in the entire county. So that, where a precinct or magisterial district has once been made dry by a vote of the county, it must forever remain dry, unless the bond is lifted by the people of the entire county. *Eggen, etc., v. Offutt, etc.*, 128 Ky. 314, 108 S. W. 383, 32 Ky. Law Rep. 1350. It is true, in the case to which we have just referred, this identical question was not before the court, but just the converse of the conditions with which we are dealing were under consideration. There the county was wet, and the precinct had taken a vote upon the question as to whether or not prohibition should be enforced within its limits and had voted dry, and the court held that it might do so, but in the same opinion distinctly stated that, if the county in which this precinct was situated had theretofore voted dry, the election would have been invalid, for prohibition having been

established in the county, the unit, the will of the people therein could not be overthrown by the voters of any part of that unit.

Applying the rule announced in that case to the case at bar, we find that there are in Muhlenberg county two units of equal dignity, one including all of the county outside of the limits of Central City, the other including the territory within the limits of Central City, and, so long as the city preserves its identity by taking a vote upon the same day that the vote is taken in the entire county, its status cannot be changed by the will of the majority of the voting population of Muhlenberg county, much less of a magisterial district therein, and, the precinct or magisterial district in dry territory no longer being recognized as a unit, there was no authority under which the county judge could legally order the election in magisterial district No. 1, and, as a vote had been taken in Central City within less than three years from December 7, 1908, the county judge was without authority to order an election in said city on said date, and for these reasons both of said elections were illegal and absolutely void. This being true, it is unnecessary to consider the other questions raised upon this appeal.

The judgment is reversed, with directions to the lower court to enter a judgment in conformity with this opinion, declaring each of said elections null and void.

ILLINOIS CENTRAL R. CO. et al. v. HAYNES.

(Court of Appeals of Kentucky. Nov. 19, 1909.)

1. LIMITATION OF ACTIONS (§ 55*)—COMPUTATION—ACCRUAL OF ACTION.

A railroad in double-tracking its road in 1900 dug borrow pits, and several years after a stream overflowed its banks and ran into the pits, thereby changing the channel of the stream, which in 1906 and 1907 injured plaintiff's land and crops. *Held*, that the rule that, where an injury to real estate results from the construction of a permanent structure, the cause of action accrues on the completion of the structure, was not applicable, and an action for damages brought in 1908 was in time.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 305; Dec. Dig. § 55.*]

2. TRIAL (§ 253*)—INSTRUCTIONS—EXCLUDING ISSUES—DAMAGES.

In an action for injuries to plaintiff's land, the tiling in a ditch thereon, and crops by the change in the course of a stream, because of a railroad borrow pit, in which action there was evidence that the water washed wide, deep gullies through the land, and that the soil was carried away, an instruction on the measure of damages, which fails to charge on permanent injury to the land, is erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.*]

3. WATERS AND WATER COURSES (§ 178*)—FLOWAGE—MEASURE OF DAMAGES.

In such case the measure of damages would be the sum sufficient to restore the tiling to the condition it was in prior to the overflow, the market value of the crops destroyed, and, if

the injury was temporary, that diminution in the value of the use of the land during continuance of the injury, or, if permanent, the difference between the market value of the land before it was injured and after it was injured.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 251-255; Dec. Dig. § 178.*]

4. WATERS AND WATER COURSES (§ 179*)—FLOWAGE—DAMAGES—INSTRUCTION.

Where, in such action, there was evidence that prior overflows had caused injuries to plaintiff's land and crops, defendant was entitled to an instruction that there could be no recovery unless the change in the course of the stream caused the damage to plaintiff's land to a greater extent than it did prior to the acts complained of.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 257; Dec. Dig. § 179.*]

Appeal from Circuit Court, Carlisle County.

"Not to be officially reported."

Action by E. W. Haynes against the Illinois Central Railroad Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded for new trial.

Trabue, Doolan & Cox, Robbins & Thomas, John E. Kane, Blewett Lee, and R. G. Robbins, for appellants. Shelbourne & Smith, for appellee.

CLAY, C. Appellee, E. W. Haynes, instituted this action against the Illinois Central Railroad Company et al. to recover damages for injury to his crops and land, alleged to have been caused by appellants. The jury returned a verdict in appellee's favor for \$680. From the judgment based thereon, this appeal is prosecuted.

Appellee, E. W. Haynes, is the owner of about 150 acres of land situated just south of Arlington, Ky., and along the line of the Illinois Central Railroad Company. The railroad was double-tracked about the year 1900, over and through the lands of appellee. In double-tracking their railroad, appellants dug some borrow pits. A few years later, Cane creek began to flow over the embankment next to the town of Arlington and into the borrow pits. This resulted in changing the channel of the stream. The water then continued in a straight course until it passed under a trestle at an abrupt angle. Drift logs and brush were allowed to lodge under the trestle and obstruct the water from flowing out. Owing to this fact, and the further fact that the water turned at an abrupt angle, it was caused to overflow the banks of the creek and to spread out over appellee's land. Appellee based his cause of action on the damage done in the years 1906 and 1907. He showed that his crops had been damaged, that the tiling which he had used in a ditch had been washed up, and that large gullies had been washed through his land.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

It is first contended by appellant that the court erred in failing to give an instruction under the statute of limitations. In this connection it is argued that, if the channel of the creek was changed, it was done in the year 1900, when the railroad was double-tracked. A careful reading of the evidence, however, shows that appellee's land suffered no material damages from the alleged overflows until the years 1906 and 1907. The assistant civil engineer of the railroad testified that, while the road was double-tracked in 1900, it was several years thereafter before the creek overflowed the embankment and made a new channel through the borrow pits. That being the case, it is manifest that the facts of this case do not bring it within the rule laid down in that line of opinions holding that, where an injury to real estate results from the construction of a permanent structure, the cause of action accrues upon the completion of the structure. *Louisville & Nashville R. R. Co. v. Orr*, 91 Ky. 109, 15 S. W. 8, 12 Ky. Law Rep. 756; *Hay v. City of Lexington*, 114 Ky. 665, 71 S. W. 867, 24 Ky. Law Rep. 1495; *Johnson v. Owensboro & Nashville R. R. Co.*, 36 S. W. 8, 18 Ky. Law Rep. 276; *Oliver v. Illinois Central R. R. Co.*, 74 S. W. 1078, 25 Ky. Law Rep. 235. In these cases the injury was apparent to a reasonably prudent man at the time of the completion of the structure. In the case at bar the double-tracking of the railroad and the digging of the borrow pits did not cause immediate injury to appellee's land. His land was not damaged until a few years thereafter, when the creek overflowed the embankment and carried the new channel through the borrow pits. A party is not required to sue for damages to his land until it is reasonably apparent that he has suffered damages. If appellee's cause of action had accrued in the year 1900, then he might have lost his right of action long before he, as a matter of fact, suffered any damages. The only material damage, if any, to his land, took place in 1906 and 1907. The action was brought in 1908. It is manifest, therefore, that there was no evidence to justify the giving of an instruction based upon the statute of limitations.

It is next insisted that the court erred in defining the measure of damages. The instruction upon the measure of damages is as follows: "And in estimating the damages (if they believe he has sustained any damages) they will take into consideration the value of plaintiff's land before the water so deflected and thrown upon his land (if they believe the water was thrown upon the land of plaintiff), the injury to his said land by washing, carrying up the soil, cutting it in gullies, and any injury to the crops raised on the land in 1906 and 1907, not to exceed, however, the amount claimed in the petition." It is manifest from the

foregoing instruction that the court gave the jury no guide by which to estimate the damages, if any, which appellee suffered. There was some evidence tending to show that the water washed wide, deep gullies through appellee's land, and that the soil was carried away. If this was true, then such injury would be permanent. In the case of *Louisville & Nashville R. R. Co. v. Whitsell*, 125 Ky. 433, 101 S. W. 334, 31 Ky. Law Rep. 76, the right of the jury to determine whether or not the injury is temporary or permanent is recognized, and it was there laid down that it was proper to submit to the jury that question. In the case at bar the jury should have been told that the measure of damages was: (1) A sum sufficient to restore the tilling to the condition it was in prior to the overflow complained of; (2) the market value of the crops destroyed, if any; (3) if the jury believed that the damage to the land was temporary, the diminution in the value of the use of the land during the continuance of the injury, or, if they believed that the injury to the land was of a permanent character, the difference between the market value of the land before it was injured and after it was injured. In other words, appellee, if he makes out his case, is entitled to recover a sum sufficient to restore the tilling to the condition it was in prior to the injury, also the market value of the crops destroyed, and such further sum as will compensate him either for the diminution in the value of the use of the land during the continuance of the injury, or for the difference in the market value before and after the injury; the last element depending upon whether or not the jury believes the injury to be permanent or temporary. And the jury should say in their verdict whether the injury to the land is temporary or permanent.

The witnesses, in testifying as to the amount of damages to appellee's property, did not comply with the rules laid down by this court. In this connection we call attention to the case of *Illinois Central R. R. Co. v. Smith*, 110 Ky. 208, 61 S. W. 2, 22 Ky. Law Rep. 1655, where the proper method of interrogating witnesses upon issues similar to those involved in this action is pointed out by this court.

There was some evidence tending to show that, prior to changing the channel of the creek and the obstruction of the water under the trestle, the waters of the creek overflowed appellee's land. That being the case, appellee cannot recover unless the change in the channel of the creek and the obstruction of the water caused the creek to overflow and damage appellee's land to a greater extent than it did prior to the acts complained of, and the jury should be so instructed.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

JOHN DIEBOLD & SONS v. WOLLBORN.
(Court of Appeals of Kentucky. Nov. 18, 1909.)

1. APPEAL AND ERROR (§ 959*)—DISCRETION OF TRIAL COURT—AMENDMENT OF PETITION—REVIEW.

The petition, in an action by a stone mason for injuries received by falling from a platform while attempting to set in the wall of a building a stone hoisted and swung over the platform by a derrick, averred that the engine was not operated in a careful and proper manner and as a result he was violently struck and thrown from the platform. Several months afterwards he offered an amendment, which some time afterwards, and on the day of trial, he was allowed to file. The amended petition alleged that the superior servant under whom plaintiff was working failed to keep in communication with plaintiff, as he should have done, and thereby placed him in a position of danger unknown to plaintiff, who, while attempting to land the stone, was thrown and carried off the platform, and that this was due to the negligence of his superior in operating the engine. *Held*, that the court's discretion in permitting the amendment would not be interfered with; it not clearly appearing that its action prejudiced the adverse party's substantial rights.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3830; Dec. Dig. § 959.*]

2. MASTER AND SERVANT (§ 197*)—WHO ARE "FELLOW SERVANTS."

An engineer in charge of a derrick engine hoisting stone to be set in the walls of a building and a stone mason receiving and placing them in position were "fellow servants."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 490; Dec. Dig. § 197.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2716-2730; vol. 8, p. 7662.]

3. MASTER AND SERVANT (§ 190*)—FELLOW SERVANTS—FOREMAN ENGAGING IN WORK.

A foreman, directing the work of constructing a building, was not, while temporarily running the engine by which the derrick was operated in the absence of the regular engineer, the fellow servant of a stone mason receiving stone from the derrick.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 452; Dec. Dig. § 190.*]

4. MASTER AND SERVANT (§ 190*)—VICE PRINCIPALS—FOREMAN TAKING PLACE OF ABSENT MAN.

When a foreman for the time being takes a place made vacant by the absence of a laborer who was under him, he does not surrender the duties and obligations of a superior; but the master will be responsible for his negligence if it results in injury to an employé also subordinate to the foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 452; Dec. Dig. § 190.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by Fred Wollborn against John Diebold & Sons. From a judgment for plaintiff, defendants appeal. Affirmed.

Bennett H. Young and Marlon W. Ripy, for appellants. Camden R. McAtee and J. B. McCormick, for appellee.

CARROLL, J. The appellee was employed as a stone mason for the appellants, who had the contract for the stonework on the City Hall Annex in Louisville. He was in-

jured by falling from a platform upon which he was standing in an attempt to place and adjust a large stone that had been lifted from the ground to a point over the platform. The platform was on the inside of an unfinished wall and several feet below the top of it. The derrick and engine by which it was operated were located on the outside of the building, and the stone desired to be hoisted, which was also on the outside of the building, would be placed in a swing attached to a boom pole that was a part of the derrick, and lifted by the engine by means of the boom pole and ropes to a point above the top of the wall, and then the boom pole and stone attached thereto would be swung around so as to bring the stone on the inside of the wall and over the platform. When the stone was swung above the platform, Wollborn, standing on the platform, would take hold of the stone with his hands and put it immediately over the place on the wall where it was intended to be set, and then it would be lowered by the operation of the engine to its position on the wall. At the time Wollborn fell from the platform, two men besides himself were engaged in the work. Robinson was operating the engine, and Huddy, who had placed the swing around the stone on the ground, was on his way up to the platform to help Wollborn place the stone in position on the wall; but before he reached it Wollborn fell. Robinson was foreman, and one of his duties was to stand on the wall and direct the movement of the boom pole by signals to the engineer, as the engineer could not be seen by the person standing on the platform; but, on this occasion, the engineer was absent, and Robinson, the foreman, was acting in his place and running the engine.

It appears in the evidence that it was the duty of the engineer, when the stone was lifted over the wall and swung above the platform, to stop the engine and not start it until notified to do so. When the regular engineer was on duty, notice to him when to start and when to stop would be given by Robinson, who testifies that after the stone had been swung above the platform the engineer should not start the engine until notified. The negligence complained of was the failure of Robinson, who was operating the engine, to stop it when the stone had been lifted over the wall. The evidence of Wollborn—and there is no contradiction of it—shows that, when the stone was swung over the wall and above the platform, he caught hold of it, expecting that the engine would be stopped as had theretofore been done, but that Robinson failed to stop the engine, and the stone in some way carried him off the small platform, causing him to fall some 35 feet. The jury that tried the case assessed the damages in favor of Wollborn at \$1,000.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The amount of the verdict is not complained of; but a reversal is asked (1) because the court erred in permitting an amended petition to be filed changing the grounds of negligence complained of in the original petition and in failing to grant a continuance, and (2) the refusal to direct the jury to return a verdict for the defendant, now appellants.

The evidence is amply sufficient to support the theory of Wollborn that it was the duty of the engineer, when the stone was suspended over the platform, not to lower it by starting the engine until signaled so to do; and, although the evidence is not so satisfactory that the failure to stop the engine and the consequent lowering of the stone caused Wollborn to fall from the platform, there was yet enough evidence upon this point to authorize the jury in finding that the lowering of the stone without a signal caused Wollborn, who had hold of it, to lose his balance and fall.

In the petition it is averred that "the engine was not operated in a careful and proper manner, and as a result thereof the plaintiff was violently struck and thrown with great force from the point where he was working." Several months afterwards, and on the 3d day of February, 1909, the plaintiff offered to file an amended petition, in which the allegation was made that the superior servant under whom Wollborn was working failed to keep in communication with him, as he should have done, and thereby placed Wollborn in a position of danger unknown to Wollborn, who, while attempting to land the stone, was thrown or carried off the platform; and this was due to the negligence of the superior, Robinson, in operating the engine. Objection to the filing was made, and the matter taken under advisement by the court until February 10th, when the objection was overruled, the pleading allowed to be filed, and an order made controverting it of record. On the same day the trial was entered into. It does not appear that the appellant was at all prejudiced by the ruling of the court in permitting this amended pleading to be filed. In matters of this sort the trial court has a large discretion that will not be interfered with in the absence of a clear showing that the action of the court operated to prejudice the substantial rights of the adverse party.

The argument that a peremptory instruction should have been given is rested upon the ground that the engineer, whose negligence caused the accident and resulting injury, was a fellow servant of Wollborn. Under the authority of *Dana v. Blackburn*, reported in 121 Ky. 706, 80 S. W. 287 (but cited by counsel as being in 28 Ky. Law Rep. 695), and *Cooper v. Oscar Daniels Co.*, 96 S. W. 1100, 29 Ky. Law Rep. 1172, if the regular engineer and not the foreman had been operating the engine, the contention of counsel

would be well taken, as the engineer and Wollborn would be fellow servants; but the rule laid down in those cases does not apply when the foreman or superior servant at the time the negligent act is committed is present and performing the services of a fellow servant. When a foreman for the time being takes a place made vacant by the absence of a laborer who was under him, he does not surrender the duties and obligations of a superior; but the master will be responsible for his negligence if it results in injury to an employé who was also subordinate to the foreman. When Robinson, the foreman, undertook to perform the duties of the absent engineer, he was as much the representative of the master and the superior of Wollborn as when the regular engineer was present, and he was the superior of both. If the regular engineer had been present and had been directed by Robinson not to stop the engine after the stone was swung over the wall, and this instruction had resulted in injury to Wollborn, there could be no doubt that it would have been actionable negligence, in view of the testimony of Robinson that the engine should not be started until a signal to do so was given. This being so, the fact that Robinson in temporary charge of the engine was guilty of a like act of negligence rendered the master liable. It is aptly said in *Illinois Central Railroad Company v. Coleman*, 59 S. W. 13, 22 Ky. Law Rep. 878, where this precise point was under consideration, that: "The rule is well settled in this state that the master is responsible for the negligence of his superior servant to one under his control for an injury thereby caused him, and we are unable to see that it can make any difference whether the negligent act was done by his own hand or by another under his orders. The reason of the rule is that the superior servant represents the master, and it seems to us to apply with as much force in one case as the other." To the same effect is *Illinois Central R. R. Co. v. Elliott*, 82 S. W. 374, 26 Ky. Law Rep. 669, and *Board v. Chesapeake & Ohio R. R. Co.*, 70 S. W. 625, 24 Ky. Law Rep. 1079.

Wherefore the judgment of the lower court is affirmed.

LANDRUM & ADAMS v. WELLS.

(Court of Appeals of Kentucky. Nov. 17, 1909.)

1. VENDOR AND PURCHASER (§ 315*)—ACTION FOR PRICE—QUANTITY OF LAND—DEFICIENCY—EVIDENCE—FINDINGS.

In an action to recover the balance of the price of certain land, evidence held to sustain a verdict finding: That plaintiffs at the time of the sale represented the land to contain 157 acres; that defendant believed and relied on the representation and was induced by it to purchase the land; that it was sold at a specified price per acre, and not in gross; and that

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he sustained a specified damage by reason of a deficiency.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 931; Dec. Dig. § 315.*]

2. VENDOR AND PURCHASER (§ 176*)—DEFICIENCY IN QUANTITY—EQUITABLE RELIEF.

Where there was a deficiency of 33⅓ per cent. in the acreage of land sold over the vendor's representation, equity would grant the vendee relief, whether the sale was in gross or by the acre, or whether the loss occurred through fraud or mistake.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333-340; Dec. Dig. § 176.*]

3. TRIAL (§ 11*)—TRANSFER OF CAUSES—SUBMISSION OF ISSUES TO JURY.

Where a suit to enforce a vendor's lien was necessarily brought in equity, but the question whether plaintiffs were entitled to an enforcement of the lien depended on whether there was anything due them on the notes secured thereby, the court properly transferred the case to the law docket for a jury trial as to the amount due in accordance with defendant's demand under Civ. Code Prac. § 12, authorizing a transfer of equity causes for a jury trial of legal issues.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 30; Dec. Dig. § 11.*]

Appeal from Circuit Court, Hickman County.

"Not to be officially reported."

Suit by Landrum & Adams against C. W. Wells. Judgment for plaintiffs for less than the relief demanded, and they appeal. **Affirmed.**

Shelbourne & Smith, for appellants. Robins & Thomas and Joe W. Bennett, for appellee.

SETTLE, J. The appellants, Landrum & Adams, by deed of date May 25, 1907, sold and conveyed the appellee, C. W. Wells, a tract of land in Hickman county at the price of \$6,500. Appellee at the time of receiving the deed paid appellants \$3,500 of the purchase price, and for the remaining \$3,000 executed to them his promissory notes of \$1,500 each, payable 6 and 12 months from date, respectively. After maturity of the notes suit was brought upon them by appellants in the court below in which personal judgment was sought against appellee for the amount due on each of them, and, in addition, judgment asked for the enforcement of the vendor's lien retained on the land by the deed and for the sale of the land to pay them. Appellee by answer and counterclaim contended for certain credits upon the notes alleging that he had made various payments thereon in work, timber, and money, aggregating \$880; the date and amount of each payment being given. The answer and counterclaim contained, in substance, the further averments: That, when appellants sold and conveyed appellee the land in question, they represented it to contain 157 acres and referred him to the deed made them by their vendors, Lane & Roberts, conveying them the land, for proof

of the fact, which was then of record and purported to convey 157 acres; that believing and relying upon this representation, and having no personal knowledge himself of the true quantity, appellee was induced to purchase the land, and did purchase it, at the price of \$41.40 per acre, or \$6,500 for the whole; but that, after his purchase thereof and his payment of \$3,500 and acceptance of the deed made him by appellants, he received information and later discovered that the land contained by correct survey only 104 acres, thereby making a shortage of 53 acres, and causing appellee a loss and damage of \$2,194.20, for which, and the several payments alleged to have been made by him to appellants, he asked credit upon the notes sued on. Appellants by reply traversed the affirmative matter of appellee's answer and counterclaim, and after thus completing the pleadings, the circuit court, on appellee's motion, transferred the case to the ordinary docket for a trial before a jury of the issues of fact made by the pleadings, to which ruling of the court the appellants at the time excepted. On the trial the jury allowed appellee all the credits and damages asked in his answer and counterclaim, and returned a verdict in appellants' favor for \$20.08. The case was then remanded to the equity docket, following which judgment was entered in conformity to the verdict. Thereafter appellants filed a motion and grounds for a new trial; but the motion was overruled, and they have appealed.

Without discussing in detail the evidence, we deem it only necessary to say that much of it conduced to prove that appellants did, as claimed by appellee, represent that the tract of land sold and conveyed him contained 157 acres. Proof of this fact was not confined to the testimony of appellee alone, but was also testified by others, among them Lane, one of the persons of whom appellants purchased the land they sold appellee. Lane testified that appellants told him, the same day they conveyed the land to appellee, that, as to the number of acres in the tract, they referred appellee "to the records at Clinton for information," meaning the deed from Lane & Roberts to them, recorded in the county clerk's office, which described the land they sold appellee as containing 157 acres. Indeed, the appellant Landrum in effect admitted that he referred appellee to the Lane and Roberts deed for information as to the number of acres in the tract of land purchased by appellee. Appellee, however, claimed in testifying that Landrum positively represented to him that the tract contained 157 acres, and in addition referred him to the Lane & Roberts deed for confirmation of the statement. It is likewise true that Landrum testified that he told appellee some one had claimed there

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were only 115 acres in the tract, but that he did not know. He admitted, however, that this statement was made to appellee after the latter had made the cash payment on the land and accepted the deed therefor.

We do not mean to say that appellants did not furnish evidence in support of their claim that they did not represent the land to contain 157 acres. They, in part, so testified themselves, and were supported in some measure by other witnesses introduced in their behalf; but on the whole evidence we cannot say that the weight of it tended to sustain their version of the contract. At any rate, there was evidence from which the jury might conclude: First, that appellants at the time of the sale and conveyance of the land to appellee represented it to contain 157 acres; second, that appellee believed and relied upon the representation and was induced by it to purchase the land; third, that it was sold to him at \$41.40 per acre, and not in gross; fourth, that he sustained a loss of \$2,194.20 by reason of the 53-acre deficit in the land. As the foregoing conclusions of fact were evidently arrived at by the jury, and it was admitted that the land sold appellee contains only 104 acres, their reasons for the verdict returned can readily be understood. There seems to be little conflict in the evidence as to the payments made by appellee upon the notes held by appellants, and for them he was properly given credit by the jury. The shortage of 53 acres shown in this case constitutes a deficit of more than 33½ per cent. Such a loss is excessive, and shows that it could not have been intended or contemplated by the parties that it would or could occur. So, whether the sale of the land was in gross or by the acre, or the loss occurred through the fraud or mistake of the vendors, certainly no court of equity should refuse relief upon such facts as are here presented. In numerous cases relief has been granted by the courts where the deficiency was as low as 15 or even 10 per cent. *Shelby v. Smith's Heirs*, 2 A. K. Marsh. 513; *Smith v. Smith*, 4 Bibb, 81; *Hazlip v. Austill*, 4 Ky. Law Rep. 982. As said in *Young v. Craig*, 2 Bibb, 270, and quoted with approval in several later decisions of this court: "The equity of such case must depend upon its own peculiar circumstances. The relative extent of the surplus or deficit cannot per se furnish an infallible criterion; but the conduct of the parties, the date of the contract, the value, extent and locality of the land, the price, and other nameless circumstances, are always important and generally decisive." *Harrison v. Talbot*, 2 Dana, 258; *Hall v. Ely*, 76 S. W. 848, 25 Ky. Law Rep. 954; *Collins v. Stodghill*, 79 S. W. 185, 25 Ky. Law Rep. 2015. In view of what we have said of the effect of the evidence, we perceive no reason for sustaining

appellants' contention that the verdict is not supported by the evidence.

Appellants insist that the trial court erred in transferring the action from the equity to the law docket, and submitting to a jury the trial of the issues of fact. This was not error. Section 12, Civ. Code Prac., provides: "In an equitable action, properly commenced as such, either party may by motion have the case transferred to the ordinary docket for the trial of any issue concerning which he is entitled to a jury trial; but either party may require every equitable issue to be disposed of before such transfer." Necessarily appellants had to bring their action in equity, as they sought an enforcement of a vendor's lien upon the land they had sold and conveyed appellee. The question of whether they were entitled to an enforcement of the lien depended upon whether there was anything due them upon the notes to secure which the lien was given. So there was no equitable issue for the court to determine until the questions of fact were determined, for the trial of which the case was transferred to the ordinary docket. In other words, as appellants' equitable right depended upon the decision of issues of fact concerning which appellee demanded a jury trial, it was not error for the court to grant the jury trial. *Carder & Vallandingham v. Weisenburgh*, 95 Ky. 135, 23 S. W. 964, 15 Ky. Law Rep. 497; *Meek v. McCall*, 80 Ky. 375; *Hill v. Phillips et al.*, 87 Ky. 169, 7 S. W. 917, 10 Ky. Law Rep. 31.

We have been unable to find any ground for appellants' complaint that the court improperly admitted or excluded testimony. We think the record is free of error in that respect.

We are also of opinion that appellants' objection to the instructions given by the court are groundless. The instructions are too numerous to copy in the opinion, but, on the whole, fairly gave the jury all the law necessary to guide them in arriving at their verdict.

Wherefore the judgment is affirmed.

COMMONWEALTH v. MARCUM.

(Court of Appeals of Kentucky. Oct. 20, 1909.)

1. SEARCHES AND SEIZURES (§ 7*)—MISDEMEANORS—ARREST WITHOUT WARRANT—STATUTES.

Ky. St. § 806 (Russell's St. § 5350), makes it an offense, punishable by a fine and imprisonment in the county jail, for any person while riding on a train in the hearing or presence of other passengers, and to their annoyance, to use obscene or profane language, or behave in a boisterous or riotous manner, and makes it the duty of the conductor either to put such person off the train, or to give notice of violation of the section to some peace officer at the first stopping place where such officer may be, who may arrest the offender without a war-

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rant. *Held*, that such act was valid, and not objectionable in so far as it authorized such arrest, as violating Const. § 10, providing that the people shall be secure from unreasonable searches and seizures.

[Ed. Note.—For other cases, see Searches and Seizures, Cent. Dig. § 5; Dec. Dig. § 7.*]

2. CARRIERS (§ 351*)—PASSENGERS—EJECTION—DISORDERLY CONDUCT.

Ky. St. § 806 (Russell's St. § 5350), providing for the ejection of passengers on railroad trains guilty of disorderly conduct or obtaining or attempting to obtain money or property from any person by any game or device, etc., is reasonable and valid.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 351.*]

3. HOMICIDE (§ 105*)—ARREST—MISDEMEANORS—USE OF FORCE.

An officer having a right to arrest for a misdemeanor may use such force, if resisted, as is necessary or reasonably appears to the officer necessary in the exercise of a sound judgment to overcome the resistance and make the arrest, but he may not, while the resistance is not forcible, wantonly shoot or injure the person sought to be apprehended.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 135; Dec. Dig. § 105.*]

4. HOMICIDE (§ 298*)—DEFENSES—RESISTANCE—FORCE—INSTRUCTIONS.

An instruction that it was a public offense for a passenger to behave boisterously in the presence of other passengers, and that it was the conductor's duty either to eject the offending person or give notice to a peace officer at the first stopping place, and that it was the peace officer's duty to arrest the offender and carry him to the most convenient magistrate of the county, and in making the arrest the officer could use such force as was necessary, even to taking the life of the offender, but that he should not use unnecessary violence, nor shoot the offender unless the arrest could not otherwise be made—was objectionable, as eliminating the necessity that the resistance must be forcible, and the idea that the officer might act on appearances in the exercise of reasonable judgment.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 612; Dec. Dig. § 298.*]

5. HOMICIDE (§ 298*)—EXECUTION OF DUTY—RESISTANCE TO ARREST—INSTRUCTION.

In a prosecution for homicide, an instruction as to the right of defendant, a city marshal, to shoot one whom a train conductor had requested to have arrested for disorderly conduct in case of resistance to the arrest, *held* proper.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 612; Dec. Dig. § 298.*]

Appeal from Circuit Court, Lawrence County.

"To be officially reported."

Fred Marcum was indicted for murder, and, after a mistrial, the Commonwealth certified certain questions to the Court of Appeals.

Byrd & Davis, Calloway Howard, and Hopkins & Hopkins, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth. W. D. O'Neal, for appellee.

BARKER, J. The appellee, Fred Marcum, was jointly indicted with Frank Blevins and

James Sizemore by the grand jury of Lawrence county, Ky., charged with the offense of willful murder, committed by shooting John Whittaker with a pistol and inflicting wounds upon him of which he then and there died. The defendants all pleaded not guilty to the indictment, and, when the case was called for trial, the appellee, Fred Marcum, demanded a severance from his codefendants, which was granted him. Thereupon the commonwealth elected to try him first, and a trial was then and there had, with the result that the jury were unable to agree upon a verdict, and were discharged by the court from further consideration of the case.

Afterwards the commonwealth's attorney, as by law authorized, certified the record to this court for the purpose of having adjudicated the propriety of giving instructions Nos. 5 and 6 to the jury, and of the court's refusal to give to the jury instruction No. 1 asked for the commonwealth. The court gave the usual instructions in murder cases, and in addition gave Nos. 5 and 6, which are as follows:

"(5) The court further instructs the jury that it is a public offense for any person while riding on a passenger train, to, in the hearing or presence of the passengers, and to their annoyance, use or utter obscene or profane language, or behave in a boisterous or riotous manner, and it is the duty of the conductor in charge of a train upon which any such offense is committed either to put the person so offending off the train, or to give notice of such offense to some peace officer at the first stopping place where any such peace officer may be, and it is the duty of such peace officer when so notified by such conductor to arrest such offender, and carry him to the most convenient magistrate of the county in which such arrest is made; and in making such arrest such peace officer has the right to use such force as is necessary therefor, even to the taking of the life of the offender, but not the right to use unnecessary violence, nor to shoot the offender, unless such offender resist such arrest, and such arrest cannot be otherwise made.

"(6) A city marshal is a peace officer of the county in which the city is located of which he is marshal, and if the jury should believe from the evidence that Frank Blevins was the conductor in charge of the train upon which the deceased Whittaker was riding at the time that he was killed, and further believe from the evidence that said Blevins as such conductor, in Lawrence county, Ky., while such conductor in charge of said train and on said run, and before said killing was done, complained to and notified the defendant, Marcum, as marshal of the city of Louisa, Lawrence county, Ky., that the deceased Whittaker had on his (Blevins') train, on said run, committed a public offense as de-

fined in said instruction No. 5, and that as such marshal in the discharge of his official duties in good faith attempted to arrest the deceased, and while so engaged the deceased, with the intent to prevent and with force resisted such arrest and assaulted the defendant, and there appeared to defendant Marcum, exercising a reasonable judgment on the time and under the circumstances, no other safe way to save his life or to protect himself from great bodily harm or to make such arrest than to shoot and kill the deceased, then in such event the jury will acquit the defendant upon the grounds of self-defense or apparent necessity."

The commonwealth tendered to the court, and asked that it be given to the jury, instruction No. 1, which was refused. It is as follows: "It was the duty of the defendant in attempting to arrest the deceased to inform him of his intention to arrest him and of the offense charged against him, and if the jury believe from the evidence beyond a reasonable doubt that the defendant failed to perform said duties, or either of them, and they further believe from the evidence beyond a reasonable doubt that the deceased did not know the defendant's purpose and the offense charged against him, then the deceased had the right under the law to use such force as was necessary or reasonably appeared to him to be necessary to protect him from danger or death, or great bodily harm then about to be inflicted on him by the defendant."

The facts out of which grew the killing for which the appellant was indicted are as follows: The Chesapeake & Ohio Railroad Company on Sunday, January 11, 1909, ran an excursion train through Lawrence county, Ky., to Catlettsburg. The deceased, John Whittaker, and his two brothers, Caleb and Frank, with several friends and acquaintances, went on this excursion. When the party reached Catlettsburg, John Whittaker and his friends proceeded to have a good time by getting drunk and visiting houses of prostitution. At one of these, John Whittaker got into an altercation with one of the women in the house, and drew his pistol, flourishing it about in a reckless manner. One of his companions, Sam Robinson, in order to keep him out of trouble, took the pistol from the drunken man, and placed it in his own pocket. The train returned at night, and John Whittaker and his party had with them a suit case containing six quarts of whisky and gin, of which they partook freely, and were in a hilarious and boisterous mood. The conductor, Frank Blevins, warned John Whittaker several times to keep quiet, and not to make a disturbance, and finally said to him: "You have got to cut that out (meaning his boisterous behaviour), for I have got a man on this train who will take you off." He referred to the appellee, Fred Marcum, who was marshal of Louisa. When the train reached Lawrence county, Marcum, at the in-

stance and request of the conductor, Blevins, went into the car where Whittaker and his party were for the purpose of arresting those who were boisterous and unruly. They first arrested Sam Robinson, who, as before stated, had taken John Whittaker's pistol from him in Catlettsburg. In making this arrest they mistook Robinson for Whittaker; they both wearing white hats, and looking something alike. Robinson submitted quietly to the arrest, and went with the officer and conductor to another car, where he explained to them that they were mistaken in the man, and told them that he had taken a pistol from Whittaker to keep him out of trouble. Thereupon the officer released Robinson, and with the conductor went back into the car for the purpose of finding and arresting John Whittaker. Whittaker and his brothers, who had seen the arrest of Sam Robinson, undertook to avoid the arrest of John Whittaker by the following ruse: John left the seat he was occupying, went in the forward part of the car, and on the opposite side of the aisle from where he had been sitting or standing, and took a seat by a little boy; and, in order to conceal him, one of his brothers sat on the arm of the seat, and leaned over John so as to screen him from ordinary observation. This necessitated somewhat of a search by the officer and the conductor, with the result that the conductor, Blevins, finally discovered John, and said to the officer, "Here he is. This is your man," or words to that effect. Thereupon the marshal, Marcum, put his hand upon the shoulder or neck of Whittaker, and said to him: "You must go with me. You are under arrest." Thereupon Whittaker replied: "I haven't done anything, and I will not go." The marshal then said, "Oh, yes; you will," and then gave him a pull or jerk with his hand. Thereupon John Whittaker immediately assaulted the officer, knocking him down, or very nearly knocking him down, and his brothers, and perhaps others, at once assaulted the marshal and conductor, Blevins, and a general and free fight resulted, creating the greatest confusion and consternation among the passengers, many of whom left or tried to leave the car. The marshal, was badly beaten about the face, the blood running freely from a wound on his head down in his eyes. In the midst of the mêlée he drew his pistol and shot John Whittaker in the left breast, and he sank into his seat, and there died within a few minutes.

We have not recited all of the mass of testimony that was adduced upon the trial. The evidence for the commonwealth and that for the defendant differs as to the degree of noise or boisterous conduct of Whittaker and his friends, but the evidence for the commonwealth sufficiently shows the facts to be substantially as stated in this opinion. We feel that it is sufficient for the purposes of this case merely to give a general outline of the evidence so that the principles of law certi-

fied to us may be properly understood. The arrest of John Whittaker by the constable was under the authority of section 806, Ky. St. (Russell's St. § 5350), which is as follows: "If any person whilst riding on a passenger or other train, shall, in the hearing or presence of other passengers, and to their annoyance, use or utter obscene or profane language, or behave in a boisterous or riotous manner, or obtain, or attempt to obtain, money or property from any passenger by any game or device, he shall be fined for each offense not less than twenty-five nor more than one hundred dollars, or imprisoned in the county jail not less than ten nor more than fifty days, or both so fined and imprisoned; and it shall be the duty of the conductor in charge of any train upon which there is a person who has violated the provisions of this section either to put such person off the train, or to give notice of such violation to some peace officer at the first stopping place where any such officer may be." The commonwealth challenges the constitutionality of the foregoing statute as being inimical to section 10 of the Constitution, which provides: "The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizure. * * * " And in support of this view cite the case of *Jainson v. Gaernett, etc.*, 10 Bush, 221. In that case it was insisted that the charter of the city of Louisville authorized policemen to arrest, with or without a warrant, persons guilty of offenses against the laws or ordinances of the city. The court in denying that the charter authorized policemen to make arrests contrary to the general law of the state said, after quoting the charter: "We do not regard this enactment as necessarily conflicting with the general law which defines and limits the power of the arresting officer; but, if we did so construe it, we should hesitate to decide that it was not an infringement of the constitutional guaranty of security to the people 'in their persons, houses, papers, and possessions against unreasonable seizure and searches.'" And then the opinion goes on to hold that policemen of the city of Louisville must make arrests in accordance with the general law bearing upon the subject. The opinion in this case is not conclusive of the question of the constitutionality of the statute we have under consideration. It may well be doubted whether policemen could constitutionally be authorized to make arrests for violations of municipal ordinances not committed in their presence without a warrant; and there would be ample room for the argument that the granting of such power would be unreasonable within the meaning of section 10 of the Constitution. But that is not the case we have here. The statute we are construing was enacted for the protection of the traveling public—men, women, and children—from unlawful conduct on the part of fellow passengers. If a conductor could not be empowered to forcibly

eject a passenger violating the foregoing statute, or to have the offender arrested as soon as a peace officer could be obtained, then we are not able to see how a railroad corporation could protect its passengers from the unlawful deeds of boisterous or disorderly or drunken persons on the train. Railroad corporations are engaged in the business of carrying passengers for long distances. Their trains ordinarily run through many counties as well as through different states. The passengers are necessarily more or less crowded together in close proximity, and their safety is in a measure at the mercy of each other. If the law-abiding cannot be protected from insult or violence by the lawless, it necessarily follows that traveling by railroad will become essentially a hazardous undertaking, independently of the ordinary dangers of accident or misfortune. The law is a growing science, and the Legislature is constantly engaged in advancing its protecting sanctions so as to safeguard the lives and the liberty of the citizen against outrage and violence. Whenever there is a special need for a new statute to protect the citizen in his rights, then it is the duty of the Legislature to enact such a statute. It was in obedience to this duty that the statute under consideration was enacted for the protection of the traveling public in their right to be transported in railroad cars free from the danger of insult, outrage, or violence by lawless men.

So much of the statute under consideration as authorized the conductor under the circumstances described in the statute to eject a passenger from his train was recognized and upheld as lawful by this court in the case of *Chesapeake & Ohio Ry. v. Crank*, 128 Ky. 329, 108 S. W. 276, 32 Ky. Law Rep. 1202, 16 L. R. A. (N. S.) 197. But the statute not only authorizes the conductor to eject a passenger who offends against its provisions, but authorizes him to obtain the assistance of a peace officer as soon as he can get into the presence of such an officer, and empowers the peace officer upon the demand of the conductor to arrest the offender without a warrant. This must necessarily be so if the statute is to have any efficient force or effect. The train could not be held at a station until the conductor could go and swear out the warrant for the arrest of the offender. To require this would nullify the statute. Laws are not made for the benefit of criminals, but for the protection of the innocent, and, if the statute was so framed as to require the issuance of the warrant as a prerequisite to the arrest of the violator of the statute, it would enable the guilty always to escape, and thus take from the innocent all hope of protection. The statute is not only constitutional, but it is an exceedingly wise and beneficent law. It puts into the hands of the railroad corporation the power to protect its innocent passengers by authorizing the conductor to eject

offenders from his train or to cause them to be arrested by the first peace officer whose services he can secure.

The question as to whether a search or seizure of the person of the citizen is reasonable under the Constitution is a relative one. It might not be reasonable to seize or search the person of a citizen for a misdemeanor where he was at large in the city or country, and where the circumstances would generally be such that a warrant could be secured in advance of the arrest. But it would not be reasonable to require the officers to wait for a warrant if the offense was a felony, because here the gravity of the offense and the importance to the public of the prompt seizure of the criminal overrides the unreasonableness of the search or seizure without a warrant. And so, in the case at bar, the circumstances which require the arrest of an offender against the statute are such as to make it reasonable that a peace officer should be authorized upon the request of the conductor of a train to arrest a violator without a warrant, and without the offense for which the arrest was to be made being done in the presence of the officer. The law, being a practical science, regards the necessities of the case, the danger to the public, and the opportunity for the escape of the offender, and arranges the remedy so as to protect the innocent, trespassing upon the liberty of the citizen as little as possible in order to secure the protection of the public. No law, therefore, can be considered unreasonable which is necessary to protect the public from violence or outrage at the hands of the lawless. And, if such a law seems to give an undue amount of absolute authority into the hands of the officers having in charge its administration, it must be remembered that this is the price that the people pay for protection; for, after all, government is but the sum total of the natural liberty of the citizen surrendered up in return for law and order and peace and safety.

We will now consider instructions 5 and 6, given by the court, and which are objected to by the commonwealth. In the case of *Stevens v. Commonwealth*, 124 Ky. 32, 98 S. W. 284, 30 Ky. Law Rep. 290, we had occasion to examine the question as to the force which a peace officer is authorized to use in making an arrest where the party is charged with a misdemeanor, and in the opinion in that case the decisions by our court are reviewed, as well as the text-books bearing upon the subject, and from the principles there enunciated we have never departed. In the opinion it is clearly stated that an officer having a right to arrest for a misdemeanor, if he be forcibly resisted, may use such force as is necessary, or reasonably appears to the officer necessary in the exercise of a sound judgment, to overcome such force and to make the arrest. But

he has not the right, where the resistance is not forcible, to wantonly shoot or injure the person charged with a crime. In the case cited an instruction was formulated which, with slight changes to meet the necessities of the varying facts, would have well served for the instruction in this case. Instruction No. 5, given by the court, is objectionable, in that it does not present the idea that the resistance of the offender to the proposed arrest must be a forcible resistance. Nor does it present the idea that the officer may act upon what appears to him to be necessary in the exercise of a reasonable judgment. Therefore No. 5 should be modified so as to make it read, commencing with the last semicolon, as follows: " * * * And in making such arrest, such peace officer has the right to use such force as is reasonably necessary therefor, if the arrest be forcibly resisted, even to the taking of the life of the offender, but he has not the right to use unnecessary force or violence, nor to shoot or otherwise injure the offender, unless such offender forcibly resists the arrest and the arrest can not be otherwise made, or it appears to the officer, in the exercise of a reasonable judgment, that it can not be otherwise made." Instruction No. 6 is not subject to criticism, and upon another trial may be given as on the first.

The commonwealth was entitled to have the jury instructed, in accordance with the provisions of section 39 of the Criminal Code of Practice, that it was the duty of the officer, before making the arrest, to inform the offender that he was about to be arrested and the offense for which he was to be arrested, unless the decedent knew these facts, in which latter case it was not necessary to inform him of that which he already knew. The court should, in addition, have told the jury plainly that it was the duty of the peace officer to arrest the offender upon the verbal request or demand of the conductor, and that in making the arrest the peace officer was not required to examine into the guilt or innocence of the offender whom the conductor asked to have arrested, and it was the duty of the decedent to submit to a lawful arrest at the hands of the peace officer, whether or not he had done anything which justified the arrest. In order to make the statute effective, it was necessary to authorize the officer to make the arrest upon the verbal request of the conductor. It does not contemplate that the offense should have been committed in the presence of the officer, and therefore the officer was authorized to act under the direction of the conductor. It may be that this construction will occasionally work a hardship upon the citizen, but, as said before, this hardship is necessary in the individual instance in order to effectuate a statute which is intended to subserve a great and general good. And the citizen who is

oppressed unlawfully by its operation has his remedy against the railroad corporation for malicious prosecution.

It is therefore now ordered that this opinion be certified to the trial court, as by law required.

CRAWFORD v. LOUISVILLE & N. R. CO.
(Court of Appeals of Kentucky. Nov. 18, 1909.)
CARRIERS (§ 297*)—INJURY TO PASSENGERS—
NEGLIGENCE.

A carrier operating its train at the ordinary rate of speed is not liable to a passenger thrown from the back platform, on which he was riding, while the train was on a curve, on the ground that the train was operated at a dangerous rate of speed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1204; Dec. Dig. § 297.*]

Appeal from Circuit Court, Clark County.
"Not to be officially reported."

Action by W. Anderson Crawford against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. M. Beckner, for appellant. Fred P. Caldwell, Benjamin D. Warfield, Pendleton, Bush & Bush, and John T. Shelby, for appellee.

BARKER, J. The appellant, W. Anderson Crawford, boarded the train of the appellee railroad company at Winchester, Ky., for the purpose of being transported to his home at Elkins, Ky. The car was somewhat crowded, and he took a seat upon the back platform of the rear car, intending to prevent himself from falling by holding on to the iron handrails. The conductor came around, found him on the back platform, and collected his fare without saying anything to him. When the train reached Elkins, which was the station of appellant, he did not observe that it was the place to get off the car, and claims that he did not hear any announcement made of the station. As a result, he was carried beyond Elkins, and he then made up his mind to leave the train at Ford and go home from there. Just before he reached Ford, the train encountered a curve which was in a cut. When the car upon which appellant was sitting struck this curve he was thrown from the platform, striking his head against the side of the cut, receiving severe injuries, to recover damages for which he instituted this action. The basis of appellant's claim for recovery, as set forth in his petition, is that the train was operated at a high and dangerous rate of speed, which caused it to lurch so severely when it struck the curve above mentioned that he was thrown off the platform and injured. The defendant answered controverting all the material allegations of the petition, and pleading, in addition thereto, the contributory negligence of the plaintiff. When the issues were made

up a trial was had before a jury, and at the close of plaintiff's testimony the circuit judge sustained a motion made by defendant corporation for a peremptory instruction to the jury to find for it. Of this instruction the plaintiff (appellant) complains.

The court ruled correctly in sustaining the motion for a peremptory instruction. There is not the slightest evidence in the case that the train was being operated at a high or dangerous rate of speed, or that it was being operated in any other way than on schedule time. Appellant's own evidence on this subject is to the effect that he did not know whether the train was running faster than usual or not. His testimony on this subject was as follows: "The train seemed to be running fast, and mighty fast when I was thrown off, as I have told. It was down-grade, and seemed to be running very fast; but I do not know whether it was unusually fast or not. I do not know that it was running faster than usual. I was holding tight to the rail when I was thrown off." No witness said the train was running faster than the ordinary schedule time. The allegation of the pleading that the train was operated at a high and dangerous rate of speed was not sustained by the evidence; and, this being the only negligence alleged or attempted to be shown, it seems to us that there was nothing for the court to do but award a peremptory instruction at the close of plaintiff's testimony. He knew when he took a seat on the platform that there is always danger attending such a position. All railroads have curves, and, as a rule, the trains are operated quite fast. To operate the trains so as to travel rapidly is one of the great utilities of the railroad system, and plaintiff was bound to know, if he sat outside of the car on the platform, that when the fast-moving car struck a curve he was liable to be thrown off. We do not see wherein the company was negligent.

Judgment affirmed.

BOGGS v. BUSH.

(Court of Appeals of Kentucky. Nov. 19, 1909.)

1. VENDOR AND PURCHASER (§ 176*)—DEFICIENCY IN QUANTITY OF LAND SOLD—SUIT TO ABATE PRICE—DEFENSES.

In the negotiations the vendor represented that the land contained 90 acres, and a survey showed that quantity. A deed was given conveying 90 acres "more or less," and thereafter it was discovered that through an error in calls the tract contained 78 acres, and the purchaser sued in equity for relief against the deficiency on the ground of mistake or fraud. *Held*, that a contention that the purchaser got all he bargained for, and that there was no loss of any part of the property, was not pertinent, though it might be in an action for breach of warranty, since the gist of the present action was mistake or fraud.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333-336, 358; Dec. Dig. § 176.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. VENDOR AND PURCHASER (§ 176*)—DEFICIENCY IN QUANTITY OF LAND—ABATEMENT OF PRICE—SALE BY ACRE OR IN GROSS.

In such case, the unit of measure of land in fixing the price being the acre, it is immaterial whether the sale was by the acre or in gross, since if by the acre the vendor was entitled to the quantity represented, and if in gross the buyer was entitled to relief against a deficit so great as was probably not within the contemplation of the parties.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333-336, 358; Dec. Dig. § 176.*]

3. DEEDS (§ 113*)—QUANTITY OF LAND CONVEYED—"MORE OR LESS."

The words "more or less" in a deed relieve only from the necessity for exactness, and not from gross deficiency.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 333; Dec. Dig. § 113.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4532-4595.]

4. VENDOR AND PURCHASER (§ 176*)—QUANTITY OF LAND—PERCENTAGE OF DEFICIT.

Since it is a rule that relief will be denied for a deficit which is less than 10 per cent. and granted where 10 or more, the purchaser was entitled to relief for the deficit of 12 acres out of 90.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 333-336, 358; Dec. Dig. § 176.*]

5. EVIDENCE (§ 460*)—DEEDS—PRIOR NEGOTIATIONS.

The court may, without offending against the rule as to parol evidence, look to the negotiations leading up to a deed to determine whether the sale was by the acre or in gross.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2117-2119; Dec. Dig. § 460.*]

6. PLEADING (§ 9*)—FRAUD OR MISTAKE—CONCLUSION FROM FACTS ALLEGED.

Where the facts pleaded are such that from them the law imputes either fraud or mistake, it need not be pleaded in terms.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 29; Dec. Dig. § 9.*]

Appeal from Circuit Court, Madison County.

"To be officially reported."

Suit by W. B. Boggs against R. F. Bush to recover for a deficit in land sold. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

J. A. Sullivan and S. M. Wallace, for appellant. J. C. & D. M. Chenault, for appellee.

O'REAR, J. Appellee, Bush, sold and conveyed to appellant, Boggs, two tracts of land in Estill county, for the consideration of \$1,400. The description of the land contained in the deed is as follows: "Beginning at the mouth of the branch, Prather corner on the Kentucky river, thence up said branch as it meanders N. 6½° W., 20 poles, N., 26 poles; thence N. 6° W., 24 poles, to a hickory on said branch; thence N. 59½° E., 6.2 poles, to a bunch of walnut bushes; thence with a Nest line between Floyd and the said Bush, N. 78¼° W., 14 poles, to a stone; thence N. 46¼° W., 15 poles, to a fence post; thence

N., to a stone in Bogle's line, corner to Ware and said Bush; thence a straight line S. W. to a locust tree near an old icehouse containing a straight line to a stone corner to Ware and Hendrix; thence with Hendrix's line S. 10° E., 136 poles, to a stake on the N. bank of the Kentucky river; thence up said river N. 68° E., 107 poles, to the beginning, containing 90 acres more or less. Also a tract of woodland containing 10 acres more or less and lying on the north side of Browning creek and Liberty road, joining lands of Jas. Hall, Lewis Richardson, and others." In this suit by appellant against his grantor, Bush, it is claimed that the tract described as containing "90 acres more or less" was actually only 78 acres. The plaintiff's damage is laid at \$250. He sues upon the ground that the sale to him was by the acre; or, if not, that the deficit was so large as to fall within the rule that it was not within the contemplation of the parties, and was therefore a mistake, a misrepresentation, from which a court of equity will grant relief. It was denied in the answer that the sale was by the acre. It was averred, on the contrary, that it was a sale in gross, and that as a matter of fact the grantee got by the conveyance all the land that was sold or intended to be sold to him, and all that he thought he was buying. The circuit court denied plaintiff the relief for which he prayed, basing the judgment upon the ground that the sale was in gross, and that the discrepancy in quantity was not enough to warrant a restitution of a proportionate part of the consideration. The circuit court also held that it was inadmissible to show by extraneous evidence the negotiation leading up to the sale and execution of the deed; that the trial must be confined to the examination of the deed alone.

The proof was: That the parties went upon the land pending the negotiation, when the lines of the first-described tract were pointed out to appellee by appellant; that appellee believed that boundary contained 90 acres, and so represented to appellant; that upon appellant's request that it be surveyed appellee, no doubt acting in good faith, responded that it had been surveyed, at least the boundary had been calculated a short while before, and that it contained 90 acres. He refused to have it surveyed again. Appellant did not know that the boundary contained less than 90 acres. The discrepancy arose from an error in one of the calls, contained in the description appearing in the deed to appellee—where the call was for a course "N. 6½° W.," it should have been "N. 62½° W." If it were run N. 6½°, the line would extend over onto another man's land, and would make the boundary embrace probably 90 acres; but, if the area is calculated with reference to the true course of that line N. 62½° W., it embraces only

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

78 acres. Some few years later, when appellant sold the land, his purchaser demanding a survey of the tract, it was discovered that the true area was only 78 acres. Appellee contends that appellant got all the land he bargained for, and, whether it was 78 acres or 90 acres, there was not a loss of any part of the property; but we do not regard this contention as pertinent. It would be upon an action for breach of warranty of title; but that is not this action. Always in actions such as this the claim is not for a failure of title, but is for the deceit practiced by the successful party in inducing the buyer to believe he was getting that which he did not get by the conveyance, or upon the mutual mistake of the parties so great as to be inconsistent with the presumption that it was within their contemplation as one of the natural and usual results likely to arise from casual errors of measurement, calculation, or observation.

We do not regard the question as a material one in this case whether the sale was by the acre or in gross. If it was by the acre, then it does not matter whether the deficiency is great or small; the number of acres represented must be within the boundary. If in gross, if the deficiency is so great as was probably not within the contemplation of the parties, the buyer is entitled to relief upon the same basis of computation as if the sale had been by the acre. The quantity or area of land embraced by a sale, described by metes and bounds, is, or at least may be, an essential inducement to the bargain. Farm lands are frequently, perhaps most frequently, sold by the acre, or are sold at a valuation into which the number of acres enters as a material feature of the trade. While the recitation of the number of acres is a part of the description of the land, or may be, it is, not unusually, more than that. The purchaser buys not only the particular body of land, but the quantity it is represented to contain; the latter feature of the bargain affecting the amount of consideration to be paid. The unit of measure of land in this country is the acre, as of wheat it is the bushel, and of certain other articles the pound. True, the bargain in a particular instance might be without respect to such unit. In that case the principle we are discussing would not apply; but where the unit of measure is considered and treated as an element of the trade, upon which the consideration is in some part rested, it is not perceived how it can be disregarded subsequently in measuring the rights of the parties, as an immaterial matter. The addition of the qualifying clause "more or less" relieves only the necessity for exactness. It indicates that the parties contemplated making some allowance for those inaccuracies that are usual in such measurements, and that they each took the chance of the fact being, if ascertained with accuracy, that the quantity was somewhat more or somewhat less than was represented. The difficulty arises, in administering relief upon

complaint, in determining the limit. While the courts have not set a rule applicable to all cases, in Kentucky no case to which our attention has been called has granted the relief where the deficit was less than 10 per cent., and none where it was refused where the deficit was as much or more than 10 per cent. In the early history of the state, when lands were cheap, and in consequence surveying was frequently attended with inaccuracies because, perhaps, it did not pay to take the time and go to the labor and expense necessary to secure greater exactness, more latitude for discrepancy was allowed. As values have enhanced, and surveying has been more carefully done, there is less reason for, and would be more injustice in, applying the rule of ancient times. The following cases are the basis for the principles advanced above: *Harrison v. Talbot*, 2 Dana, 266; *Smith v. Smith*, 4 Bibb, 81; *Shelby v. Shelby's Heirs*, 2 A. K. Marsh. 504; *Hall v. Ely* (Ky.) 76 S. W. 848; *Anderson v. Dawson* (Ky.) 118 S. W. 953; *Anthony v. Hudson* (Ky.) 114 S. W. 782; *Landrum & Adams v. Wells* (opinion delivered November 17, 1909) 122 S. W. 213.

In the early and leading case of *Harrison v. Talbot*, supra, indeed throughout the cases on the subject, it appears that the court may look to extraneous evidence to show the nature of the transaction, to enable it to determine whether the sale was in gross or by the acre, or whether, under the circumstances of the particular case, equity required the granting of the relief. The action is based upon deceit or mistake. Each presupposes that the written memorial is incomplete. If the rules of evidence precluded a resort to anything but the document to determine the fact, it would often happen that the ends of equity would be defeated by the rigidity of a rule of law. The writing may in truth show that the sale was in fact in gross, or was in fact by the acre. If it does, then other evidences of the fact need not be resorted to—not because of its irrelevancy, but because it is unnecessary. A deed may be impeached, it is conceded. A prerequisite is to attack its genuineness in a proper pleading. In this kind of a case, the very essence of which is one of the grounds for attacking a writing collaterally, it is not necessary to charge either fraud or mistake in its execution. The allegation that a conveyance of a tract of land, described as containing so many acres, erroneously mistakes the acreage to such an amount as the court will be able to see, in the light of the attending circumstances pleaded, was beyond the probable contemplation of the parties, is such an excessive variation as to indicate fraud or mistake. When the facts pleaded are such that from them the law imputes either fraud or mistake, it need not be pleaded in terms.

In this case the discrepancy was more than 13 per cent.

The judgment should have been for the plaintiff.

Reversed and remanded.

SHALLCROSS v. SHALLCROSS.

(Court of Appeals of Kentucky. Nov. 19, 1909.)

1. DIVORCE (§ 303*)—CUSTODY OF CHILDREN—JUDGMENT—MODIFICATION—STATUTES.

Ky. St. 1909, § 2123 (Russell's St. § 73), provides that the court in divorce proceedings may make an order for the care, custody, and maintenance of minor children, and at any time afterward, on the petition of either parent, may revise the same, having, in all cases, the welfare of the children principally in view. *Held*, that such section did not deprive the court, after granting a divorce decree, from modifying the same after the term, on its own motion, in so far as it granted the father the right to visit a child, the custody of which was granted to the wife, nor to limit such action to a case instituted for that purpose by petition of either parent.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.*]

2. DIVORCE (§ 298*)—CUSTODY OF CHILDREN.

Where a child of divorced parents has reached years of discretion, its wishes as to its custody will be considered, but are not controlling.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 781-787; Dec. Dig. § 298.*]

3. DIVORCE (§ 298*)—CUSTODY OF CHILDREN—RIGHTS OF PARENTS.

On the granting of a divorce, the custody of very young children will generally be awarded to the mother.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 781-787; Dec. Dig. § 298.*]

4. DIVORCE (§ 303*)—CUSTODY OF CHILDREN—MODIFICATION OF DECREE.

While the circuit court should not modify a divorce decree in so far as it affected the custody of children, without notice to the parents, a divorced husband, having applied for a rule on his divorced wife to show cause why she did not comply with the decree in so far as it granted the husband a right to have visits from his child, could not object to a modification of the decree denying him the right to further visits because he was not served with a written notice of an application to modify the decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.*]

5. DIVORCE (§ 303*)—CUSTODY OF CHILDREN—VISITATION.

Where a father, by reason of inebriety and profligacy, was not a proper person to associate with his infant son, the court properly modified a prior divorce decree granting the father the right to visit his son, and have him with him under certain circumstances, by withdrawing such right of visitation; benefit to the child being the chief concern.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"To be officially reported."

Action by Sarah Shelby Shallcross against Harry M. Shallcross. From an order modifying a divorce decree in so far as it related to the company of children, defendant appeals. Affirmed.

Barrett Gibson and Gibson, Marshall & Gibson, for appellant. C. H. Shield and R. A. McDowell, for appellee.

SETTLE, J. On April 29, 1907, the appellee, Sarah Shelby Shallcross, was, by a judgment of the Jefferson circuit court, chancery branch, second division, divorced from her husband, the appellant, Harry M. Shallcross, and given the custody of their son and only child, Vernon Lewis Shallcross, an infant of tender years. The judgment in question is as follows: "This action having been heard and submitted upon the plaintiff's petition and the defendant's answer herein and upon the proof, and the court being advised, it is adjudged that the plaintiff, Sarah Shelby Shallcross, be and she is hereby divorced from the bonds of matrimony with Harry Mason Shallcross, and it is further adjudged that the said plaintiff is given the custody and control of her son, Vernon Lewis Shallcross, and it is further adjudged that the defendant, Harry Mason Shallcross, shall have the privilege of seeing his child at such reasonable times as will not interfere with the education of the child, and that he shall have the privilege of having the said child with him at least two days during each month during school season, and shall have the privilege of having the child with him during vacation for periods ranging from one to two weeks at a time, such periods of visit to his father to be, however, at such times as shall be mutually agreed on between the plaintiff and the said defendant, and will not in any wise interfere with the health or welfare of the said child. It is further adjudged that the final custody of said child, in case of the death of Sarah Shelby Shallcross during the minority of said child, shall not now be determined, but left open, and this action is reserved for such proceedings as may then be had. It is further adjudged that the defendant shall be charged with the reasonable and proper clothing and education of such child, and that the question of alimony to his wife be reserved for future determination, and this action is reserved for said purpose. It is further considered and adjudged by the court that each party shall restore to the other such property not disposed of at the commencement of this action as either may have obtained, directly or indirectly from or through the other, during marriage in consideration or by reason thereof."

It does not appear from the foregoing judgment, or any subsequent order found in the record before us, that the case was ever stricken from the court's docket. At any rate, on June 30, 1909, the same court, on motion of the appellant, Harry M. Shallcross, based on his affidavit then filed, granted and issued a rule against appellee, Sarah Shelby Shallcross, returnable July 5, 1909, requiring her to show cause, if any she had, why she should not comply with the judgment of April 29, 1907, by permitting him to see and be with their infant son as provided therein. In the affidavit for the rule appellant stated

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the appellee had not, since November 26, 1908, permitted him to see his son, Vernon Lewis Shallcross, and had repeatedly refused him the right to do so, or to have the child with him at any time, and had announced that she did not intend, in the future, to permit appellant to see or have him in his custody. Appellee, on the day the rule was returnable, filed a response thereto, in which it was admitted that she had refused appellant the privilege of seeing or having their child, and had announced her purpose to persist in such refusal as charged in appellant's affidavit for the rule, but stated, in substance, that she was constrained to so act because of the drunken and debauched habits and life of appellant from the excessive use of whisky and cigarettes; many instances being given of intoxication and boisterous and other unseemly conduct on his part in hotels, saloons, and other public places in the city of Louisville, some of which occurred when appellant had his son with him. It was further, in substance, stated in the response that appellant constantly kept whisky in his apartments, which he regularly drank in excessive quantities in the presence of his son, when the latter would visit him; that by indulging the whims of the child, and otherwise improperly influencing him, appellant attempted to wean his affection from appellee and make him disobedient to her; that the intemperance, profligacy, and evil example of appellant, manifested as stated, were well calculated to corrupt the mind and morals and ruin the life of the child, and that to avert such a catastrophe appellee believed it her duty to prevent further association between the father and son, for which reason alone she had for some time, as complained by appellant, refused his requests to have the child visit him as he had been accustomed to do.

Appellant by a pleading entitled an answer controverted all the affirmative statements of the response. Thereupon the court heard all the evidence introduced by the parties and thereafter rendered the following judgment: "The court being sufficiently advised, it is considered and adjudged that said response of the plaintiff is sufficient, and the rule awarded against her is hereby discharged at defendant's costs. It is further considered and adjudged that by the original judgment the plaintiff is given the custody and control of the child, Vernon Shallcross, and the defendant is not entitled thereby to any custody or control over said child, and the plaintiff's motion is therefore unnecessary and overruled. The court on its own motion sets aside as much of the provision in said judgment as gives the defendant the privilege of seeing his child at his home, and it is hereby ordered that the plaintiff shall send the child to the home of Henry T. Shanks at No. 619 Floral Terrace, in the city of Louisville, at 2 o'clock, p. m. on the 1st and 3d Saturday afternoons of each month, to remain until 6 o'clock of said day,

where the defendant may visit and see said child according to the opinion filed herein. Such visits, however, not to interfere with the welfare, health, and education of said child. Exceptions reserved to both parties, appeal to the Court of Appeals granted to the defendant, and a cross-appeal granted to the plaintiff." Being dissatisfied with the judgment appellant prosecutes this appeal.

His able counsel earnestly insist that the judgment complained of is but a modification of the first judgment, rendered in the action for divorce at a previous term, and that the court was without jurisdiction, and had not the power, upon a mere motion, to modify or vacate the former judgment after the expiration of the term at which it was rendered. Section 2123, Ky. St. (Carroll's Ed. 1909 [Russell's St. § 73]), provides: "Pending an application for divorce, or on final judgment, the court may make orders for the care, custody and maintenance of the minor children of the parties, or children of unsound mind, or any of them, and at any time afterward, upon the petition of either parent, revise and alter the same, having in all such cases of care and custody the interest and welfare of the children principally in view; but no such order for maintenance of children or allotment in favor of the wife shall divest either party of the fee-simple title of real estate."

It is not denied by counsel that the court rendering such a judgment as that referred to can modify or vacate it, after the expiration of the term at which it was rendered, but contended that, in order to enable it to do so, the power to that end must be reserved in the judgment itself, or its exercise invoked by the petition of a parent of the child to be affected. In all cases respecting the custody of a child the welfare of the child is the governing principle with the courts. The right of the father to have the custody of his child is, in its general sense, admitted, but this is not on account of any absolute right of the father, but for the benefit of the infant; the law presuming it to be for its interest to be under the care of its natural protector, both for maintenance and education. Neither the father nor mother, however, has any right that can be allowed to seriously militate against the welfare of the child. If the father be unfit to have the custody of his child, the courts will promptly declare his rights forfeited. The same is true of the mother, and neither parent is entitled to the custody, if it is manifestly against the child's welfare. In such a case the custody of the child will be awarded to a third person. If the child has reached years of discretion, its wishes will be considered, but will not always control. As between the parents, the tendency of the courts is to give very young children to the mother, especially in cases of divorce. Our meaning has been admirably expressed by Judge Robertson in the opinion in *Adams v. Adams*, 1 Duv. 167, as follows: "The welfare of in-

fancy, involving that also of the commonwealth, defines the sphere of parental duties and rights, and these preferred rights and duties are correlative. The character and destiny of the citizen are molded by the domestic tutelage of the nursing. Therefore, whenever the parents are separated by divorce, although *prima facie* the abstract right and duty of the father are superior to those of the mother, yet the court dissolving the union should confide the care and custody of their infant child to the parent most trustworthy and capable, and if neither of them shall be worthy of such a delicate and eventful trust, the interest of the child and the public may authorize the transfer of the custody to a stranger."

In this state courts of equity are given practically exclusive jurisdiction over the persons and property of infants, and the jurisdiction attaches from the very fact of the institution of an action or proceeding affecting the person or property of an infant, and at once makes him a ward of the court. When such jurisdiction is invoked in the infant's behalf, there are few, if any, inflexible rules of procedure. Even section 2123, Ky. St., which gives to the parent of an infant the right to apply by petition to a court of equity for the vacation or modification of a judgment with respect to the custody of the infant, rendered at a previous term, should not be so interpreted as to exclude any other remedy or course of procedure allowed under the rules of chancery, or that might be invoked or followed in a court of equity for such relief, unless the language of the statute sufficiently indicates that such was the legislative intent. On the contrary, it should, if such a meaning can reasonably be given its language, be construed as intended to add to the jurisdiction and power already possessed by courts of equity, or as affording an additional remedy to either divorced parent. At any rate we are unwilling to hold that the statute, *supra*, ties, or was ever intended to tie, the chancellor's hands until a parent acts in the matter. Besides the language of the statute itself recognizes and emphasizes the paramount duty of the court, which is to look to the child's welfare regardless of both parents, or, to quote from the statute, "having in all such cases of care and custody the interest and welfare of the children in view." Exercise of the power possessed by a court of equity with respect to the custody of an infant in such a case is not therefore dependent upon action upon the part of either of the divorced parents, or upon a reservation in the judgment of authority to subsequently change or modify it. The court need not have waited for either parent to take the initiative, but possessed the power to modify, upon its own motion, the previous judgment as to the custody of the infant, upon the state of facts

appearing in the response and established by the proof. We do not mean to say that the circuit court should at any time enter a judgment, or change one rendered at a previous term, as to the custody of a child without notice to the parents. In this case, however, both had notice. It does not lie in the mouth of appellant to complain that he was not served with a written notice of the proceedings resulting in the modification of the original judgment as to the custody of his son; for he instituted the proceeding by taking the rule against appellee, and thereby gave cause and opportunity for the filing of her response, the statements of which, together with the evidence introduced to support them, convinced the court of the necessity for modifying the first judgment to the extent that would prevent appellant from having the custody of his son at all. In this view of the matter we think appellant is estopped to complain of the want of previous formal notice of the action of the court in modifying the judgment, and likewise estopped to complain that the modification resulted without the filing of a petition therefor by appellee or himself.

We deem it unnecessary to discuss in detail the evidence upon which the circuit court acted in modifying the judgment as to the custody of the child, but we think it was sufficient to show that appellant is unfit to have the custody, even temporarily, of his son.

The circuit court did what it could and was authorized to do to protect the child. Wherefore the judgment is affirmed.

CRANE & BREED MFG. CO. v. STAGG'S ADM'R.

(Court of Appeals of Kentucky. Nov. 17, 1909.)

1. PLEADING (§ 301*)—AFFIDAVITS (§ 14*)—PLEADINGS EXECUTED IN ANOTHER STATE—SUFFICIENCY.

A pleading or affidavit to be used in Kentucky must be made and verified as required by the laws thereof, though executed in another state.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 301; * Affidavits, Dec. Dig. § 14.*]

2. EXECUTORS AND ADMINISTRATORS (§ 227*)—ACTIONS AGAINST—VERIFICATION OF CLAIMS.

Ky. St. § 3870 (Russell's St. § 3901), provides that all demands against the estate of a decedent shall be verified by the claimant's written affidavit. Civ. Code Prac. § 544, defines an affidavit as a written declaration under oath made without notice to the adverse party. Section 550, subsec. 1, provides that any affidavit by law may, unless otherwise expressed, be made by his agent or attorney if he be absent from the county. Section 117 provides that an affidavit of a private corporation must be verified by its chief officer or agent, etc., or, if it have no such officer or agent in the county in which the action is brought, that it may be verified by its attorney. Section 549, subsec. 2, provides that an affidavit may be made out of the state

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

before any officer or person who may be authorized pursuant to section 564 to take depositions, and section 564 authorizes the taking of depositions out of the state before a notary public, etc. *Held*, that the affidavit of a nonresident corporation claimant against the estate of a decedent may be made before a notary at its chief office or principal place of business in the state of its residence by its chief officer, or, in his absence from the county of its principal place of business, by its treasurer or other authorized agent, the affidavit in the latter case to show the official title of the chief officer, his absence from the county, and the authority of the treasurer or other agent to make the necessary affidavit, and such an affidavit which does not purport to have been made by the corporation's chief officer, or state that he was absent from the county, or that the corporation's treasurer, in the absence of its chief officer from the county, was authorized to make the affidavit, is insufficient.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 811-818; Dec. Dig. § 227.*]

3. EXECUTORS AND ADMINISTRATORS (§ 227*)—ACTIONS AGAINST—AFFIDAVIT OF CLAIM—SUFFICIENCY.

Under Ky. St. § 3871 (Russell's St. § 3902), providing that, if any part of the demand of a claimant against a decedent's estate has been paid, the affidavit of claim shall state the payment, and, when it was made, to the best of affiant's knowledge and belief, an affidavit of a claim upon an account which embraced sales of merchandise from claimant to decedent covering a period of four years, aggregating \$1,463.71, upon which decedent had made during that period numerous payments, all credited on the account, amounting to \$1,062.91, leaving a balance due of \$400.80, which affidavit treated the balance, not as a balance, but as representing decedent's entire indebtedness from start to finish, was insufficient.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 811-818; Dec. Dig. § 227.*]

4. EXECUTORS AND ADMINISTRATORS (§ 227*)—ACTIONS AGAINST—AFFIDAVIT OF CLAIM—SUFFICIENCY.

Under Ky. St. § 3870 (Russell's St. § 3901), which requires that, when a person other than the claimant against a decedent's estate makes affidavit to the claim, he shall state in his affidavit that he believes the claim to be just, and shall give the reason why he so believes, an affidavit by an employé of a claimant on an account against an estate giving as the only reason for his belief as to the correctness of the account that he had examined claimant's books, and found that the account against decedent appeared on the books as on the copy of the account to which his affidavit was attached, is insufficient.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 811-818; Dec. Dig. § 227.*]

5. EXECUTORS AND ADMINISTRATORS (§ 431*)—SUIT TO COMPEL SETTLEMENT BY ADMINISTRATOR—NECESSITY FOR VERIFIED AFFIDAVITS OF CLAIMS.

Where a creditor sued in equity to compel the settlement of an estate by an administrator, under Civ. Code Prac. § 428, and the payment of debts, including plaintiff's claim, making the administrator, decedent's heirs, and such of the creditors as were known to plaintiff defendants, and the petition charged that the administrator was delaying settlement, stated the amount of the estate's indebtedness, the value of its property, that the personal property was not sufficient to pay the debts, alleged the necessity for a sale of realty for such purpose, asked a ref-

erence of the case to a master commissioner for taking proof as to creditors' claims, and reporting assets and liabilities of the estate, and closed with a prayer for personal judgment for plaintiff's debt, with interest, and for a settlement of the estate, etc., it was unnecessary that payment of plaintiff's claim should have been demanded of the administrator before the institution of the action, and it was error to dismiss the suit because of a failure of plaintiff to present such affidavit; the object of the statute requiring the claimant, before bringing an action on his claim, to make demand of payment, being to afford the personal representative an opportunity to pay it without cost of suit, which would not be necessary where there are no assets in the hands of the personal representative with which to pay decedent's debts, or such as he may have are insufficient for that purpose, and decedent left real estate liable for such debts.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1679-1682; Dec. Dig. § 431.*]

Appeal from Circuit Court, Mercer County.
"To be officially reported."

Action by the Crane & Breed Manufacturing Company against Matilda Staggs' administrator. Judgment of dismissal, and plaintiff appeals. Reversed and remanded.

B. F. Roach, for appellant. Thomas H. Hardin, for appellee.

SETTLE, J. This is an appeal from a judgment of the Mercer circuit court dismissing appellant's action upon the grounds that the account of \$400.80 against the estate of Matilda Staggs, deceased, sued on, had not been verified, or its payment demanded of the administrator before suit, as required by sections 3870-3872, Ky. St. (sections 3901-3903, Russell's St.). Attached to the account filed with the petition were two affidavits; the first being that of appellant's treasurer, and the second that of another person, presumably an employé of appellant, who made oath as to the correctness of the account from a comparison of it with the original entries contained in appellant's books. The first affidavit was insufficient. In the first place, it did not purport to have been made by appellant's chief officer, or state that such chief officer was absent from the county in which appellant's chief office is situated at the time the affidavit was made, or that appellant's treasurer, in the absence of the chief officer from the county, was authorized to make the affidavit. Appellant is a corporation created and doing business as such under the laws of Ohio, and its chief office or place of business is in that state, as is the residence of its chief officer.

A pleading or affidavit to be used in Kentucky must, though executed in another state, be made and verified as required by the laws of Kentucky. Section 3870, Ky. St., provides: "All demands against the estate of a decedent shall be verified by the written affidavit of the claimant, or in his absence from the state, by his agent, or if

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

dead, by his personal representative, stating that the demand is just, and has never to his knowledge or belief been paid, and that there is no off-set or discount against the same, or any usury therein; and if the demand be other than an obligation signed by the decedent, or a judgment, it shall also be verified by a person other than the claimant, who shall state in his affidavit that he believes the claim to be just and correct and give the reasons why he so believes." Civ. Code Prac. § 544, thus defines the word "affidavit": "An affidavit is a written declaration under oath, made without notice to the adverse party." Subsection 1, § 550, provides: "Any affidavit which, this Code requires or authorizes a party to make may, unless otherwise expressed, be made by his agent or attorney, if he be absent from the county." By yet another provision of the Civil Code of Practice, viz., section 117, a pleading or affidavit of a private corporation "must be verified by its chief officer or agent upon whom a summons in the action is lawfully served, or might be lawfully served if it were a defendant; or if it have no such officer or agent in the county in which the action is brought, or is pending, it may be verified by its attorney." It will be observed that neither the sections of the statutes nor those of the Code, supra, offer any obstruction to the right of appellant to make or execute the affidavits in verification of its claim in the state of Ohio. They merely provide how the verification shall be effected if made or to be used in this state. The Code (section 549, subsec. 2) does, however, provide: "That an affidavit may be made * * * out of this state, before any officer or person who may be authorized, pursuant to section 564 to take depositions." And section 564 authorizes the taking of depositions out of this state "before a commissioner appointed by the Governor thereof; or before any other person empowered by a commission directed to him by consent of the parties, or by order of the court; or before a judge of a court, a justice of the peace, mayor of a city, or notary public." Therefore the claimants' affidavit, in proof of appellant's demand against appellee, might have been made before a notary at its chief office or principal place of business in Ohio by its chief officer, or, in his absence from the county in which such chief office or principal place of business is situated in that state, by its treasurer, or other authorized agent. In the latter case, however, the affidavit should, by an appropriate statement, be made to show the official title of the chief officer, his absence from the county, and the authority of the treasurer or other agent to make the necessary affidavit. None of these essential facts appear in the affidavit made by the treasurer, and their omission, as we have already intimated, rendered it fatally defective.

We think the affidavit defective in another

particular. It fails to state the decedent's full indebtedness to appellant according to the account as originally rendered, or to indicate the payments for which the account on its face shows she was given credit. In other words, the affidavit treats the \$400.80, balance due on the account, not as a balance, but as representing the decedent's entire indebtedness to appellant from start to finish; whereas, according to the account itself, it embraced sales of merchandise from appellant to the decedent covering a period of four years, aggregating \$1,463.71, upon which she made, during the same period, numerous payments, all credited on the account and amounting in the aggregate to \$1,062.91, which, subtracted from the total indebtedness, left a balance due appellant of \$400.80. In addition to what section 3870, Ky. St., directs to be stated in the affidavit of the claimant, section 3871 requires: "If any part of the demand has been paid, or there be any set-off or discount against the same, or any usury therein, the affidavit shall state the payment or usury, when the payment was made, and when the off-set or discount was due, to the best of the affiant's knowledge and belief. * * *"

The second affidavit accompanying the account, made doubtless by an employé of appellant, appears to be defective in one particular. It gives but a single indefinite reason for the affiant's belief as to the correctness of the demand sued on, viz., that he had examined appellant's books and found that the account against the decedent appeared on the books as on the copy of the account to which his affidavit was attached. Though without personal knowledge of the sales to the decedent of any of the merchandise set forth in the account, if, in addition to what is said in his affidavit, this employé had therein stated he was familiar with the merchandise described in the account as having been sold the decedent and its market value during the period covered by the account, that the various sums charged in the account therefor were reasonable and the customary prices for such goods, and that it appeared from the original entries that the merchandise therein described was sold the decedent as of the dates respectively therein specified—it would have made the affidavit sufficiently conform to section 3870 of the statute, supra, which requires that the person other than the claimant "shall state in his affidavit that he believes the claim to be just and correct, and give the reason why he so believes." *Dewhurst v. Shepherd*, 102 Ky. 239, 43 S. W. 253, 19 Ky. Law Rep. 1260. But, notwithstanding the conclusions we have expressed as to the insufficiency of the affidavits furnished by appellant in proof of its claim, we are nevertheless of opinion that the circuit court erred in dismissing the action on that ground, or because of the alleged failure of demand.

We find from the record that the action was one in equity brought under section 428, Civ. Code Prac., by appellant as a creditor of the decedent to compel a settlement by the administrator of her estate and the payment of the estate's indebtedness, including its claim of \$400.80. The administrator, heirs at law of the decedent, and such of the creditors as were known to appellant were made defendants, and the petition, as amended, charges that the administrator is delaying the settlement of the decedent's estate in order to obtain profit in its business from the interest realized on the money belonging to the decedent's estate it has received; states with particularity the amount of the estate's indebtedness, the nature and value of the property, real and personal, left by the decedent; that the personal property is not sufficient to pay the debts; and alleges the necessity for a sale of the real estate or such part thereof as will realize an amount, which together with the proceeds of the personalty will be sufficient to pay the decedent's debts. The petition also fully described the real estate, asks a reference of the case to the master commissioner for taking proof as to the claims of creditors and reporting the assets and liabilities of the estate, and closes with the prayer for a personal judgment against the administrator for appellant's debt with interest, for a settlement of the estate, and all necessary general and equitable relief.

In view of the object of the action and the fact that appellant's claim, as well as those of all other creditors of the estate, must be properly proved as required by the statute before they are filed with and allowed by the commissioner, it was unnecessary that payment thereof should have been demanded of the administrator before the institution of the action by the presentation to him of the claim accompanied by the necessary statutory affidavits. *Huffman v. Moore's Adm'r*, 101 Ky. 288, 41 S. W. 292, 19 Ky. Law Rep. 461; *Grey v. Lewis*, 79 Ky. 453; *Hamilton v. Wright*, 87 S. W. 1093, 27 Ky. Law Rep. 1144. The object of the statute in respect to the verification of claims against decedents' estates is to protect them against unjust or fraudulent claims, and the reason for requiring the claimant, before bringing an action on his claim, to make demand of payment, is to afford the personal representative an opportunity to pay it without cost of suit, and at the same time have a legal voucher of such payment. If, however, there are no assets in the hands of the personal representative with which to pay the decedent's debts, or such as he may have be insufficient for that purpose, but the decedent left real estate liable for such debts, there can be no reason or necessity for a creditor's presenting his claim, accompanied by the statutory affida-

vit, to the personal representative, in order to entitle him (the creditor) to bring suit for the purpose of subjecting such real estate to the payment of the decedent's debts, including his own. As well said in *Huffman v. Moore's Adm'r*, supra: "Indeed, the right to bring an action such as this is expressly given to a creditor by section 428, Civ. Code Prac. And that right is not thereby made conditional upon compliance by the creditor with the terms prescribed by the statute in order to maintain an action ordinary to recover personal judgment against the administrator or executor. Of course, an action such as this involves a reference to the master commissioner of court to pass upon and report, subject to approval of court, in regard to every claim or demand that may be presented, each of which must be verified, and approved as required by statute before being allowed." When appellant's claim against the decedent's estate is presented to the commissioner, it can then be, and should be, verified and proved in the statutory manner.

On account of the error committed by the circuit court in dismissing the action, the judgment is reversed, and cause remanded for further proceedings consistent with the opinion.

BROADWAY COAL MINING CO. v. DAVIS.

(Court of Appeals of Kentucky. Nov. 16, 1900.)

1. MASTER AND SERVANT (§ 279*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—SUPERIOR SERVANTS.

In a miner's action for injuries by a coal car which broke loose and ran over plaintiff, the car having been chocked under the direction of another employe, evidence held to show that such employe was plaintiff's superior, and had authority to control his work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 978; Dec. Dig. § 279.*]

2. MASTER AND SERVANT (§ 231*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—RELIANCE ON MASTER'S CARE.

Where plaintiff, a coal miner, notified his superior that a coal car was off the track, and such superior brought a gang and put it on the track, and, before it was chocked under the personal direction of the superior, plaintiff resumed his work with his back to the car, plaintiff could assume that the latter would have the car securely chocked so as to prevent injury from its getting away.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 675; Dec. Dig. § 231.*]

3. APPEAL AND ERROR (§ 1002*)—FINDINGS—CONCLUSIVENESS—CONFLICTING EVIDENCE.

The Supreme Court is reluctant to interfere with a finding on substantially conflicting evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.*]

4. APPEAL AND ERROR (§ 1033*)—HARMLESS ERROR—INSTRUCTIONS—ERROR FAVORABLE TO PARTY COMPLAINING.

In a coal miner's action for injuries caused by a car breaking away and running over him, an instruction to find for plaintiff if an-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ther servant, who was superior in authority to plaintiff, "and" was engaged in a different line of work, by gross negligence caused the car to run over him was more favorable to defendant than to plaintiff, since by using the word quoted it required a finding that the negligent servant was not only superior to plaintiff, but was engaged in a different line of work.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4056-4058; Dec. Dig. § 1033.*]

5. MASTER AND SERVANT (§ 202*)—INJURIES TO SERVANT—GROSS NEGLIGENCE OF SUPERIOR SERVANTS.

A servant is entitled to recover from the master for injuries caused by the gross negligence of a superior servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 535-537; Dec. Dig. § 202.*]

6. MASTER AND SERVANT (§ 191*)—INJURIES TO SERVANT—NEGLIGENCE OF CO-SERVANT.

A servant is entitled to recover from the master for injuries caused by the negligence of a collaborer engaged in a different line of work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 475; Dec. Dig. § 191.*]

7. MASTER AND SERVANT (§ 294*)—INJURIES TO SERVANT—INSTRUCTIONS—NEGLIGENCE OF FELLOW SERVANTS.

In a coal miner's action for injuries caused by a car breaking away and running over him, an instruction to find for plaintiff if his foreman choked the car, or ordered another than plaintiff to do so, and plaintiff did not, and could not, know by exercise of ordinary care that it was improperly secured, was erroneous as authorizing a recovery if the accident was caused by the negligence of a fellow servant in choking the car under orders from the foreman; thus virtually abolishing the fellow-servant rule.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1162; Dec. Dig. § 294.*]

8. APPEAL AND ERROR (§ 1066*)—HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT.

In a miner's action for injuries by a coal car, which broke loose and ran over plaintiff, the evidence showed that the car was choked under the personal direction of another servant, who was plaintiff's foreman, and the issues were whether such other servant was plaintiff's superior, and, being present, directed others to choke the car, or whether plaintiff himself assisted in choking it. The court instructed that if plaintiff's foreman choked the car, or ordered another than plaintiff to do so, and plaintiff did not, and could not, know that it was improperly choked, the jury should find for him. *Held* that, while the instruction was erroneous, considered abstractly, as authorizing a recovery if the accident was caused by the negligence of a fellow servant in choking the car under the foreman's direction, irrespective of whether the latter was present, in view of the evidence and issues it could not have prejudiced defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4220; Dec. Dig. § 1066.*]

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by J. T. Davis against the Broadway Coal Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Belcher & Sparks and Barnes & Anderson, for appellant. Heavrin & Woodward, for appellee.

CARROLL, J. The appellee, Davis, while engaged in a mine as a laborer for the appellant company, was seriously injured by a car running upon him. In this action to recover damages for the injuries sustained, the jury returned a verdict in his behalf for \$850. The judgment entered upon this verdict we are asked to reverse for reasons that will be pointed out in the course of the opinion.

The accident happened in this way: Davis, in connection with other employes, was directed by Jones, the mine boss, to load some cars in the mine with slate that it was desired to remove out of the mine. The track upon which the cars run descended at a heavy grade to the point at which they were placed to be loaded, and at this place there was considerable water running into the mine that made the rails very slippery. The track ended where Davis was engaged at work, and it was necessary to chock the cars to keep them from running off the end of the track. A short while before the accident in which Davis was injured the car he was loading, not being properly chocked, ran off the end of the rails, and Davis went to see H. C. Chumley, who was in charge of a gang of men some 200 feet away, to get him to bring his men down and put the car back on the track. In obedience to this request, Chumley and several of the laborers placed the car on the track, and went back to their work. After the car was placed on the track, Davis, who had been engaged in picking immediately at the end of the rails, resumed his work, with his back to the car, and had been so occupied for about 15 minutes when the car again got loose and run off the end of the rails and over and on Davis.

Two questions of fact are presented concerning which the evidence is conflicting—one is whether or not Chumley was a superior servant to Davis, and the other, whether Davis himself choked, or assisted in choking, the car that struck him. Davis testifies that, although Jones was the mine boss, and in general charge of all the laborers engaged in the mine, Chumley was the second superior officer to Jones, and, in the absence of Jones, had the control and direction of the work and the laborers engaged in the mine, and that when in obedience to his request Chumley and the gang of men employed immediately with him came to put the car on the track, Chumley remained in charge of the car until after it had been choked under his immediate direction, and that when the car was placed on the track, and before it was choked, he (Davis) went back to his work, leaving the choking of the car to Chumley and the laborers with him, supposing that Chumley would see to it that the car was properly choked, and that he relied upon the fact

that Chumley would do this, and did not personally give any attention to the manner in which it was chocked. On the other hand, Chumley and other witnesses testify that Davis assisted in chocking the car, and was directed by Chumley to chock it so that it would not run off the track again. We think the evidence sufficiently shows that Chumley was the superior of Davis, and had the authority to direct and control his work, and that Davis, accepting his testimony as true, had the right to assume that Chumley, who was immediately in charge of the matter, would have the car chocked so that it would not run off the track. Upon the question whether or not Davis assisted in chocking the car, there is more difficulty. The weight of the evidence shows that he did assist in chocking it, and that Chumley told him in substance to chock it so that it would not run off the track. But, as we have often said in matters like this, we are reluctant to interfere with the finding of a jury upon a disputed question of fact.

In instruction No. 1 the jury were told that the law was for the plaintiff if they believed from the evidence that, while he was exercising ordinary care for his own safety, "one Chumley, who was superior in power and authority to Davis, and who was engaged in a different line of work, by gross negligence caused and occasioned the car to run down upon and over him." This instruction is criticised because of the use of the word "and" after the word "Davis." But the instruction is more prejudicial to Davis than the company, as in it the jury were required to believe that he was not only superior in authority, but also engaged in a different line of work, although Davis was entitled to recover if injured by the gross negligence of a superior or the negligence of a colaborer engaged in a different line of work. *L. & N. R. Co. v. Brown*, 127 Ky. 732, 106 S. W. 795, 32 Ky. Law Rep. 552, 13 L. R. A. (N. S.) 1135.

Instruction D, reading: "If the jury believe that the defendant, Chumley, chocked the car, or ordered another than the plaintiff to chock it, and plaintiff did not know, and could not have known by ordinary care on his part, that the car was improperly secured, and the injuries were inflicted as supposed in the first instruction, then the jury should find for the plaintiff"—is complained of. The objection to this instruction urged by counsel is that, if Chumley ordered a fellow servant of Davis, engaged with him in loading slate, to chock the car, and he did it in a negligent manner, the company would nevertheless be liable, and it is said this

would virtually abolish the fellow-servant rule, as whenever two or more fellow servants were directed by their superior to do a certain thing, and any one of them was negligent in the performance of his labor, the master would be responsible for injury to the other laborers resulting from it? The instruction as an abstract statement of law, and disassociated from the evidence in this case, is open to the objection urged against it, and as counsel well say the master would be responsible, in almost every instance, for injuries inflicted upon one fellow servant by another if he merely directed all of them to do certain work. But, when the jury considered this instruction in connection with the evidence, they could not well have been misled by it. There is no conflict in the evidence about the fact that Chumley was present when the car was put back on the track, and when the laborers undertook to chock it. The dispute comes up concerning whether or not Davis was directed by Chumley to and did assist in chocking the car, or whether or not Chumley, being present, directed some of the other persons to do it. It is evident that the court gave the instruction upon the theory presented by the evidence that Chumley was present, and he himself chocked the car, or ordered one of the other employes than Davis to do it, and that if Davis did not know it had not been properly done, the company was liable. Taking this view of the matter, the instruction is not so objectionable as if Chumley, who the jury had a right to assume was the foreman, himself chocked the car, or directed any person other than Davis, who was not assisting, to chock it. He owed a duty to Davis to exercise ordinary care to properly chock it; and, if he failed to do so, the company was liable. If the court had inserted in the instruction the words "who was present" after the word "Chumley," there could be no criticism made of the instruction; but, as it is, we do not believe that it prejudiced the substantial rights of the appellant. The whole case of Davis was predicated upon the idea that Chumley, his superior, was present looking after the chocking of the car, and that he (Davis) had nothing to do with it. On the other hand, the theory of the company was that Chumley was not the superior of Davis, or, assuming that he was, that Davis, himself, chocked the car or assisted in doing so. Upon these two lines the case was contested in the lower court, and the jury could not well have been mistaken in the meaning of the instruction.

Wherefore the judgment of the lower court is affirmed.

SMITH et al. v. AGNEW.

(Court of Appeals of Kentucky. Nov. 18, 1909.)

1. **INSURANCE (§ 116*)—INSURABLE INTEREST.**
One not a creditor nor related to insured has no insurable interest in his life.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 158-162; Dec. Dig. § 116.*]

2. **INSURANCE (§ 122*)—LIFE INSURANCE—ASSIGNMENT OF POLICY.**

An instrument assigning a policy of insurance to one having no insurable interest, to hold the same unto the assignee and to be paid to him at maturity, the assignee agreeing on any settlement of the policy that there should be first deducted all the then existing indebtedness to the company, without expressing what the assignee is to do, or that he is to do anything, is void and unenforceable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 166, 167; Dec. Dig. § 122.*]

3. **INSURANCE (§ 122*)—ASSIGNMENT OF LIFE POLICY—"WAGERING CONTRACT."**

A policy of life insurance, assigned to one having no insurable interest, with an agreement that the assignee should pay the premiums, and, when the policy was paid, retain the amount so paid and a certain part of the surplus, is void as a "wagering contract."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 166, 167; Dec. Dig. § 122.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7365-7368, 7831.]

Appeal from Circuit Court, Henderson County.

"To be officially reported."

Action by George W. Smith and others against R. W. Agnew and the Mutual Life Insurance Company of New Jersey. The action having been dismissed on demurrer as against Agnew, plaintiffs appeal. **Affirmed.**

Vance & Heilbronner, for appellants. W. P. McClaim, for appellee.

CARROLL, J. In 1884 the Mutual Benefit Life Insurance Company of Newark, N. J., issued to George W. Smith a policy of insurance for \$3,000 in consideration of his agreement to pay an annual premium during his life. The beneficiaries named in the policy were his children, now the appellants. Smith died in 1908, and after his death the beneficiaries brought this suit against the insurance company and R. W. Agnew, alleging that in 1904 their father, the insured, entered into a written contract with Agnew by the terms of which Agnew agreed to pay all annual premiums that might thereafter fall due, keep the policy in force until the death of the insured, and, upon his death, collect the amount due on the policy, and, after deducting and retaining the premiums paid by him, the balance of the amount paid by the insurance company was to be divided equally between Agnew and the beneficiaries in the policy. They further averred that in pursuance of the agreement the policy was assigned and transferred to Agnew, and that, if the policy had lapsed or become of no effect, it was because Agnew had failed to perform his

part of the contract and pay the annual premium. They sought judgment against Agnew for their part of the policy. Agnew was called on in the pleading to produce and file the policy of insurance, as well as the contract entered into between himself and Smith. Thereupon Agnew filed the policy, as well as the contract of assignment, which reads as follows: "For value received we do hereby assign, transfer and set over unto R. W. Agnew the above-named policy of insurance, and all sum or sums of money, interest, benefit and advantage whatsoever, now due or hereafter to arise, or to be had or made by virtue thereof; to have and to hold unto the said R. W. Agnew and to be paid to him at maturity the said assignee hereby agreeing that in any settlement of the said policy there shall first be deducted all then existing indebtedness to the company on said policy." A demurrer interposed by Agnew was sustained, and, declining to plead further, the petition as to him was dismissed.

The only question before us is the correctness of the ruling of the court in dismissing the petition as to Agnew. It is conceded in the brief of counsel that Agnew did not have any insurable interest in the life of Smith, not being his creditor, or related to him in any way. Under the pleading the rights of the parties are to be determined by the written contract, and it is manifest from it, taken in connection with the fact that Agnew did not have any insurable interest in the life of Smith, that the contract was void and unenforceable in its inception and at all times thereafter. It has been settled by repeated decisions of this court that a person who has not an insurable interest in the life of another cannot take an assignment of an insurance policy upon such life. The authorities are fully collected in the case of Hess v. Segenfeiter, 127 Ky. 348, 105 S. W. 476, 32 Ky. Law Rep. 225, 14 L. R. A. (N. S.) 1172. As the contract was void—in fact, no contract—it is clear that a cause of action predicated upon it cannot be maintained, as the law will not enforce what it has forbidden and denounced. Bromley v. Washington Life Insurance Company, 122 Ky. 402, 92 S. W. 17, 28 Ky. Law Rep. 1300, 5 L. R. A. (N. S.) 747, 121 Am. St. Rep. 453. The case of Vaughan v. Reddick, 106 S. W. 292, 32 Ky. Law Rep. 531, relied on by counsel for appellants, does not support his contention. In that case Vaughan, the insured, made a contract with Reddick, a stranger, to pay the premiums upon the policy and assigned the policy to him as security. The only interest that the assignee, Reddick, had in the policy, was to hold it as indemnity for what he might pay in the way of premiums. The court held that this contract was valid; the only question in the case being whether or not a person who had for a sufficient consideration obligated himself to pay the premiums could be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

made liable in an action for a breach of his contract. It was not decided that a person who had no insurable interest in the life of another might by assignment or otherwise acquire an interest in the policy independent of or in excess of the amount paid as premiums. It has never been held that an insured might not make a valid contract with another who had no insurable interest in his life to pay the premiums, nor that he might not pledge to the person paying the premiums so much of the policy as was necessary to secure him in the amount of premiums paid. In this kind of a contract the question of insurable interest is not involved, as the person paying the premiums has no interest in the policy except as security for the premiums paid. If the policy had been assigned to Agnew under an agreement by which he was to hold it as security for any sums he paid as premiums, then under the authority of *Beard v. Sharp*, 100 Ky. 606, 38 S. W. 1057, 18 Ky. Law Rep. 1029, and other cases, Agnew could retain a sufficiency of the proceeds realized from the policy to reimburse him for the amount of premiums paid. And so, if Agnew for a sufficient consideration had agreed to pay the premiums, and failed to do so, thereby causing loss to Smith, Smith could, as held in *Vaughan v. Reddick*, supra, sue him for a breach of the contract and recover the damages he sustained. But in the case at bar the written contract upon which the action is based is an unconditional assignment of the entire policy to Agnew without expressing what he is to do or that he is to do anything. This being so, the contract was void, and consequently nonenforceable. But if we should assume that Agnew, independent of the writing, agreed to pay the premiums, and when the policy was paid retain the amount so paid and one-half or any other part of the surplus, the contract as a whole would likewise be void. The contract of assignment, whether looked at as it appears in the writing, or as it is stated in the petition, is nothing more nor less than a wagering speculative contract of insurance. If it should be upheld, the barriers that the court have set up to prevent wagering insurance would be of little effect. To avoid the prohibition it would only be necessary to stipulate that the assignee should in consideration of the payment of the premiums have such interest in the policy as might be agreed upon.

The petition does not charge that Agnew ever paid or agreed to pay any premiums, except in consideration of the fact that he was to become an equal owner in the policy with Smith, and receive in addition to the premiums he might pay one-half of the amount received on the policy, and the attempt is to recover from Agnew one-half the amount of the policy, or, to be more accurate, that part of the policy that Smith was to receive under the contract. In other words, the legal

effect of the contract is precisely the same as if Agnew had taken an assignment of the policy and agreed to pay Smith \$100 or any other specified amount for it.

The question presented is not like that considered by the court in *Beard v. Sharp*. There the contract made by the insured with Sharp as assignee of the policy was similar to the contract here made by Agnew, but in that case the money realized on the policy was paid to Sharp as assignee, who had fully performed his contract. And the question before the court was whether or not Sharp as against the beneficiary was entitled to hold that part of the insurance the contract gave him the right to retain, or only so much as would cover the premiums paid by him, and it was held that he could only retain the amount of the premiums. Here the attempt is made to specifically enforce an invalid executory contract. There is no claim that Agnew ever paid any premiums or did any other thing entitling him to an interest in the policy.

The judgment of the lower court dismissing the petition is affirmed.

KIDD v. BELL et al.

(Court of Appeals of Kentucky. Nov. 18, 1909.)

1. HUSBAND AND WIFE (§ 15*)—DEEDS—INTEREST PASSING—INTEREST OF WIFE—CONSTRUCTION OF DEED.

Where the grantor's wife was not named in the deed, the testimonium clause merely reciting that she relinquished her right to dower interest in land, in testimony whereof she subscribed her name, and the clerk's certificates recited that she had appeared and declared that she signed and sealed relinquishment of dower of her own free will, etc., no interest of the wife in the land passed under the deed; she having merely relinquished her dower interest therein.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 95-97; Dec. Dig. § 15.*]

2 PARTITION (§ 63*) — SUFFICIENCY OF EVIDENCE.

In an action to sell land for partition claimed to be owned jointly with defendant, in which the latter claimed a part thereof under title bonds, weight of evidence held to show that no title bonds were ever executed to him.

[Ed. Note.—For other cases, see *Partition*, Dec. Dig. § 63.*]

3. HUSBAND AND WIFE (§ 187*)—CONVEYANCES—VALIDITY.

Where the statute directing the manner in which a married woman could convey real estate was not complied with in the execution of a title bond by a married woman, it was ineffectual.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 722, 723; Dec. Dig. § 187.*]

4. ADVERSE POSSESSION (§ 100*)—EXTENT OF POSSESSION—NECESSITY OF HOSTILE CLAIM.

Where defendant thought that a tract which he fenced and on which he erected a barn was a part of land he had purchased, and did not then know it was a part of land now claimed by him by adverse possession, his possession would not extend beyond the fenced part, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was not available to sustain an adverse claim to other land.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 551; Dec. Dig. § 100.*]

5. ADVERSE POSSESSION (§ 111*)—STATUTORY PROVISIONS.

Defendant could not claim by adverse possession in partition proceedings a two-acre tract which he had fenced, where in his pleadings he did not describe such tract and claim to have held it for more than 15 years; Civ. Code Prac. § 125, requiring the answer in an action to recover land to state whether defendant claims any part of the land, and, if so, to describe that part claimed so as to identify it.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 646-650; Dec. Dig. § 111.*]

6. TENANCY IN COMMON (§ 3*)—CREATION OF RELATION.

Defendant was a joint tenant or tenant in common with the other owners, where the deeds under which he claimed referred to the land conveyed as undivided sixth interests.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 8; Dec. Dig. § 3.*]

7. TENANCY IN COMMON (§ 15*)—ADVERSE POSSESSION."

While a tenant in common may hold adversely against his co-tenant to make his possession adverse, it must be open, notorious, and hostile to the other co-tenant, and known by him to be so.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 1, pp. 227-236; vol. 8, p. 7568.]

8. ADVERSE POSSESSION (§ 41*)—LIMITATIONS—TIME.

An adverse claim to land made shortly before the beginning of the action in which it was set up was not available to give title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Dec. Dig. § 41.*]

9. PARTITION (§ 16*)—TITLE—COMMON SOURCE.

A party to a partition suit need not trace his title beyond the common source of title of all the parties.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 52; Dec. Dig. § 16.*]

10. LIMITATION OF ACTIONS (§ 195*)—BURDEN OF PROOF—RUNNING OF LIMITATIONS—REMOVAL OF DISABILITY.

The burden was upon one claiming land by adverse possession against a married woman under a deed from her husband to show that the period within which she could have asserted her rights to prevent the running of limitations after her husband's death had elapsed, in that her husband died more than three years before the beginning of the action in which the adverse possession was set up.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 714; Dec. Dig. § 195.*]

Appeal from Circuit Court, Wayne County.
"Not to be officially reported."

Action by Sally Bell and others against H. P. Kidd. From a judgment for plaintiffs, defendant appeals. Affirmed.

John W. Tuttle and Harrison & Harrison, for appellant. Cress & Cress, for appellees.

LASSING, J. Appellees brought suit against appellant, H. P. Kidd, in the Wayne circuit court, wherein they sought to have

sold five tracts of mountain land for the purpose of dividing the proceeds among themselves, alleging that they and the appellant, Kidd, were the joint owners thereof in unequal interests, and that the land could not be divided between them without materially impairing its value. It being made to appear that three of the plaintiffs owned an interest in but one of the tracts described in the pleadings, the plaintiffs were required to elect whether they would proceed to have the four remaining tracts sold or the tract in which the three plaintiffs owned an interest. They elected to have the four tracts sold, and the case was dismissed as to the three plaintiffs claiming an interest in only the fifth tract.

Appellants claim title to the lands in question as the only heirs at law of William Carson, who died in 1869, leaving six children Sally Bell, Laurana Steele, Cynthia Dolan, Linda Koger, Rebecca Jones, and Cyrenus Carson, each of whom as heir at law of their father acquired an undivided $\frac{1}{6}$ interest in the property in question. The two first named, to wit, Sally Bell and Laurana Steele, are still living. Cynthia Dolan died in 1906, leaving six children, who jointly claim their mother's interest, or $\frac{1}{6}$, and each is therefore entitled to $\frac{1}{36}$. Linda Koger died many years ago, and the appellant, Kidd, has procured by purchase from her children and heirs at law $\frac{7}{8}$ of her interest in the estate of her father, or $\frac{7}{48}$ of the entire tract in litigation. Rebecca Jones and Cyrenus Carson each sold and transferred their entire interest to the defendant, Kidd, making his undivided interest in the four tracts of land $\frac{23}{48}$. The petition admits that Kidd is the owner of $\frac{23}{48}$, and claims that the appellees are the owners of the remaining $\frac{25}{48}$. The defendant in his answer traverses the material allegations of the petition, denies that plaintiffs or any of them owned any interest whatever in the land in controversy, and alleges that he is the sole owner thereof by purchase from the various claimants. He further pleads and relies upon the statute of limitations as a bar to their right of recovery, alleging that he had been in the actual, peaceable, and continuous adverse possession of the property for more than 15 years. He further pleaded that he had made lasting and valuable improvements on the property which had greatly enhanced its value, and he asked that, if the plaintiffs be adjudged the owners of an interest therein, these improvements be taken into consideration, and that he be allowed therefor. The affirmative matter set up in the answer was traversed in the reply. Much proof was taken, and upon final submission the chancellor found that the plaintiffs owned an undivided $\frac{25}{48}$ interest, and that the defendant, Kidd, was the owner of an undivided $\frac{23}{48}$ interest

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

in the land. He further found that it could be divided without materially impairing its value, and he directed this to be done and the portions upon which the defendant, Kidd, had erected the improvements be set apart to him without placing any value whatever upon the improvements. From that judgment the defendant prosecutes this appeal.

Thus from the pleadings it is seen that appellant, Kidd, claims to be the owner of all of the land in question, first, by purchase; and, second, by adverse possession. He says he purchased the property in the following manner: That about 1880 William Bell and Sally Bell gave him a title bond for their undivided one-sixth interest, and that at that time William Bell held a title bond for the one-sixth interests of Cynthia Dolan and Cyrenus Carson in this land, and that he purchased from said Bell each of these title bonds. He thereafter procured a deed from Cyrenus Carson for his undivided interest, so his title to Cyrenus Carson's interest is not in question. He files a deed from H. S. Steele under which he claims to have purchased the interest of Laurana Steele in the estate of her father. In this deed she is not named as a party, and her name only appears for the purpose of relinquishing her right of dower; the recitation in the deed being as follows: "In testimony whereof the said H. S. Steele hath hereunto subscribed his name the day and date above written. The said Laurana H. Steele, wife of said H. S. Steele, relinquishes her right to dower in said land, in testimony whereof she hath hereunto subscribed her name as above." The certificate of the clerk relative to the signature of Mrs. Steele reads as follows: "And on the same day also voluntarily appeared before me the said Laurana H. Steele, wife of said H. S. Steele, to me well known, in the absence of her husband declared that she had of her own free will signed and sealed relinquishment of dower in the foregoing deed for the consideration, uses and purposes therein contained." The husband was the sole grantor, and the wife did not attempt to convey any interest which she might own in the land; and this intent on her part is evidenced not only by the fact that she is not made a party grantor in the deed, but the clerk who took the acknowledgment so understood, and so certified that she was merely relinquishing her right of dower in the land which her husband was conveying. This court in the cases of *Hedger v. Ward* and *Hobbs v. Hedger*, 54 Ky. 106, held that where the wife signed the deed purporting to convey on the part of her husband land which was the inheritance of the wife, and acknowledged the deed and relinquished dower in the land, such deed was ineffectual to pass the inheritance of the wife, as the deed contained no language indicating any intention to convey her right of inheritance. And, again, in the case of *Hatcher and Wife v. G. W. and N.*

P. Andrews, 68 Ky. 561, it was held that such a deed did not operate to divest the wife of any interest in the land which she had. Under the authority of these decisions, the deed from H. S. Steele to appellant, Kidd, did not operate to pass the interest of Laurana Steele in said land, and hence, if she is entitled to hold said land against her, it must be under his claim of adverse possession, and not by purchase.

There is a sharp conflict in the evidence as to whether or not the title bonds which appellant claims he procured for the interest of Sally Bell and Cynthia Dolan were in fact executed to him. Appellant swears positively that they were, while appellees testify just as pointedly that no such bonds were ever executed. Appellant says that the bonds were lost or misplaced, but it is a singular circumstance that, although he knew these bonds were lost during all the years that intervened between the date of the alleged purchase and the beginning of this litigation, he made no efforts to procure from appellees a deed for this land. The weight of the evidence is against the contention of appellant that these bonds were ever executed, but, even if this were not so, appellant's claim in this particular must fail for the further reason that at the date when these bonds were alleged to have been executed both Sally Bell and Cynthia Dolan were married women, and the statute then in force directed the way and manner in which a married woman could divest herself of title to real estate, and there is no pretense that the requirements of the statute were in any wise complied with, and, this being so, even if such a bond had been executed, as appellant claims there was, it would have been inoperative. Hence appellant's title to these interests must likewise rest upon his claim of adverse possession.

From his own testimony appellant shows that he resided upon one of these tracts of land for nine years and a tenant resided upon the same tract for two years prior to his occupancy, so that he has had actual possession for only 11 years, unless it is held that the possession of one William Spradlin, a tenant of appellant, who fenced something like two acres of ground supposed to be a part of this land, was such possession as would authorize a finding that it extended to the whole of said tract. It appears that upon this tract of land there was no building except a small stable or barn which stood upon the line, and appellant is not sure from his testimony whether any part of this building or the tract which was fenced by Spradlin is included within the Carson boundary, for he says there is a survey, known as the Hurt and Long survey, which is claimed to run in between the Carson land and the land owned by appellant, and he testifies that he does not know whether the stable in question did in fact stand upon the Carson land or not; that the

Hurt and Long survey has never been located, and he was not sure as to where the lines ran, and, while he claims that he has had the two-acre tract in possession and claimed same for about twenty-four years, he admits that when he directed his tenant, Spradlin, to take possession thereof, and authorized him to fence it, he claimed his tract "the same as any of it," and that he directed his tenant to take charge of that land as his. Evidently at that time, as he did not know where the Hurt and Long survey ran, he regarded this tract which was fenced and upon which the barn stood in part as a part of the land which he was purchasing from Spradlin, and, even though it was in fact a part of the Carson land, if he did not know it to be such, and was not claiming at that time the whole of the Carson land, his possession would not extend beyond his inclosure, to wit, the two acres, and, as he failed to set out and describe this two-acre tract and claim to have held it for more than fifteen years adversely, his claim to even that small portion of the entire tract must fail. Civ. Code Prac. § 125. Practically all of this land is wild mountain land, valuable only for its timber and minerals. The heirs of William Carson resided chiefly in the West, and there is no evidence that any of them knew that appellant was laying claim to any portion of the land except the interests which he had purchased, and as all the deeds under which he acquired these interests referred to the land as undivided sixth interests, etc., by each separate purchase he became a joint tenant or tenant in common with the remaining owners thereof; and, while it is possible for a joint tenant or tenant in common to hold adversely to his co-tenant, as said by this court in the case of Vermillion v. Nickell, 114 S. W. 270, to make the possession of a tenant in common adverse to the co-tenant, the possession must be open, notorious, and hostile to the other co-tenant and known by him to be so. Measured by this standard, appellant had at no time been in the adverse possession of any portion of this land prior to 1902 or 1903, when he made claim to a son of Sally Bell that he was claiming his mother's interest under a title bond. And this claim, of course, can be of no avail, for it was made but a short time before the institution of this suit.

Appellant's counsel in brief argues that the claim of appellees to tract 1 must fail for the reason that they failed to trace their title from the commonwealth to William Carson, their ancestor. The petition alleges that William Carson died seised and possessed of this land, and this allegation stands unchallenged. But, even if it were, inasmuch as appellant claims title through various deeds from brothers and sisters of appellees, he traces his title to a common

source with them, and under the repeated decisions of this court, where parties claim title from a common source, it is unnecessary to trace title beyond that source. *Barnett v. Mimick*, 17 S. W. 334, 13 Ky. Law Rep. 503; *Heard v. Cherry*, 92 S. W. 551, 29 Ky. Law Rep. 106; *Luen v. Wilson*, 85 Ky. 503, 3 S. W. 911, 9 Ky. Law Rep. 83. The case of *Heard v. Cherry*, supra, is directly in point, for it was there held that one tenant in common is not permitted to question the validity of the title of his other joint tenants.

The contention of appellant's counsel is that, even though his claim to the whole of this tract under his plea of adverse possession must fail as to some of the heirs, it is nevertheless good as to the interest of Laurana Steele therein for the reason that he took possession under the deed that was executed to him by her husband and has been holding same ever since openly, adversely, and notoriously against her interest, and that, while at the time he took possession thereof she was under the disability of coverture, her husband died more than three years before the institution of this suit, and therefore the time within which she might have asserted her right and prevented the running of the statute has elapsed, and the plea is now operative and good as to her. In this contention, however, he must fail for the reason that the record does not show affirmatively this fact. It is not clear from the evidence that Laurana Steele had been a widow as much as 3 years prior to the institution of this suit; and, the burden being upon appellant to establish this fact, he loses even if it be conceded that he had been in the actual adverse possession of this land for the 24 years, as claimed.

On the whole case we are of opinion that appellant has failed to make out a claim of adverse possession to any of this property. When he claims to have taken possession 24 years before the institution of the suit, it is evident that he was directing the tenant, Spradlin, to take possession of and hold the land which he had bought of Spradlin. He was not then aiming to seize the Carson land. He did not know the true boundary thereof, and, in fact, he understood that there was another survey in between the Spradlin land which he had purchased and the Carson land, and if, in attempting to take possession of his own land, he had unintentionally taken possession of some of the Carson land, he would acquire no rights to any portion thereof which he did not actually inclose and hold for the statutory period.

From a careful examination of the record, which is not altogether clear upon many points, we are convinced that the conclusion reached by the Chancellor was correct; and the judgment is therefore affirmed.

FERGUSON v. STATE.

(Supreme Court of Arkansas. Oct. 23, 1909.)

1. CRIMINAL LAW (§ 1159*)—APPEAL—REVIEW—VERDICT.

A verdict of the jury will not be disturbed on appeal if there is substantial evidence to support it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3075; Dec. Dig. § 1159.*]

2. HOMICIDE (§ 253*)—FIRST-DEGREE MURDER—EVIDENCE.

In a prosecution for homicide, evidence held to sustain a verdict of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

3. HOMICIDE (§ 152*)—MURDER—DEGREE—PRESUMPTION.

Under Kirby's Dig. § 1766, declaring that all murder by means of poison, lying in wait, or other malicious or premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or larceny, shall be deemed murder in the first degree, when the fact of killing alone is proved, it will be presumed that the crime is murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 280; Dec. Dig. § 152.*]

4. HOMICIDE (§ 22*)—FIRST-DEGREE MURDER—PREMEDITATION—DELIBERATION.

Under Kirby's Dig. § 1766, defining murder in the first degree, it is incumbent on the state, in order to sustain a conviction of that crime, to prove that the killing was done with premeditation and deliberation.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 37; Dec. Dig. § 22.*]

5. HOMICIDE (§§ 147, 152*)—FIRST-DEGREE MURDER—"PREMEDITATION."

"Premeditation" essential to the crime of murder in the first degree cannot be inferred from the fact of death, but there must be evidence of a prior intention to do the act of killing, though it is not necessary that such intention be conceived for any particular period of time.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 272, 280; Dec. Dig. §§ 147, 152.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5503-5507; vol. 8, p. 7760.]

6. CRIMINAL LAW (§ 730*)—TRIAL—ARGUMENT OF COUNSEL.

The state, in rebuttal, having introduced testimony that certain witnesses for defendant had made statements different from those which they made on the witness stand, the state's attorney in his argument referred to such contrary statements, and, on objection, stated that his argument was only in consideration of the truthfulness of the witnesses' statements, and the court charged that the testimony of contrary statements was not admissible on the question of the guilt or innocence of defendant, but only to impeach or discredit the witnesses contradicted. *Held*, that the attorney's argument was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

Appeal from Circuit Court, Howard County; James S. Steel, Judge.

Butler Ferguson was convicted of murder in the first degree, and he appeals. *Affirmed*.

J. D. Conway and W. P. Feazel, for appellant. Hal L. Norwood, Atty. Gen., C. A. Cunningham, Asst. Atty. Gen. (J. S. Lake and Geo. M. Chapline, of counsel), for the State.

FRAUENTHAL, J. The defendant, Butler Ferguson, was indicted by the grand jury of Howard county charged with the crime of murder in the first degree by killing Pet Henderson on the 30th day of May, 1909. Upon his trial he was convicted by a petit jury of that county of the crime of murder in the first degree; and from the judgment rendered upon that verdict he prosecutes this appeal.

The evidence on the part of the state establishes the following facts: The deceased, Pet Henderson, was a young man about 24 years old. On the afternoon of Sunday, May 30th, in company with two young men of about the same age, young Henderson went to a creek a short distance south from the town of Center Point for the purpose of swimming. After going along the creek for some distance, they decided they would not go in swimming because the water was too muddy. They then proceeded across a field towards the public road, and young Henderson was somewhat in the lead, and got to the road in advance of his companions. In this road Henderson met two small negro boys, whom he began chasing, and the negro boys became frightened and ran down the road for a distance to a negro church house, before which a crowd of colored people were lingering. In the crowd were Grant Whitmore and Tap Clardy, and the defendant was just across the road and within hearing distance from the crowd. To this crowd the negro boys ran, and told them about being chased by the deceased. In a short time after this the defendant, Grant Whitmore and Tap Clardy went up this road from the negro church towards where the deceased had chased the negro boys. In the meanwhile young Henderson, after chasing the negro boys, had returned to his two companions, who by that time had come out of the field into the road; and the three young men sat down on the ground next the side of the road, and engaged in friendly conversation. When the defendant, in company with the two parties who had proceeded from the negro church with him, got to a point in the road about 50 or 60 yards from where young Henderson and his two companions were seated next the road, the defendant said: "There sits that God damn Pet Henderson, the God damn son of a bitch. If he does anything to me, I will fix him." Henderson arose from where he was seated, and walked in the direction of the defendant, and the defendant continued along the road towards the deceased. Henderson was unarmed, and his hands were extended down by his side. When he came within a few steps of defend-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ant, Henderson spoke to defendant, and said: "Did you call me a God damn son of a bitch?" The defendant immediately drew his pistol, and began shooting at Henderson, and saying "I did." He shot three times in rapid succession, and, as Henderson was falling, he shot twice more; and then the defendant whirled around, and ran back towards the negro church. When Henderson walked towards the defendant and spoke to him, he had nothing in his hands, and at the time defendant shot him he was a few steps from the defendant, and was making no demonstration of any kind. There was testimony showing that the deceased and his two companions had drank some diluted alcohol a few hours before the killing, but the young men testified that it was not sufficient to affect them, and that they were not affected thereby. The defendant and his two friends testified that, when the deceased approached, he had a stick in his hand, and struck defendant with it, and that he was backing when he pulled his pistol and shot the deceased, firing five times. There was testimony showing that the defendant and his two friends did not state that the deceased had a stick or had struck him with a stick when they first narrated the circumstances of the killing; and there was other testimony contradicting the defendant and his two friends in their statements made upon the trial as to the manner and circumstances of the killing. But the two young companions of the deceased, who at the time of the killing were only a few steps distant, testified that the deceased did not have a stick, and that when he was shot his hands were empty and extended by his side, and that the deceased was making no demonstration when he was shot. Before the jury these witnesses appeared, and the jury were the judges of their credibility. The defendant and his two friends gave their testimony before the jury, and, in the light of their demeanor on the stand and in the light of all the evidence in the case, the jury were the judges to determine whether their statements were true, or only made to shield the defendant from a punishment for the perpetration of a great crime. It was peculiarly the province of the jury to determine the facts of this case; and it has been uniformly held by this court, that, if there is substantial evidence to sustain the findings of the jury as to questions of fact, its verdict will not be disturbed. *Hubbard v. State*, 10 Ark. 378; *Chitwood v. State*, 18 Ark. 453; *Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250; *Doghead Glory v. State*, 13 Ark. 236; *Dixon v. State*, 22 Ark. 213; *Harris v. State*, 31 Ark. 196; *McCoy v. State*, 46 Ark. 141; *Holt v. State*, 47 Ark. 196, 1 S. W. 61; *Williams v. State*, 50 Ark. 511, 9 S. W. 5. We have carefully examined the testimony in this case, and find that there is ample evidence to sustain the jury in finding the facts of the case to be as they were detailed by the state's witnesses; and it is upon these findings that the verdict of mur-

der in the first degree must necessarily be based.

It is urged by learned counsel for the defendant that the evidence on the part of the state is not sufficient to sustain the verdict of the jury convicting the defendant of murder in the first degree. The statutes of the state provide: Kirby's Dig. § 1766: "All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, malicious and premeditated killing, or which shall be committed in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary or larceny shall be decreed murder in the first degree." Section 1767: "All other murder shall be deemed murder in the second degree." When the fact of death alone is proved, the presumption is that the crime is murder in the second degree, and, before it can be determined that the crime is murder in the first degree, it is incumbent on the prosecution to prove further by evidence that the killing was done with premeditation and deliberation. The premeditation cannot be inferred from the fact of death, but there must be evidence of a prior intention to do the act of killing in question. But it has been universally held that it is not necessary that this intention be conceived for any particular period of time. As is said by Judge Battle in the case of *Green v. State*, 51 Ark. 180, 10 S. W. 280: "In order to constitute the killing of a human being murder in the first degree, there must be a specific intent to take life formed in the mind of the slayer before the act of killing was done. It is not necessary, however, that the intention be conceived for any particular length of time before the killing. It may be formed and deliberately executed in a brief space of time. If it was the conception of a moment, but the result of deliberation and premeditation, reason being on its throne, it would be sufficient. The law fixes no time in which it must be formed, but leaves its existence as a fact to be determined by the jury from the evidence." *Bivens v. State*, 11 Ark. 455; *McAdams v. State*, 25 Ark. 405; *McKenzie v. State*, 26 Ark. 339; *Fitzpatrick v. State*, 37 Ark. 256; *Casat v. State*, 40 Ark. 524; *King v. State*, 68 Ark. 572, 60 S. W. 951, 82 Am. St. Rep. 307; *Wharton on Homicide* (3d Ed.) § 152; *Bishop on Criminal Law* (7th Ed.) 728; *People v. Cornetti*, 92 N. Y. 85. The proof advanced in the case must be sufficient to satisfy the minds of the jury that the killing was willful, deliberate, malicious, and premeditated. But it is not necessary to show a specific motive or even a deep-seated ill will. The will of man acts under a variety of motives and varies with the man. One may be actuated by a deep-seated passion, another by a general intent to violate the law, no matter on whom the consequences may fall. Another may labor under a sense of a wrong or some indignity, real or fancied. But, if he deliberately kills the person by whom he sup-

poses himself to be aggrieved, or by whom he thinks some indignity has been done to another in whom he may take an interest, he is guilty of murder in the first degree, if the act was done with the premeditated design to kill. The motive may be inadequate or comparatively trivial, or the act may be done through a feeling of resentment. No matter how groundlessly it may be based, still if the killing, by whatever of these motives it may be actuated, is done with deliberation and after premeditation, it is murder in the first degree. 1 Wharton's Criminal Law (10th Ed.) § 121. Whether the defendant was incensed by having just heard that the deceased had chased the two negro boys in whom he may have felt an interest, or whether he had a resentment against deceased caused by reason of some fancied grievance, or whether he was bent on doing generally an unlawful act fall the consequences where they may, the evidence on the part of the state shows that he did the killing deliberately, and after premeditation and without provocation. Just before reaching the deceased, he spoke to him in a violent manner, applying to his name a vile epithet, and then spoke of "fixing him," and at the time he was armed with a deadly weapon. Here was evidence of malice and of premeditation, and, when in a few moments thereafter the deceased without making any demonstration accosted him, the defendant immediately fired at him, with an expression of words showing his design to kill was fixed; and, although the deceased was several steps away and wholly unarmed and made no demonstration, the defendant fired several shots and continued to fire after the deceased was falling. The jury was justified from this evidence in finding that the killing was willful, malicious, and deliberate. Where there is substantial evidence to support the verdict so that it cannot be said to be without evidence in any essential ingredient to the finding, the verdict should be permitted to stand. *Bivens v. State*, 11 Ark. 455; *Stanton v. State*, 13 Ark. 319; *Richardson v. State*, 47 Ark. 502, 2 S. W. 187; *Dow v. State*, 77 Ark. 404, 92 S. W. 28; *Wharton on Homicide* (3d Ed.) 156.

It is urged by counsel for defendant that error was committed by the trial court in permitting certain remarks to be made by the attorney on behalf of the prosecution in his argument to the jury. The state by way of rebuttal had introduced testimony showing that certain witnesses who had testified on behalf of the defendant had made statements different from those which they made on the witness stand. The state's attorney in his argument spoke of these contradictory statements made by these witnesses prior to the trial. Upon objection being made to the character of the argument, the court told the jury that such previous statements could only be considered for the purpose of impeaching the credibility of the witnesses, and that all remarks of the attorney relative to said state-

ments, except that going to impeach the credibility of the witnesses, was excluded. The state's attorney thereupon said to the jury that the remarks in his argument were only made "for the purpose of considering the truthfulness or untruthfulness of the statement of the witness." From this the jury fully understood that the previous statements of the witnesses could not be considered by them as substantive evidence of any fact in the case, but only for the purpose of impeaching the witness. Such argument for that purpose was warranted by the law, and with the statement and admonition of the court made to the jury at the time we do not think an undue advantage was secured by the argument which has worked a prejudice to the defendant. In addition to this, the court specifically instructed the jury relative to the testimony of these impeaching witnesses as follows:

"(10) You are instructed that the testimony of Jeff Reese and ——— Woodruff as to the statements made to them by the witness Grant Whitmore as to how the killing occurred can only be considered by you for the purpose of impeaching or discrediting the testimony given by said witness on the stand. This testimony cannot be considered by you as tending to establish the guilt or innocence of the defendant.

"(11) You are instructed that the testimony of Lee Garner and ——— Stuart as to the statements made to them or either of them by the witness John Ferguson, as to what he saw or heard of the killing, can only be considered by you for the purpose of impeaching or discrediting the testimony given by said witness while on the stand. His statements to them cannot be considered by you as tending to establish the guilt or innocence of the accused."

We do not think, therefore, that the verdict of the jury should be set aside or the punishment reduced by reason of the remarks of the attorney on behalf of the state. *Redd v. State*, 65 Ark. 475, 47 S. W. 119; *Kansas City Southern Ry. Co. v. Murphy*, 74 Ark. 256, 85 S. W. 428; *Noble v. State*, 75 Ark. 246, 87 S. W. 120.

There is no special instruction mentioned by counsel for appellant in their brief which they claim it was error to have given or to have refused. We have carefully examined all the instructions given by the court and all those that were refused, and in none of its rulings relative to these instructions do we find that any error was committed. The court fully and fairly instructed the jury on every phase of the case, and in those instructions presented every privilege and guarded every right that the defendant was entitled to.

The defendant has had the aid of able counsel. He has had a full and fair trial before a jury of the country. That jury has declared by its verdict that he is guilty of the crime of murder in the first degree; and

we find that there is ample evidence to sustain that verdict.

The judgment of the Howard circuit court herein is affirmed.

KIRCHMAN v. TUFFLI BROS. PIG IRON & COKE CO.

(Supreme Court of Arkansas. Oct. 25, 1900.)

1. SALES (§ 153*)—BREACH OF BUYER—TENDER.

Where, prior to the time for performance of an executory contract of sale, the buyer announced that he would not accept performance, the contract was broken, and the seller was absolved from any further duty to tender or ship the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 363; Dec. Dig. § 153.*]

2. SALES (§ 370*)—CONTRACT—CANCELLATION BY BUYER.

A buyer has no right to cancel the contract while the seller is not in fault without the seller's consent; and, if he does so, the seller may treat the repudiation as a breach of contract and sue for the breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1085; Dec. Dig. § 370.*]

3. SALES (§ 383*)—CONTRACTS—BREACH BY BUYER—ACTION BY SELLER—EVIDENCE.

Where a buyer, prior to the time for delivery, notified the seller that he would not accept delivery, the seller was entitled to recover for damages for breach of contract, without proof that he actually had the goods on hand, or tendered them or had actually sold the goods for less than the contract price.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1097; Dec. Dig. § 383.*]

4. SALES (§ 384*)—CONTRACTS—BUYER'S BREACH—MEASURE OF DAMAGES.

The measure of damages for a buyer's breach of a contract of sale is the difference between the contract price and the market value of the goods at the time and place of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.*]

5. SALES (§ 79*)—CONTRACT—PLACE OF DELIVERY.

Where an order for coke specified the quantity, grade, price per ton, and terms, "f. o. b. Van Buren, Ark.," it fixed the place of delivery at Van Buren.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 214-216; Dec. Dig. § 79.*]

6. SALES (§ 384*)—CONTRACTS—BREACH—MEASURE OF DAMAGES—NEAREST MARKET.

Where, in an action for a buyer's breach of a contract of sale, there was no market for the goods at the place of delivery, the market value at that place was the value of the goods at the nearest market, plus the cost of transportation to the place of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.*]

7. APPEAL AND ERROR (§ 216*)—INSTRUCTIONS—NECESSITY OF REQUEST.

A party cannot complain that an instruction given is not sufficiently specific, unless he has requested one more specific.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216;* Trial, Cent. Dig. § 623.]

8. SALES (§ 382*)—CONTRACT—BREACH—ACTION BY SELLER—EVIDENCE.

Where, in an action for buyer's breach of a contract to purchase 72-hour economy coke, he claimed that the coke shipped under the contract was not suitable for the purpose for which it was purchased, the seller was entitled to show the character and efficacy of such coke.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 382.*]

9. SALES (§ 377*)—CONTRACT—BREACH OF BUYER—PLEADING.

In an action for a buyer's breach of a contract to purchase coke, the buyer having repudiated the contract before expiration of the time for performance, the seller was not required to allege in his complaint the amount of coke it had prepared for shipment under the contract before it was terminated, especially in view of Kirby's Dig. § 6133, providing that in pleading performance of a condition in a contract, the facts showing performance need not be alleged, but it may be stated generally that the party duly performed all the conditions on his part.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1092; Dec. Dig. § 377.*]

10. SALES (§ 377*)—ITEMS OF DAMAGE—PLEADING.

In an action by a seller for breach of a contract of sale, repudiated by the buyer before the time of performance was past, it is not necessary for the complaint to allege the items of damage suffered, since the measure of damages is established by law.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1092; Dec. Dig. § 377.*]

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by Tuffli Bros. Pig Iron & Coke Company against William Kirchman. Judgment for plaintiff, and defendant appeals. Affirmed.

Sam R. Chew, for appellant. E. L. Matlock, for appellee.

FRAUENTHAL, J. This is an action instituted by the appellee against the appellant to recover damages for an alleged breach of contract. The complaint, in substance, alleged that on July 29, 1907, the appellant entered into a contract with appellee for the purchase of "six cars of 72-hour economy foundry coke," to be shipped to appellant between that date and July 1, 1908, as called for, at \$8.95 per ton of 2,000 pounds f. o. b. cars at Van Buren, Ark.; that at the request of appellant one car of said coke was shipped on October 2, 1907, and that thereafter the appellant countermanded the order, and refused to take and receive the remainder of the coke, and repudiated the contract, although the appellee fully complied with its part of the contract. It alleged that it was damaged by reason of the said breach of the contract by appellant in the sum of \$250, for which it asked judgment. The appellant made a motion to require the appellee to make the complaint more definite and certain by stating at what time and how many cars the appellee prepared for shipment and the items of the damages. The court overruled this motion. Thereupon appellant filed

his answer in which, in substance, he alleged that on receipt of the first car of coke he discovered that the coke would not answer the purpose for which he had purchased same, and he immediately countermanded the order, and directed the appellee not to ship any more coke on the contract.

It appears from the evidence in the case that the parties entered into the following written contract on July 29, 1907:

"To Tuffli Bros. Pig Iron & Coke Company, Sales Agents, St. Louis, Mo.—Dear Sirs: Please enter our order as follows: Quantity, six car loads. Grade 72 hr. Economy Fdy. Coke. Price \$8.95 per ton of 2,000 lbs. F. o. b. Van Buren, Arkansas. Terms cash 30 days. Shipment between now and July 1, 1908, as called for. Railroad weights at point of origin to govern settlements. All agreements are contingent upon strikes, accidents, car supply, railroad delays or other causes beyond our control. The above contract is not subject to any change or cancellation whatsoever without obtaining full consent of the sellers. Yours truly, The Engineering Works, Wm. Kirchman, Prop.

"Accepted. Tuffli Brothers Pig Iron & Coke Co., Sales Agents."

In October thereafter the appellee shipped to appellant at his request one car of coke, which was received and paid for. Not receiving request for further shipment, the appellee wrote to appellant, who, on May 2, 1908, replied as follows: "Gentlemen: We have your favor of the 30th ult. regarding coke shipments, and in view of the fact that business does not pick up as expected, and that we still have a large quantity of coke on hand, we consider it the best policy for all concerned to cancel the balance of this contract, as we are unable to tell at present when we will have capacity to store any more coke. Very truly yours, The Engineering Works, By William Kirchman, General Manager." Further correspondence passed between the parties when, on June 13, 1908, the appellant wrote to appellee as follows: "Van Buren, Ark. June 13, 1908. Tuffli Brothers Pig Iron & Coke Company. St. Louis, Missouri.—Gentlemen: Answering your favor of the 9th regarding coke still due on contract will say, we affirm our former letter canceling balance of order. We find that this coke does not come up to our expectations," etc. The evidence tends to prove that the remaining five cars of coke amounted to 125 tons, and that the market value of said coke declined \$1.90 per ton from the said contract price by June 13, 1908. There was no market value of the coke at Van Buren, the place of delivery, but the above market value was at the oven, the nearest place to Van Buren having such market, and with transportation from such place to Van Buren the decline in the market value of the coke from the contract price would have amounted to \$1.90 at Van Buren. The evidence tended further to prove that the coke

named in the contract was of a quality and grade sufficient for the purpose for which it was purchased. The jury returned a verdict in favor of appellee for \$237.50.

The questions that are presented by the appellant upon this appeal are determined by the nature of the above contract, its breach, and the character of this action. The parties had entered into an executory contract by which the appellant had agreed to purchase the commodity noted in the contract, which was to be shipped by the appellee upon request made therefor by appellant at any time from July 29, 1907, to July 1, 1908. The appellee was to perform the contract on its part by shipping the coke on request of appellant at any time up to July 1st. If during said time the appellant had made a request for the shipment of the coke, and the appellee had failed or refused to ship same, then appellant could have recovered from appellee such damages as he might have suffered by reason of such failure. But the appellant made no request for shipment, and before the time arrived for the performance of the contract on the part of the appellee, the appellant canceled the order, and by his letter of June 13th unqualifiedly announced that he would not receive the coke, and would not therefore accept performance of the contract on the part of appellant. The contract was then not rescinded, but broken by the appellant; and, by such repudiation of the contract, he absolved the appellant from any further duty to tender or ship the coke. 2 Mechem on Sales, § 1037. The appellee at this time of the repudiation of the contract by the appellant was not in any default, and it did not lie within the power of the appellant to end the contract without the consent of appellee. The appellee had then the right to treat this repudiation as a wrongful putting an end to the contract, and to at once bring his action as for a breach of it.

In the case of Roehm v. Horst, 91 Fed. 345, 33 C. C. A. 550, it was ruled that a positive and absolute refusal to carry out the contract prior to the date of actual default amounted to a breach of the contract, and that after the renunciation of the agreement by the one party the other party should be at liberty to consider himself absolved from any further performance of it, retaining his right to sue for any damage he has suffered from the breach of it. This case was affirmed by the Supreme Court of the United States in the case of Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, and we think correctly announces the rights of the parties under such circumstances. In the case at bar the appellant, by his letter of June 13th, absolutely and unqualifiedly canceled the contract and renounced its performance. The evidence tends to prove that prior to that time the appellee was ready and willing to perform the contract on its part. It was urging the appellant to send his request for the coke, so that appellee could ship it to him;

but the appellant refused to comply with the provisions of the contract on his part, and repudiated it on the ground, as he then claimed, that the coke did not come up to the requisite quality. That issue was presented to the jury, and it was decided against appellant. The appellee was therefore not in any default, and the appellant then wrongfully breached the contract. The appellee thereupon had the right to treat the breach as complete, and to sue for the damage he suffered thereby. It was not necessary then for the appellee to prove that it actually had the coke on hand and tendered same, or that it actually sold the coke for a less price than the contract price. *Tiedeman on Sales*, § 333; 2 *Mechem on Sales*, § 1091.

Upon a breach of contract to purchase goods by the buyer the general rule is that the measure of damages is the difference between the price fixed by the contract and the market value of the goods at the time and place of the delivery, provided the contract price exceeds said market value. *Glasscock v. Rosengrant*, 55 Ark. 376, 18 S. W. 379; *Morris v. Cohn*, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384; *Nelson v. Hirschberg*, 70 Ark. 39, 66 S. W. 347; 24 *Am. & Eng. Ency. Law* (2d Ed.) 1114. In this case the court gave an instruction as to the measure of damages conforming with this rule. It is urged by the appellant that "there is no proof where, under the terms of the contract, the coke was to be delivered." But the contract itself says that the coke was sold "f. o. b. Van Buren," and this therefore named the place of delivery. If there was no market at the place of delivery, then the value of the goods at the nearest market, plus the cost of transportation to the place of delivery, would be the market value of the goods at such place of delivery. *Tiedeman on Sales*, § 333. And the evidence in this case sufficiently showed the market value. The instruction given by the court on the measure of damages we think is in general terms correct. If the appellant desired that it should have been more specific in any respect, he should have requested an instruction in that regard himself. Failing to do that, he cannot now complain because the instruction, although correct, is too general. *Fordyce v. Jackson*, 56 Ark. 595, 20 S. W. 528, 597; *White v. McCracken*, 60 Ark. 613, 31 S. W. 882. The above principles of law governing the facts of the case will also show that the instructions numbered 1 and 2, as requested by the appellant, were rightly refused. One of the instructions in substance stated that before the appellee could recover in this case, it must show that it actually had the coke on hand, and the other stated that it must actually have sold the coke for a price less than that of the contract, before it could recover more than nominal damages.

The appellant complains of the admission

of certain testimony on the part of appellee relative to the character and efficacy of 72-hour economy coke. But we think no error was committed by its introduction, because the appellant was claiming that the coke was not suitable for the purposes for which he purchased, and the testimony thus admitted tended to prove that it was.

The appellant, before filing his answer herein, requested by motion that the complaint be made more definite, and says that error was committed by the trial court in overruling his motion. We have thought it best to consider this contention of appellant after the above statement of the principles governing this case, and which are involved in the cause of action as set out in the complaint. Inasmuch as, by reason of the repudiation of the contract by the appellant before the date of its performance, the appellee could treat it as breached, and at once sue for its damages without further performance on its part, the appellee did not have to allege in the complaint "how many cars of coke it prepared for shipment to defendant."

Furthermore the plaintiff in the complaint alleged, in substance, the performance by it of the conditions of the contract. Section 6133, *Kirby's Dig.*, provides: "In pleading the performance of a condition in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part."

And it was not necessary for the complaint to allege the items of damage, as requested by appellant. The law fixes the element and measure of the damage in case of a breach of such a contract as is involved in this case, and therefore it was not necessary to be more definite in the allegation of damage.

We have examined the testimony and the instructions, and we find no reversible error in the record. The judgment is affirmed.

PARKVIEW LAND CO. v. ROAD IMPROVEMENT DIST. NO. 1 OF JEFFERSON COUNTY.

(Supreme Court of Arkansas. Oct. 25, 1909.)

1. HIGHWAYS (§ 19*)—IMPROVEMENT DISTRICTS—VALIDITY OF STATUTE.

As Const. art. 7, § 28, giving the county court exclusive original jurisdiction of matters relating to county roads, does not specify in what manner the jurisdiction shall be exercised, the Legislature has power to prescribe the method by appropriate legislation not inconsistent with the Constitution; and hence Act No. 247, p. 568, Acts 1907, authorizing the county court of Jefferson county to form the whole of that county, or any part thereof, upon a petition of property owners, into a road improvement district for the purpose of constructing, repairing and maintaining public roads within the dis-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trict, was not violative of that section of the Constitution.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 19.*]

2. STATUTES (§ 64*) — VALIDITY — EFFECT OF PARTIAL INVALIDITY.

If Act No. 247, p. 568, Acts 1907, authorizing the county court of Jefferson county to form the whole or any part of that county into a road improvement district, contravened the power of the Legislature in authorizing the formation of the county into one road improvement district for the purpose of constructing new roads, it would still be valid in so far as it authorized the formation of a part of the county into one district for the purpose of repairing and improving public roads already in existence; that object of the act being perfectly distinct, so that it could stand, though the other fail.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

Appeal from Jefferson Chancery Court; J. M. Elliott, Chancellor.

Action by the Parkview Land Company against the Road Improvement District No. 1 of Jefferson County. Decree of dismissal, and plaintiff appeals. Affirmed.

Daniel Taylor, for appellant. Taylor & Jones and W. F. Coleman, for appellee.

BATTLE, J. The Parkview Land Company brought suit in the Jefferson chancery court against Road Improvement District No. 1 of Jefferson County, the directors thereof, and Citizens' Bank. It alleged in its complaint: That it is the owner of certain lands in Jefferson county, and that the same are situate within the boundaries of Road Improvement District No. 1, "which was formed under Act No. 247, p. 568, Acts 1907, and in conformity with the provisions thereof, for the purpose of constructing about eight miles of macadam and gravel road within the district, assessing the cost thereof against the real property benefited in the district.

"That A. Brewster, P. P. Byrd, and J. A. Clement are the duly appointed directors of said district, and that through them, as directors, the district has constructed about eight miles of road in Jefferson county, known as the 'Star City and Cornersville Road,' by grading, ditching, and macadamizing same with crushed rock and gravel at a cost of about \$30,000, for which bonds have been issued and sold, and pursuant to a resolution of the said board of directors are declared a lien upon the lands embraced in the district.

"That against plaintiff's land there is assessed a total betterment of \$16 upon which an annual tax of 6 per centum has been levied by the directors, which, by the terms of the act, is made a lien against all the lands of the district for which it is provided by said act plaintiff's land may be sold, if it be not paid.

"That Act No. 247, together with the bonds aforesaid, the assessment of betterments, and levy of annual taxes thereon purporting to

be a lien against the lands, are invalid, because the act under which the district was formed is in conflict with the provisions of the Constitution of Arkansas vesting exclusive jurisdiction over roads in the county courts.

"That the bonds of the district, together with the assessment of betterments against the lands and the levy of an annual tax of 6 per centum on the betterments provided by the act, and claimed to be a lien against the lands, constitute a cloud upon the title of plaintiff to the lands.

"Unless restrained the district will annoy plaintiff with numerous suits for the collection of the annual taxes.

"That the Citizens' Bank is the purchaser and holder of the bonds.

"Plaintiff prayed that the bonds, together with the resolution, contract, and all acts of the board of directors in declaring the bonds to be a lien upon the lands of the plaintiff, be canceled and held for naught; that the assessment of betterments against the lands and levy of the annual tax before mentioned be canceled and held for naught, and that the district be enjoined from assessing any betterments against the lands of plaintiff, or levying any annual or other tax on such betterments for the purpose of paying the cost of said improvement or reducing the bonds or any thereof, and that plaintiff's title be quieted in it free of such lien."

The defendants answered, and denied "that the act conflicts with the provisions of the Constitution. They stated that the improvement contemplated and as actually made was for the purpose of improving a county road in Jefferson county, already in existence, by the construction of what is known as a macadam or gravel road over, upon, and along such county road as mentioned in the complaint for a distance of about eight miles between the terminal points on the county road as stated; that no part of the road is a new road, nor was it contemplated that any portion of such improvement should involve the laying out or establishing of any new public road or any portion thereof whatsoever.

"They denied that the bonds, assessment of betterments, and levy of taxes now claimed and purporting to be a lien on plaintiff's lands are invalid."

The court found that "the improvements contemplated by the formation of road improvement district No. 1, and as actually made thereunder, were solely for the purpose of improving a county road in Jefferson county, Ark., already in existence, and which county road is an old and established county road of the county, and has been for many years, and that the road so improved is in no part a new road, nor was it contemplated that any portion of such improvement should involve the laying out or establishing of any new public road, or any portion thereof what-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

soever," and dismissed the complaint for want of equity. The evidence sustained the findings of the court. Plaintiff appealed.

Appellant contends that Act No. 247, of the Acts of General Assembly of 1907, under which Improvement District No. 1 was formed, is unconstitutional, because it is in conflict with section 28 of article 7 of the Constitution, which is as follows: "The county courts shall have exclusive original jurisdiction in all matters relating to county taxes, roads, bridges, ferries, paupers, bastardy, vagrants, the apprenticeship of minors, the disbursement of money for county purposes and in every other case that may be necessary to the internal improvement and local concerns of the respective counties. * * *"

Act No. 247 is, in part, as follows:

"Section 1. Whenever a majority in value of the owners of real property in a county or any part of a county (such majority in value to be determined by the assessment for purposes of general taxation in force at the time) shall present a petition to the county court of any county in this state, praying for the formation of a road improvement district, the said county court shall, after having given public notice for twenty days by printed copies in ten places in said county or part thereof, one of which shall be posted on the principal door of the courthouse of said county, or by publication in some newspaper published in said county, determine the fact that such petition is so signed by such majority in value of said landowners. * * *

"After such hearing, or opportunity to be heard, the said county court shall determine, and so enter upon the records, the fact of existence or nonexistence of the assent of the said majority in value to the prayer of said petition. If the said county court shall make an order declaring that the said petition contains a minority in value of the landowners within the territory described in said petition and accompanying map, then the said finding shall be entered of record, and shall not thereafter be questioned except for fraud in the making thereof. Upon ascertaining, as aforesaid, that the necessary majority in value of the landowners have requested the formation of said district, the said county court shall make an order declaring the same to be and exist under the name and style of 'Road Improvement District No. — of the county of —.' That the said district shall be and become a body politic and corporate by said name and may sue and be sued, implead and be impleaded, and have perpetual succession for the purpose of building, constructing, repairing and maintaining, within the territory described in said petition and order, such public roads as may be mentioned in said petition. * * *

"Sec. 3. In the order declaring said road improvement district to exist, the court shall appoint three persons, owners of real property therein, who shall compose a board of directors for the district. * * *

"Sec. 9. The said board of directors shall have and they are hereby vested with, power and authority, and it is hereby made their duty to build, construct, maintain, and repair such road or roads within their respective districts as provided in the petition as may be deemed necessary to carry out the improvement contemplated, and in doing so shall expend sums of money authorized to be levied and collected under authority of this act. * * *

"Sec. 12. As soon as said board of directors shall have formed the plan of improvement, and shall have ascertained the cost thereof, it shall report the same to the county judge, who shall appoint three electors of the county, who shall constitute a board of assessment of the benefits to be received by the several and particular tracts of lands, or other subdivision of land within said district by reason of the proposed local improvement. * * *

"Sec. 23. Annually during the month of September all road improvement districts created under this act shall file with the clerk of the county in which such improvement district is formed, a settlement showing all collections and moneys received and paid out, with proper vouchers for all such payments, which settlement shall lie over for one month for examination and adjustment, during which time any taxpayer of such district may file exceptions to such settlement.

"Sec. 24. Whether any such exceptions are filed or not, the county court shall proceed to examine such settlement, and shall disallow all unjust charges and credits, if any there be, and shall readjust such settlement whenever an improper item may be included in it, which adjustment shall be finally subject to re-examination in a court of chancery for error or mistake, upon suit brought by such board or by any taxpayer of such district. * * *

"Sec. 28. All roads built, constructed, maintained and repaired under authority of this act shall be public roads, and after the roads shall have been built, constructed, maintained and repaired, the same shall be and constitute a part of the general highways of the county, to be thereafter cared for and maintained by the county court out of the general revenues and special road tax authorized by the Constitution and laws of the state of Arkansas. And in building, constructing, maintaining, or repairing said roads it shall be lawful for the county court, from time to time, to supplement by specific allowances out of the general revenues and special road tax aforesaid, the revenues raised under the authority of this act for the purposes thereof, to the end that the tax levied under the authority of said general laws shall be equitably and fairly apportioned to the several localities in the county, including therein the districts formed under authority of this act."

The act provides that it shall apply only to Jefferson county.

It (act) is not in conflict with the Constitution of this state. Section 28 of article 7 of the Constitution, which defines the jurisdiction of county courts, does not specify or indicate in what manner the jurisdiction shall be exercised. In the absence of such specifications, the Legislature has the power to prescribe by appropriate legislation not inconsistent with the Constitution how it shall be exercised. Cooley's Constitutional Limitations (7th Ed.) 126, 236, 242. In the exercise of this power it has from time to time specifically and without question prescribed on what conditions and in what manner public roads and highways shall be laid out, opened, and repaired, the failure of the county court to comply with the mandatory provisions of which renders the orders and judgment of the court invalid (Kirby's Dig. §§ 2992-3016); and in the same manner has prescribed how and by what agencies or instrumentalities such roads and highways shall be repaired and maintained (Kirby's Dig. §§ 7223-7358); and without such legislation the court can do and has done nothing.

Act No. 247 does not usurp the jurisdiction of the county court. It was passed to aid the court in the accomplishment of its object. For that purpose it authorizes the county court to form road improvement districts, to appoint their boards of directors and assessment of benefits, and requires the directors to annually account to it for moneys received by them, and authorizes the court to aid them (improvement districts) by specific allowances out of the revenues at its disposal for the construction, repair, and maintenance of roads; and provides that, after "the roads shall have been built, constructed, maintained and repaired, the same shall be and constitute a part of the general highways of the county, to be thereafter cared for and maintained by the county court." Where the roads are in the condition the improvement districts were formed to place them, the districts cease to exist, and the roads become subject to the care and control of the county court as they were before the formation of the districts; they (districts) being temporary expedients adopted to assist the county court in doing the work imposed upon it, and are not usurpers, but friends and allies of the county court, created by it by authority of the act for the accomplishment of one of its duties—instrumentalities of the county court for that purpose.

If it be true, as contended, that the Legislature cannot authorize the formation of the county into one road improvement district for the purpose of constructing new roads, it can so form a part of the county for the purpose of repairing and improving public roads already in existence as held in *Road Improvement Dist. No. 1 v. Glover*, 117 S. W. 544, and to that extent Act No. 247 is valid. It comes within the rule to the effect that, "where a statute is divisible and

a portion of it is repugnant to the Constitution, so much of the statute is to be upheld as does not conflict with the Constitution and the enactment sustained by rejecting the objectionable part."

As to when a statute is divisible, Judge Cooley in his work on Constitutional Limitations says: "When, therefore, a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter, depending on each other, operating together with the same purpose, or otherwise so connected together in meaning that it cannot be presumed the Legislature would have passed the one without the other. The constitutional and unconstitutional provisions may be even contained in the same section, and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section, for the distribution into sections is purely artificial, but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If a statute attempts to accomplish two or more objects, and is void as to one, it may still be in every respect complete and valid as to the other. But, if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall unless sufficient remains to effect the object without the aid of the invalid portion. And, if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and, if all could not be carried into effect, the Legislature would not pass the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." Cooley's Constitutional Limitations (7th Ed.) 246-248. See *Little Rock & Ft. Smith Ry. Co. v. Worthen*, 46 Ark. 312, 328, 329; *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030; *Gray v. Matheny*, 66 Ark. 36, 48 S. W. 678; *State v. Marsh*, 37 Ark. 357; *State v. Deschamps*, 53 Ark. 490, 14 S. W. 653; *Cribbs v. Benedict*, 64 Ark. 555, 44 S. W. 707.

The Act 247 authorizes the county court of Jefferson county to form the whole of that county, or any part of it, upon a petition of the majority in value of the owners of real property in the territory formed, into a road improvement district "for the purpose of building, constructing, repairing, and maintaining" public roads within such district.

It is obvious that the act is divisible according to the rule as stated by Judge Cooley, and that so much of the act as authorizes the formation of the whole county into one district and authorizes the building and constructing of new roads can be stricken out, and that so much as authorizes the formation of a part of the county into road improvement district for the repairing, maintaining, and improving roads in existence is complete within itself, and can be executed in accordance with the apparent legislative intent, without the aid of the part so stricken out and wholly independent of it, and is therefore sustained, and the remainder of the act is rejected and declared void. Road Improvement District No. 1 v. Glover.

Having decided the only questions submitted for our consideration, the decree of the chancery court is affirmed.

WAGNER v. CITIZENS' BANK & TRUST CO.

(Supreme Court of Tennessee. Nov. 13, 1909.)

1. **BANKRUPTCY (§ 326*)—CLAIMS—SET-OFF.**
Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), providing that, in cases of mutual debts or credits between the estate of a bankrupt and a creditor, the account shall be stated, and one debt shall be set off against the other, does not enlarge the doctrine of set-off, or enable a party to have a set-off, where the principles of legal or equitable set-off do not authorize it.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. § 326.*]

2. **BANKS AND BANKING (§ 136*)—GENERAL DEPOSITS—RELATION BETWEEN BANK AND DEPOSITOR.**

The relation of a bank to its general depositor is that of debtor to the depositor, and the bank holds a lien on the general deposit to secure repayment of the depositor's indebtedness.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 353; Dec. Dig. § 136.*]

3. **BANKS AND BANKING (§ 153*)—SPECIAL DEPOSITS—RELATION BETWEEN BANK AND SPECIAL DEPOSITOR.**

A bank does not have a lien on special deposits, or on money deposited for a specific purpose, as for collateral security, or for the payment of a particular debt.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 356; Dec. Dig. § 153.*]

4. **BANKS AND BANKING (§§ 134, 136*)—SPECIAL DEPOSITS—SET-OFF.**

A bank, dealing with a depositor as trustee, and recognizing funds standing in his name as trust funds, and knowing them to be such, cannot appropriate the same to the payment of an individual debt to the bank, as there is no right of set-off against a trust deposit, nor any lien for the trustee's personal debts.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353, 356; Dec. Dig. §§ 134, 136.*]

5. **BANKS AND BANKING (§ 134*) — SPECIAL DEPOSITS—SET-OFF.**

Where, pursuant to an agreement between the creditors of an insolvent business concern, funds of the concern were deposited in a bank, which was a creditor, for pro rata distribution among all the creditors, and the bank, through

its president, consented thereto, and the funds were not to be checked out without the signature of the representative of the committee of the creditors, the funds were trust funds for a specific purpose, with the consent of the bank, and it had no right to set-off in such funds against the concern's indebtedness to it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 356; Dec. Dig. § 134.*]

6. **BANKRUPTCY (§ 140*)—RECOVERY OF FUNDS BY TRUSTEE.**

A trustee in bankruptcy may recover funds deposited in a bank by the bankrupt for the benefit of all the creditors, pursuant to an agreement between the creditors, including the bank.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 221; Dec. Dig. § 140.*]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Suit by T. H. Wagner, trustee in bankruptcy of the Wilcox Furniture Company, against the Citizens' Bank & Trust Company. From a decree for complainant, defendant appeals. Affirmed.

Pritchard & Sizer, for appellant. White & Martin and Burkett, Miller & Moore, for appellee.

McALISTER, J. Complainant, as trustee in bankruptcy of the Wilcox Furniture Company, a bankrupt corporation, filed the present bill to recover the sum of \$6,110.98 alleged to be due the bankrupt. The bill alleges that at the date of the adjudication of bankruptcy against said Wilcox Furniture Company, and also at the date of the appointment of the complainant as trustee in bankruptcy of said company, there was on deposit in the custody of the Citizens' Bank & Trust Company a fund, amounting to \$6,110.98, belonging to said Wilcox Furniture Company, and which fund was a part of its assets. It is alleged that said fund was impressed with the character of a trust fund, and was accumulated under circumstances which fixed upon defendant Bank & Trust Company the character of trustee in relation to said fund. It is alleged in the bill that said money was accumulated as the result of an agreement among the creditors of the said bankrupt, including defendant bank, to the effect that the assets of the bankrupt should be collected, and the proceeds deposited in the defendant bank, and distributed pro rata among all the creditors. It is alleged that at the meeting of the creditors the defendant Citizens' Bank & Trust Company was represented by its president, G. N. Henson, and he concurred in the course then adopted, and agreed to act with the local creditors in pursuing whatever plan might be devised, and to share with them pro rata in the division of the proceeds which might be realized from the sale of the assets of the said Wilcox Furniture Company. It is then alleged that, after the appointment of a temporary receiver in the bankruptcy case, the defendant "set up a claim to said trust fund then on deposit in the bank, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

claimed the right to set off, as against said fund, a large amount of indebtedness owing to it from the Wilcox Furniture Company."

It is then claimed that, under the facts set forth in the bill, the defendant is "estopped from appropriating said funds to its own use, to the exclusion of other creditors, or from setting up any adverse claim to the said fund, or from withholding the same from your complainant."

The defendant bank, in its answer, admitted that on the date of the adjudication in bankruptcy there was a balance of \$6,110.98 due from it to the bankrupt on deposit in its bank; but it averred that the bankrupt was indebted to the defendant by notes in an amount exceeding said balance, and that said credit balance in favor of the bankrupt was applied pro tanto to the payment of said notes. The bank denied that it held any trust fund belonging to the Wilcox Furniture Company at the time of its adjudication in bankruptcy, or that it was a trustee of said bankrupt with relation to any fund. It admitted that it had refused to pay said credit balance to complainant, and denied the allegations of the bill asserting a right in complainant to recover the same.

Proof was taken, and on the hearing the chancellor decreed that the deposit account in the defendant bank was impressed with the character of a trust fund for the benefit of all the creditors of the Wilcox Furniture Company, and that defendant bank was estopped from appropriating the same to its own use, to the exclusion of the other creditors. He accordingly pronounced a decree in favor of the complainant and against the defendant bank for the sum of \$5,810.98, but declined to allow any interest on the recovery, and adjudged the cost against the complainant.

The defendant bank appealed, and has assigned the following errors:

- (1) That the bank is clearly entitled to the right of set-off claimed in its answer; and
- (2) That the trustee in bankruptcy has no right to enforce the alleged trust in behalf of the creditors, even if one existed.

The material facts necessary to be noticed are that in the spring of 1907 the Wilcox Furniture Company was indebted to various creditors in the sum of about \$40,000, and had also become delinquent in the payment of its current bills. The resident creditors, after securing inventories and examining into the condition of the company, extended to it further time on its past-due indebtedness, receiving from it notes therefor, and during the summer of 1907 the company succeeded in paying to each of the Chattanooga creditors about 25 per cent. of their respective claims. In the fall of 1907, on account of the financial panic that was then prevailing, the furniture company became still further embarrassed, and about October 1st the local creditors of the concern had another meeting in the city of Chattanooga, and, after conferring with

the officers of the company, determined, with their consent, to convert the assets of the furniture company into cash, which should be deposited in the defendant bank, and only so much thereof used as might be necessary to defray current expenses and satisfy the claims of persistent creditors, and the surplus, after the accumulation of sufficient funds, should be divided pro rata among all the creditors, both local and foreign. A committee of three was appointed to represent the interests of all the creditors, and especially to see that the policy adopted by the meeting should be faithfully executed. It was also determined at the said meeting that the committee so selected should appoint a competent bookkeeper, by and with the consent of the Wilcox Furniture Company, who should be placed in the office of that company to represent the interests of the creditors, but who at the same time should be on the pay roll of the furniture company. It should be stated that the defendant bank, as a creditor of the furniture company, was represented at said meeting by its president. At a subsequent meeting a rule was adopted, with the consent of the defendant bank, whereby all the checks drawn by the president of the Wilcox Furniture Company against its bank deposit should be countersigned by the representative of the creditors' committee, and without such signature should not be honored by the bank.

The clear weight of the proof is that Mr. G. N. Henson, president of the Citizens' Bank & Trust Company, attended a number of meetings held by the creditors of the Wilcox Furniture Company and definitely agreed to the policy adopted by the committee of husbanding the resources of the furniture company, which should be deposited in the defendant bank, and after a sufficient accumulation the fund should be divided pro rata among all the creditors of the furniture company. We cannot, of course, undertake to detail the testimony establishing this proposition, and can only state our conclusion as to the weight of the testimony from an examination of the record. We think it undeniable on this record that the Wilcox Furniture Company was insolvent, at least from the date of the appointment of J. L. Morrison as the representative of the committee, and that this fact was known to the bank. The fact is the Wilcox Furniture Company was unable to meet its obligations as they matured in the usual course of business during the spring, summer, and fall of 1907. The proof shows that J. L. Morrison, the representative of the creditors' committee, prepared weekly financial reports of the condition of the furniture company, which he submitted to the creditors' committee. These reports commenced November 21, 1907, and continued down to the close of the week ending January 4, 1908. Mr. Morrison testifies that he kept Mr. Henson advised daily as to the condition of its affairs, and that Mr. Henson ap-

proved of the policy of the committee. The trustee in bankruptcy testified that claims amounting to \$33,718.90 had been proven against the bankrupt mercantile corporation. He further testified that all the assets of the furniture company had been disposed of, and the entire amount that came into his hands was \$9,941.02. It appears that the furniture company was indebted to the defendant bank, when the bankruptcy proceedings were commenced, in the sum of \$7,363, and that after the present suit was commenced the defendant bank applied the sum of \$6,110.98, standing to the credit of the furniture company on the books of the bank at the close of banking hours on January 17, 1908, to the indebtedness of the Wilcox Furniture Company, leaving the sum of \$1,252.50 as the balance due the bank, which it filed as a claim against the bankrupt. It appears that on January 7, 1908, the cash balance standing to the credit of the Wilcox Furniture Company in the Citizens' Bank & Trust Company was only \$217.17. It appears that the receipts from the total sales of the business conducted in the usual manner were not more than sufficient to defray the current expenses. The creditors of the company were becoming impatient, and some were threatening litigation. In this crisis the creditors' committee determined to throw the stock of goods on the market and dispose of them at auction sale. This mode of converting the stock of the company into cash was approved by the creditors, including the defendant bank. Accordingly auction sales were commenced on January 8th, and were continued from day to day until January 11th, when certain nonresident creditors of the Wilcox Furniture Company filed a petition of involuntary bankruptcy against it. At this date there was on deposit in the defendant bank the sum of \$4,761.25, which had been accumulated as the result of the first three days of the auction sale. Application was made to the trustee in bankruptcy to allow the sales to continue, and under an arrangement with the trustee the sales were continued for two or three days after the petition in bankruptcy was filed. The sum of \$2,301.72 was realized from the auction sales after the petition in bankruptcy was filed. We find from the proof that the fund which the bank is now seeking to set off against the indebtedness due it from the furniture company was accumulated as the result of the auction sales, and that it was understood by the defendant bank that this fund was being deposited with it as a special fund for pro rata distribution among all the creditors of the Wilcox Furniture Company.

The defendant bank bases its right to a set-off on section 68a of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450]), as follows:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt

and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

In the case of *New York, etc., Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, the Supreme Court of the United States, in dealing with the clause just mentioned, says:

"Section 68a of the bankruptcy act of 1898 is almost a literal reproduction of section 20 of the act of 1867."

In *Sawyer v. Hoag*, 17 Wall. 610, 21 L. Ed. 731, in construing section 20 of the act of 1867 (Act March 2, 1867, 14 Stat. 526, c. 176), the court said as follows:

"This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it."

The general rule is that the relation of the bank to the depositor is that of debtor and creditor, and the bank is the debtor of the depositor. *Harris v. Bank*, 110 Tenn. 249, 75 S. W. 1053.

"The bank holds a lien on the deposits in its hands to secure the repayment of the depositor's indebtedness, and may enforce that lien as the debts mature by applying the debtor's deposits upon them, thus setting the two off against each other." 3 Am. & Eng. Ency. of Law (2d Ed.) p. 835.

It is also stated:

"The right of the bank to apply deposits to the extinguishment of the depositor's indebtedness as it matures grows out of the doctrine that relationship between the bank and the depositor is that of debtor and creditor." 3 Am. & Eng. Ency. of Law (2d Ed.) p. 835.

But it is well settled that a bank does not have "a lien upon special deposits or monies deposited for a specific purpose, as for collateral security, or for the payment of a particular debt." 3 Amer. & Eng. Ency. of Law (2d Ed.) p. 837, and cases cited.

Again it is said:

"The proposition that there is no right of set-off against a trust deposit, nor any lien for the trustee's personal debts, is axiomatic." 3 Am. & Eng. Ency. of Law (2d Ed.) p. 837, and cases cited.

In *State v. Corning State Sav. Bank*, 128 Iowa, 597, 105 N. W. 159, it is said:

"Where a bank, which was a creditor of an insolvent estate, received a deposit of funds from the receiver, it could not apply such funds on its claims, nor plead such claims as an offset against the deposit."

In *State Bank v. McCabe*, 135 Mich. 479, 98 N. W. 20, it is said:

"Where the bank deals with a depositor as trustee, and recognizes funds standing in his name as trust funds, knowing them to be such, it cannot appropriate them to the payment of the trustee's individual indebtedness to the bank."

This question arose in *Re Davis* (D. C.)

119 Fed. 950, wherein an insolvent partnership sold its stock of goods, and, by its direction, the purchaser deposited its price in the bank, taking a receipt therefor, showing that the money was to be prorated among the several creditors of the firm as their interests might appear. Subsequently, on petition of creditors, the partnership was adjudicated an involuntary bankrupt. After said adjudication, the bank undertook to apply the money so deposited on certain notes of the firm held by it and another creditor, without the consent of the depositor or the bankrupt, and to refuse the demands of the trustee therefor. Held, that the bank held the deposit in a fiduciary capacity as a trust fund, which precluded it from asserting an adverse claim thereto after the bankruptcy as against the trustee.

Among other things, the court said:

"Upon the merits of the controversy, would the bank be in position to successfully contest the right of the trustee to the money? Its ability to do so would depend upon its right to apply the fund to its own use. While a general deposit by a merchant of money in a bank creates the relation of debtor and creditor, and authorizes the bank to use the money as its own, such result does not obtain when the deposit is made for a special purpose, as, for example, to be paid to creditors, as was the case here."

In *Wilson v. Dawson*, 52 Ind. 515, it was said:

"It is a general rule that funds deposited in bank for a special purpose, known to the bank, cannot be withheld from that purpose, to the end that they may be set off by the bank against a debt due to it from the depositor."

In *Lynam v. National Bank*, 98 Me. 448, 57 Atl. 799, it appeared that:

"In June, 1902, the Standard Granite Company sent to each of its creditors, including the Belfast National Bank, a circular letter stating that it was unable to meet its obligations. A few days later in the same month it called a meeting of its creditors, at which meeting the Belfast National Bank was represented by one of its directors. At this meeting a committee of three creditors was appointed, with instructions to secure, if possible, the discharge of certain attachments which had been placed upon the property of the granite company. On September 4th, following, the directors of the granite company passed a resolution, admitting the inability of the company to pay its debts, and its willingness to be adjudged a bankrupt on that ground. On the day following the granite company sent to the Belfast National Bank a deposit of \$800. At that time the granite company had a balance of \$1.04 standing to its credit on the books of the Belfast National Bank. The intention of the Standard Granite Company in making this deposit of \$800 was that it should be held by the bank until a trustee in bankruptcy for the

granite company should be appointed; but no notice of such intention was given to the bank, and the deposit was credited to the account of the granite company and added to the balance of \$1.04 then standing on the books of the company.

"At the time this deposit was made the granite company was indebted to the bank to the amount of several thousand dollars. On the day following the making of this deposit of \$800, a petition in bankruptcy was filed against the granite company, and it was duly adjudged a bankrupt, and one Lynam was appointed and qualified as its trustee in bankruptcy. Said trustee made a demand on the bank for the \$800, which demand was refused; the bank claiming that it would offset the deposit on the past-due notes of the granite company.

"For some time past, all the efforts of the granite company * * * and that of its creditors had been to obtain a distribution of its assets equitably, and to that end the first attempt was to discharge the attachments. Honest dealing on the part of the granite company, which is to be presumed, required that all of its assets should be husbanded for the benefit of all of its creditors. Pending the effort to obtain an assignment or adjudication of bankruptcy, it had \$800 in money, which it intended to retain, and ought to retain; as part of its general assets. As some time would elapse before it could be thus administered, it was deposited in the bank, really for safe-keeping. All these facts were well known to the bank when it received the deposit. It knew it was not intended as a payment, and did not treat it as such. The bank could not fail to understand that it was intended that this money should be added to the other assets for the general benefit as it equitably ought to be. It certainly understood that the granite company, under the then existing circumstances, would not voluntarily subject this portion of its assets to a set-off by the bank, to the injury of other creditors.

"Upon consideration of all the circumstances, and the situation of the parties, we think it a fair inference that the bank understood that the deposit was intended only for safe-keeping, to be ultimately appropriated for the benefit of all the creditors of the granite company, and that in fact it was a deposit in trust for that purpose. And it being charged with such trust, the plaintiff, as trustee in bankruptcy, is entitled to recover."

We are of opinion that these authorities are applicable in the present instance. It distinctly appears on this record that the funds accumulated in the defendant bank were deposited for a special purpose, with the knowledge and consent of the president of the bank; that the funds could not be checked out by the president of the furniture company without the signature of J. L. Morrison, representative of the creditors'

committee. The fund thereby became a trust deposit for specific purposes, with the knowledge and consent of the bank, and the latter had no right of set-off in said fund against the bankrupt's indebtedness to the bank.

Counsel for the bank relies on several cases as announcing a contrary doctrine, namely, *New York County Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 390; *Clark v. Northampton Nat. Bank*, 160 Mass. 26, 35 N. E. 108; *Lowell v. International Trust Co.*, 158 Fed. 781, 86 C. C. A. 137.

In *Bank v. Massey*, *supra*, the court said: "It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes part of the general funds of the bank, to be dealt with by it as other moneys, to be loaned to customers and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character."

But in that case the facts did not show a deposit for a special purpose, with the knowledge and consent of the bank, but only a deposit in the ordinary course of business. In such a case the authorities are uniform that the bank has the right to set off its notes against the deposits.

In *Clark v. Northampton National Bank*, *supra*, the case seems to have turned on a finding of fact by the lower court. The court said as follows:

"The amount of the notes is to be set off against the balance due on account of the deposits at the time of the commencement of the proceedings in bankruptcy, unless the deposits made after March 8, 1892, are to be construed as made with a view to give a preference or to effect a fraudulent transfer of property, contrary to the statute relating to insolvency, or as made upon a trust for the creditors. Whether these deposits were made in violation of either section 96 or section 98 of chapter 157 of the Public Statutes was a question of fact, and the court, trying the case without a jury, has found that they were not so made. On the facts found by the court, the rulings on this part of the case were right.

"We are not certain that the exceptions set out all the evidence. Enough, however, is recited to show that the plaintiff had some ground to contend that after March 8th the bank knew that the business of the Florence Tack Company was being carried on with a view of converting its assets into cash for the benefit of its creditors, and that the company must either effect a compromise with its creditors or go into insolvency. The mon-

ey received after March 8th ought perhaps to have been specially deposited; but this was not done, and the account of the tack company with the bank continued unchanged in form. There is evidence that the defendant's cashier understood that, after March 8th, checks were to be drawn only to 'pay the help' of the company; but there is also evidence that checks were in fact drawn for other purposes and were paid. There appears to be no doubt that the officers of the bank knew of the insolvency of the company on March 8th. Still it is a question of fact whether the transactions between the company and the bank after March 8th were had under an implied contract or understanding on the part of both parties different from that which existed before. The [lower] court has in effect found that after March 8th the money continued to be deposited and checks to be drawn on the same understanding as that which existed before that time; that is, upon the understanding that the relation of the parties continued to be the ordinary one of a depositor with a bank of discount and deposit. We cannot say, as a matter of law, that this finding was wrong. It was for the court below to draw the proper inferences of fact, and the exceptions disclose no errors of law."

In *Lowell v. International Trust Co.*, *supra*, it was said:

"Portions of the propositions submitted to us by the trustee allege that the bankrupt had been insolvent for a considerable time, and that during that period it had been struggling along with its business, with some support from its creditors, and with an understanding between the International Trust Company and some other creditors, by virtue of which all of them, including the International Trust Company, should receive certain pro rata benefits out of whatever funds might come from the Thomas & Pike Coal Company. Therefore it is claimed that the funds now used for are held by the International Trust Company in a quasi trust, enforceable by the trustee."

The court held: "A trustee in bankruptcy has no interest, which he can enforce for the benefit of the general creditors, in an arrangement between the bankrupt and certain creditors, by which money deposited with one, which was a bank, was to be held in trust and distributed pro rata between them, and which was not prohibited by the bankruptcy statute."

The facts appearing in *Lowell v. International Trust Co.* are very different from the facts presented on the present record. There the trustee was seeking to enforce a contract between the bankrupt and certain creditors. In the present instance the fund was accumulated in defendant bank for the benefit of all the creditors, and the bank had become a party to the arrangement. In the present case the trustee clearly has a right

to recover a fund which had been deposited by the bankrupt for the benefit of all the creditors.

We are therefore of opinion that the bank is estopped, by its conduct and by its agreement with the other creditors, from asserting any right to a set-off against the funds derived from the sales of the stock of the furniture company, and that the decree of the chancellor so holding was correct; and the same is affirmed.

CAMPBELL et al. v. BARTLETT et al.

(Supreme Court of Tennessee. Oct. 30, 1909.)

1. SPECIFIC PERFORMANCE (§ 105*)—CONTRACT OF SALE—LACHES.

To obtain specific performance of a contract of sale evidenced by a title bond, the purchaser must sue with reasonable promptness, though the writing does not make time of the essence of the contract, especially where there has been a great increase in the value of the property.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 327, 334; Dec. Dig. § 105.*]

2. SPECIFIC PERFORMANCE (§ 105*)—CONTRACT OF SALE—RIGHT OF MARRIED WOMAN—DISABILITY AS EXCUSE FOR LACHES.

The same rule should apply to a married woman as to an infant as to her right to sue for specific performance of a contract of sale, and her disability, like that of an infant, is not an excuse for unreasonable delay in making payment; and after a great lapse of time, and a large increase in the value of the property, a married woman, notwithstanding her disability, will not be awarded specific performance of a contract of sale evidenced by a title bond in favor of her father, on which the purchase money was long due when he died.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 340; Dec. Dig. § 105.*]

Appeal from Chancery Court, Campbell County; Hugh G. Kyle, Chancellor.

Bill by Mary A. Campbell and another against J. S. Bartlett and others. The bill was dismissed, and complainants appeal. Affirmed.

James M. Hill, Jno. P. Rogers, and Agee & Peters, for appellants. W. A. Owens and Jourolmon, Welcker & Smith, for appellees.

NEIL, J. The bill in the present case was filed to recover a one-eighth undivided interest in a tract of land described. This land was sold, or the greater part of it, in 1853, to James S. Murray, complainant's father, by a title bond executed by one J. M. Cooper. In 1861, 50 acres additional were added, and the old title bond taken up and a new one executed, putting both tracts into one. In December, 1864, Murray died, without having paid the purchase money for either tract. His children all married and moved away, except F. M. Murray. He remained upon the land with his mother until about the year 1871, when, becoming convinced that

they could never pay the balance of purchase money due, which, with interest, was then more than the original sum, they surrendered the bond, and the possession of the land, to the vendor, Cooper. He placed a tenant in possession, one Reuben Marlow, who remained until about 1880. P. W. Rutherford then went upon the land, and remained until the summer of 1881. After this F. M. Murray was upon the land for a while, but it does not clearly appear how long he remained. Perhaps others of the heirs at law of James S. Murray were upon parts of the land for a year or two at a time, but none of them attempted a permanent residence. In 1886 several of the heirs of the vendor, Cooper, who had died in 1880, conveyed their interest in the land now in controversy, along with many hundred other acres besides, to F. M. Murray, and in 1886 others of these heirs conveyed to him, so that, when these deeds were made, he was the ostensible owner of seven-eighths interest in 600 or 700 acres of land, including the 300 acres now in controversy. On May 2, 1890, F. M. Murray conveyed his seven-eighths interest in the lands thus acquired to William Baird, S. C. Baird, and Jeremiah Smith. On March 25, 1902, these persons conveyed the same interest to Benjamin D. Bartlett. On April 3, 1902, William Baird acquired the remaining one-eighth interest from the heirs of the persons representing that outstanding interest in the Cooper estate, and on January 8, 1903, he conveyed it to Benjamin D. Bartlett. On April 1, 1905, Benjamin D. Bartlett conveyed all of the lands to J. S. Bartlett, and in the same year the latter conveyed an undivided one-third interest to H. M. La Follette, and a portion was also conveyed by him to the La Follette Coal, Iron & Railroad Company.

On July 7, 1906, the complainant, joined by her husband, Wyatt F. Campbell, filed the present bill against the said J. S. Bartlett, H. M. La Follette, and the La Follette Coal, Iron & Railroad Company, in which she asserted her right to a one-eighth undivided equitable interest as heir at law of James S. Murray, deceased, in the land covered by the title bond made to her father in 1861, on the ground that she had never consented to the surrender of that bond, expressing a willingness to pay out of her share any of the purchase money remaining unpaid. She learned about the year 1880, or shortly thereafter, that the title bond had been surrendered. She made no complaint until 1890, when she told her brother, F. M. Murray, that she still claimed her one-eighth interest. She also made the same statement, in substance, to William Baird, about the time he was negotiating his purchase of the land. In 1890 she employed an attorney to bring suit; but he was the son-in-law of F. M. Murray,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and after a conference with the latter he declined the employment. After this she slept upon her rights until the present bill was filed, 16 years later, or 26 years after the surrender of the title bond, and 42 years after her father's death. She has, however, all the time been under coverture.

The present defendants had no actual knowledge of complainant's claim when they purchased and obtained deeds in fee to the lands; but there was, perhaps, sufficient reference to a title bond or bonds, in the deeds made by the Cooper heirs to F. M. Murray, which were in their chain of title, to start them upon an inquiry which would have led to a discovery of the existence of the title bond of 1861, and of the fact that complainant had no hand in surrendering that bond, and that she was still claiming an interest in the land; that is, if we can assume that the parties indicated, the Coopers and F. M. Murray, were willing to make true replies to inquiries, and would have done so. The title bond was not registered; but it seems to have been handed, with the unpaid notes, as papers no longer useful, to F. M. Murray, by the Coopers, when they made the deeds to him, and the bond was by him handed over to William Baird, along with the deed made to him and his co-purchasers. The Cooper deeds did not describe any special title bond, but stated in general terms that title bonds had been executed on the lands, and never paid for, and that they did not warrant against such incumbrances.

When the title bond was executed the land was worth only \$1 an acre, because of little value for agricultural purposes and unavailable for mineral uses, being in a mountainous country, remote from railroads. Within recent years a railroad has been built into that country, and coal discovered upon the land, close to transportation facilities. As a consequence, the land is now worth \$50 per acre, an increase in value of 50-fold.

In disposing of the case, we shall assume, without deciding, that the facts stated were sufficient to fix the defendants with constructive notice, under our registration laws (*Teague v. Sowder*, 121 Tenn. 132, 114 S. W. 484), though it is worthy of remark that after such a great length of time as had ensued when Bartlett bought he might perhaps assume that any outstanding title bonds, not already enforced, had been abandoned, and, in that event, his defense of innocent purchaser would be available. We shall not consider the general subject of estoppels against married women arising out of conduct on their part deceiving and misleading persons relying thereon, upon different phases of which we have cases. *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522; *Pilcher v. Smith*, 2 Head, 208; *Cooley v. Steele*, Id. 605; *Fletcher v. Coleman*, Id. 384; *Stephenson v. Walker*, 8 Baxt. 289; *Howell v. Hale*, 5 Lea, 405; *Berrigan v.*

Fleming, 2 Lea, 271; *Fogg v. Yeatman*, 6 Lea, 580; *Anderson v. Akard*, 15 Lea, 192; *Gates v. Card*, 93 Tenn. 341, 24 S. W. 486; *Johnson City v. Wolfe*, 108 Tenn. 277, 52 S. W. 991; *Bruce v. Goodbar*, 104 Tenn. 638, 645, 58 S. W. 282. And see *Duckwall v. Kisner*, 136 Ind. 99, 101, 35 N. E. 697; *Catherwood v. Watson*, 65 Ind. 576; *Minnich v. Shaffer*, 135 Ind. 634, 34 N. E. 987.

We are of the opinion, however, that the controversy must be decided adversely to complainant, on the ground that the present bill is in effect one to enforce a specific performance of the contract of sale evidenced by the title bond. Such rights must be enforced with reasonable promptness, even where the writing does not in terms make time of the essence of the contract, especially when there has been a great increase in the value of the property. *Smith's Heirs v. Christmas*, 7 Yerg. 565. In that case eight months was held too long a delay, although the complainants were infants, who had succeeded to the rights of their father, who had died before the maturity of the contract. The uncle of the infants assumed to act in their behalf after the death of their father. He testified that on the 1st day of January, the time when the purchase money was due, under the contract, he did not consider it an advantageous contract. It seems to have been thought better then to lie by and speculate on the advantages of the contract. The property might rise, or it might fall, in value, or remain stationary. In either of the latter two events, the friends of the infants did not intend to execute the contract. The court said they could not, after waiting eight months and willfully neglecting to do anything, and by their backwardness authorizing the inference that they did not intend to do anything, and after the property had increased threefold, come into a court of equity and get the contract enforced. "It would be most inequitable if they could," continued the court, "and it is not believed that, in any case circumstanced as this is, has a court of equity ever decreed in favor of a complainant. It is true that the simple fact of a rise in the value of the property is not a ground for refusing a specific performance. 2 Ver. 42, 43, 280. Nor do we consider that, in a contract like this, where there is no condition that it shall be void on the nonperformance of one of the parties, time is of the essence of the contract; but time in such a case is material, and if there be no excuse for nonperformance, according to the stipulation of the bargain, and the party has willfully lain by, until the circumstances of the estate have changed, and a performance would be ruinous to the other party, a specific performance will not be decreed. In this case Christmas gave up an advantageous contract with Camp, which he had made on the faith of this. Lands in that section of the county had greatly increased in value before an offer was made in behalf

of the complainants to perform this contract, during all which time their friends had willfully forborne to do anything in the business. They came now too late to obtain the assistance of this court."

In another opinion in the same case the English doctrine was stated to be: "When a court of equity holds that time is not of the essence of the contract, it proceeds upon the principle that, having regard to the nature of the subject, time is immaterial to the value, and is urged only by way of pretense and evasion. *Dolorch v. Rothschild*, 1 Sim. & Stuart, 590. Where the contract upon its face is to be void in case of default, there the defendant may so consider it, though, if he waive the default, the circumstances remaining the same, he will be bound by the contract. Where there is any change in the circumstances, either of the estate or the parties, as the falling in of lives, or any great rise or fall in value, a specific performance will not be decreed. Where the delay has operated injuriously to the defendant, or where his object in making the contract has thereby been defeated, a performance will be refused. *Crofton v. Ormsby*, 2 Sch. & Lef. 604. Where the party has lain by and speculated, or has trifled and shown a backwardness in carrying the contract into effect, no decree will be made in his favor. 12 Ves. 228; *Guest v. Humphrey*, 5 Ves. 818. See, also, *Sugden on Vend.* 277, 278, 281; *Jeremy*, 461, 462." Speaking further to the same matter the court said: "If this be the state of the English law, what ought to be the rule in this country? In England land is of a permanent and fixed value. There is but very little fluctuation in price, so that what is a fair valuation in one time is generally so a year or two afterwards. This rule, then, that time is not of the essence of the contract, restricted as it is by the modern doctrines of the court, may have pretty extensive application in practice in that country, consistently with the substantial rights of the parties. But as often as the application of the rule would not subserve the ends of justice, the courts have departed from this rule and refused to enforce the contract. In this country, which is comparatively but newly settled, where the price of land depends upon the tide of emigration, the settling and improving of particular sections, the springing up of towns, and other causes operating to change the price in particular neighborhoods, as well as larger sections, the rule, restricted as it should be, would be found of much less practical utility. In this country, time should be regarded as a circumstance of decisive importance, fixing the necessity upon the negligent party of observing that the defendant has waived the default, or that no inconvenience or loss will arise to him, and that the property is substantially of the same value. This is the view taken of the subject

by Chancellor Kent in *Benedict v. Lynch*, 1 Johns. Ch. (N. Y.) 379, 7 Am. Dec. 484, with whose general course of reasoning in that case I entirely concur."

Upon the subject of the infancy of the complainants, the court said: "But it is said that laches cannot be imputable to these complainants, because they are infants. Upon this part of the case we cannot better express the views we entertain than in the language of the Chancellor. 'It is true,' he says, 'in many cases this answer to the objection of time elapsed would be good for some reasonable delay on the part of the infants. In all cases, depending on the question of abandonment simply, or backwardness and trifling conduct, they would be considered as standing on more favorable grounds than adults. But I cannot assent to the position that this is to be allowed as an excuse, when the fault or delay, from whatever cause it may have arisen, other than the acts of the defendant, has been the means of defeating the object of the defendant, or where the property has greatly risen or fallen in value in the meantime. If we adopt such a rule, while we relieve one party from an inconvenience, we do great injustice to the other. In cases of this kind a court of equity will leave the parties to their legal remedies, and will let the loss fall where Providence has placed it. This view of the question is supported and enforced by that able Chancellor, Lord Reddesdale, in the case of *Griffin v. Griffin*, 1 Sch. & Lef. 352. Infants, in such cases, must always act by their friends, and their rights will be saved or lost by the activity or negligence of those whom nature has placed around them for their protection. If this should not be the case, the infants would be protected until maturity, which might be for 20 years or more, and, in the meantime, both parties to the contract might be dead, and the situation of the parties interested, and the value and circumstances of the property, entirely changed.' If the infancy of the complainants be an excuse for a delay of 8 months, it may, for the same reason, excuse a delay of 20 years. The injustice such a rule would inflict upon the other party could not be endured. But in this case the friends of these infants were alive to their interests. They forbore to do anything so long only as they believed it would be for the benefit of the infants to forbear; but when they find, by the sudden rise of property, that it would be for their interest to act, we find them promptly doing all they could to secure the speculation. As the notes were at last executed and tendered by the administrators, they could have been as easily executed and tendered by them at any previous time, so that there is no pretense for an excuse for the delay growing out of the infancy of the complainants. Had Smith's death, just before the time the contract was to be completed, been attended with any embarrass-

ment or difficulty, so that the friends of the children knew not how to act, or were unable to act in the business, and if, so soon as they reasonably could have done so, advice had been taken, and an offer made to perform the agreement on their part, this would have been a good excuse for delay; and, although the lands might have risen in value, still the contract would have been enforced. But this was not the case. The administrator, whose duty it was to act, was appointed at the October court. He was acquainted with the nature of the contract, and knew that it devolved on him to perform it on the part of Smith; but, not believing it an advantageous one on the part of Smith's children, he purposely declined doing anything until the great rise in the value of the land convinced him that it would be greatly to their advantage to have the bargain executed, and then he was willing to put himself to great personal inconvenience to secure it for them. If, after all this, the infancy of these complainants should be held sufficient to excuse this delay, under the circumstances of this case, the friends of other infants will have the strongest temptation to commit the most deliberate frauds upon persons with whom the ancestors of such infants may contract. They may purposely hold back for years, until some favorable change in the estate shall occur, and then come forward and offer to perform, and plead the infancy of the children as an excuse for the delay." See, also, on the general subject, *Mann v. Dun*, 2 Ohio St. 187; *Brown v. Haines*, 12 Ohio, 1; *Henry v. Conn*, Id. 193; *Scott's Ex'rs v. Barber's Heirs*, 14 Ohio, 547. See, also, *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484, 1 L. Ed. N. Y. Ch. Rep. 175, and note. In *Henry v. Conn*, the court held that, where the purchase money becomes due in the lifetime of the vendee, the infancy of his heir will not excuse delay in making payment, so as to induce the court to decree performance against the vendor, after a great lapse of time. This rule was approved and followed in the sub-

sequent case of *Scott's Ex'rs v. Barber's Heirs*, supra.

In the case we have before us, the purchase money had long been due when the father of complainant died. In this class of cases, at least, we think the same rule should apply to a married woman as to an infant, to say nothing of the more stringent rule laid down in *Smith's Heirs v. Christmas*, supra. We are, however, further of opinion that after a great lapse of time, and a large increase in the value of the property, the rule of *Smith's Heirs v. Christmas* is a proper one to be applied, even to married women. Certainly the natural inhibition upon infants, arising out of their immaturity, is no less than the supposed restraint of coverture in cases of married women, preventing them from setting up claims to valuable property. The underlying reason in each instance is the public policy that supports the rule.

The present decision is confined to cases wherein specific performance is sought. We do not impair the authority of *Dodd v. Benthall*, 4 Heisk. 601, and *Moore v. Walker*, 3 Lea, 656, and similar cases wherein a married woman seeks to set aside deeds made by her, or to recover property the title to which has been vested in her.

On the grounds stated, we are of the opinion that the decree of the chancellor dismissing the bill should be affirmed.

The Chief Justice, while concurring, is of the opinion that the court should go further, and authoritatively determine that, after such a lapse of time, one examining the records in the register's office, and seeing such a statement concerning title bonds as appears in the deeds referred to, would have the right to presume conclusively that such title bonds had been abandoned, and were hence no longer in the way of his making a purchase. In brief, he is of the opinion that, after such a length of time, recitals of the character above referred to would not put the purchaser upon inquiry.

FT. WORTH DRIVING CLUB v. FT. WORTH FAIR ASS'N.

(Supreme Court of Texas. Nov. 17, 1909.)

1. LANDLORD AND TENANT (§ 44*)—STIPULATIONS RUNNING WITH LAND—VIOLATION BY SUBLESSEE.

A stipulation in a lease forbidding the sale of intoxicating liquors on the premises, under penalty of a forfeiture of the lease, runs with the land, and a violation thereof by a sublessee furnishes as good ground for forfeiture as if committed by the original lessee.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 110; Dec. Dig. § 44.*]

2. INJUNCTION (§ 62*)—COVENANTS IN LEASE—BREACH.

Where the violation by a sublessee of a stipulation in the lease against selling liquor on the premises will work a forfeiture of the lease and destroy valuable rights of the lessee, injunction will lie to restrain such violation, where the contract of subleasing, while it does not forbid, does not authorize such sale of liquors; both parties holding subject to the original lease.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 124-127; Dec. Dig. § 62.*]

3. LANDLORD AND TENANT (§ 103*)—LEASE—WAIVER OF CONDITIONS.

A lessee could not waive, in favor of a sublessee, a stipulation in the original lease against the selling of intoxicating liquors on the premises, and providing for a forfeiture of the lease for violation of such stipulation.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 324; Dec. Dig. § 103.*]

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by the Ft. Worth Driving Club against the Ft. Worth Fair Association. From a judgment of the Court of Civil Appeals dissolving an interlocutory injunction (121 S. W. 213), plaintiff brings error. Reversed, and injunctions ordered reinstated.

Q. T. Moreland, for plaintiff in error. Mike E. Smith, Marshall Spoons, Smith, Turner, Bradley & Powell, and Bryan & Spoons, for defendant in error.

WILLIAMS, J. This writ of error is taken from the judgment of the Court of Civil Appeals, dissolving an interlocutory injunction granted by the district judge at the suit of the Driving Club against the Fair Association, restraining the sale of intoxicating liquors on grounds held under lease.

The land formerly belonged to David Evans, who let it to the Driving Club for a term of 15 years; the contract providing that the sale of intoxicating liquors on the premises should not be permitted during the term, and giving the lessor the right of re-entry for failure of lessee to perform any of the covenants and agreements. The Driving Club improved the premises with barns, stalls, well, race track, etc., at a cost of some \$6,000, and its rights under the lease were very valuable. The Driving Club let to the Fair Association, with Evans' consent, the right to use

the premises two weeks each year for five years for the purposes of the association, the contract between them containing no provision concerning the sale of liquor, but the provision of the original lease being known to the sublessee. Evans thereafter conveyed the land, and assigned his rights under the original lease to Johnson. At the time the injunction was sued out the Fair Association was permitting the sale of intoxicating liquors on the premises, and Johnson refused to give his assent thereto, and notified the Driving Club that he would forfeit the lease if the selling continued. Thereupon the Driving Club sued out the injunction. The Court of Civil Appeals dissolved the injunction for the reason that the sublessee was not a party to, nor bound by, the covenant made between the lessor and lessee. It is true that there is no privity between a lessor and a sublessee, such as makes the covenants in the lease binding on the latter personally; but it is equally true that stipulations like that in question, forbidding the use of the premises for a specified purpose, run with the land, and are in the nature of conditions, and the forbidden use of them by a sublessee is as much a violation of such a provision, and furnishes as good ground for forfeiture and re-entry as if it were the act of the original lessee. 24 Cyc. 1064; 22 Cyc. 861.

The texts referred to are well sustained by the authorities cited, which establish, not only the substantive rule stated, but also that the injunction is the proper remedy where others are inadequate. In *Wheeler v. Earle*, 5 Cush. (Mass.) 31, 51 Am. Dec. 42, the substantive doctrine is thus stated: "This restriction upon the manner of using the premises runs with the land, and is binding upon the estate in the hands of subtenants. They take only the title of the lessee, and with the like limitations and restrictions. Such use by a subtenant holding under the original lessee, for an unlawful purpose, would equally forfeit the estate. This principle seems very clear, and hence, in the treatises upon the relation of landlord and tenant, it is said that when an estate is held subject to forfeiture, for breaches of numerous covenants or stipulations, some of which may be likely to be violated, it is expedient always to take from a sublessee good security against all such violations of the various stipulations in the original lease as may subject the original lessee to lose his whole estate." Since the alleged action of the sublessee, if not restrained, would have the effect of forfeiting the lease and destroying the valuable rights of the lessee, it seems plain that the case is one which calls especially for the exercise of the preventive power of a court of equity. The contract between the two does not forbid, but neither does it authorize, the sale of liquor in violation of the original lease, subject to which both hold. The latter contains the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

provision the violation of which by the sub-lessee will work to the original lessee the injury to prevent which the aid of equity is sought. We think that is enough.

We are of opinion, also, that the facts relied on to show that Evans, or the Driving Club, or both, had waived the provision against the sale of liquor are not sufficient to justify such a conclusion. Beyond several permits granted by Evans, consenting for the Fair Association to conduct such a business for two weeks at a time, restricted to that time, and providing that the provision in the lease should continue in force thereafter, nothing of a definite character is shown. Certainly nothing appears which would justify this court in holding that the trial court was bound to find that the provision was waived, and to deny the relief on that ground. It is shown that the Driving Club did not object to the forbidden use of the premises so long as the lessor did not object, but it could not waive the right of its lessor, and its claim to the aid of equity arises from the threat of the lessor rightfully to cancel the lease because of the wrongful act of the sub-lessee.

The judgment of the Court of Civil Appeals will be reversed, and the injunction granted by the district judge will be reinstated.

Reversed.

DILLEY v. JASPER LUMBER CO. et al.
(Supreme Court of Texas. Nov. 17, 1909.)

RECEIVERS (§ 139*) — SALE — VACATING — COLLUSION.

A receiver was appointed to sell property for not less than \$35,000 at private sale, and afterward the order of sale was modified so as to permit a public sale for not less than \$15,000, and thereafter all limitations as to price were removed, and the property was finally sold for about \$2,150, making it necessary to appropriate the property upon which intervenor had a lien to payment of receivers' certificates, etc. Intervenor moved to vacate the sale, alleging that the modification of the order of sale was without notice to him, and that the sale was collusive between the receiver and the debtor, and was for a grossly inadequate price, and that he was prevented from contesting the confirmation of the sale by a misunderstanding between his attorney and the court as to the time the sale was to be affirmed. *Held*, that the facts required the sale to be set aside, so that it was error to refuse to hear evidence on the motion.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. §§ 243, 244; Dec. Dig. § 139.*]

Error from Court of Civil Appeals of Fourth Supreme Judicial District.

Action by C. S. Basham against the Jasper Lumber Company, in which George E. Dilley intervened. Motion by intervenor to remove the receiver and set aside a sale was denied, and from affirmance thereof by the Court of Civil Appeals (114 S. W. 878) intervenor brings error. Reversed and remanded.

A. D. Lipscomb, for plaintiff in error. McDowell & Duffie, W. D. Wilkerson, E. A. Easterling, Hunt, Meyer & Townes, and A. R. Masterson, for defendants in error.

GAINES, C. J. C. S. Basham brought this suit against the Jasper Lumber Company upon a promissory note, alleging that the sawmill, the running of which was the lumber company's business, was shut down, and that work could not be resumed, for the want of ready money, and prayed that a receiver be appointed to operate the mill and to wind up the business. At the same time the lumber company filed an answer and joined in the prayer for the appointment of a receiver, which was accordingly done, and W. C. McClelland was appointed and gave bond and entered upon the duties of the position. On the — day of April, 1906 (five months after the institution of the suit and the appointment of a receiver), George E. Dilley filed a petition of intervention, in which he alleged that the lumber company was indebted to him to the amount of certain notes and attorney's fees and that it had executed to him a mortgage to secure the same. On the 5th day of March, 1906, the court ordered the receiver to sell the property at a sum not less than \$35,000, at private sale, and, if not sold in 30 days, then to advertise and sell to the highest bidder for cash. On the 21st day of April, 1906, the order of sale was modified, the upset price being placed at \$15,000. Finally all restrictions were removed from the order of sale, and the receiver was authorized to sell at any price he could get at a public sale. The property was sold as follows: 1 engine, heater, and pump for \$475.15; the property subject to Dilley's mortgage for \$800; 115,000 feet of lumber for \$375; and all the residue of the property for the sum of \$500—and A. P. Laughlin became the purchaser of the whole. The sale was confirmed by the court. Thereupon came George E. Dilley, the plaintiff in error in this proceeding, and on July 5, 1906, filed a motion to remove W. C. McClelland as receiver of the property in suit on the grounds: That the receivership was collusive as between him and the president of the defendant company; that the final modification of the order of sale had been made without notice to the intervenor; that the sale of the property was for a grossly inadequate price; that it was his intention to have contested a confirmation of the sale; that on account of some misunderstanding between his attorney and the judge of the court the question of confirmation of the report of sale was taken up at an unexpected hour, when his attorney was not present; and that by reason of the collusion between the receiver and the purchaser at the sale the property was sold at a grossly inadequate price. The court de-

clined to hear evidence in support of the motion and sustained exceptions to the allegations therein contained.

The action of the court in declining to hear evidence in support of the motion is assigned as error, and we think the assignment is well taken. If the facts alleged in the motion are true, the sales ought to be set aside. The aggregate of the money received for the property was about one-tenth of the original price and about one-fifth of the second lowest price at which the receiver was authorized to make the sale. The result was that, notwithstanding Dilley had a lien upon property which brought \$800, the price was appropriated to pay the receiver's certificates—and, it may be, other expenses of administration. For this error the judgment must be reversed, and the cause remanded.

There is no statement of facts in the record, and for this reason the Court of Civil Appeals held, as we think, correctly, that the other assignments of error could not be considered.

The judgment is reversed, and the cause remanded.

BYRNE v. ROBISON, Land Com'r.

(Supreme Court of Texas. Nov. 17, 1909.)

1. MANDAMUS (§ 152*)—NECESSARY DEFENDANTS.

Where the Commissioner of the General Land Office awarded school land to relator as purchaser, and afterwards canceled the award, and awarded them to W., W., while a proper party, is not a necessary defendant to mandamus to compel reinstatement of relator as purchaser, at least where it is indicated, from the fact that she cannot be found in the county, that she has either abandoned her purchase or sold her rights, though she, not being made a party, will not be affected by the judgment.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 293; Dec. Dig. § 152.*]

2. PUBLIC LANDS (§ 173*)—SALE OF SCHOOL LANDS—AWARD TO HIGHEST BIDDER.

Under Act April 15, 1905 (Laws 1905, p. 159, c. 103), providing a scheme for selling school lands to the highest bidder, requiring persons desiring to buy to send bids in envelopes to the Commissioner of the General Land Office, to remain in the land office unopened till the day after that named for sale, and to be opened at 10 o'clock of that day, the award to be made to the highest bidder, an award so made cannot be set aside, and the land awarded to one who had sent a bid which did not reach the commissioner's office in time because the letter containing it remained in the post office, owing to absence of an employé of the land office whose duty it was to get the mail.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 544-551; Dec. Dig. § 173.*]

Original mandamus proceedings by B. D. Byrne against J. T. Robison, Land Commissioner. Writ awarded.

E. Cortledge, for relator. R. V. Davidson, Atty. Gen., and William E. Hawkins, Asst. Atty. Gen., for respondent.

GAINES, C. J. This is a petition for the writ of mandamus to compel J. T. Robison, as Commissioner of the General Land Office, to reinstate relator as purchaser of section 348 in block 2, certificate 1/406, Texas & Pacific Railway Company, for 640 acres, being a section of the public free school lands of the state.

It is alleged in the petition: That the section in controversy had been appraised at \$1.50 per acre and had been advertised for sale on August 1, 1908. That on July 18, 1908, the relator made application to purchase said section as additional lands to his home tract. He wrote out his application, together with the obligation for the installment of 39/40 of the purchase money and inclosed them in an envelope indorsed as required by the statute, and before the 1st day of August, 1908, paid into the State Treasury 1/40 of the purchase money. His bid was \$2.30 per acre. This being the only bid received by the commissioner at 10 a. m. August 3, 1908 (August 2d being Sunday), the land was awarded to relator, and he was notified of its acceptance. Mrs. Nannie May Williams, however, put in a bid for the land in July, 1908, and mailed it in accordance with law. The papers reached the post office in Austin in due time; but for absence of an employé of the land office, whose business it was to convey the mail from the post office to the land office, it did not reach the Commissioner of the General Land Office until August 4, 1908. Thereupon the commissioner reconsidered his action and, at a subsequent day, canceled the award to the relator and awarded the purchase to Mrs. Williams.

Mrs. Williams and her husband are made parties to the suit, but process sent to Presidio county has been returned by the officer with the statement that they could not be found in that county. The relator has submitted the case with the understanding that if they are not considered necessary parties the suit may be dismissed as to them. That they are proper parties there can be no doubt; but that they are necessary parties is not so clear. But from the fact that the return of the sheriff upon the citation to them shows that they were not found in the county at the time of its attempted service, and indicates that they had either abandoned their purchase or sold their rights, we with some reluctance conclude that they are not necessary parties, and therefore dismiss the suit as to them. They will not be affected by the judgment in this case.

The scheme of the act of April 15, 1905 (Laws 1905, p. 159, c. 103), under which the transaction in controversy was had, was to sell the unsold school lands to the highest bidder. In order to accomplish this, bidders were required to make application in the terms of the act and to inclose the

same in envelopes, addressed to the Commissioner of the General Land Office, with certain indorsements thereon, offering to buy the land, giving the amount of the bid and with certain other prerequisites prescribed by law. The envelopes were to remain in the land office unopened until the day next after that named as the day of sale, and at 10 o'clock of that day were to be opened, and the land was to be awarded to the highest bidder therefor. The language is peremptory and absolute. There is no provision for a delayed application, from whatever cause the delay may arise. The idea of the Legislature seems to have been to have the applications all in by a certain day, and that from those that were on file the commissioner should determine who was entitled to the land and make his award. Those that were not on file could not be considered, and no provision is made for reopening the matter and considering them thereafter. Was this wise? The state is desirous of selling the school lands. It owes no duty to any individual to sell it to him. It gives every one a fair chance to bid, and this is all that is required. Ample time is afforded to allow one not only to mail his application, but to see that it has been received in the land office. For example, in the present case, Mrs. Williams could have ascertained that her application had not been received in the land office by August 1, 1908, and could have informed the commissioner that it was mailed in time to have been there. Then on inquiry at the post office, either by a messenger from the land office, or by herself, or her agent, the necessary package would have been found and would have been delivered in time. Is it better not to consider an application not filed in time, or to consider it with the additional question whether the delay was caused by fault of the applicant or not? We think the Legislature was of the opinion that the applications on file at 10 o'clock on the day after the day of sale should only be considered, and that the highest bidder among them should be entitled to buy the land.

Our conclusion is that the land was properly awarded to the relator, and that, having been so awarded, the commissioner was without power to set it aside.

The mandamus prayed for is therefore awarded.

SCHAPER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909.)

CRIMINAL LAW (§ 775*)—DEFENSES—ALIBI—INSTRUCTIONS.

Where, in a prosecution for unlawfully carrying a pistol at a dance, defendant's only defense was that he was in the dancing room at the time of a difficulty, when certain others exhibited pistols in the yard, and denied that he had any pistol on his person at any time, and

requested to be searched when charged, the court's refusal to charge on alibi in accordance with defendant's specific request was error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1833-1837; Dec. Dig. § 775.*]

Appeal from Guadalupe County Court; H. M. Wurzbach, Judge.

Willie Schaper was convicted of unlawfully carrying a pistol, and he appeals. Reversed.

P. E. Campbell, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for unlawfully carrying a pistol. The evidence discloses there was a social function at a little village in Guadalupe county known as New Berlin. Quite a crowd assembled, among whom was appellant. He was a stranger, and went from the town of Lavernia, in Wilson county, to attend the social gathering. During the evening there occurred a personal difficulty in the room in which there was dancing. Appellant was not engaged in this difficulty. The owner of the premises and one of his sons ejected one of the parties to the difficulty from the house, chasing him out into the yard some distance. The state's testimony shows that, about the time the chasing party overtook the man they were pursuing, appellant and Harry Peck exhibited their pistols and forced them to cease their pursuit. There were two or three witnesses who testified to seeing appellant and Peck exhibit their pistols. When the party returned into the house, appellant was accused of being one of the men who exhibited the pistols. This he denied. This was in the dancing room, and he requested them to examine him, stating that he had no pistol. They declined to examine him. Appellant testified that there was a difficulty in the house, that the parties were strangers to him, and that he took no part in it. He further testified that he did not leave the dancing room during the difficulty, and was not in the yard or out of the house. He also testified that he did not have a pistol, and corroborates the state's witnesses to the effect that after the difficulty, and after their return to the dancing room, upon being accused of having exhibited a pistol, he denied it, and offered to be examined, and requested that they make an examination of his person, and satisfy themselves that he was not armed, and he corroborates the state's witnesses, further, in that they declined to make the examination.

The court charged the jury in regard to the presumption of innocence and reasonable doubt, and the further phase of the law that they were the exclusive judges of the facts proved and the weight of the evidence and the credibility of the witnesses. Upon the general issue he instructed the jury, if they should believe from the evidence beyond

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a reasonable doubt that the defendant, Willie Schaper, on or about the 25th day of December, 1908, in Guadalupe county, Tex., did carry on or about his person a pistol, they should find him guilty, and assess an appropriate punishment. If they should find defendant not guilty, they should say so in their verdict. Appellant asked in writing an instruction submitting the law of alibi, which was refused. To this refusal exception was taken in the motion for new trial, as well as in a bill of exceptions. We are of opinion this charge should have been given. This was the only theory of appellant's defense, except the evidence, above detailed, that he was not armed, had no pistol, and his good faith in offering to be examined to demonstrate the fact that he was not armed. In the case of *Jones v. State*, 53 Tex. Cr. R. 131, 110 S. W. 741, 126 Am. St. Rep. 776, the question of charging upon alibi was discussed at length, both in the original opinion and in the opinion on motion for rehearing. In the opinion on motion for rehearing quite a number of cases are overruled in regard to the necessity of charging upon alibi, and the further statement made as to what should be the rule, and it was said: "We reaffirm and redeclare the old rule, which so long existed in this state, that a case will not be reversed for the mere failure of the court to charge on the subject of alibi, unless a special charge submitting this issue is requested, or an exception reserved, at the time." Following this decision, appellant complied with what is the rule there laid down in regard to this phase of the law. The court did not charge with reference to the matter. It was appellant's real defense as against the state's evidence, combined with the further fact that he was not armed. Complying with this decision, appellant asked a special charge, and, upon its being refused, reserved his exception, both in the motion for new trial and in an approved bill of exceptions. We are of opinion that there was error in refusing to give this instruction, under the circumstances of the case, under the decision in the *Jones Case*, supra.

Appellant's motion for a first continuance makes a very strong equitable showing; the testimony being unquestionably of the most material character. The absent witnesses would have testified, as stated in appellant's application, which is supported in the motion for new trial by their affidavits, that appellant was not out of the house during the difficulty, and therefore could not have been one of the parties who exhibited a pistol on the outside. One of the witnesses would have testified that, before the difficulty between the parties in the house, he (the witness) wanted to borrow a pistol from appellant. Appellant stated to him that he did not have a pistol, and the absent witness, thinking that he did not want to lend it to

him, examined him, and found that he did not have one on his person, but said to him that he had one in his buggy. This appellant denied, and the party went to the buggy and examined for, but failed to find, it. It may be further stated in this connection that the evidence shows that whoever exhibited the pistol did so in the dark. While the diligence was not sufficient, we are of opinion, under the circumstances of the case, and in view of the refusal of the court to charge alibi, appellant being the principal witness for himself in the case, that there is such error in this record as precludes the idea that appellant got that character of fair trial guaranteed by the law. Therefore the judgment is reversed, and the cause remanded.

RAMSEY, J. I concur in the result. Under the circumstances, the ends of justice would doubtless have been best secured by granting appellant's application for continuance. I doubt if the court was called on, under the circumstances, to charge on alibi.

CARR v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909.)

LARCENY (§ 55*)—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to sustain a conviction for theft of hogs.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 149-178; Dec. Dig. § 55.*]

Appeal from District Court, Houston County; B. H. Gardner, Judge.

Will Carr was convicted of theft, and he appeals. Affirmed.

Moore & Sallas, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft, and his punishment assessed at two years' confinement in the penitentiary.

The only question raised in the record before us is the sufficiency of the evidence. The evidence contains marked discrepancies as to the marks upon the hogs alleged to have been taken, but there is a clear identification of the hogs by the prosecuting witness from flesh marks. Appellant sold the hogs at an unreasonable hour and fled the county, and various other circumstances that we do not deem necessary to collate authorized the jury in finding appellant guilty.

The judgment is affirmed.

GROVES v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909.)

1. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTIONS—PRESUMPTIONS IN FAVOR OF VERDICT.

In absence of a statement of facts to enable the appellate court to consider the ground

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

urged in the motion for new trial, which was made on the ground of newly discovered evidence, all presumptions will be indulged in favor of the judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3086; Dec. Dig. § 1144.*]

2. CRIMINAL LAW (§ 1097*)—APPEAL—STATEMENT OF FACTS—NECESSITY—EFFECT OF ABSENCE.

One of the defenses at trial was insanity, and the motion for new trial was on the ground of newly discovered evidence showing insanity; the witnesses by whom such evidence was to be proved being accused's father and sister, who, it was claimed, would testify that his aunt was confined in an insane asylum, and a deceased brother had epilepsy. The only affidavit filed was by accused's attorney, which stated that the testimony was unknown to his attorneys at trial and negatived want of diligence; but it was not shown whether accused was claimed to have been permanently or temporarily insane, or that he was so insane as to be unable to inform his attorneys of his family history. *Held*, that the newly discovered testimony may have been only cumulative, and, in absence of a statement of facts, the Court of Criminal Appeals could not review a denial of the motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2948-2948; Dec. Dig. § 1097.*]

Appeal from District Court, Travis County; George Calhoun, Judge.

J. A. Groves was convicted of assault with intent to commit murder, and he appeals. Affirmed.

W. L. White, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault with intent to murder Ellen Groves; his punishment being assessed at ten years' confinement in the penitentiary.

There are no bills of exceptions in the record, nor was a statement of facts prepared for the inspection of this court in determining this appeal. The motion for new trial sets up newly discovered evidence in regard to the plea of insanity. One of the issues on the trial was insanity. This is gathered from the charge of the court, which submits the issue for the consideration of the jury. One of appellant's attorneys files an affidavit that the testimony was unknown to the attorneys for appellant at the time of and during the trial, and that it was discovered since, and that the failure to discover said testimony was not owing to any want of diligence on the part of said attorneys. The appellant does not make an affidavit. What testimony was introduced on the trial is not shown in this record, and we have no information in regard to it upon which we can act as a court. The witness by whom this newly discovered testimony was to be shown is the father of the defendant, who resides at Lipan, Tex., and by him they expected to show that appellant's aunt, a sister of his mother, was insane, and confined in the insane asylum at Terrell, and that a deceased brother of appellant during his lifetime, suffered from epilepsy; and by a sister of appellant, who, it

is alleged, is believed to live at Cleburne, he expected to prove the same facts; that this testimony was unknown to appellant's attorneys. This testimony may have been only cumulative, and, in the absence of the statement of facts proved on the trial, all presumptions will be indulged in favor of the validity of a judgment and against the grounds of the motion for new trial. It is not shown that appellant was insane to the extent that he was unable to give his attorneys information about his family history, and on his plea of insanity the jury found against him. It may be further stated we are not informed in any way as to the species of insanity under which appellant was laboring, whether temporary or permanent. In the absence, therefore, of the evidence, and as the matter is presented by the motion, we are unable to review the question.

The judgment must be affirmed, and it is so ordered.

SOUTHERN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 8, 1909.)

HOMICIDE (§ 234*)—MURDER—EVIDENCE—SUFFICIENCY.

Evidence held not to support a conviction of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 482-493; Dec. Dig. § 234.*]

Appeal from District Court, Ft. Bend County; Wells Thompson, Judge.

Ellis Southern was convicted of murder, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This appeal is prosecuted from a conviction had in the district court of Ft. Bend county on the 23d day of April, of this year, in which appellant was convicted of the offense of murder, and his punishment assessed at confinement in the penitentiary for life.

Only two questions are raised on the appeal, and these both raise the sufficiency of the evidence to support the verdict. In the first place, it is urged that the testimony is not sufficient to show that the body found was that of the alleged deceased, Jerry Williams; and, second, that it was not shown that his death occurred by, through, or of the criminal agency or direction or act of, appellant. No synopsis of the testimony can fairly present these questions, so as to make a precedent of value to the profession. We therefore set out the testimony in full. It is as follows:

"J. C. Florea, county attorney of Ft. Bend county, Tex., testified: That on Sunday morning, January 31, 1909, he received word that a barn and some outbuildings were burned near Clodine, a small town in the north-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

east part of Ft. Bend county, and that the remains of a human being had been found in the ruins. That he and the deputy sheriff, Elmo Ransom, went to the scene of the fire. Upon their arrival at the scene of the fire they found that a large barn, and a lot of farming implements, and some small buildings were completely destroyed by fire Saturday night. The barn was a frame building, consisting of two large corncribs, with a driveway between them, and shed room on either side for stock. The witness did not know whether the barn had mow room over the cribs or not. In the ruins, about two feet from where the north door to one of the cribs had been, they found the charred remains of a human being lying across the tines of a pitchfork and some old wire, face up, and the stubs of the arms indicating that the hands had been folded across the breast. The legs and feet were burned off up to within a few inches of the knees. The bowels were oozing out of an opening in the belly. The flesh was burned off of the face, exposing a set of small, even teeth. The frontal bone was mashed in between the eyes, apparently by some blunt instrument, and from the back and top of the head the brains had oozed out through a bursted place in the skull. The witness stated that he was certain that the body found in the burned ruins was the body of a negro man; that he reached this conclusion after a thorough examination of the body; that nowhere about the body could he tell the color of the human being, but the skull was that of a negro; that the remains looked to be those of a person of medium height, with a full chest. The body was burned crisp all over, except two patches on the cheeks of the buttocks, which rested on the ground. These two patches of flesh were covered with burned clothing, and were parched brown. On the body, extending from the throat down the chest, there were four rows of buttons of different styles. One kind were small dish buttons; another, pearl buttons larger than the former; another row, of metal buttons, with the word 'Niagra' engraved thereon, and also a locomotive; another row, of large metal buttons, like the buttons used on slickers. The witness stated he and the deputy sheriff gathered these buttons up; also a number of brass eyelets, without hooks, like those worn on laced boots or shoes, hob nails and brass screw brads like those used in fastening on boot soles, a barlow pocket knife, and tin snuff box, and a metal piece off of the shank of a pipe. The iron frames of various kinds of farming implements were strewn over the ground near the body; also a heavy sledgehammer was found near by. The witness stated that a short distance from the ruins stood a vacant tenant house, and from which trailed a mark to the ruins, as though something heavy had been dragged on the ground. The witness stated he found no blood stains

around the vacant building, or on the ground about there.

"The state introduced dish buttons, pearl buttons, metal buttons, with the word 'Niagra' printed on them and a locomotive engraved thereon, and a large flat metal button, like those used on slickers, a tin snuff box, a metal piece off of the shank of a pipe, and some hob nails and brass brads like those used in fastening on boot soles, and a barlow pocket knife, all of which the witness identified as being found on the dead body by him and Elmo Ransom.

"Elmo Ransom, deputy sheriff, testified to practically the same facts as Mr. Florea, except that he could not tell whether the remains were those of a white man or a negro.

"S. J. Winston, sheriff of Ft. Bend county, Tex., testified: That he went to the scene of the fire Monday morning, and began inquiring as to the probable offender, if any one at all, and he was informed that the defendant, Ellis Southern, had been seen leaving the Washington house Sunday morning, going in the direction of the Figure 4 ranch, carrying a suit case. That he and Jerry Williams were the only persons missing from the neighborhood. That he went to the Figure 4 ranch, and found the defendant and Phoebe Williams. That he found that suit case, with these clothes in it (pointing to a suit case and some clothing that had been introduced), in the defendant's room. That he arrested the defendant and Phoebe Williams, and brought them to Richmond, and placed them in jail. That the man who was then being tried was the same man.

"Bat O'Brien, testified: That the defendant, Ellis Southern, and Jerry Williams, Lee Asmore, Lee Collier, Edgar Lindsey, and Charles Washington worked for him the week the fire occurred. That he had known Jerry Williams about a year, and that he had worked for him since last harvest. That Jerry seemed to be temperate in his habits and did not run about much. That during harvest season Jerry gave him money to keep for him. That Jerry used snuff and smoked a pipe. That the Saturday the fire occurred Jerry accompanied the witness to the train, he having gone into Houston that day and did not return until some time Monday. That he had not seen or heard of Jerry Williams since that Saturday. The witness stated he lived about 1,200 feet from the Washington house, and the Washington house was that distance from Clodine. That Clodine was about 2½ or 3 miles from the Jones place, where the buildings were burned.

"W. J. Weller testified: That he lived in Clodine, Ft. Bend county, Tex., where he kept a general store. That about 9:30 Saturday evening, January 30th, his attention was attracted by a big fire in the direction of the Jones place, which is about 2½ or 3

miles from Clodine. That when he saw the fire it was well under headway. That he had known Jerry Williams about a year. That Jerry was of medium height and full-chested. That he had not seen or heard of Jerry Williams since the fire. The witness stated he kept barlow knives for sale exactly like the one exhibited and same brand, also jumper coats, with buttons on them of the style and make of those exhibited, and also had often sold goods to Jerry Williams.

"J. A. Madden testified: That he lived about 400 yards from the scene of the fire. That the buildings had been vacant since some time last December. That the buildings were burned some time Saturday night, January 30, 1909; just what time during the night he did not know, as he went to bed early Saturday night, and did not wake up until late the next morning. That the barn, which was completely destroyed by fire, was a large frame building, consisting of two large corncribs, with a driveway between them and a big haymow overhead, and shed rooms for stock round the sides of the cribs, in which had been stored a lot of farm implements, the iron frames of which were scattered about in the ruins. That he found the charred remains of a human being in the ashes a few feet from where the north door to one of the cribs had been. The body was lying on its back, across the tines of a pitchfork and some old wire. The feet and legs were burned off up to within a few inches of the knees. The bowels were oozing from an opening in the abdomen. The hands were burned off, and from the position of the arms it looked as though the hands had been folded across the breast. That the flesh was burned off of the face, leaving exposed a set of small, even teeth. The frontal bone was crushed in, apparently by some blunt instrument; and from the back and top of the head the brains had oozed out through a bursted place in the skull, which looked as though it had been caused by the fire. That, after examining the ruins, he sent one of his men to Clodine to telephone the sheriff about the fire. That quite a number of people visited the scene of the fire that morning. That he was present when the county attorney, J. O. Florea, and the deputy sheriff, Elmo Ransom, made an investigation. That they gathered up some metal buttons, with the design of a locomotive on them, being the style of button worn on the 'Niagra' jumper coat, a snuff box, a metal piece which looked like a fastening off of a pipe, a barlow pocket knife, and some brass eyelets from a pair of lace boots or shoes. That he knew Jerry Williams and Ellis Southern. That Ellis Southern lived on the O'Brien farm, at the Washington house, near Clodine. He knew Jerry Williams about a year. When Jerry first came to that section of the country, he worked for him. That Jerry was a negro man of medium height and heavy built, about 50 years of age. That he had not seen or heard of Jerry Williams since the fire. That he did not know wheth-

er the body found in the ruins was that of Jerry Williams or not. That quite a number of people visited the scene of the fire Sunday, but he did not remember seeing Lee Osburn there that day. The witness stated that Clodine was about 2½ miles from the Jones place, where the fire occurred, and about 1½ miles across the prairie.

"Lee Collier testified: That he, Ellis Southern, Lee Asmore, Edgar Lindsey, Charley Washington, and Jerry Williams worked at Bat O'Brien's the week the fire occurred. That he had been cooking at the O'Brien place for some time. That he had known Jerry Williams about a year. He did not know how old Jerry was, but his hair was gray. That Jerry had 'good sound teeth, medium in size, and they looked sorter narrow to me.' That Jerry was full-breasted, low, 'chunky, and was pretty heavy sot.' That the last time he saw Jerry was about 7:30 Saturday night at the O'Brien place, where he ate supper. He stayed in the kitchen awhile after supper, then left, telling me 'he believed he would go over to the store and get some tobacco.' That Jerry wore laced boots, a jumper, and carried a slicker on his arm. That it was about 7:30 when he left the house, going in the direction of Clodine. That he had not seen or heard of Jerry Williams since that time. The witness stated that he heard Jerry say on Friday at dinner that he was going to make a point (appointment) with some woman who had promised to meet him in a 'wast' house in the bottom Saturday night, and that Lee Asmore told him, 'The way you are going there is no wast house,' and that Jerry replied that there was one on the edge of the prairie. The witness said the Jones place was 'pretty much on the edge of the prairie.' That Ellis Southern left O'Brien's place Saturday after dinner, and did not return until about 6 o'clock that evening. That he did not eat supper at O'Brien's, but went to Clodine to mail a letter on the train going to Houston, which was due about 6:14. The witness identified the clothing exhibited as being Jerry Williams' clothing. That Jerry complained about losing a watch some time before the fire occurred. That he (Lee Collier) was arrested some time after the fire occurred. That the sheriff found the watch in his (Lee Collier's) room, between the mattresses of his bed. That he pleaded guilty to stealing the watch. The witness stated he was alone at the O'Brien place the night of the fire.

"Lee Asmore testified: That he, Jerry Williams, Ellis Southern, and Charles Washington worked for Bat O'Brien. That he and Jerry Williams slept in the same room at O'Brien's. The witness identified the clothing exhibited as being the same clothing Jerry Williams gave to the defendant, Ellis Southern, in his (witness') presence about two weeks before the fire occurred. That Ellis took the clothing home with him. That defendant lived on the O'Brien place, at the

Washington house, with Phoebe Williams, Charles Washington's sister. That Friday, the 29th, while he, Ellis Southern, Jerry Williams, and Lee Collier were eating dinner, Jerry Williams made the statement that 'he was going down in the bottom to make a point (appointment) with some woman who had promised to meet him in a wast house,' and witness told him there was no empty house in the direction he was going, and Jerry replied that there were some empty houses on the edge of the prairie, and that he was going there and make a point (appointment) with a woman. That he did not hear Jerry tell Ellis that Friday morning—the witness and they and some other negroes were standing around a fire in the field warming—that he (Jerry) was going to Houston Sunday, and for Ellis to write to him at a certain address. The witness stated he left the fire before Jerry and Ellis left. That witness stated he did not know Jerry was married, and that he had told him he was not married. That Jerry wore a jumper with buttons on it like those exhibited. That Jerry wore a short, black slicker, with flat metal buttons on it, like those exhibited. That he wore laced boots, with brass eyelets like the ones exhibited. That Jerry had a barlow pocket knife, exactly like the one exhibited. That Jerry dipped snuff, which he carried in a tin box like the one exhibited, and also smoked a pipe with a metal piece on it like the one exhibited. That Jerry Williams did not run about much with the other negroes. He sometimes went over to the store of an evening.

"Charley Washington testified: That he lived on Mr. O'Brien's place, in the same house with his sister, Phoebe Williams, Sally Washington, and his mother, and that Ellis Southern had been living there with Phoebe Williams. That Phoebe Williams and Ellis had had a quarrel about two weeks before the night of the fire, and that Phoebe left her house and went to work for Mr. Aker on the Figure 4 ranch, about four miles from Clodine. The witness stated that Friday morning, while he and defendant, Lee Asmore, and Jerry Williams were standing around a fire they had built in the field to warm by, Ellis Southern told 'Uncle Jerry' that he was going to make a point (appointment) with a woman to meet him (Ellis) in a wast house Saturday night, and that he would make a point with a woman for Jerry. That Jerry said he would go if Ellis would make the arrangements. Witness left O'Brien's about 3 o'clock Saturday, and did not return until Sunday evening.

"Alice McDonald testified: That she went over to Charles Washington's house, on the O'Brien place, about 5 o'clock, Saturday evening, January 30, 1909, to sit up with Sadie Washington, who was very sick. That between 7 and 8 o'clock that evening, about 7:30 as near as she could tell, Ellis Southern came to the house and stayed a while, then left, saying he was going to the store, which

is a short distance from the Washington house. He told Pathinia Washington that he would bring her back some oranges. That Ellis was gone a few minutes, probably 15 or 20 minutes, when he came back to the house, bringing some oranges with him. That he stayed in the house a few minutes, and went out again, and she asked him where he was going, and he said he was going to talk to Jerry Williams; that he had some business with him. That Ellis did not return until a short time before the train from From came, which is due at 9:57. As near as the witness could tell, he was gone about two hours. That while he was gone she saw a fire toward the Jones place, which she took to be a strawstack on fire. That when Ellis came back he asked her if she saw the fire, and on being told she did, and that she thought it was a strawstack on fire, he said it looked too big for a strawstack, and that it looked like the Jones buildings. That Ellis helped witness move the sick woman from a chair after he came back, then said he would go over to the depot and see the train come in, but just as he was starting out the train whistled. Witness stated that, when Ellis came in and helped her move the sick woman, he did not seem to be excited or breathless, like a person would be after running some distance. That he was calm and self-possessed.

"Phoebe Williams testified: That she knew Ellis Southern and Jerry Williams. That she and Ellis had been living together for about two years at her brother's house on the O'Brien place. That she did Jerry Williams' washing for him, and Jerry came to the house after his clothes. That she and Ellis had a quarrel about two weeks before the fire occurred, and she left the Washington house, and went to work for Mr. Aker on the Figure 4 ranch, about four miles from Clodine. That she had never seen the coat and vest and the two pair of pants at the Washington house when she was there. That she was afraid of Ellis, as he had threatened to kill her about some men, and was jealous of her. That she had not seen the clothes that were exhibited but two or three times, but she knew they were Jerry Williams' clothes. The witness said she had seen Jerry Williams wear the suit of clothes two or three times when he was going to town. That Sunday, January 31st, Ellis came to the Figure 4 ranch, where she was working, and brought the suit case and the clothes exhibited with him. That she asked him why he brought Uncle Jerry's clothes with him, and he said 'Jerry had gone to Houston, and had given him the clothes to keep, and if he did not come back he (Ellis) could have the clothes.' That Ellis told her that the two Martin boys told Jerry they saw an officer looking for him. That Ellis stayed with her that night, and that the next morning they were arrested and brought to Richmond and placed in jail.

"G. W. Brantmer testified: That about 9 o'clock Saturday night, January 30, 1909, he saw a large fire in the direction of the Jones farm, which is about $2\frac{1}{2}$ or 3 miles from Clodine. That he visited the scene of the fire the next day, and saw the charred remains of a human being in the ruins; but he could not tell whether it was the body of a white man or a negro. That he had known Jerry Williams about a year. That he was a middle-aged man, of medium height, and weighed about 150 pounds. That, judging from the size and appearance of the body and from the teeth, he 'thought' the body was that of Jerry Williams. That he knew the 'defendant, who lived with Phoebe Williams at the Washington house.

"Lee Osburn testified: That he knew Jerry Williams about a year. That he met him at the train when Jerry first came to Clodine, and that Jerry went home with him and stayed all night. That the next day Jerry went to work for Mr. Madden. That Jerry frequently after that came to his house and visited with him. The witness stated that Jerry had a small set of even teeth; that he was about 50 years old and of medium height and heavy set; that he went to the scene of the fire about 10 o'clock Sunday morning; that he saw the body in the ashes, and it was charred beyond recognition, the flesh being burned from the face, and the teeth showed plainly. The witness stated, when he saw the teeth, 'I says, "them shore's Uncle Jerry's teeth."' He stated that the top of the head was mashed flat, and the body burned to a crisp. That he did not remain at the ruins but a very short time. That he had not seen or heard of Jerry Williams since the fire. He did not know whether that was Jerry Williams' body he saw in the ruins, but he was 'shore them were Uncle Jerry's teeth.' That witness stated that he did not know Jerry Williams was married until after the fire. The witness stated his hearing was defective, being partially deaf.

"Julia Williams, wife of Jerry Williams, testified: That she lived in Houston, Tex. That she was the wife of Jerry Williams. That she met Jerry Williams some months before at a church in Houston. That they were married December 27, A. D. 1908, and that Jerry and she lived together until January 1, 1909, when Jerry went to Clodine to go to work. That was the last she saw of him. That she did not know where he was. That he had written her two letters after going to Clodine. That he had promised her that he would come to Houston January 30th or 31st, but he did not come. That Jerry had never failed to keep a promise with her before this time.

"Edgar Lindsey testified: That he was working in a blacksmith shop on the O'Brien

place Saturday, January 30, 1909. That he knew Jerry Williams and Ellis Southern. That a while before supper Saturday evening Jerry Williams went to his room and went to sleep. About 6 o'clock Ellis came to the shop where he was at work, and asked him if he knew where Uncle Jerry was, and he told Ellis that Jerry was in his room asleep. And Ellis said he did not want to wake him, and for the witness to tell Jerry that he had made the arrangements they had talked about, and for him (Jerry) to meet him as he had agreed to. That he told Jerry at supper time what Ellis had told him to tell. That Ellis did not stay for supper, but said he was going to mail a letter on the train going to Houston, which was due about 6:14 p. m. That evening, after supper, was the last time he had seen Jerry Williams. The witness stated that he was at the examining trial, but did not say anything about what Ellis had told him to tell Jerry until a short while before the regular trial of the defendant."

There was no testimony offered by the defendant. It may be that the evidence is sufficient to authorize the jury to find that the burned and disfigured body found was that of Jerry Williams, with whose murder appellant stands charged. If, however, this fact could be conceded, the testimony falls far short of being of that degree of cogency and directness as to justify us in upholding a conviction consigning any man, black or white, to prison walls for his whole life. A reading of the testimony will demonstrate that there was no motive shown, and that the sum of the criminative evidence is the possession by appellant of some clothing said to have belonged to deceased, and the fact that they were together with other persons on the evening of the fire, which almost consumed the body of the dead man. While this might raise some suspicion, it falls so far short of that high degree of proof which the law requires that we cannot hesitate in believing it insufficient.

The judgment is reversed, and the cause is remanded.

ZACHARY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909.)

1. CRIMINAL LAW (§ 603*)—CONTINUANCE—ABSENCE OF WITNESS—FAILURE TO STATE TESTIMONY EXPECTED.

An application for a continuance for the want of certain witnesses, which did not set out what facts it was expected would be testified to by them, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1354; Dec. Dig. § 603.*]

2. CRIMINAL LAW (§§ 419, 420*)—EVIDENCE—HEARSAY.

In a rape case, testimony of prosecutrix's mother as to whether, before the alleged inter-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

course with accused, she did not hear that the school trustees were threatening to expel prosecutrix for immoral conduct, was properly excluded as hearsay.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 973; Dec. Dig. §§ 419, 420.*]

3. RAPE (§ 13*)—FEMALE UNDER AGE OF CONSENT—REPRESENTATIONS OF FEMALE AS TO AGE.

Carnal knowledge of a child under the age of consent being itself criminal, in a prosecution therefor, representations of the child to accused as to her age are immaterial.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 12; Dec. Dig. § 13.*]

4. CRIMINAL LAW (§ 1091*)—BILL OF EXCEPTIONS — CONSTRUCTION — EXPLANATION OF COURT.

In a rape case, a bill of exceptions, complaining of the refusal to permit a witness to answer a question relating to the reputation of prosecutrix for chastity prior to her alleged connection with accused, stated that the witness would have answered that he knew her general reputation in that respect, and that it was bad. The court approved the bill to where it undertook to set out what would have been the witness' answer, and gave an explanation that it changed its ruling, and notified accused's attorneys during the trial, offering to permit evidence of prosecutrix's reputation, and calling special attention to the former witness, that that witness was afterwards on the stand, but was asked no further question on the subject. The bill as proved up by bystanders included the court's explanation, recited the question asked, that objection was made, the answer of the witness, purpose of the testimony, and that "we, the undersigned, * * * hereby attest that we are fully informed, and understand the contents of the foregoing bill of exceptions, * * * and that the said bill of exceptions, which the judge * * * refused to sign, is correct. * * *" Held that, as the bill as proved up did not in terms deny the statement of the court, it should be accepted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2828-2833; Dec. Dig. § 1091.*]

5. CRIMINAL LAW (§ 1170*)—APPEAL—REVIEW — HARMLESS ERROR—RULINGS ON EVIDENCE.

Any error in the exclusion of testimony as to the reputation of prosecutrix in a rape case was not prejudicial, where prosecutrix was unquestionably under the age of consent, and accused afterwards had the opportunity to introduce the same evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.*]

6. CRIMINAL LAW (§ 338*)—EVIDENCE—REASON FOR NOT INDICTING OTHER PARTY.

In a criminal prosecution, evidence as to why another person was not also indicted for the offense was irrelevant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1752; Dec. Dig. § 338.*]

7. CRIMINAL LAW (§ 1091*)—APPEAL—BILL OF EXCEPTIONS—CONSTRUCTION—RIGHT TO USE STATEMENT OF FACTS.

Where there is an issue between the explanation of a bill of exceptions by the court and the matters recited and proved up by bystanders, which is in doubt, the recitals in the statement of facts may be looked to.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2828-2833; Dec. Dig. § 1091.*]

Appeal from District Court, Houston County; B. H. Gardner, Judge.

Adolphus Zachary was convicted of rape, and appeals. Affirmed.

Moore & Sallas, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was indicted in the district court of Houston county, charged with the offense of rape on one Sylvia Gadway, a female then and there under the age of 15 years. On his trial, had in said court on 5th day of March of this year, he was found guilty by the jury, and his punishment assessed at confinement in the penitentiary for a period of 20 years.

The age of Sylvia Gadway was established by unquestioned testimony, and she was shown by all the evidence to have been under 15 years of age at the time of the alleged unlawful intercourse. The proof of the unlawful carnal intercourse was shown, not only by the testimony of the witness Sylvia Gadway, but by John A. Davis, who testified: That he was justice of the peace at Grapeland, in Houston county, and had been for 22 years, and had known appellant all his life. That in 1908 appellant came to him, and asked him how old a girl would have to be before a person would be permitted by law to have intercourse with her, and in this connection he testified further, as follows: "He [appellant] said he had been having intercourse with the Gadway girl. He said he did not think she was 15 years old." In addition to this, George Calhoun, who was introduced as a witness by appellant, testified that appellant told him that he was having a good time with the Gadway girl. "He said he had met her at a church, and asked me if I did not want to have a good time with her." The evidence shows that, when first brought before the grand jury, prosecutrix denied the intercourse, and never admitted same at all until after a physical examination of her person by a physician. Her testimony also developed several other contradictions of an important character, not necessary here to notice. We make this brief statement of the case, to the end that the opinion may be understood.

1. When the case was called for trial, appellant filed an application for continuance for the want of the testimony of Mrs. J. E. Price, F. H. Bayne, and Dr. W. B. Collins. This application did not set out at all what facts, or any facts, which it was expected to be testified to by the witness Collins. The bill of exceptions evidencing the action of the court touching this matter tendered by appellant was refused by the court, and in lieu of the bill tendered the court prepared and had a bill of exceptions filed. In this bill it appears that, when the application was presented by appellant's counsel, the district attorney called the court's attention to the failure to state what was expected to be proved by Dr. Collins. It is further stated by the court that there was not any further request for additional process, nor for post-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ponement until Collins could be had, though it was a fact that he lived at Lovelady, on the International & Great Northern Railroad, within 13 miles of Crockett, and could be reached by telephone, and could easily reach Crockett by buggy in two hours, and the trains passed twice a day. The court further states that he would have granted all reasonable indulgence and process to have procured the attendance of said witness, and the case was on trial for two or three days. It is further stated by the court, and appears in the record, that Mrs. Price, as well as the witness Bayne, both appeared and testified. Appellant had prepared touching this matter a bill of exceptions and proved same up by bystanders. In this bill it is stated that the witness Collins, if present, would have testified that he was a physician, a graduate in medicine, with 20 years' experience in the practice of medicine and surgery, that while prosecutrix was before the grand jury he made an examination of her person, and that in his opinion she was a virgin, and had never been penetrated by the male organ of a man. This application, whether tested by the statements contained in the bill of exception prepared by the court or that tendered by appellant, shows no error, in that there was no kind of statement made in the application for continuance as to the testimony expected to be given by this witness. The application speaks for itself, and a careful reading of it discloses that it is wholly wanting in the essential, and, indeed, one of the most essential, particulars demanded by the law—that of stating the testimony expected to be given by the absent witness.

2. There are a number of bills of exception contained in the record proven up by bystanders, many of which are in contradiction and impeachment of the bills prepared and allowed by the court, thus evidencing a most unfortunate condition of affairs. We do not believe, however, that, tested by any of the bills, in the light of the entire record, there is any issue or question of such importance as would justify us in reversing the case. For instance, Mrs. Sarah Gadway, mother of prosecutrix, was asked if it was not a fact that, before the alleged intercourse with appellant, she did not hear that the school trustees of that community were threatening to expel her daughter from school on account of her immoral conduct. This, it was claimed, was admissible and material, as tending to show that prosecutrix was, prior to the alleged conduct of appellant, of a bad and immoral character, and would have affected her credibility as a witness. This was clearly hearsay, and under no circumstances admissible.

3. Again, it is claimed that the court erred in refusing to permit and compel prosecutrix to answer the question as to whether or not, at the marriage of one Miss Ada Ward, on the 8th day of January, 1908, she did not tell the defendant that she was then 14 years

of age. In this connection it should be stated that the prosecutrix was not introduced by the state to prove her age, nor did she testify in respect to her age, nor was there, in the light of all the testimony, any question or substantial issue made in respect to this matter. Besides, this identical question was ruled adversely to appellant in the case of *Edens v. State*, 43 S. W. 89. In that case appellant complained of the action of the court in "refusing to permit him to prove by the alleged injured female, who was at the time of the trial his wife, that in the latter part of January, 1897, at their first meeting in the woods, the question of her age was discussed between them, and that she then informed appellant that she was over the age of 15 years, and on the other occasions of their assignations she always told defendant that she was over the age of 15 years." In discussing this question Judge Davidson, speaking for the court, says:

"On objection by the state, this evidence was ruled out. In this, we think, there was no error. The indictment alleged that at the time the sexual intercourse occurred between the parties the girl was under 15 years of age and not his wife. The uncontradicted proof in the case shows that these were facts. The first act of intercourse occurred in the latter part of January, 1897, and was repeated at intervals for several months, until finally, to escape a prosecution, he married the girl on the 18th of August, 1897, she having become 15 years of age on the 10th of July previous to said marriage. 'Where the offense is in having connection with a child under the age of consent, belief on the part of the defendant that she was over the age of consent, and that, therefore, consent on her part would prevent the act from being criminal, cannot be shown. Connection with a child under the age of consent being criminal, one who has connection with a female which would, in any event, be unlawful, must know at his peril whether her age is such as to make the act a rape.' See *McClain*, Cr. Law, § 451. And see, also, *Lawrence v. Com.*, 30 Grat. (Va.) 845; *State v. Newton*, 44 Iowa, 45; *State v. Houx*, 100 Mo. 654, 19 S. W. 35, 32 Am. St. Rep. 686; *State v. Baskett*, 111 Mo. 271, 19 S. W. 1097; *Holton v. State*, 28 Fla. 303, 9 South. 716; *Reg. v. Prince*, L. R. 2 Crown Cas. 154; *State v. Grossheim*, 79 Iowa, 75, 44 N. W. 541; *People v. McDonald*, 9 Mich. 150; *Hays v. People*, 1 Hill (N. Y.) 351; 2 Bish. Cr. Law, 1091; Bish. St. Crimes, § 490. Mr. Bishop says: 'While, within principles explained in another connection, no one is ever punishable for any act in violation of law where to, without his fault or carelessness, he was impelled by an innocent mistake of facts, this rule does not free a man from the guilt of his offense by reason of his believing, on whatever evidence, that the girl is above the statutory age. His intent to violate the laws of morality and the good order of society, though with the consent of the girl, and

though in a case where he supposes he shall escape punishment, satisfies the demands of the law, and he must take the consequences.' Bish. St. Crimes, § 490. See, also, 1 Bish. Cr. Law, §§ 301-310, and note to section 303a. And see, also, sections 327, 330-340. We have found no contrary opinion, and but one dissenting opinion. The latter is found in the case cited from Grattan's Reports. We deem it unnecessary to amplify this question, for the authorities above cited fully settle it."

4. The next bill relates to the action of the court in refusing to permit the witness John A. Davis to answer the following question: "Do you know the general reputation of the prosecutrix, Sylvia Gadway, prior to her alleged connection with the defendant, for chastity?" It is stated in the bill that this witness, if permitted, would have answered that he knew the general reputation of the prosecutrix, Sylvia Gadway, for chastity, prior to her alleged connection with defendant, and that it was bad. The bill further states that this evidence was offered for the purpose of affecting the credibility of prosecutrix, Sylvia Gadway. In approving this bill the court makes this statement: "Approved down to where it undertakes to set out what would have been the answer of said witness. As a matter of fact the court changed the ruling, and so notified defendant's attorneys during the trial, and offered to permit defense to go into the reputation of the prosecutrix, and called special attention to the witness Davis, and he was thereafter on the stand, but no further question as to reputation of said Sylvia was asked of said Davis." The bill as proved up by bystanders includes the explanation of the court, recites the question asked, and that objection was made, the answer of the witness, the purpose of the testimony, and proceeds as follows: "We, the undersigned, citizens of Houston county, Tex., hereby attest that we are fully informed, and understand the contents of the foregoing bill of exceptions; that we were bystanders in the court, and present when the matters related in said bill of exceptions occurred, and we are fully cognizant of said matters, and the said bill of exceptions, which the judge presiding at said trial has refused to sign, is correct, and truly presents the facts as they really transpired." It will be noticed that the bill as proved up does not in terms deny the explicit statement of the court. If, in any event, there was any merit in the bill, in the absence of the court's explanation we think, where the record contains such an explicit statement of material facts, not in terms denied and negated by the bill as proven up by bystanders, that we must and should accept the court's explanation. With this explanation, it is manifest that there was no error in the ruling, since appellant, in the light of the bill, had the opportunity to make proof of the evidence tendered. Besides, it is doubtful, under the authority of *Steinke v. State*, 33 Tex. Cr. R. 65, 24 S. W. 909, 25

S. W. 287, in the light of the unquestioned age of the prosecutrix, whether in any event this testimony would be admissible.

5. On the trial it was proposed to be shown by the testimony of the witness Bayne the reason why no indictment had been returned against one Calhoun. The reason was, as stated in the bill, it was believed that the finding of such indictment would weaken the state's case against appellant. If it were permissible for the appellant to have shown the reasons why Calhoun was not indicted, and these reasons were, among others, that it would weaken the case against appellant, it would seem to have been equally competent, if Calhoun had been indicted, for the state to have shown that fact as an evidence of their belief in the guilt of both parties. This testimony, under any view of the case, was wholly irrelevant and inadmissible.

6. Touching the question as to the action of the court on the matter of proof of the general reputation of prosecutrix for virtue and chastity, we may say the following statement is made on page 8 of the statement of facts: "Prior to the time of the alleged transaction of the defendant with the prosecutrix, Sylvia Gadway, did you know her reputation in the community in which she lived for chastity? State objected. Court sustained objection. Defendant excepted. The court afterwards notified defendant's counsel in open court that he had changed his mind on that ruling, and would permit the witness to testify as to the reputation of said witness, and, though the witness Davis was on the stand, said attorneys declined or did not avail themselves of said ruling." To what extent we may look to the statement of facts in explanation of bills of exception has never been very clearly determined; but we think, in a case like this, where there is an issue between the explanation of the court and the matters recited and proven up by bystanders, and where, as in this case, it may be stated to be left in some doubt, that we should, in reason, be authorized, in testing the accuracy of conflicting statements, to look to recitals and statements made in the statement of facts.

7. Finally, it is urged that the testimony of the prosecutrix is so contradictory as not to form a just basis of conviction. If the testimony of the prosecutrix, in respect to intercourse, had stood alone, we should, indeed, hesitate in the matter of affirming the judgment; but in view of the explicit statements of appellant, directly affirming the intercourse, one of which was testified to by a witness introduced by himself, and in view of the unquestioned proof as to her age, it seems to us that, not only is the verdict sustained by the testimony, but, indeed, no other verdict could or should in fairness have been rendered.

Finding no error in the record, the judgment is hereby in all things affirmed.

JAEHNIG v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909.)

1. CRIMINAL LAW (§ 1167*)—APPEAL—HARMLESS ERROR—DEFECTS IN INFORMATION.

One convicted of simple assault cannot complain because the information, attempting to charge an aggravated assault, is defective because it fails to state the manner in which the instrument charged was used.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101-3106; Dec. Dig. § 1167.*]

2. CRIMINAL LAW (§ 1172*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS.

One convicted of simple assault cannot complain because the court misdirected the jury as to the law on aggravated assault.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.*]

Appeal from Bee County Court; W. W. Dodd, Judge.

Herman Jaehnig was convicted of simple assault, and he appeals. Affirmed.

Chambliss & Baker, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of simple assault, and his punishment assessed at a fine of \$10.

Appellant complains that the information is defective, in that it attempts to charge an aggravated assault, and therefore is insufficient, in that it nowhere states the manner in which the instrument charged was used, and that the court misdirected the jury as to the law of aggravated assault. Conceding this was true, appellant was only convicted of a simple assault and fined \$10. Therefore appellant cannot complain of same. The court properly charged on simple assault, and the jury properly found appellant guilty under the evidence as disclosed in the record. See *McCutcheon v. State*, 49 Tex. Cr. R. 607, 95 S. W. 525.

Finding no error in the record, the judgment is affirmed.

STATE MUT. LIFE INS. CO. v. BALLARD.

(Court of Civil Appeals of Texas. Oct. 27, 1909.)

EVIDENCE (§ 411*)—APPLICATION FOR INSURANCE—PAROL EVIDENCE—ADMISSIBILITY.

Where an application for insurance did not upon its face attempt to set out in full the character of the policy or contract entered into between the insurer's agent and the insured, but stated that there was a special contract, the terms of which did not appear, it was proper to admit evidence of the nature and character of the special contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1892; Dec. Dig. § 411.*]

Appeal from Haskell County Court; Joe Irby, Judge.

Action between T. E. Ballard and the State Mutual Life Insurance Company. From a

judgment in favor of Ballard, the insurance company appeals. Affirmed.

S. W. Scott, for appellant. H. G. McConnell and Gordon B. McGuire, for appellee.

FISHER, C. J. We find no error in the action of the trial court in overruling the motion for continuance. He correctly concluded that the diligence shown was not sufficient.

The court properly admitted testimony of appellee as to the nature of the contract entered into between him and the agent of the appellant. The application for insurance did not upon its face attempt to set out in full the character of the policy or contract that the appellee was entitled to. It stated that there was a special contract, the terms of which do not appear on the face of the application. Therefore it was proper for the court to admit evidence showing the nature and character of the special contract there referred to.

We find no error in the record, and the judgment is affirmed.

ST. LOUIS, B. & M. RY. CO. v. YZNAGA.

(Court of Civil Appeals of Texas. Oct. 21, 1909. On Motion for Rehearing, Nov. 11, 1909.)

1. APPEAL AND ERROR (§ 1169*)—REVERSAL—THEORY OF CAUSE—INSTRUCTIONS.

Where, in a negligence case, the verdict is general, and there were two theories presented on which the case was tried, an erroneous instruction on one theory will require a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4535; Dec. Dig. § 1169.*]

2. APPEAL AND ERROR (§ 497*)—RECORD—SHOWING GROUNDS OF REVIEW.

Where the appeal record fails to show that a special charge complained of was given, the instruction will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2954; Dec. Dig. § 497.*]

Appeal from Cameron County Court; John Bartlett, Judge.

Action by J. A. Yznaga against the St. Louis, Brownsville & Mexico Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed, and rehearing refused.

Claude Pollard and R. J. McMillan, for appellant. J. F. Canales and A. J. Hudson, for appellee.

PER CURIAM. Judgment affirmed, without written opinion.

On Motion for Rehearing.

McMEANS, J. At a former day of this term we affirmed the judgment of the court below without a written opinion. Appellant's attorneys have filed a motion for rehearing, in which they ably argue that the court below committed reversible error in giving to the jury, upon the request of ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

pellee, a special charge which will be hereafter set out. Appellee's cause of action grew out of the killing of certain animals by reason of being struck by the engine and cars of appellant. That they were so struck and killed was not controverted by appellant in the court below, nor in this court—appellant's contention in the main being, first, that the animals were killed at a place where public necessity and convenience, and a regard for the safety of its employes in operating its trains and switching its cars, required that its track should not be fenced; and, second, that the killing of the animals at such place was not the result of the negligence of its employes. Both theories were appropriately submitted by the court in the main charge to the jury. Before ordering the affirmance of the judgment, we concluded that the evidence was sufficient to sustain a finding that the animals were killed at a place where the track should have been fenced. But appellant contends that as the verdict was general, and it being therefore impossible to say upon which theory the jury found, the giving of an erroneous instruction upon one theory necessitates the reversal of the judgment. We recognize this contention as correct.

Appellant, by its fifth assignment, presented in its brief, called our attention to special instruction No. 2 requested by appellee, and which appellant claims was given by the court to the jury, and again calls our attention to it in the motion for rehearing. The charge complained of is as follows: "That it is the duty of those operating railroad trains to keep a lookout for persons or animals upon or near to and approaching its tracks, and, upon discovering animals on or near to and approaching its tracks, to blow the whistle and ring the bell, and, if necessary, stop its train, if it could do so, so as to avoid injury thereto, and, when the danger is discovered, it becomes its duty to use all means in its power to avoid such injury, and a failure to do so would constitute negligence on its part. Therefore, if you find and believe that the defendant and its agents and employes operating the train that struck and killed plaintiff's animals (if it did so kill them) did not keep a diligent lookout to discover said animals, if they were on or near defendant's railroad track, and that if by keeping such lookout they could have discovered said animals in time to have avoided said accident, and you further find that said acts of the defendant constituted negligence, which was the direct or proximate cause of the injury or death of plaintiff's animals (if any there was), then the defendant would be liable to plaintiff for whatever damages he sustained thereby. And in this connection you are told that by negligence is meant the failure to use such

care as a reasonably prudent person would use under the same or exactly similar circumstances." The charge is manifestly incorrect and misleading, and if it was in fact given the judgment should be reversed.

Upon consideration of the assignment, we found that the only statement made under the assignment was, "Plaintiff's special charge No. 2, complained of in this assignment, is there correctly copied," and refers us to the page of the record where the charge is set out. We concluded that this statement was incomplete and insufficient to require our consideration of the assignment, for the reason that it was not there shown that the charge was given. Since then we have examined the record, and find there is nothing therein to show whether the charge was given or refused. It seems to be well settled that, when the record fails to show that a special charge was given, appellate courts cannot take the alleged giving of it into consideration. *Hodde v. Susan*, 63 Tex. 310; *Hill v. Crownover*, 4 Tex. 8; *James v. Fulcrod*, 5 Tex. 512, 55 Am. Dec. 743; *Moore v. Brown*, 27 Tex. Civ. App. 208, 64 S. W. 947; *Michael v. Yoakum* (Tex. Civ. App.) 30 S. W. 1076. It is said in *Hodde v. Susan* that "the statement of counsel in a motion for new trial to the effect that the charge was asked and refused cannot be accepted as evidence of that fact." In *Michael v. Yoakum* it is said: "It is the action of the judge in connection with the charges that is complained of as error; and there must be something in the record to show that the charges have been called to the attention of the judge, and that action has been taken by him in regard to them, before errors assigned in connection with them will be entertained by an appellate court. The file mark indicates nothing but a ministerial act on the part of the clerk."

The motion for rehearing is refused.

NAIL v. FIRST NAT. BANK OF CHICKASHA.

(Court of Civil Appeals of Texas. Oct. 27, 1909.)

BILLS AND NOTES (§ 537*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action on a note, evidence held sufficient to go to the jury on the question of payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1885, 1886; Dec. Dig. § 537.*]

Appeal from District Court, Lipscomb County; H. G. Hendricks, Judge.

Action by the First National Bank of Chickasha against A. L. Nail and others. Judgment of dismissal as to other defendants, and a directed verdict for plaintiff against the defendant named, who appeals. Reversed and remanded.

See, also, 118 S. W. 1084.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

E. C. Gray and Capps, Canty, Hanger & Short, for appellant. Bond & Melton and Hoover & Taylor, for appellee.

KEY, J. The First National Bank of Chickasha brought this suit against Joe Perry, A. L. Nail, and S. B. C. Nail to enforce the payment of a promissory note for \$1,500, signed by Joe Perry, and payable to A. L. and S. B. C. Nail, or order. The bank acquired the note from the Nails. Joe Perry and S. B. C. Nail were not served with citation, and suit was dismissed as to them. A. L. Nail answered by general demurrer, special exceptions, general denial, and plea of payment by Joe Perry; the plea alleging that Perry had paid the note sued on by executing and delivering to the bank two other notes in full payment and satisfaction of the one involved in this suit. There was a jury trial, and, after hearing all the testimony, the court instructed a verdict for the plaintiff for \$1,809.50, which verdict was returned, and judgment entered thereon. From that judgment the defendant has appealed, and assigns as error the action of the trial court in peremptorily instructing a verdict for the plaintiff, and not submitting the question of payment to the jury, as requested by the defendant.

We sustain appellant's contention, and hold that the question of payment should have been submitted to the jury. It would hardly be proper for this court to discuss at length the testimony bearing upon that question, and express any opinion as to how the question should be decided, and we content ourselves with saying that, in our opinion, the testimony of Joe Perry to the effect that he executed and delivered to one Melton, who was acting as agent for appellee, a renewal note for \$1,620 and another note for \$125 as advance payment of interest, and that thereafter he saw both of said notes in possession of the bank, together with the letters written by the bank to A. L. Nail, of date February 27, 1905, and May 4, 1905, tended to sustain the plea of payment. There was much testimony to the contrary; but that did not deprive appellant of his right to have the jury pass upon the weight of the testimony and decide the question of payment.

For the error pointed out, the judgment will be reversed, and the cause remanded.

Reversed and remanded.

BELL COUNTY v. FELTS et al.

(Court of Civil Appeals of Texas. Nov. 10, 1909.)

1. APPEAL AND ERROR (§§ 175, 854, 856*)—PRESERVATION OF GROUNDS OF REVIEW.

To affirm a judgment, the Court of Civil Appeals is not bound by the reasons given by the trial court, nor limited in its conclusions to the grounds stated in the findings below, if the findings of fact or the evidence in the record

show that no other result could be reached, and the issue proved is pleaded, though not passed upon by the trial court nor called to its attention by a request for a finding upon it, but where the evidence merely raises the issue, and is not conclusive of it, the party who relies upon it should have it passed upon by the trial court, or at least request that it be done to have the question reviewed, and, if he fails to do so, the contention is waived, and he cannot have the cause remanded, which would otherwise be rendered, to permit him to have the issue submitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1137, 3408, 3409; Dec. Dig. §§ 175, 854, 856.*]

2. EVIDENCE (§ 589*)—WEIGHT—CREDIBILITY—PARTIES.

Where a witness is a party in interest, his credibility is largely a fact to be considered in determining what effect should be given to his testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2438; Dec. Dig. § 589.*]

3. LIMITATION OF ACTIONS (§ 103*)—ADVERSE POSSESSION OF TRUSTEE—REPUDIATION—NECESSITY.

If a person held title to land in trust for a county, his possession would not be adverse, so as to start the statute of limitations, until there was a repudiation of the trust.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 506-510; Dec. Dig. § 103.*]

On Rehearing. Motion overruled.

For former opinion, see 120 S. W. 1005.

FISHER, C. J. The only question that we desire to discuss, raised in appellee's motion for rehearing, is whether or not the judgment could be affirmed on the undisputed evidence in the record that the three-year statute of limitations applies, or whether the judgment below should be reversed and remanded for the purpose of permitting that question to be considered and determined in the trial court. Some of the evidence of appellee Felts tends to show that the land in question was intended to be used as a public park; and, if the evidence was satisfactory that it was used for such purpose, then we were correct in holding that limitation did not affect the right of the county to recover, but it is more than probable that we should not have given this effect to the evidence, and that on this branch of the case the rule announced in *Johnson v. Llano County*, 15 Tex. Civ. App. 421, 39 S. W. 995, should be applied. But however this may be, we are of the opinion that the appellee is in no position to have this question reviewed and the three-year statute of limitations applied in his favor. The case was tried before the court, and the trial judge filed conclusions of fact and law, which did not in any respect touch the question or the application of the three-year statute, nor was there any request made by either party for a finding upon that issue. Of course it is true that in order for this court to affirm we are not bound by the reasons given by the trial court, nor are we limited in our conclusions to the grounds stated in the find-

ings below, but if the findings of fact or the evidence contained in the record show that no other result could be reached, we should affirm, if the issue so proven is pleaded, although not passed upon by the trial court nor called to its attention by a request for a finding upon it. But where the evidence merely raises the issue, and is not conclusive of it, the party who relies upon it should have it passed upon by the trial court, or at least request that this be done, in order to have the question reviewed by the appellate court; and, if in such a case this is not done, it is regarded as waived. *Tenzler et al. v. Tyrrell et al.*, 32 Tex. Civ. App. 443, 75 S. W. 58, and cases cited. In the cases cited and others upon this point this rule of law was invoked to defeat an objection or complaint urged by the appellant, but we can perceive no reason why the rule should not apply to the appellee when he is urging the court in support of his judgment to consider evidence which was not considered by the trial court, and the effect of which was waived by not requesting some finding based upon it. In a case of this character, where the appellate court in reviewing the evidence and the issues of fact and law found by the trial court reaches the conclusion that the judgment is not only erroneous, but that it should be reversed and rendered, the appellee should not be permitted to defeat this course by the suggestion that the case should be reversed merely so that upon another trial he may be permitted to have submitted and passed upon an issue which could, if he had so requested, have been determined and settled at the original trial.

The evidence in this case is not conclusive of the question of limitation. Its effect was merely to present an issue of fact which the trial court could have determined either for or against appellee. The appellee's testimony furnishes the only evidence as to his actual possession, and whether it was adverse to the county. He being a party at interest, his credibility is largely a fact to be considered in determining what effect should be given to his testimony. This has been frequently decided by this and other courts. Further, his evidence as to his possession is not altogether clear, and it is by no means certain that it could be held that it was adverse to the county; that is, that it should be held adverse unless he, in some unequivocal manner, repudiated the trust under which he held the legal title. It is true that he had a deed to the land, but that title was held in trust for the county, as said in the original opinion, which his evidence shows he offered to surrender to the commissioners, but which they declined to accept, and upon that body doing this, he claims that he went into possession. We pointed out in the original opinion that the commissioners' court could not lawfully bind the county

by such agreement, and that if the superior title had vested in the county, there was only one way of divesting it; and, in this connection, it is well to remember that the evidence shows there was no final settlement of this matter with the commissioners' court until November, 1904, from which time to the filing of this suit in May, 1907, would not be sufficient to bar under the three-year statute. The most that can be said in appellee's favor is that he relied upon the illegal agreement with the commissioners' court to the effect that he could retain title, as the county did not want it. At least it could be held that up to the time of the final settlement in November, 1904, his possession was based upon that agreement. Prior to the time of this final settlement there was not, independent of the first agreement and the fact of possession, any distinct act of repudiation of the trust. From these facts, if the issue had been passed upon, the trial court could have concluded that a repudiation of the trust was not shown, at least, prior to the time of the settlement in 1904; and, if we were correct in holding that appellee occupied to the county a trust relation with reference to this title, limitation would not run until there was a repudiation. We are inclined to think that the evidence on this branch of the case, with the rules of law applied to it, is sufficient to show that there was no adverse holding for a time sufficient to bar the appellant's action under the three-year statute. Or if not entitled to be given any effect, it could be considered as merely raising an issue of fact which the appellee has waived by not requesting it to be passed upon by the court below, and that we are not authorized to reverse in order to permit its presentation in another trial.

Motion overruled.

MORGAN'S L. & T. R. & S. S. CO. v. STREET.

(Court of Civil Appeals of Texas. Oct. 20, 1909.
Rehearing Denied Nov. 10, 1909.)

1. REMOVAL OF CAUSES (§ 81*)—WAIVER OF RIGHT.

A nonresident defendant who failed to request the court to suspend the trial to enable him to prepare a bond and application for removal of the action to the federal court on the dismissal of the action as to the resident defendant, but who continued in the trial, and took his chances with the jury, waived his right of removal to the federal court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 137, 138; Dec. Dig. § 81.*]

2. COURTS (§ 7*)—TRANSITORY ACTIONS—PERSONAL TORTS.

An action of tort to the person is transitory, and the courts of one state may take jurisdiction of actions for torts based on acts or omissions done or occurring in sister states.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 14, 16, 22-31; Dec. Dig. § 7.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

3. COURTS (§ 7*)—TORTS (§ 2*)—TRANSITORY ACTIONS—PERSONAL TORTS.

The right of the courts of one state to take jurisdiction of an action for tort to the person, based on acts or omissions done or occurring in a sister state, is not affected by the fact that there is a dissimilarity between the laws of the two states as applicable to the action, for the court taking jurisdiction must apply the law of the state where the cause of action arose.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 14, 16, 22-31; Dec. Dig. § 7; *Torts, Cent. Dig. § 2; Dec. Dig. § 2.*]

4. ABATEMENT AND REVIVAL (§ 13*)—ANOTHER ACTION PENDING.

That a plaintiff in an action in the courts of Texas for a personal injury inflicted in a sister state, and removed to the federal court on the application of the nonresident defendant, brought an action in the sister state on the same cause of action before the federal court remanded the cause to the state court, did not abate the action in the state court.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 92-98, 100; Dec. Dig. § 13.*]

5. TRIAL (§ 143*)—CONFLICTING EVIDENCE—QUESTION FOR JURY.

The jury must weigh conflicting evidence, and determine its probative force.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.*]

6. MASTER AND SERVANT (§ 129*)—INJURY TO SERVANT—NEGLIGENCE.

Where the mud on a rail was a concurring cause with the defective condition of the wheel and axle of a motor car and of excessive speed of the car in producing its derailment, injuring a servant, the presence of the mud on the rail did not defeat an action for the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 257-263; Dec. Dig. § 129.*]

7. TRIAL (§ 260*)—INSTRUCTIONS—REFUSAL TO GIVE INSTRUCTIONS COVERED BY THE CHARGE GIVEN.

It is not error to refuse requested charges embraced in the court's main charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Error from District Court, Harris County; Norman G. Klittrell, Judge.

Action by Gus C. Street, Jr., against Morgan's Louisiana & Texas Railroad & Steamship Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Baker, Botts, Parker & Garwood, for plaintiff in error. Lovejoy & Parker, for defendant in error.

NEILL, J. This suit was originally brought by defendant in error, hereafter called plaintiff, against the Southern Pacific Company, the Texas & New Orleans Railroad Company, and plaintiff in error, Morgan's Louisiana & Texas Railroad & Steamship Company, hereafter called defendants, to recover damages for personal injuries alleged to have been inflicted through their negligence when in their service operating a motor car on the railroad of the last-named defendant in the state of Louisiana. Morgan's Louisiana &

Texas Railroad & Steamship Company seasonably filed its application and bond to remove the case to the United States Circuit Court for the Southern District of Texas, whereupon the application was granted, and the cause transferred to the federal court. On March 20, 1903, upon motion of plaintiff, the cause was remanded by the United States Circuit Court to the district court of Harris county, Tex., wherein the suit was first instituted. Then each of the defendants filed its original answer in the district court April 7, 1908, which embraced, on behalf of each defendant the following pleas in abatement and demurrers, to wit: (1) A verified plea as to the jurisdiction of the Texas court, based on certain alleged dissimilarities between the laws of the state of Louisiana and of the state of Texas, specially alleged; (2) a plea in abatement, setting forth that prior to the time this cause was remanded to the state court a suit, based on the same cause of action, between plaintiff and the defendant Morgan's Louisiana & Texas Railroad & Steamship Company, had been instituted and was still pending in the state of Louisiana; (3) a general demurrer; (4) a special demurrer on account of the misjoinder of parties defendant; and (5) a special demurrer based on the contention that the petition, on its face, showed the injury complained of to have resulted from the negligence of a fellow servant. The pleas to the jurisdiction and in abatement, and the demurrers, were duly submitted, heard, and overruled by the court. Thereafter the Morgan's Louisiana & Texas Railroad & Steamship Company filed its first amended original answer, which, in addition to said overruled pleas and demurrers, contained the following pleas in bar, to wit: (1) A general denial; (2) the negligence of a fellow servant; (3) contributory negligence on the part of Street (a) in failing to keep proper lookout for obstructions on the track, and (b) in sitting in a careless position and manner on the motor car, without holding on or securing himself; (4) assumed risk; (5) unavoidable accident; (6) a plea in bar of the action by reason of various dissimilarities alleged between the laws of Louisiana and of Texas applicable to such cases. The case as to all the parties was then tried before a jury, and resulted in a verdict and judgment in plaintiff's favor against Morgan's Louisiana & Texas Railroad & Steamship Company in the sum of \$12,500; the plaintiff having, before the case was submitted to the jury by the charge of the court, dismissed it as to the other two defendants, and the jury were expressly informed in the second paragraph of the general charge, which directed them, on account of such dismissal, to consider only the defendant, Morgan's Louisiana & Texas Railroad & Steamship Company, in arriving at their verdict. After the judgment was rendered, the mo-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion for a new trial overruled, the court adjourned for the term, and the petition for a writ of error filed in the district court, the defendant, Morgan's Louisiana & Texas Railroad & Steamship Company, on September 25, 1907, filed another petition and bond for removal of the case to the federal court, which application, with the bond, was presented to and denied by the court on October 5, 1908. This application was based upon the ground of diverse citizenship of the parties, and was urged upon the theory that on the voluntary dismissal by plaintiff of the other two defendants (who, having been parties, defeated the first application for removal) the case against it, as the only defendant, was removable to the federal court upon its filing a proper bond and application therefor. As the action of the trial court in denying the application for removal just referred to is assailed by an assignment of error, styled "Error apparent of record," we will dispose of it before considering those which go to the merits of the case.

If it be conceded, as we think it should be, that upon the voluntary dismissal of the other two defendants the case as to this one, notwithstanding it had gone to trial against them all, eo instante rendered it subject to removal to the federal court upon the defendant's filing a proper bond and application, yet we are of the opinion that it waived its right of such removal, the case being then on trial, by failing to request the court to suspend the trial, in order that it might have time to prepare a bond and application for removal and present it for the action of the court, and by taking its chances for a verdict by continuing in the trial of the case without then taking such steps as were necessary to remove it to the federal court. It cannot be successfully contended that defendant did not know of the fact that plaintiff had discontinued his action as to the other two; for, as is shown in our statement of the case the second paragraph of the court's charge expressly informed the jury that plaintiff had dismissed his suit as against the Southern Pacific Company and the Texas & New Orleans Railroad Company, and directed them to only consider the defendant, Morgan's Louisiana & Texas Railroad & Steamship Company, in arriving at their verdict. If defendant's counsel did not know of the dismissal before, they knew it then, or were charged with knowledge of it; for the record shows they were in court, where it was their duty to be. And, as the court was required to read the charge to the jury, it must be presumed it discharged such duty, and that it was heard by defendant's counsel. Then they should have taken the proper steps to have the cause removed, instead of taking chances of a verdict in their client's favor, and not have waited until after the verdict against the defendant was returned, judgment entered on it, motion for a new trial overruled, court adjourn-

ed, and application for a writ of error sued out before presenting the bond and application for the removal of the cause.

But under the first assignment of error is advanced this proposition: "When a plaintiff, having sued in a state court, and sought to fix joint liability on two defendants, one a resident, the other a nonresident of the state, has kept his pleading in this form, so that the case is not removable until after the lapse of the time limited by the laws of the state for pleading or answering in said case, and thereupon the plaintiff voluntarily abandons and dismisses the case as against the resident defendant by an order entered of record concurrently with, and as a part of, a judgment then entered against the nonresident, such a device is a fraud on the right of a nonresident defendant to have the cause removed under the statutes of the United States. It estops the plaintiff to complain of delay in the removal proceedings, and vitiates the judgment, rendering it void as against the exercise by the nonresident defendant of his right and option to so remove the case by filing and presenting his petition and bond thereafter, and such option and right to remove will continue in defendant so long as the removal status of the record continues, and up to the time when such defendant would be required to plead or answer in response to this new status of the record." We need not discuss nor pass upon the abstract question of the soundness of the proposition in its entirety; for it is more extensive than can be sustained by the record. It is deemed sufficient to point out that the record does not warrant the assertion contained in the proposition that plaintiff voluntarily abandoned and dismissed his case against the resident defendants "by an order entered of record concurrently with and as a part of the judgment against the nonresident." In this case no judgment was entered, nor could be, until after the verdict was returned. There could have been no verdict until after the charge was prepared by the court and read to the jury, and the charge expressly states that the plaintiff had dismissed his suit against the two resident defendants. Therefore the order of dismissal was not entered of record "concurrently with, and as a part of, the judgment against the nonresident defendant." But, as is shown by what has been said in disposing of the preceding assignment, the order was entered in ample time to have enabled the defendant by taking the proper steps to have presented its bond and application for removal before the verdict was returned and the judgment on it rendered. Inasmuch as no such steps were taken, it cannot be truly said that defendant's "option and right to remove continued" after the verdict and judgment; but from that time must be considered waived. *N. P. Ry. Co. v. Austin*, 135 U. S. 315, 10 Sup. Ct. 753, 34 L. Ed. 218; *Chesapeake & O. Ry. Co. v.*

Dixon, 179 U. S. 140, 21 Sup. Ct. 67, 45 L. Ed. 125; Powers v. Chesapeake & O. Ry. Co., 169 U. S. 101, 18 Sup. Ct. 264, 42 L. Ed. 670; Jones v. Mosher, 107 Fed. 561, 46 C. C. A. 471. Having thus disposed of these preliminary assignments, we come to the consideration of those which question the validity of the judgment.

The contention on the part of defendant that the court erred in not sustaining its plea to its jurisdiction by reason of the alleged dissimilarity of the laws of Louisiana—the state where plaintiff's injury was inflicted—to those of this state, cannot be maintained. The right of the courts of one state to take jurisdiction of causes of action for torts to persons based upon acts or omissions done or occurring in other states is established beyond dispute. The alleged injury to the plaintiff is actionable under the laws of Louisiana as well as under those of Texas. It is transitory in its nature, and such as can be brought wherever jurisdiction can be obtained over the person of the defendant. Even if there were a dissimilarity between the laws of the two states, as applicable to the action, that would not deprive the courts of Texas of jurisdiction; for they would simply apply the laws of the state where the cause of action arose as was done in this case. That after the institution of this suit the plaintiff also sued the defendant on the same cause of action in Louisiana furnished no cause for abating the suit brought in this state.

There was no error in the court's refusing defendant's request to instruct the jury that, according to the law and the undisputed evidence in this case, the plaintiff is not entitled to recover, and therefore to return a verdict in favor of defendant. Because the evidence was not undisputed, but in sharp conflict, it was for the jury to weigh and determine its probative force. In doing so they must have found that the derailment of the motor car, which was the cause of plaintiff's injuries, was due either to the unsafe and defective condition of the axle of its front wheel, or to the speed at which Stevens, who was defendant's servant and vice principal in charge of and running the car, propelled it; or to both causes combined. The evidence was reasonably sufficient to warrant the jury in finding that either or all of these acts were the cause of the derailment which resulted in plaintiff's injuries, and that they all were negligent acts of the defendant, and also that the plaintiff did not assume the risk of the derailment from any of said negligent acts, and was guilty of no negligence contributing to his injuries.

This disposition of the third assignment of error, also disposes of the fourth, fifth, sixth, and ninth, which complain that the evidence is insufficient to support the findings of the jury, and also of the seventh, which com-

plaints that the court erred in submitting to the jury the question as to a defect in the left front wheel and axle of the car, whether it was in an unsafe and defective condition, and, if unsafe and defective, whether such condition caused the car to leave the track, and was the proximate cause of plaintiff's injuries, upon the ground that there was no evidence to warrant the submission of such issues.

There is no error in that part of the charge complained of in the eighth assignment. If, as is said by the court in that part of its charge, there was mud on the rail, and it was only the concurring cause with the condition of the wheel and axle and speed of the car, or with both together, in producing the derailment, then the presence of mud on the rail would not defeat defendant's action, if the left front wheel was in a defective and unsafe condition by reason of defendant's negligence, or if the rate of speed the car was running was negligence, and that either of such acts of negligence or both concurring caused the derailment, either together or in connection with mud on the rail.

So much of the requested charges, the refusal of which is complained of in the tenth, eleventh, and twelfth assignments, as is the law applicable to the case is embraced in the court's main charge.

There is no error in the judgment, and it is affirmed.

KIRBY LUMBER CO. v. C. R. CUMMINGS & CO.

(Court of Civil Appeals of Texas. Oct. 27, 1909.
Rehearing Denied Nov. 17, 1909.)

1. TRIAL (§ 141*)—JURY QUESTION—UNDISPUTED FACTS.

Where the essential facts of plaintiff's cause of action are established by undisputed evidence, there is no issue of fact for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 336; Dec. Dig. § 141.*]

2. SALES (§ 420*) — ACTION BY BUYER FOR BREACH—JURY QUESTION.

In an action by a buyer for breach of the contract of sale, there is no question for the jury except the amount of damages where the facts as to the contract and breach are established by undisputed evidence.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1202; Dec. Dig. § 420.*]

3. SALES (§ 418*)—BREACH OF CONTRACT BY SELLER—MEASURE OF DAMAGES.

While ordinarily the measure of damages for the vendor's breach of a contract of sale is the market price of the goods at the time and place of delivery, less the contract price, if, when the contract is made, the vendor has notice that the goods are purchased for resale in a particular market or pursuant to a particular contract, so that he may reasonably be deemed to have contracted in contemplation of such purpose, damages may be recovered on the basis of such market or such special contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1192, 1193; Dec. Dig. § 418.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in admitting evidence on the amount of damages was harmless where the undisputed evidence fully sustained the verdict as to the damages awarded, measured by the rule properly given the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4163; Dec. Dig. § 1051.*]

5. PLEADING (§ 248*) — AMENDMENT — NEW CAUSE OF ACTION.

Where both the original and amended petitions were based upon a breach of the same contract, that plaintiff construed the contract as one of agency in the original petition, and as a contract of sale in the amended petition, did not make the amended petition set up a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 701, 702; Dec. Dig. § 248.*]

6. SALES (§ 406*)—REMEDY OF BUYER—ACTION FOR BREACH—CONDITIONS PRECEDENT.

Where, in an action for breach of contract to deliver lumber sold, it appeared that the seller had no lumber on hand at the time for delivery which it intended to deliver under the contract, the buyer was not bound to inspect and select any lumber in order to sue for the seller's breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1156, 1157; Dec. Dig. § 406.*]

7. SET-OFF AND COUNTERCLAIM (§ 55*)—UNLIQUIDATED DEMANDS—EXISTENCE OF SET-OFF.

Where plaintiff at the accrual of an indebtedness owing by him under a contract was entitled, as damages for breach of the contract, to a much larger sum than the amount due, interest on such amount was properly disallowed.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. § 126; Dec. Dig. § 55.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by C. R. Cummings & Co. against the Kirby Lumber Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Moye Wicks and Andrews, Ball & Streetman, for appellant. Hutcheson, Campbell & Hutcheson, for appellees.

NEILL, J. This suit was brought by appellees to recover damages against appellant for the breach of certain alleged sales of lumber made by the latter to the former; the breach alleged being the company's failure to deliver the lumber contracted for. The defendant answered by general and special exceptions to plaintiff's first amended original petition, on which the case was tried, a general denial, pleas of limitation, and certain other pleas in bar, which will hereafter be referred to. The case was tried before a jury, whom, after the evidence was introduced, the court instructed as follows:

"The undisputed evidence shows that the 360,000 feet of lumber bought by the plaintiff of the defendants on the 23d of July, 1902, was ultimately delivered, and consequently you will not consider that matter at all in making up your verdict.

"(2) The evidence is also undisputed that all the orders beginning near the foot of page

2 of the plaintiff's first amended original petition filed April 23, 1903, the first order being No. 517, continuing down to and on to page 6, the last being order No. 551, were all given to the defendant Kirby Lumber Company by the plaintiffs, and were by said company accepted for delivery in the quantities and at the prices and at the times stated in the petition.

"(3) The evidence is also undisputed that the Kirby Lumber Company would not have any connection with or sell to any person in Germany or beyond the seas, but that all the orders above cited were sold to and charged to C. R. Cummings & Co., and that they were placed on the books of the Kirby Lumber Company as a charge against the said C. R. Cummings & Co., and it is further undisputed that the said Kirby Lumber Company knew when the orders were given that the lumber was bought to be shipped abroad and sold in foreign markets.

"(4) It is further undisputed that none of the lumber was delivered, and the only duty devolving upon you is to determine what loss Cummings & Co. suffered by reason of such failure on the part of the Kirby Lumber Company to deliver the lumber. In arriving at this, you will take the price at which the lumber was sold for delivery at Rotterdam or at Hamburg, as the case may be, in each instance, and then ascertain what the lumber was worth in that market at the time it was to have been delivered, and allow the plaintiffs as damages the difference between the two prices per thousand feet, and will find what that difference amounted to as to each shipment, and then add to the amount you so find to have been the loss or damages of the plaintiffs on each shipment 5 per cent. on the amount which the whole shipment would have brought at the place of delivery at the time it was contracted to be delivered. You will pursue this method of calculation as to each shipment in regular sequence, and find the aggregate of such loss, if any, as you find there was, and then from that aggregate you will deduct the credit of \$2,302.59, admitted to be due by the plaintiffs to the defendant upon some other account, and add to the balance so remaining 6 per cent. interest per annum from June 1, 1903, to this date, and return your verdict for the plaintiffs for the sum resulting from this method of inquiry and calculation. You will then find for the plaintiffs the sum of \$925.83 as the amount paid Langbehn & Co., but will allow no interest on that amount, and then, by adding the sum of \$925.83 to the aggregate so found as above stated, state the total due at this date, and return your verdict therefor."

In response to the charge the jury returned the following verdict:

"We, the jury, find for the plaintiff, C. R.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Cummings & Co., damages and interest as follows:

Order 517,	damages.....	\$	830	77
" 521,	"		397	70
" 524,	"		353	64
" 531,	"		5,418	19
" 532,	"		524	19
" 533,	"		102	90
" 535,	"		1,806	06
" 546,	"		573	17
" 551,	"		303	56
				\$10,310 16
Interest 6% June 1, 1903, to date				2,378 25
Claim of Langbehn & Co.....				925 83
				\$13,614 24
Less amt. due Kirby Lumber Co..				2,302 59
Total				\$11,311 65"

Upon the verdict judgment was entered in favor of plaintiffs for the sum of \$11,311.65, with interest from its date.

We find that the undisputed evidence establishes beyond question such matters of fact as the jury were charged by the court were incontrovertibly proved, and that it is reasonably sufficient to support the verdict as to the damages. We deem it unnecessary to consider and discuss seriatim the numerous assignments presented in appellant's brief, for many can be disposed of on principles of law applicable alike to them all.

Our conclusions of fact dispose of the assignments which attack the part of the charge which enumerates certain matters of fact proved by the undisputed evidence; for, when the undisputed evidence establishes beyond controversy facts essential to plaintiff's action or to the defense of his adversary, as to such matters there can be no issues of fact to submit to the jury's finding but they become matters of law for the court to determine. Hence, under the undisputed evidence, it was proper for the court to submit to the jury only the question as to the amount of damages plaintiffs had sustained by defendant's breach of the contracts.

But it is complained that the charge gives to the jury the wrong measure of damages in a case like this, where the breach consists in the vendor's failure to deliver to the vendee the goods contracted for. Ordinarily, if a contract for the sale of personalty, executory on the part of the vendor, is broken by him, the measure of damages is the market price of such property less the contract price, and the market price for this purpose must be determined as to the time and place of the delivery agreed upon. But, if at the time the contract is made the vendor has notice or knowledge that the goods are being purchased for sale in a particular market, or to be supplied in pursuance of a particular contract, he may fairly and reasonably be deemed to have made his contract in contemplation of that purpose, and to have assumed the risks thereby entailed, then, if he breaks his contract, damages for loss caused thereby, if not uncertain and remote, may be recovered. 3 Page on Contracts, § 1589; Mechem on Sales,

§ 1763; Sutherland on Damages, § 52. In this case the evidence conclusively shows that at the time the sales were made defendant knew that plaintiffs purchased the lumber for resale in a foreign market—at Rotterdam or at Hamburg. In fact, the defendant knew when it sold plaintiffs the lumber that they bought it for delivery to parties in Rotterdam and Hamburg, with whom they had contracted to sell it at prices designated in the orders which they furnished the defendant at the time it made the contracts with them upon which this action is founded. We think, therefore, that the proper measure of damages was presented to the jury in the court's charge. While it may be that in view of the court's charge the evidence as to prices at which plaintiffs had contracted resales of the lumber in Rotterdam and Hamburg, and as to their having to indemnify the parties to whom they sold for the damages they sustained by reason of their inability to deliver the lumber, occasioned by defendant's breach of its contract, was irrelevant, it cannot be held to have been inadmissible in view of plaintiff's pleadings. If, however, all the evidence, the admission of which is complained of by numerous assignments, should be deemed inadmissible under the objections urged to its introduction, still, inasmuch as the undisputed evidence fully sustains the verdict as to the damages, measured by the rule given the jury, its introduction could have in no way affected the verdict, and such error, if error, was therefore harmless.

The plaintiffs' first amended original petition declares upon the same contracts that were sued upon in their original petition, the breach of which in each pleading is the foundation of the action. That the plaintiffs did not place the same construction upon the contracts in each pleading—having construed them in the first as contracts of agency and in the other as a contract of sale—did not constitute the filing of the first amended original petition the beginning of a new or different cause of action. In view of this, it is apparent from the dates of the several contracts and of the filing of the original petition that plaintiffs' action was not barred by the statutes of limitations pleaded, and that the court did not err in refusing to submit as an issue in the case the question of limitation to the jury.

From the uncontroverted evidence the defendants had no lumber on hand that it intended to deliver the plaintiffs under the contracts. Hence plaintiffs' failure to inspect and select the lumber cannot be urged as a defense to this action.

Inasmuch as plaintiffs were entitled, as damages, to a much larger sum than the \$2,302.59 they owed defendant at the time such sum became due, there was no error in the court's not allowing defendant interest on such amount.

There is no error in the judgment, and it is affirmed.

DOLINSKI et al. v. FIRST NAT. BANK OF PITTSBURG et al.

(Court of Civil Appeals of Texas, Oct. 28, 1909.)

1. PRINCIPAL AND AGENT (§ 69*)—PURCHASE BY AGENT—ACCOUNTING FOR PROFITS.

The purchasers of property requested the vendor to purchase other property for them. He was not told what to pay for it, but, upon his asking to be limited as to the price, he was told not to give more than \$6,000. He was to receive nothing for making the purchase. He paid \$5,000 for the property, and took a bill of sale for \$5,800, and on the same day deeded it to the purchasers for \$5,800. *Held* that, in making the purchase, he acted as agent for the purchasers, so that he was bound to account to them for his profit on the transaction.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 130, 132, 140; Dec. Dig. § 69.*]

2. APPEAL AND ERROR (§ 852*) — REVIEW — SCOPE AND THEORY OF CASE.

Where plaintiff in an action on a note pleaded performance of a condition precedent, but not a waiver by defendant of performance, the court, on plaintiff's appeal, need not consider whether the evidence supports a finding that there was such a waiver of performance.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3402; Dec. Dig. § 852.*]

3. CONTRACTS (§ 346*)—ACTION—PLEADING AND PROOF—PERFORMANCE—WAIVER.

Plaintiff, who pleads performance of a condition precedent, cannot recover on proof of a waiver by defendant of such performance.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 1750; Dec. Dig. § 346.*]

4. VENDOR AND PURCHASER (§ 285*)—VENDOR'S LIEN—FORECLOSURE—JUDGMENT.

In an action to foreclose a vendor's lien retained in a note for the purchase price of property, no judgment except for foreclosure should be rendered against a defendant who has succeeded to the rights of the makers of a note, in the absence of allegations in the pleadings showing a further liability and a prayer for further relief against such defendant than such foreclosure.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 803-805; Dec. Dig. § 285.*]

5. BILLS AND NOTES (§ 120*)—VENDOR'S LIEN—NOTE—CONSTRUCTION—"WE OR EITHER OF US PROMISE TO PAY."

Where a vendor's lien note stated that "we or either of us promise to pay," etc., the liability of the four makers was properly held joint and several, though the conveyance, a part of the consideration of which was represented by the note, stated that the cash payment was made by the purchasers in the proportions of one-fourth, one-third, one-sixth, and one-fourth, and that the amounts to be paid by the purchasers on the note were in the same proportions.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 257; Dec. Dig. § 120.*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 7421, 7422.]

Appeal from District Court, Camp County; R. W. Simpson, Judge.

Action by the First National Bank of Pittsburg against P. Dolinski, H. D. Knight, and others. Judgment for plaintiff against all defendants, and for defendant Knight against the other defendants, who appeal. Affirmed

as to the judgment in favor of the bank against Knight, and in other respects reversed and remanded for new trial.

The suit was by the appellee bank against the appellants P. Dolinski, C. G. Davis, J. B. Greer, and P. W. Thorsell as makers, and against appellee H. D. Knight as an indorser, to recover a balance of \$1,800, interest and attorney's fees, alleged to be due on a promissory note for the sum of \$5,300, payable to said Knight, and representing a part of the purchase price of a saw and a shingle mill, certain pine timber, and other property which need not be specified, and as against said appellants and appellee Knight and as against appellant the Progressive Lumber Company to foreclose a vendor's lien recited in the note as having been retained on the property to secure the payment thereof. In accordance with the verdict of a jury, judgment was rendered in favor of the bank against all the other parties for the sum of \$2,277.44, interest and costs, and foreclosing the vendor's lien as prayed for, and in favor of Knight over against all the appellants for said sum of \$2,277.44 and costs. The appeal is prosecuted by Dolinski, Greer, Thorsell, Davis, and the Progressive Lumber Company.

The note declared upon was as follows: "\$5,300.00. Gilmer, Texas, February 6th, 1907. On or before the first day of January, 1908, we or either of us promise to pay to H. D. Knight or order the sum of Fifty Three Hundred Dollars for value received, with interest from date hereof at the rate of eight per cent. per annum until paid. And in case this note is placed in the hands of attorneys for collection by suit we agree to pay 10% additional as attorney's fees. This note is given in part consideration for the purchase money for one saw mill complete, and Thirteen hundred and forty five acres of Pine saw timber, this day conveyed Phillip Dolinski, C. G. Davis, J. B. Greer and P. W. Thorsell, on which property a vendor's lien is hereby retained until the purchase money is fully paid. It is further agreed by the said H. D. Knight that he is to furnish the Grantees herein the amount of One hundred acres of virgin Pine timber, in order that the amount of 1345 acres conveyed in said deed may be completed. One thousand dollars of this note not to be paid until 100 acres is deeded to said grantees by good and sufficient deed. The said H. D. Knight agrees further that he will secure releases for approximately \$900.00 outstanding against said timber before the payment of this note. [Signed] Phillip Dolinski. C. G. Davis. J. B. Greer. P. W. Thorsell." A portion of the instrument conveying the property referred to from Knight to appellants Dolinski, Davis, Greer, and Thorsell, bearing the same date as the note, was as follows: "Know all men

by these presents: that I, H. D. Knight of the county of Upshur and state of Texas, for and in consideration of the sum of twenty-two thousand and one hundred dollars to me paid and secured to be paid by Phillip Dolinski, C. G. Davis, J. B. Greer and P. W. Thorsell, as follows: Sixteen thousand and eight hundred dollars cash in hand paid, the receipt whereof is fully acknowledged, and the sum of fifty three hundred dollars in one certain promissory note executed by the said grantees to said H. D. Knight for said sum, due January first, 1908, with interest from date hereof until paid at the rate of eight per cent. per annum, and the respective amounts paid by the grantees herein is as follows, Phillip Dolinski forty-two hundred dollars, the same being his one-fourth interest of the cash payment; C. G. Davis fifty-six hundred dollars, the same being his one-third interest in the cash payment; J. B. Greer twenty-eight hundred dollars, the same being his one-sixth interest in the cash payment; P. W. Thorsell forty-two hundred dollars, the same being his one-fourth interest in the cash payment. The respective amounts to be paid by the grantees on the said note being in the order above named, one-fourth, one-third, one-sixth, and one-fourth being in the same proportion as the cash payment."

Mell & Stephens and Sam D. Snodgrass, for appellants. Warren & Briggs and W. R. Heath, for appellees.

WILLSON, C. J. (after stating the facts as above). Appellants insist that the uncontradicted evidence showed that in purchasing the shingle mill Knight acted for them as their agent, and therefore that they were entitled to have allowed as an offset against the balance remaining unpaid on the note the sum of \$800, representing the difference between \$5,000, the sum Knight actually paid for the shingle mill, and \$5,800, the sum he represented to them he had paid for it and the sum he demanded and received of them on account of same. Knight testified: "They," referring to appellants Dolinski, Davis, Greer, and Thorsell, "asked me to buy the property for them, and I told them I would, and went, but did not buy it for them. I did not tell them I was going to buy that property for myself. I did not tell them anything about it. I don't remember them asking me to buy it directly for them. They asked me to go and buy it, I suppose for them, but they did not say I was to buy it for them. They did not tell me how much to pay for it. When I started, I said, 'You had better limit me on this thing, because I might give more than you want to give for it;' and they said, 'Don't give over \$6,000.' They did not want to give any more than that. They said, 'Don't pay over \$6,000.' They were not to give me anything for making the purchase of that Brown property for them. There was nothing said about it at all. * * * I paid

\$5,000 for the property. I deeded the same property to them the same day I got it. * * * I took a bill of sale to the Brown property for \$5,800. This is the bill of sale that Brown executed to me that same day. When I went back, I showed this bill of sale to these parties. I gave it to them. The bill of sale shows the consideration paid for the Brown property was \$5,800. The reason I did that was because it suited me to do it that way. But, as a matter of fact, I only paid \$5,000 for it. I did not say there to those gentlemen, 'This is what I paid for it.' I never did say that. They did not ask me. They never asked me if I did not pay but \$5,000 for that property. I never told them what I really paid for this piece of property. They did not ask me, and I did not tell them voluntarily. I got \$5,800 for the property because that is what I asked them for it. I did not represent anything about the price to them, any more than I just showed them the bill of sale." From the testimony quoted we think the conclusion is irresistible that, when he purchased the shingle mill, Knight acted as appellants' agent, and we do not think the conclusion is weakened by other portions of Knight's testimony tending to show that he may have believed he acted for himself in purchasing the shingle mill, and that at the time he undertook to represent appellants in the purchase thereof the negotiations between himself and appellants with respect to the sale by him to them of his sawmill had not reached a point where appellants had become bound to purchase his sawmill property in the event they secured the shingle mill. Whether they had become bound to purchase the sawmill property or not, when they authorized Knight on their account to purchase the shingle mill, they became bound to receive and pay for same after Knight had purchased it for them at a price authorized by them. And, as their agent, the latter became bound, when he took a conveyance to himself of the shingle mill, to convey same to appellants at the price he paid for it. He would not be permitted to make a profit for himself out of his agency by selling to his principals at a price in excess of that he paid for it property he had undertaken to purchase on their account. 1 Clark & Skyles on Agency, p. 800. On the evidence as it appears in the record, we think the peremptory instruction requested by appellants directing the jury to find in their favor the offset of \$800 claimed as specified should have been given.

By the terms of the contract between the parties to the note declared upon, \$1,000 of the amount thereof was not to be paid until 100 acres of virgin pine timber, in addition to the quantity conveyed by the instrument referred to in the note, had been conveyed by a "good and sufficient deed" to the makers thereof. Appellants insist that the testimony showed that in the particular re-

ferred to the contract had not been complied with, and therefore, in so far as the judgment awarded a recovery against them for the \$1,000 interest, etc., it is erroneous, because contrary to the evidence. That the 100 acres of timber, nor any part of it, never was conveyed to appellants, seems to have been conclusively established by uncontradicted testimony. Appellees sought to avoid the consequence of the failure on Knight's part to comply with his undertaking to make a conveyance of such timber by a "good and sufficient deed" by testimony tending to show that the Progressive Lumber Company, succeeding to the rights of the makers of the note, had cut and manufactured into lumber for its own use the timber off of 29 acres of land belonging to Knight, and that Davis, as president of said lumber company, had accepted as a compliance on the part of Knight with his undertaking a conveyance to him (Knight) from one Ferguson of 71 acres of timber owned in common by Ferguson and other persons who did not join in the conveyance. Davis denied having so accepted such a deed; and, without going into a discussion of the evidence on that phase of the case, we will say, if it established anything, it established a waiver by Davis of the performance by Knight of that term of the contract, and not a performance, substantial or otherwise, thereof. The allegation in appellees' pleading was that Knight had performed the undertaking in question by conveying to appellants the 100 acres of virgin pine timber. They did not allege a waiver by appellants of a performance by Knight of his undertakings. It therefore is unnecessary to consider whether the testimony was sufficient to support a finding by the jury that there was such a waiver or not. To be available as an excuse for the nonperformance by Knight of his undertaking, the waiver must have been pleaded. *Insurance Co. v. Holcomb*, 89 Tex. 410, 34 S. W. 915; *Insurance Co. v. Brown*, 82 Tex. 631, 18 S. W. 715; *Insurance Co. v. Daniels* (Tex. Civ. App.) 33 S. W. 550.

For the errors indicated by what has been said, the judgment except so far as it is in favor of the bank against appellee Knight will be reversed. On another trial, in the event of a recovery by the appellees, if the pleadings remain as they are, a judgment other than for a foreclosure of the lien asserted should not be rendered against the Progressive Lumber Company. Facts showing further liability on its part were not alleged, and the only relief prayed for as against it was for a foreclosure of the lien.

We do not think the court erred in construing the contract between the parties to the note as binding the makers jointly and severally for the full amount of the balance, if any, due on the note. Such a con-

struction was necessary to give effect to the language of the contract as evidenced by the note and the instrument conveying the property from Knight to Dolinski, Davis, Greer, and Thorsell. We think the recital of the proportions paid and to be paid of the purchase price of the property by the purchasers thereof should be construed as intended as between themselves to evidence their respective interests in it.

So far as the judgment is in favor of the bank against appellee Knight it will be affirmed. In all other respects it will be reversed, and the cause will be remanded for a new trial on the issues remaining.

ATTOYAC RIVER LUMBER CO. *v.* PAYNE. (Court of Civil Appeals of Texas. Nov. 1, 1909.)

1. MASTER AND SERVANT (§ 79*)—TIME CHECKS—PAYMENT IN MERCHANDISE—LIABILITY.

An employer issuing checks to his employes payable only in merchandise at the employer's store is not liable in money to the employes or their assignee for the amount of the checks unless demand for their payment in merchandise is refused.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 104; Dec. Dig. § 79.*]

2. BILLS AND NOTES (§ 162*)—TIME CHECKS—PAYMENT IN MERCHANDISE—"NEGOTIABLE INSTRUMENT."

Checks issued to employes payable only in merchandise at the employer's store are not negotiable instruments payable to bearer, and mere possession of them by a third person raises no presumption that he is entitled to the rights of the employes, and, in the absence of evidence that the third person has acquired the right of the employes, he is not entitled to recover thereon.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. § 397; Dec. Dig. § 162.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4767-4770; vol. 8, p. 7731.]

Appeal from District Court, Nacogdoches County; James I. Perkins, Judge.

Action by Mrs. N. Payne against the Attoyac River Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

June C. Harris and Ingraham, Middlebrook & Hodges, for appellant. King & King and C. D. Mims, for appellee.

PLEASANTS, C. J. This suit was brought by appellee against appellant to recover the sum of \$738.65, the aggregate amount of certain time checks issued by the appellant to various of its employes, and claimed to be owned by appellee.

In addition to general and special exceptions and general denial, the defendant's answer contains the following special pleas: "Further answering herein, defendant denies that it ever at any time issued any time checks which were given for labor performed by its employes to be redeemed in cash or

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

payable to any one, except in this: That defendant has heretofore for the convenience and accommodation of its employes issued time checks, some of which have been delivered to defendant's employes before their wages were due for the special and peculiar benefit and accommodation of its said employes, and with the specific agreement and understanding in each instance that said checks were issued and delivered to said employes for the special accommodation of the employe to whom they were delivered; that said checks were nontransferable, and were delivered by the defendant and accepted under the condition that such employe so receiving said checks would use them for the purpose of purchasing merchandise at defendant's store located near its mill at Mayo, in Nacogdoches county, Tex., and that said checks were not redeemable in money. Defendant says that the average profit made upon merchandise sold out of its said store to its employes is 25 per cent., and that the value of said checks is not more than 75 cents on the dollar. The defendant did issue checks such as are described in plaintiff's petition with an agreement with such party to whom issued that they would not transfer them to any one, that they were only payable in merchandise at the commissary store of defendant, and were nothing but orders for merchandise at the prices the same was sold at the commissary of this defendant, and were not payable in money, that they were only issued as emergency matter, and to avoid to some extent keeping an elaborate set of books and accounts with each man to whom issued, and the said merchandise was sold at a profit of 20 per cent., and no demand has been made for the payment of said checks in merchandise of this defendant, who was at all times and now is ready to pay them off at its commissary with merchandise at its selling price at its commissary, and the same would thus be paid there on presentation upon proof of ownership of the holder, and these facts it is ready to verify." The trial in the court below was with a jury, and under peremptory instructions by the court a verdict was returned in favor of the plaintiff for amount claimed by her, and judgment was rendered in accordance with such verdict.

The record does not contain a copy of any of the checks upon which the suit was brought, and the description of said checks shown by the evidence is very meager. It only appears that the checks were numbered 5, 10, 25, 50, or 100, and were issued by the appellant. It does not appear that said checks show on their face to whom they were issued, or show that in issuing them appellant became liable to any one in any amount. The evidence does show, however, that the number of the check was intended to show the number of cents in which appellant was indebted to the person to whom they were is-

sued for labor performed for appellant, and there was testimony tending to show that the appellant in issuing said check intended to and did obligate itself to pay to the person to whom they were issued the number of cents shown by the number of said check. The evidence offered by the appellant was to the effect that it only issued checks of the kind sued on by appellee at request of its employes and with the distinct understanding and agreement on the part of the employe to whom any such check might be issued that the check was redeemable only in merchandise, and, unless such check was presented at appellant's store and offered in exchange for merchandise, appellant was under no obligation to redeem it. Appellant's testimony upon this issue is as follows:

S. F. Carter for defendant testified: "We just issue these checks for the convenience of the employes and bookkeepers. When they would want something out of the store and had no money, we would issue them a check, and they would buy something out of the store with the check. Any one that wanted something out of the store we would issue them a check; but he had to buy out of the store, and with that check. It was with that understanding that we issued the checks to the men. Sometimes we would accommodate a man that had done no work yet and was wanting something out of the store. We would issue him a check so he could get something to live on until he could get to work and get in some time. We only done this for accommodation, however, but done it quite often. When we would issue a man a check that had in no time, we would just charge him with it, and, as soon as he had worked some, would fix that up again. He would have to get merchandise with his check. We made 18 or 20 per cent. net on our merchandise. We did not give checks for cash at all, but so the men could purchase merchandise. We were advised by our attorney not to put 'Merchandise' on the checks. If a man was working at \$1 per day, if he wanted it at night, I would give him \$1 check. We had a pay day, Saturday after the 15th of each month. Our hands all worked under this. If a man would draw his checks every night and spend only 15 of them during the month, we would not give \$15 in cash for 15 No. 100 checks. We did not issue checks only for men who wanted to trade out of the store. That was the only purpose they were issued for, and that was the understanding with the men."

H. M. Carter testified: "I am superintendent of defendant; know Mr. Atkinson; have cashed small checks for him, not many times. I told him I would not cash any more unless discounted 10 per cent. I told the men they would have to discount the checks 10 per cent. Atkinson told me he would get every one of the damned things he could, and we stopped issuing them. I cashed some to

avoid a lawsuit. Every one else was willing to the discount. Mr. Skeeters and Mr. Phillips was. I do not remember who else. The peddlers were. The checks were issued solely for the convenience of the employees of the mill. When those laborers would get the checks and go outside of the store with them, we would discount the man that finally brought them in 10 per cent. Any man who brought them in would have to accept a discount of 10 per cent."

There was no evidence that the persons from whom appellee obtained the checks were those to whom they were originally issued, or had acquired the title of those to whom they were issued.

Under this state of the evidence, the trial court should not have instructed a verdict for the plaintiff, and the assignment of error complaining of such instruction must be sustained.

It is clear that the evidence above set out would authorize a finding by the jury that the checks sued on were issued by appellant with the understanding and agreement on the part of the employees to whom they were issued that such checks were payable only in merchandise. If this is true, it is well settled that neither the employees to whom the checks were issued nor their assignee could recover in money the amount specified in the checks, unless demand had been made for their payment in merchandise and such demand refused by appellant. The privilege of the appellant to discharge the obligation in merchandise was not lost until demand had been made therefor; the obligation not being payable on a day certain, but on demand of the payee. *Baker v. Todd*, 8 Tex. 273, 55 Am. Dec. 775; *Hopkins v. Seymour*, 10 Tex. 202; *Short v. Abernathy*, 42 Tex. 94. The checks in question having none of the essential qualities of a negotiable instrument payable to bearer, the mere possession of them by the appellee raises no presumption that she is entitled to the rights of the person to whom they were issued. The evidence failed to show that appellee had acquired the right and title of the original owner of said checks, and therefore fails to show that she was entitled to recover thereon. *Rush Bros. v. Haggard*, 68 Tex. 674, 5 S. W. 683; *Griffeth v. Hanks*, 46 Tex. 217; *Robinson v. Texas Pine Land Ass'n* (Tex. Civ. App.) 40 S. W. 620. The act of the Legislature prohibiting employers from issuing time checks to their employees payable in merchandise was declared unconstitutional by the Court of Criminal Appeals in the case of *Jordan v. State*, 51 Tex. Cr. R. 531, 103 S. W. 633, 11 L. R. A. (N. S.) 603, and the rights of the parties to this suit are therefore not affected by that act.

For the reasons above given, the judgment of the court below must be reversed, and the cause remanded, and it is so ordered.

Reversed and remanded.

WESTERN UNION TELEGRAPH CO. v. WILLIAMS.

(Court of Civil Appeals of Texas. Oct. 23, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 67*)—FAILURE TO DELIVER MESSAGE—NOTICE OF PROBABLE DAMAGE.

'A telegram sent by plaintiff to his agent, reading: "Rent building if you think best," was sufficient to show defendant telegraph company's agents that the addressee had been negotiating to rent plaintiff's building, that he was authorized to rent it if he thought best, and that damages might result to plaintiff if defendant did not deliver the message, and the building was not rented.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 65; Dec. Dig. § 67.*]

2. DAMAGES (§ 62*)—FAILURE TO DELIVER MESSAGE—DAMAGES—DUTY TO REDUCE DAMAGE.

It was plaintiff's duty, on losing a prospective tenant for his building for a stated term through defendant telegraph company's failure to deliver a message, to use reasonable diligence to secure another tenant at the best rental he could get, and thus reduce the damages.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 128, 129; Dec. Dig. § 62.*]

Appeal from Freestone County Court; John Terry, Judge.

Action by J. H. Williams against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

N. L. Lindsley, for appellant.

BOOKHOUT, J. Appellee, J. H. Williams, a resident of Freestone county, Tex., on July 23, 1908, brought suit against appellant, Western Union Telegraph Company, for the nondelivery of the following telegram: "Rockwall, Texas, 7-23-1907. To R. H. Waldrop, Teague, Texas. Rent building if you think best. [Signed] J. H. Williams." It was alleged that on the 23d of July, 1907, appellee was the owner, and is still the owner, of lot No. 17, in block No. 94, in the town of Teague, Tex., and a certain storehouse situated thereon; that on said last-mentioned date appellee had an agent, to wit, R. H. Waldrop, who was then residing in the town of Teague, and was in said town at said time, and that he was well known to the citizens of said town of Teague; that Connell Bros., a firm then doing business in said town of Teague, was desirous of leasing appellee's said storehouse for a period of 12 months beginning on the 1st day of August, 1907, and to run for 12 months, or until August 1, 1908, and the said Connell Bros. offered to the appellee the sum of \$35 per month rental for said building; that appellee was absent from the town of Teague at the time, and was in the town of Rockwall, Tex.; that being advised by his said agent of the proposition so made by the said Connell Bros. to lease his said building, his said agent not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

having the authority to lease same without the consent of appellee, he (appellee) on the 23d day of July, 1907, made and delivered to the appellant's agent at Rockwall the telegram hereinabove set out; that he paid to appellant's agent at Rockwall, Tex., the sum of 25 cents, being in full of all charges demanded by appellant's agent at said place; that the said telegram was by the negligence of said appellant, its agents and servants, never delivered to the said R. H. Waldrop, and by reason of such negligence of appellant in failing to promptly transmit and deliver the said message to the said R. H. Waldrop, as it contracted and agreed to do, the said Connell Bros. failed to lease the said building, and appellee has thereby suffered and lost in actual damages the amount of \$420; that, had the appellant delivered the said message to R. H. Waldrop, the said Waldrop could and would have closed a rental contract with the said Connell Bros. for appellee's said building for one year, beginning on the 1st day of August, 1907, and ending on the 1st day of August, 1908, at a monthly rental of \$35; that appellee has only been able to rent his said building for about two months during said time, and has collected as rents the sum of \$45, which said amount he credits on the yearly rental he would have received; leaving a balance due of \$375, for which amount he asks judgment. The defendant answered by general and special exceptions, general denial, and by special answer that the plaintiff could and should by the use of ordinary diligence have rented the premises for a reasonable monthly rental shortly after July 23, 1907, and that by reason of plaintiff failing to use ordinary diligence in this respect, and by reason of the fact that the plaintiff has been guilty of contributory negligence, the alleged loss and damage to plaintiff was occasioned, and that the plaintiff for this reason is not entitled to recover against the defendant herein. The demurrers were overruled, to which action of the court the defendant excepted. Trial was had before the court, which resulted in a judgment in favor of appellee and against appellant for \$375.

We are of the opinion that the telegram gave sufficient notice of the object of plaintiff in sending it, and that the agents of defendant could reasonably have contemplated that some such damages as that sued for would result to plaintiff by its failure to use reasonable diligence for its delivery. The message was sufficient to show that Waldrop, the addressee, had been negotiating to rent plaintiff's building, and that he was authorized to rent it if in his judgment he thought best, and that damages might result to plaintiff if the company failed to deliver the message, and the building was not rented. There was no error in overruling appellant's demurrers to the petition.

We are, however, of the opinion that reversible error is pointed out by the sixth assignment of error, reading as follows: "The court erred in rendering judgment in favor of the plaintiff and against the defendant herein for the reason that it appears from the uncontradicted evidence in this case that the proximate cause of the damages claimed to have resulted to the plaintiff was caused by the failure on the part of the plaintiff to make other efforts to rent the storehouse during the time it is claimed he could have rented it to Connell Bros." It was the duty of plaintiff, after the contract had been breached and he ascertained that Connell Bros. would not rent his building, to use reasonable diligence to rent the same to some other responsible party. If it could not be rented for the same amount that Connell Bros. were willing to pay, then he should have used reasonable diligence to rent it for the best price he could get from other solvent parties, and hold the appellant liable for the difference, and thus reduce as far as possible his damages. *Telegraph Co. v. Jeanes*, 88 Tex. 230, 31 S. W. 186; *Kramer v. Wolf Cigar Stores*, 99 Tex. 597, 91 S. W. 775. Appellee testified that he made no attempt after he found his telegram had not been delivered to rent his storehouse during the balance of the year.

For the error pointed out, the judgment is reversed, and the cause remanded.

PRATT et al. v. INTERSTATE SAVINGS & TRUST CO.

(Court of Civil Appeals of Texas. Nov. 3, 1909.)
APPEAL AND ERROR (§ 407*)—CITATION IN ERROR—SERVICE.

Rev. St. 1895, art. 1394, provides that a citation in error shall be directed to an officer commanding him to summon defendant to appear, etc. Article 1398 provides that, if defendant is a nonresident or cannot be found in the county, the citation shall direct the officer to summon defendant by service on his attorney of record, if there be one. *Held* that, where a citation in error merely commands the officer to summon defendant, service thereof on defendant's attorney is not service on defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 2129; Dec. Dig. § 407.*]

Error from District Court, Taylor County; J. H. Calhoun, Judge.

Action between John A. Pratt and Emma W. Pratt and the Interstate Savings & Trust Company. To review the judgment entered the Pratts brought error. Heard on motion to dismiss writ of error. Writ dismissed.

Harry Tom King and B. K. Isaacs, for the motion.

On Motion to Dismiss Writ of Error.

RICE, J. This is a motion by the defendant in error to dismiss the writ of error herein. The service in this case of the writ

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of error was made upon the attorney of the defendant in error, and no service whatever was made upon the defendant in error, nor has it in any manner accepted service of said petition in error. It appears, both from the petition for writ of error and from the petition in the lower court, that the defendant in error was a nonresident corporation. The citation in error in this case commanded the sheriff to serve the same upon the defendant in error, and no direction whatever was made therein to serve the same upon its attorney of record, as was in fact done by the sheriff. Among other requisites of a citation in error it is required that it shall be directed to the sheriff or any constable of the county where the defendant is alleged to reside, and shall command him forthwith to summon the defendant to appear and defend such writ, etc. Rev. St. 1895, art. 1394. Ordinarily service of such writ shall be made by delivering to the defendant in error in person a true copy of such citation by the officer. Article 1398 of the Revised Statutes prescribes that if it appears from the allegations in the papers of the cause that the party is a non-resident of the state, or if it appears from the return of the sheriff or constable that the party cannot be found in the county of his residence, the citation shall direct the officer to summon the defendant by making service on his attorney of record if there be one.

Defendant in error has moved to quash the service and dismiss the writ of error, for several reasons, amongst others, because said citation in error so issued by the clerk was not, by the sheriff serving the same served on the party who by its terms he was commanded to serve; second, because said citation commanded the sheriff to serve the Interstate Savings & Trust Company (defendant in error), and his return on said process shows that he served Harry Tom King (who, it appears from the papers, was its attorney of record); and, third, because the record in this case fails to show that defendant in error was properly cited to appear and defend the writ of error. We think the motion is well taken, and should be sustained. The citation in error was formal, and such as prescribed by article 1394, Rev. Civ. St. 1895, and such as is contemplated when the defendant in the writ is a resident of the county to which the same is directed, but where it appears from the papers of the cause that the party is a nonresident, or if from the return of the sheriff it appears that the defendant cannot be found in the county of his residence, then the citation shall direct the officer to summon defendant by making service on his attorney of record, if there be one. These are the only contingencies authorizing service upon the attorney, so that the writ in this case did not, in fact, direct the sheriff to summon defendant by serving the same

upon its attorney of record. Such being the case, the officer was not authorized to serve the writ upon the attorney, and such service was insufficient to give jurisdiction over the defendant in error, for which reason the motion to dismiss is well taken. See Rev. St. 1895, Art. 1398; Bradley's Procedure, p. 284; Thompson v. Thompson (Tex. Civ. App.) 41 S. W. 679; McGuire v. Newbill, 54 Tex. 317; Scarborough v. Groesbeck (Tex. Civ. App.) 25 S. W. 687; Oge v. Froboese (Tex. Civ. App.) 63 S. W. 654; National Cereal Co. v. Ernest (Tex. Civ. App.) 84 S. W. 1101; Aspley v. Olcott (Tex. Civ. App.) 90 S. W. 885.

We do not think, however, that we are justified in dismissing the petition in error, but simply hold that the attempted service was insufficient (Holloman v. Middleton, 23 Tex. 537), and dismiss and strike from the docket the writ of error, but without prejudice to plaintiff in errors' right to perfect service in accordance with law, if they should hereafter desire so to do; and it is so ordered.

Writ of error dismissed.

GOLDMAN et al. v. HADLEY.

(Court of Civil Appeals of Texas. Nov. 3, 1909.)

1. VENDOR AND PURCHASER (§ 334*)—FAILURE OF CONSIDERATION—RIGHT OF PURCHASER—QUITCLAIM DEED.

In the absence of fraud, a vendor who sells land as vacant land between two surveys, when it is part of one of them and belongs to another, is not liable for the purchase price for failure of consideration; he having given merely a quitclaim deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 968; Dec. Dig. § 334.*]

2. BOUNDARIES (§ 3*)—PATENTS—CONTROLLING CALLS.

The call in a patent of a survey for the south line of another survey as its north line controls a call for distance which will not make its north line reach the other survey.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 32; Dec. Dig. § 3.*]

3. BOUNDARIES (§ 3*)—SURVEYORS' MARKS ON GROUND.

A call in the patent of a survey for a fixed and undisputed line as a boundary cannot be controlled by the lines and corners marked on the ground by the original surveyor in making the survey; his field notes making no reference to such objects.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 27; Dec. Dig. § 3.*]

4. BOUNDARIES (§ 35*)—EVIDENCE—LOCATION OF MARKS.

Testimony of a witness that he found on the ground certain lines and corners made by the original surveyor when making a survey is objectionable; he not showing how he knew the marks he found were made by such surveyor.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 178; Dec. Dig. § 35.*]

5. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR.

Admission of evidence of an admitted fact was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4164; Dec. Dig. § 1051.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. FRAUD (§ 56*)—EVIDENCE—RELIANCE ON REPRESENTATIONS.

As a circumstance tending to throw light on the material question whether plaintiff in buying land of defendant was deceived by any false representation of defendant that it was vacant land, when it was included in a survey belonging to another person, evidence that the evening after plaintiff had paid for it he told defendant's agent in the transaction that he had just found out that there was no land there, and that he wanted his money back, is admissible.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 53; Dec. Dig. § 56.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by J. M. Hadley against A. Goldman and others. Judgment for plaintiff. Defendants appeal. Reversed and remanded.

Ford, Crawford & Ford and Moye Wicks, for appellants. E. P. & Otis K. Hamblen, for appellee.

JAMES, C. J. This action was brought by Hadley, charging, in substance, that Goldman had by false representations induced him to buy a piece of land as vacant school scrap land in Harris county when the same was not vacant land at all, but a part of section 3, Houston & Texas Central Railroad Company, block 1.

The court charged the jury as follows: "There is no testimony sufficient to prove any fraudulent conduct on the part of the defendant Goldman, but the record evidence shows that there was not, and is not, any vacancy between the Lubbock survey and survey No. 3. You will, therefore, return your verdict for plaintiff in the sum of \$759.70, with interest thereon at 6 per cent. per annum from March 2, 1907, against defendant Goldman and the Planters' & Mechanics' National Bank, and return your verdict also against defendant Goldman alone for \$100, with interest thereon at the rate of 6 per cent. per annum from March 2, 1907, and for cancellation of the deed from Goldman to Hadley." The verdict was in accordance with the instruction. We have considered the testimony, and in our opinion it was sufficient to have sustained a finding that the sale was induced by false representations of Goldman, and it was for the jury to pass upon the question. From the tenor of the court's charge it must have been upon the theory of failure or want of consideration that the court deemed Goldman liable. The deed given by Goldman to Hadley was a quitclaim. No liability existed by reason of any warranty, for there was none. The court found that the evidence established that there was no vacancy. This would be a total failure of consideration, but to make the vendor liable for the purchase price paid by reason of this fact would be to give a quitclaim deed the force and effect of a warranty deed.

The only real issues in this case were whether or not there was a vacancy embracing the land which was the subject-matter of the deed, and, if there was not, was the purchaser. Hadley, induced by false representations of Goldman to enter into and make the purchase. That there was evidence to support the latter issue we have already determined. The land in question was covered by the calls of the patent to survey No. 3, Houston & Texas Central Railway Company, the field notes of which made its north line identical with the south line of the Thos. Lubbock survey. The theory upon which the fact of vacancy is founded is that the distance called for in the patent to survey 3 falls to make its north line reach the Lubbock survey, and that the intervening space constitutes the vacancy for which Goldman had secured an award from the Commissioner of the General Land Office. The land lay within the calls of the patent to survey 3, and *prima facie* it was patented land.

The court ruled out the testimony of surveyors offered by Goldman, who sought to show that the footsteps of the original surveyor had been traced by them, and found to be not as far north as the Lubbock south line. To the exclusion of this testimony there are bills of exceptions. The bill shows that Goldman expected to show by the witness Allen that he "located the survey 3 on the ground, and found that the north line of said section 3 as actually found and marked upon the ground was * * * south of the south line of the said T. S. Lubbock survey, leaving a vacant strip between the north line of said section 3 and the south line of the said T. S. Lubbock survey 351.1 varas wide and 2,984 varas in length, containing 185.3 varas of land; that in locating said section 3 he found that the calls as given in the field notes could not be made to fit on the ground, and that it was impossible to give effect to all the calls; that he found upon the ground the northwest and northeast corners of section 3 marked by the surveyor who originally laid out said section 3 at the time of said survey; that said northwest and northeast corners forming the north line of No. 3 were plainly marked on the ground by the surveyor who originally laid out the said survey at the time of making the said survey; that he found and followed said original marks and lines so made upon the original survey of said lands and located said section 3 in conformity therewith; that, as located upon the ground by him, said section No. 3 contains an excess of 25 acres, and that, if section 3 were permitted to extend as far north as the south line of the T. S. Lubbock survey, it would contain an excess of 210.3 acres; that he found and located upon the ground all of the corners of said section 3 placed upon the ground by the original surveyor of said section 3, and that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

all of them are there to-day, plain, visible, and marked upon the ground, and that he located said section 3 upon the ground exactly in conformity with said original marks and lines, and that said location of section 3 left a vacant strip between the north line of said section 3 and the south line of the said T. S. Lubbock survey 351.1 varas wide and 2,984 varas in length." The court ruled out this character of testimony for the reason that, as the patent of section 3 calls for the south line of the Lubbock, no evidence could be received tending to show that said section, when surveyed out and applied to the ground according to its field notes, fails to reach as far north as the south line of the Lubbock, and held as a matter of law that the north line of No. 3 coincides with the south line of the Lubbock, and that no vacancy existed between them. The above testimony of Allen was an effort to show that the footsteps of the original surveyor in making survey 3 were traceable on the ground by marks, marked lines, and corners of the surveyor, when no reference was made in his field notes to such objects. This has frequently been held not admissible. *Brodent v. Carper* (Tex. Civ. App.) 100 S. W. 185; *Hamilton v. Blackburn* (Tex. Civ. App.) 95 S. W. 1097. A survey is to be located by what appears upon the face of the grant (*Blackwell v. Coleman Co.*, 94 Tex. 216, 59 S. W. 530), and here there was nothing in the description to control the call for the Lubbock south line (which was a fixed and undisputed line) except a call for distance. The patent had a clear and well-settled construction and meaning, and the land it designated was ascertainable without any ambiguity arising. Had the field notes called for a marked line and other objects, it would have been different. The testimony of Allen, even if such testimony had been competent, was properly rejected for another reason. It failed to show in any manner how he knew the marks he found were made by the original surveyor. It may have been from hearsay, or merely conclusions. Nothing was shown from which the jury could have found or inferred that the marked lines were those made upon the original survey.

As the sole question in this case upon this transcript is whether or not Hadley was deceived by false representations of Goldman into making the purchase, all testimony which was merely for the purpose of proving that there was or was not a vacancy only incumbered the record. That fact was established. For this reason, the map mentioned in the fourth assignment was irrelevant, and the judgment referred to in the sixth assignment of error was also irrelevant, likewise the reasons of the General Land Office for canceling Goldman's award. The fact that the Commissioner canceled the award to Goldman was shown by the testimony of

Goldman himself and was an admitted fact. Therefore he was not prejudiced by the letter mentioned in the fifth assignment, in so far as the letter went to show the fact of cancellation. In so far as it went to show the Commissioner's reasons for the cancellation, it was irrelevant. Upon such an issue as fraud or deceit in inducing a purchaser to buy, the evidence necessarily must take a wide range. One fact essential for Hadley to establish would be that, when he consummated the purchase, he had the belief that the award was a valid one by reason of a vacancy; in other words, that Goldman, by the award, had title. If he did not have this belief, it was not possible for him to have been deceived. This leads us up to the third assignment of error, which complains of the admission of this testimony of Munger, plaintiff's witness: "Now, I will ask you whether or not, when you saw Mr. Hadley that evening after the check was given, Mr. Hadley said anything about the title to the land, and, if so, what he said? Answer. He said he had just found out that there was no land there at all, and he wanted his money back, and he wanted to know what I could do." This was objected to as evidence of a self-serving character. Hadley could testify to what the state of his mind was when he made the purchase. The above testimony was immaterial, if its purpose was to show whether or not a vacancy existed, as that was not really an issue. If its purpose was to show what was in Hadley's mind at the time of the purchase as to what he was getting, it was relevant. Munger was Goldman's agent in the transaction, and nothing was more natural than for Hadley to go to him with a complaint of this kind and to make known his reasons. It was a circumstance which tended to throw some light on a material question, and its weight was for the jury. We think there was no error in admitting the evidence.

Reversed and remanded.

ABBOTT GIN CO. v. MISSOURI, K. & T. RY. CO. OF TEXAS et al.

(Court of Civil Appeals of Texas. Oct. 23, 1909.
Rehearing Denied Nov. 13, 1909.)

1. TRIAL (§ 253*)—INSTRUCTIONS—FAILURE TO CHARGE—ABSENCE OF REQUEST.

Where two grounds were alleged as a basis for plaintiff's recovery, the court's failure to charge on one of the grounds was not error, in the absence of a special request to charge thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 627-641; Dec. Dig. § 255.*]

2. CARRIERS (§§ 108, 113*)—DESTRUCTION OF FREIGHT—LIABILITY.

Where goods are placed in a carrier's possession for immediate shipment and are destroyed before transportation begins, the carrier cannot escape liability except by showing that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

loss was due to an act of God, the public enemy, an inherent defect, or negligence of the shipper.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 100, 471-496, 520-522, 608-620; Dec. Dig. §§ 108, 113.*]

3. CARRIERS (§ 113*)—DELIVERY TO CARRIER—DESTRUCTION OF GOODS.

Where plaintiff's cotton seed was placed in certain houses located on a carrier's right of way, but not belonging to the carrier, for storage until cars could be obtained in which it could be shipped, and no bills of lading had been issued by defendant, or other act done showing an intention to accept the seed for transportation, the railroad company was not liable as a carrier for the destruction of the seed by fire communicated to the storage houses from fire originating on its cotton platform from sparks from defendant's engine.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 100, 608-620; Dec. Dig. § 113.*]

4. RAILROADS (§ 484*)—FIRES—DESTRUCTION OF ADJOINING PROPERTY—CONTRIBUTORY NEGLIGENCE.

Where plaintiff stored cotton seed in certain houses located on defendant's right of way to remain until cars could be procured for shipment, and it appeared that the storage house was near the track and adjacent to the railroad company's cotton platform, and was destroyed by fire communicated from sparks to the cotton platform and from the platform to the storage house, such facts were sufficient to raise the issue of plaintiff's contributory negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1745; Dec. Dig. § 484.*]

Error from District Court, Hill County; W. C. Wear, Judge.

Action by the Abbott Gin Company against the Missouri, Kansas & Texas Railway Company of Texas and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Morrow & Smithdeal, for plaintiff in error. Coke, Miller & Coke, Ramsey & Odell, and Vaughan & Hart, for defendants in error.

RAINEY, C. J. This suit was instituted by plaintiff in error against defendants in error to recover the sum of \$1,020, the value of 68 tons of cotton seed owned by plaintiff, and which stood on defendant's right of way, alleged to have been burned by negligently permitting sparks of fire to escape from defendant's engine. The defendant pleaded a general denial and contributory negligence of plaintiff in placing said cotton seed on defendant's right of way exposed to fire. A trial before a jury resulted in a verdict and judgment for defendant.

Plaintiff in error complains of the giving of a special charge requested by defendant in error, to wit: "You are instructed that the burden is upon the plaintiff to show by a preponderance of the evidence that the fire which destroyed the property in controversy was caused from a spark or sparks emitted or discharged from an engine of the defendant railway company; and unless you believe from the preponderance of the evidence that it was so caused, or if you be-

lieve that said fire originated from any other cause, you will find for the defendant." The first contention is that "It being alleged in the petition that the cotton seed in question were delivered to the defendant company as a common carrier for immediate shipment, and there being evidence in the record supporting said allegation, it was error for the court to tell the jury in the special charge mentioned that the burden was upon the plaintiff to show by a preponderance of the evidence that the fire which destroyed the property was caused by sparks emitted from the defendant's engine, because under the law, if the property was in possession of the defendant as a common carrier for immediate shipment, the destruction of the property would fix its liability." The petition of plaintiff contained two counts. The first was, in substance, that defendant had negligently permitted sparks to emit from its engine and set fire to and destroy the cotton seed, etc.; and the second, in effect, was that the cotton seed had been placed in defendant's warehouse situated on its right of way and tendered to defendant for immediate shipment, that application for cars had been made, and while awaiting the furnishing of cars and "while the seed were in the possession of defendant and in said warehouse upon the right of way, and after the same had been delivered to the said defendant for immediate shipment, the same were destroyed by fire." There being two grounds alleged as a basis for a recovery by plaintiff and a charge covers one ground, the failure to charge upon the other ground, in the absence of a special charge requesting the court to so charge, will not be reversible error. No such charge was asked. *Currie v. Gunter*, 77 Tex. 490, 14 S. W. 127.

But it is contended that the charge was affirmative error, in that the burden was placed upon plaintiff to show the burning was caused by the negligence of defendant, when the burden was on defendant, as the seed had been placed in its possession for immediate shipment, and the defendant could not escape liability except by showing "the loss was due to an act of God, a public enemy, or inherent defect or negligence on the part of the shipper." While this contention of plaintiff states a correct principle of law, we do not think the facts support the contention. As we view the facts, there was no such delivery of the seed to the defendant in error which would make it liable as a common carrier. The cotton seed were placed in a house situated on defendant's right of way. It had been erected by some concern for its own use, presumably with defendant's consent, in storing and shipping seed, but said concern had gone out of business, and the house was used for the same purpose. *McDaniel*, who

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

owned a half interest in the Abbott Gln Company, and was its general manager, testified that he had frequently made demands of defendant's station agent for cars to make shipments, and the agent had remarked: "Why don't you fill up that house down there until we can get a little more time and have more cars?" This remark was made before he commenced putting seed in the house. He further testified that Mr. White, general counsel for the Abbott Gln Company, "was the one that instructed me to put those seed in that seedhouse. * * * When I got that instruction from him, I commenced putting those seed in there right away. Mr. White told me to fill up all the houses with the seed if I could not get cars. No bill of lading had ever been executed for the shipment of any of this seed." The house was used during the summer to store grain in by grain buyers. The grain was stored for shipment on the railway. "I could not say that I had made demand for cars for this particular amount of seed." Defendant introduced two written statements made by McDaniel in regard to this matter, in one of which he says he rented the seedhouse from the Swift Cotton Oil Company, and in the other that he was instructed to put the seed in there by G. L. White of Hillsboro. G. L. White testified: "I owned and controlled half of the Abbott Gln Company prior to and in October, 1906. In the management and control of the property, the output of it, I advised with Mr. McDaniel, and he acted through my advice in the management of it. I did have knowledge of the fact that cotton seed were put in the building which was destroyed down at Abbott. We had quite a lot of seed to move that year from Abbott, and could not get cars. * * * I talked to the M., K. & T. Railway Company authorities with reference to cars every day over the phone almost about it. Those conversations did relate to the seed that I had at Abbott for shipment. We had urged the agent here to place us cars at Abbott because our seed was needing to be moved, and our house was full, and I knew we didn't have cars, and I urged them every day to work and co-operate with us and get cars at Abbott." T. H. Shaw, the agent of the defendant company at Abbott at the time of the fire, after testifying that there was cotton for shipment on the cotton platform, testified as follows: "That cotton platform is there on the right of way. I think that right of way is 80 feet from the main line, each side, right through the town there, and 100 feet altogether. This seedhouse was on the right of way, too. I did not know that they were putting those seed in there, and I don't remember when the seed were put there. I knew there was seed there. I expect that Mr. McDaniel had talked to me about getting cars to ship those seed. I did not, that I remember, say anything to him about put-

ting those seed in those houses. I would not be positive that I did not say something to him on the subject. So far as my recollection goes, I think it has always been rulable for them to store the seed in those houses to ship, or probably they wanted to hold them for a raise in price. I don't know. If they wanted to ship, that was the place to put them, because that was convenient to get them in the cars. They could either load them from them or from a wagon. If the car was not there at the time, there was no place right on the right of way to put them except in those houses. In the absence of the car, the only way to load them or have them there was to put them in the seedhouse or dump them in the car when the car came. Those houses had been used for that purpose ever since they had been there, but then they did not ever store them there but once to my recollection. They shipped them out. I remember Mr. McDaniel coming to me about cars several times about shipping cotton seed in 1906. During the fall of 1906, during his ginning season, he wanted to ship to the oil mill at Hillsboro, and often I got him cars as soon as he placed them. Sometimes we would get cars for him, and sometimes we could not. He could not load many cars. They could not load three or four cars every day, or could not load one car every day. Whenever he got a supply of seed, we got him cars. Sometimes we could furnish them and sometimes we could not, which is always the case."

Considering the evidence in its most favorable light for plaintiff, it fails to show that the defendant had received the cotton seed for immediate shipment. Take the remark testified to as having been made by the agent of defendant, which, when properly construed, means that plaintiff might store the seed in the house until cars could be furnished, and it shows there was no intention of then receiving the seed for shipment. That the agent was willing for the house to be occupied by the seed to await the procuring of cars when he had failed to get them for a long time, and did not know when he could get them, would be doing an injustice to hold that defendant had received them for immediate shipment, and that it was liable for loss. No bill of lading had been issued by defendant, nor any other act done by it showing an intention to then accept the seed. We understand the rule of law that the issuance of a bill of lading is not necessary where the property is placed in the possession of the railway company for immediate shipment, but this is not that kind of a case. Neither party under the facts contemplated an immediate shipment, but that the seed should await the procurement of cars. We are of the opinion that, under the circumstances of this case, there is no reversible error in the failure of the court to charge on the matters complained of.

The proposition that the special charge submitted an issue not raised by the evidence, "in that there was no evidence whatever that the fire was caused by anything other than the escape of sparks from defendant's engine," is not tenable. The natural conclusion is that, if the fire was not caused by the escape of sparks from defendant's engine, it was evident that it was from some other cause, and no harm could possibly have resulted to plaintiff by reason of such expression in the charge.

The second assignment of error is: "The court erred in giving to the jury special charge No. 3, requested by the defendant, because the evidence in the case did not raise the issue of contributory negligence, and because there was no testimony showing, or tending to show, that the property destroyed by the fire had been placed on the railway company's right of way without the consent of the defendant's agent at Abbott, and because there was no evidence showing, or tending to show, that at the time the cotton seed were placed in said building where they were stored there was any cotton on the platform, or other inflammable material on defendant company's right of way, or platform, in proximity thereto." The first contention is: "The special charge was error, in that there was no evidence that the property destroyed was placed there without the consent of the agent of the company." Defendant's station agent testified: "I know Mr. McDaniel there at Abbott. I did not tell Mr. McDaniel to place said seed in that house. I did not know that they were putting those seed in there, and don't remember when the seed were put in there. I did not, that I remember, say anything to him about putting those seed in those houses." The witness further testified that the company had nothing to do with the seedhouses, as it did not belong to it, and that they did not accept seed until after they got a car. He further testified: "I never use those seedhouses at all, and had nothing to do with them." It was shown that the seedhouse the seed were stored in was leased by the West Cotton Oil Mills at the time of this fire, and that said building was situated about six feet south of a cotton platform upon defendant's right of way used for the storage of cotton for shipment, and the defendant's house track, main line track, and passing track were west of said structure. The fire originated on the other platform, and was communicated to the seedhouse. The contention of plaintiff on this issue is not sustained. The second contention is that, "it appearing from the evidence that plaintiff desiring to ship cotton seed over the defendant's railroad, and the defendant, having no cars available in which to load them, permitted them to be placed in a seedhouse on its right of way, which was used for loading grain and seed into

cars of the defendant company, no issue of negligence of the plaintiff is raised by the fact that on the same right of way the defendant had cotton on its platform for shipment." The house in which the seed were stored was on the right of way near the track and adjacent to the company's platform on which it had placed bales of cotton for shipment. The cotton first caught, and the fire was communicated to the cotton seed. The condition shown by the evidence raised the issue of contributory negligence, and there was no error in the court submitting it. *Martin v. Railway*, 87 Tex. 117, 26 S. W. 1052; *Railway v. Crabb* (Tex. Civ. App.), 80 S. W. 408.

We have considered the other assignments of error, all of which we conclude are not well taken.

Finding no reversible error, the judgment is affirmed.

GALVESTON, H. & S. A. RY. CO. v. HOUSTON ELECTRIC CO.

(Court of Civil Appeals of Texas. Oct. 20, 1909. Rehearing Denied Nov. 17, 1909.)

1. STREET RAILROADS (§ 23*)—CONSTRUCTION IN HIGHWAYS—CONSTITUTIONAL PROVISIONS.

Const. art. 10, § 7, prohibiting laws granting the right to construct and operate a street railroad within any city or town upon any public highway without first acquiring the consent of the local authorities having control of the highways, is prohibitory and does not directly grant the right to construct railways along public highways, but by implication recognizes the right if the consent of the highway officers is obtained.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 66; Dec. Dig. § 23.*]

2. STREET RAILROADS (§ 25*)—"PUBLIC HIGHWAYS"—"LOCAL AUTHORITIES."

"Public highways," as used in the Constitution, requiring the consent of local authorities to the use of the public highways by street railroad companies, refers to some public thoroughfare different from a street in a city, town, or village, and not to streets in an unincorporated town, or village, as distinguished from the streets in an incorporated city, town, or village; and "local authorities" means those officers on whom the administration of the government of the particular political subdivision of the state, by virtue of their office, devolves in relation to the subject-matter of the provision.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. § 77; Dec. Dig. § 25.*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3291-3306; vol. 8, p. 7678; vol. 5, p. 4205.]

3. STREET RAILROADS (§ 25*)—CONSTRUCTION ON HIGHWAYS—POWER TO AUTHORIZE.

The Legislature having conferred upon the commissioners' courts the power to establish, change, and discontinue public highways, and to exercise general superintendence over all highways in their counties, commissioners' courts are the "local authorities" within the Constitution, from whom permission to build a street

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

railway along the public highways of counties must be obtained.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 77; Dec. Dig. § 25.*]

4. STREET RAILROADS (§ 41*)—RIGHT TO OCCUPY HIGHWAYS—OBJECTION BY THIRD PERSONS.

The commissioners' court having granted the right to a street railway company to use a road for the construction of its track upon petition of citizens owning the land in the vicinity and for whose use it was primarily constructed, the company could not be deprived of that right by objection of a steam railway company which had previously been permitted to cross the road.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 114; Dec. Dig. § 41.*]

5. STREET RAILROADS (§ 20*)—OPERATION BEYOND LIMITS OF CITY.

A street railway company incorporated under Rev. St. 1895, art. 642, subd. 21, authorizing the formation of corporations for the constructing, acquiring, maintaining, and operating of street railways and suburban belt lines of railways within and near cities and towns for the transportation of freight and passengers, could construct and operate a line of road beyond the limits of the city wherein it was chartered to operate, and into a city which was practically a suburb of the other.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 57; Dec. Dig. § 20.*]

6. EMINENT DOMAIN (§ 120*)—USE OF HIGHWAY—ADDITIONAL SERVITUDE—RIGHT TO CROSS STREAM ROAD.

No new servitude is imposed upon a public highway by constructing and operating a street railway therein whose cars are propelled by electricity for the transportation of passengers, and the right of such a city railway company to cross over the tracks of a steam railroad crossing such highway is subject to no conditions other than those to which the general public is subject in traveling over the highway.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 316; Dec. Dig. § 120.*]

7. STREET RAILROADS (§ 2*)—CHARACTER OF BUSINESS.

That an electric railway carries mail, persons, and property would not render it a commercial, and not a street, railway.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 2; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6693-6696.]

8. STREET RAILROADS (§ 68*)—APPLICATION OF STATUTES—CROSSING OTHER TRACKS.

Gen. Laws 1901, p. 255, c. 89, authorizing the railroad commission to regulate railroads crossing each other's tracks, does not apply to street railways.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 146; Dec. Dig. § 68.*]

9. EMINENT DOMAIN (§ 10*)—DELEGATION OF POWER TO STREET RAILROADS.

Gen. Laws 1907, p. 23, c. 13, conferring the power of eminent domain on interurban electric railway companies, does not apply to street railways.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 35; Dec. Dig. § 10.*]

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Action by the Galveston, Harrisburg & San Antonio Railway Company against the Houston Electric Company. From a re-

straining order entered in defendant's cross-action, plaintiff appeals. Affirmed.

Lane, Wolters & Storey and A. L. Jackson, for appellant. Andrews, Ball & Streetman, for appellee.

FLY, J. Appellant sought to restrain appellee from building a line of suburban street railway across its line of steam or commercial railway about $3\frac{1}{2}$ miles from the city of Houston, at a point where said commercial railway crosses the public road leading from said city to Harrisburg. A temporary writ of injunction was issued, and appellee answered, setting up the facts, and by way of a cross-action prayed that appellant be restrained from interfering with it in building the desired crossing. On a final hearing the temporary order was set aside, the application of appellant was denied, and an order was made restraining appellant from interference with appellee in building the crossing, and a suitable person was appointed to supervise and superintend the installation of a standard grade crossing, which appellee was authorized to build. From that order of the court, this appeal has been perfected.

Upon the petition of numerous citizens of Harris county living in the vicinity of the public road leading from Houston to Harrisburg, permission was granted by the commissioners' court to appellee to build an electric street railway along the public road which was crossed by appellant's line of railway. Appellee sought to build its line along the said public road and across the line of appellant's commercial railroad, as empowered by the commissioners' court, the crossing known as the "Standard crossing" to be a perfectly safe and convenient one, and under its rules, to which it was commanded to adhere by the decree of the court, would be attended with no danger to passengers or operatives on either line of railway. Railroads around Houston are crossed at numerous places by street railways by grade crossings, and no interlocking devices are required, and no inconvenience or danger results therefrom. It appeared that neither a non-grade crossing nor an interlocking device was required at the point in question, and at a similar point appellant had recently consented to a grade crossing over its line, near Houston, by an electric railway company, and the same had been continuously operated without accident or injury to any one. The building of the line of electric railway is a public convenience and necessity. The franchise was granted for 28 years and restricted the use of the road to the carriage of "passengers, mail, express matter, parcels, packages and passengers' baggage only," and the motive power was confined to electricity, "or gasoline in cases of emergency." The fol-

lowing proposition is made under the first assignment of error: "The commissioners' court of Harris county had no power, under the Constitution or the laws of Texas, to authorize the possession, appropriation, or use of a public road for any purpose except a public use, according to the usual methods of travel, and any order attempting to confer upon a private corporation the right to make an unusual or extraordinary appropriation or use of such public road is void."

In section 7, art. 10, of the state Constitution, it is provided: "No law shall be passed by the Legislature granting the right to construct and operate a street railroad within any city, town or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad." The section is merely prohibitory and does not directly grant any authority for the erection of railways along streets or public highways, but by implication recognizes the right to build along such thoroughfares, if the consent of those to whom the supervision and control of the streets and public highways are confided is obtained. So it has been specially decided in the case of *Mayor v. Street Railway Co.*, 83 Tex. 548, 19 S. W. 127, 29 Am. St. Rep. 679, in regard to the streets of a city, and, if the public roads of a county are comprised within the term "public highways," the authority to build street railroads upon such public roads is recognized to rest in the "local authorities." The words "public highways" are clearly used to describe some public thoroughfare different from a street in a city, town, or village, and cannot be construed to mean streets; nor can they be held, with any degree of reason or force, to apply to streets in an unincorporated town or village as contradistinguished from the streets in an incorporated city, town, or village. If the desire had been to confine the power to grant authority to erect and operate street railways to the streets of cities, towns, or villages, the words "public highways," being superfluous and confusing, would never have been used. It is stated by Nelms, in his work on *Street Surface Railroads* (page 71), that in nearly every state of the Union a like provision is found either in the Constitution or some statutory provision, and in some of them is recognized the right of county boards, commissioners, or supervisors, corresponding to the commissioners' court in Texas, to grant the authority for street railways to be erected along public roads or highways. *Matter of Rochester Electric Railway Co.*, 123 N. Y. 351, 25 N. E. 381; *State v. Board*, 56 N. J. Law, 416, 28 Atl. 553. We have seen no decision denying such authority.

The term "local authorities," used in the Constitution, is defined in the New York cited case as "those officers on whom the

administration of the government of the particular political subdivision of the state, by virtue of their office, devolves, in relation to the subject-matter of the legislative provision." In Texas the commissioners' court is created by the Constitution, and it is given "such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of this state, or as may be hereafter prescribed." Under that authority the Legislature has conferred upon commissioners' courts the power "to lay out and establish, change, and discontinue public roads and highways," and "to exercise general control and superintendence over all roads, highways, ferries and bridges in their counties." Commissioners' courts are therefore the "local authorities," within the purview of the Constitution, from whom permission to build a street railway along the public highways of a county must be obtained. Control of streets and public highways of a county has been given by law to the local authorities of cities and counties, and the Constitution delegates to them alone the authority to permit street railways to construct their lines upon such streets and highways. Having been granted, by the only authority that could grant it, the privilege of using the road for the construction of its track, appellee could not be deprived of that right because appellant has been permitted to cross the public road and objects to any other railway company using such road, although the citizens owning the land in the vicinity of the road and for whose use it was primarily constructed have petitioned the county authorities to grant the privilege to the street railway of occupying the public highway. However unusual it may be to use "a rural public highway for the permanent location and maintenance of a street car roadbed and track," as stated by appellant, the Constitution and statutes authorize it, the citizens interested in the public road demand it, the commissioners' court has permitted it, and appellant has no right to complain.

Appellee was incorporated under the provisions of Rev. St. 1895, art. 642, subd. 21, which authorizes the formation of corporations "for the constructing, acquiring and maintaining and operating street railways and suburban belt lines of railways within and near cities and towns, for the transportation of freight or passengers." Appellee's desired line of railway is within and near the "city of Houston," and we think that the construction of the railway is fully authorized by its charter. The terms of the statute fully contemplate the construction and operation of street railways beyond the limits of cities and clearly authorize such construction and operation. Harrisburg is but a short distance from the city of Houston, and the testimony tended to show that it is practically a suburb of that city.

Appellant has no right in the public roads of Harris county except those granted it by

the proper authorities, and it cannot assume the function of protecting the public from encroachments upon the highways by other corporations, and cannot assume the authority of the state in inquiring into the legality of appellee's acts under its charter. The evidence clearly indicates that it will not be injured by a crossing, to which its resident engineer gave the stamp of his approval, and which is necessary for the accommodation and comfort of a number of the citizens of Harris county. Its rights have been fully protected by the decree of the court. Appellee is not seeking to take possession of anything belonging to appellant, but is merely trying to do what any vehicle of any kind, authorized on a public road, has the right to do—get across a railroad built over a public highway.

No additional burden will devolve upon appellant by the crossing constructed by appellee, and it has acquired no right by being authorized to cross the public road as would empower it to stop the wheels of progress and thwart the efforts of the public to obtain cheaper and faster transportation. It has been held time and again in this state and others that no new burden or servitude is imposed upon a public street or highway by constructing and operating a street railway thereon whose cars are propelled by electricity for the transportation of passengers. *Aycock v. Association*, 26 Tex. Civ. App. 341, 63 S. W. 953; *Rische v. Transportation Co.*, 27 Tex. Civ. App. 33, 66 S. W. 324; *Railway v. Street Railway*, 64 Tex. 80, 53 Am. Rep. 739; *Railway v. Limburger*, 88 Tex. 79, 30 S. W. 533, 53 Am. St. Rep. 730; *Railway v. Traction Co.*, 111 Ga. 679, 36 S. E. 873, 51 L. R. A. 125; *Railway v. Railway*, 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264; *Kinsey v. Traction Co.*, 169 Ind. 563, 81 N. E. 922; *Railway v. Railway*, 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916; *Railway v. Electric Railway*, 42 Ind. App. 66, 83 N. E. 650. In several of the cases cited it was held that the right of way acquired by a steam railroad across a public highway is subject to the operation of a street railway, that it imposes no additional burden, and that it can cross the steam railroad tracks without compensation to the company. Quotations from some of the authorities will indicate the reasons for such decisions.

In the case of *Railway v. Railway*, 139 Ind. 297, 38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264, it is said: "So long therefore as it is the settled law of this state that a street railway is not an additional burden to that of the easement the general public has in the street, and that the street railway company's right to use the street is founded on that easement, that long it must be held that the right of such street railway to cross over the tracks of a steam railway laid on such street is subject to no conditions other

than those to which the general public is subject in traveling over such streets. When the steam railway company obtains its right of way over and along a public street, it does so subject to the right of the general public to use that street, and the street crossings over its tracks; and it is generally incumbent on such steam railway companies to make such crossings as passable for the general public as they were before the construction of the tracks thereon. * * * In short, the appellant's rights obtained in the use of the streets for its steam railway were subject to the burden of the appellee's use thereof, in the ordinary and proper manner, for its street railway."

In the case of *Railway v. Railway*, 169 Ind. 339, 82 N. E. 765, 13 L. R. A. (N. S.) 916, the court held: "Assuming that the railroad was constructed across the highway, its owners thereby acquired merely the privilege of crossing in the transportation of freight and passengers, subject to all proper uses to which the highway might be devoted under the law. The owners of the railroad were bound to know that a street or interurban railroad might thereafter be lawfully located upon such highway and across the track at that point. The board of commissioners, in whom the authority was lodged, determined that the location and construction of the interurban road upon the highway would subserve the convenience of the traveling public. When appellants obtained the privilege of crossing the highway, they did it with the knowledge and upon the condition that they must submit to such growing inconveniences as might result from the development of the country, among which would be the wants and demands of the public for better facilities in traveling. Appellants complain that their track will be cut and their private rights invaded. Such interference must have been contemplated when their road was located across a public highway. * * * Our conclusion therefore is that the owners of a steam railroad are not entitled to recover compensation for the crossing of its track, at a public highway intersection, by an electric interurban road built upon such highway with the consent of the board of commissioners of the county; nor can such crossing be enjoined until compensation therefor shall have been assessed and paid or tendered." A long list of authorities were cited to sustain the decision.

The case of *Michigan Central Railroad v. Electric Railway*, 42 Ind. App. 66, 83 N. E. 650, not only holds as do the cases quoted from, but, in addition, defines a "street railroad" and holds an electric railway carrying mail, persons, and property was a street railway, and not what is known as a "commercial" one, and therefore its occupancy of a street or road was not an additional servitude. The same contention is made in this case; but it is not shown that appellee's

charter authorizes it to carry freight, and its character cannot be fixed by the order of the commissioners' court giving it permission to build along the Harrisburg road. Its character is fixed by the charter which it obtained from the state of Texas, and not by orders made by the commissioners' court. It was not shown that it had ever carried freight, and, should it attempt to do so in violation of the terms of its charter, the state will be fully able to care for the matter.

The act of 1901 (Gen. Laws 1901, pp. 255, 256, c. 89) has no reference to street railways, and neither does the act of the Thirtieth Legislature (Gen. Laws 1907, p. 23, c. 15) appertain to street railways. Appellee obtained its charter under a different statute, and claims the right to cross the railroad of appellant in a public road just as a dray or wagon would claim the right to cross. Having obtained permission of the "local authorities," it claims the right of any other vehicle using the public road.

The judgment is affirmed.

GALLUP et al. v. LIBERTY COUNTY.†
(Court of Civil Appeals of Texas. Oct. 20, 1909. On Motion for Rehearing, Nov. 17, 1909.)

1. PUBLIC LANDS (§ 173*)—LANDS OF STATE—SCHOOL LANDS—SALE BY COUNTY COMMISSIONERS—STATUTES.

Const. art. 7, § 6, as it existed in 1881, provided that lands granted to counties for school purposes might be sold by the counties as provided by the commissioners' court; the proceeds to be held for the benefit of the public schools. Const. 1876, art. 5, § 18, declared that the county commissioners' court should exercise such powers and jurisdiction over all county business as was conferred by the Constitution or laws of the state, and Rev. St. 1895, arts. 1550, 4271, made it the duty of the commissioners' court to provide for the disposition of all county school lands in the manner provided by the commissioners' court. Held that, while such provisions authorized a disposition of such lands, they could only be sold "in the manner" provided by the commissioners' court, which had no power to delegate to the county judge the power to make such sales as agent for the county, and sales so attempted to be made by him were invalid.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 544-551; Dec. Dig. § 173.*]

2. PRINCIPAL AND AGENT (§ 163*)—"RATIFICATION."

"Ratification" is the election by a person, and the expression of such election in words or conduct, to accept an act or contract previously done or entered into in his behalf by another who had at the time no authority to do the act or make the contract on his behalf. If the acts have been performed or contracts made without his authority on his behalf, he has, when he obtains knowledge thereof, an election either to accept or repudiate them. If he accepts them, his acceptance is a "ratification" of the previously unauthorized acts or conduct and makes them as binding on him from the time they are performed as if originally authorized.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 619; Dec. Dig. § 163.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5928-5932; vol. 8, p. 7778.]

3. MUNICIPAL CORPORATIONS (§ 248*)—UN-AUTHORIZED ACTS OF OFFICERS—RATIFICATION.

The principle of ratification applies to a municipal corporation as well as to an individual as to contracts which have been unauthorizedly entered into on its behalf, if the corporation could have originally authorized such acts or contracts, especially where the illegality consists of some irregularity or informality in the manner or time of its execution, so that it is incapable of enforcement; but, if there is no legal authority to contract, such authority cannot be created by estoppel, acquiescence, or ratification.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 684; Dec. Dig. § 248.*]

On Motion for Rehearing.

4. PUBLIC LANDS (§ 173*)—LANDS OF STATE—SCHOOL LANDS—INVALID SALE—RATIFICATION.

Where a county had full power to sell certain school lands, but the sale was invalid because made by the county judge under an ultra vires delegation of authority by the commissioners' court, the county, having received the purchase money and used it for county purposes, thereby ratified the sale and was not entitled to recover the land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 544-551; Dec. Dig. § 173.*]

5. PUBLIC LANDS (§ 173*)—LANDS OF STATE—SCHOOL LANDS—SALE—DISPOSITION OF PROCEEDS.

Where a county having full power to sell school lands without authority directed sales to be made by the county judge, and thereafter ratified the same, such sales were not invalidated as against the county because the judge was allowed a commission of 5 per cent. of the proceeds, which was diverted from the school fund for which the county held the lands in trust; the beneficiaries of the school fund being entitled to recover such commission from the county as an obligation payable out of its general fund.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 544-551; Dec. Dig. § 173.*]

Appeal from District Court, Polk County; L. B. Hightower, Judge.

Suit by Liberty County against David L. Gallup and others. Judgment for plaintiff, and defendants appeal. Reversed and rendered.

Coke, Miller & Coke and Terry, Cavin & Mills, for appellants. Branch T. Masterson and Stevens & Pickett, for appellee.

NEILL, J. "This suit was brought by the county of Liberty, appellee herein, against David L. Gallup and East Texas Oil Company, appellants herein, and C. M. Votaw, C. W. Nugent, Oscar E. Oates, A. G. Hodges, A. W. Hodges, J. K. Humble, J. W. Humble, and E. D. Saunders, to recover the title to 10 certain tracts of land, aggregating about 16,000 acres, situated in the counties of Polk, Hardin, and Tyler. The suit was in the ordinary form of an action in trespass to try title. Of the defendants, David L. Gallup was a resident and citizen of the state of New York, the East Texas Oil Company was a resident and citizen of the state of New Jersey, and all of the other defendants were resi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

dents of the state of Texas. The defendants David L. Gallup and East Texas Oil Company, who are appellants in this court, filed petition and bond for removal of the cause to the Circuit Court of the United States for the Southern District of Texas, upon the filing of which the plaintiff dismissed its suit as to all of the defendants except David L. Gallup, a citizen of New York, the East Texas Oil Company, a citizen of New Jersey, and J. W. and J. K. Humble, citizens of Polk county, Tex. The petition of these appellants for the removal of the cause to the Circuit Court of the United States for the Southern District of Texas was granted; but the cause was remanded to the district court of Polk county from the Circuit Court of the United States, and was tried in the district court of Polk county. Judgment was rendered against the defendant J. W. Humble by default, and judgment *nil dicit* was rendered against the defendant J. K. Humble, and upon trial had judgment was rendered for the land in controversy against the defendants Gallup and East Texas Oil Company, appellants here. These appellants answered in the court below by general demurrer, plea of not guilty, and also filed a cross-action against the plaintiff, seeking to recover the title and possession of the same land sued for by the plaintiff, upon which cross-action judgment was also rendered against these appellants. The trial court duly filed, at the request of appellants, his findings of fact and conclusions of law, which were excepted to by these appellants, who filed also a motion to correct and supplement said findings of fact and conclusions of law, which motion was overruled. The case has been properly brought to this court by appeal of these appellants, David L. Gallup and East Texas Oil Company." This statement of the nature and result of the suit, taken from appellant's brief, is accepted by the appellee, with this emendation: "Final judgment in favor of the county of Liberty was against defendants David L. Gallup, East Texas Oil Company, J. K. Humble, and J. W. Humble, for the land in controversy"—and is adopted by us.

The findings of fact and of law by the trial judge are as follows:

"Findings of Fact.

"(1) I find that the 10 tracts of land in controversy, as described in plaintiff's first amended original petition, were patented during the year 1858 by the state of Texas to the school commissioners of Liberty county in due form of law.

"(2) I find that on July 1, 1881, the commissioners' court of Liberty county made and entered on the minutes thereof the following order: 'Whereas, it is the judgment of the court that it is for the interest of Liberty county that all of the county school lands situated in the counties of Polk, Tyler, and Hardin be placed on the market for sale, and the proceeds thereof invested as provided by

law: It is therefore ordered by the court that W. W. Perryman be and he is hereby appointed agent of the county of Liberty with full power to sell all of said school lands, either at private or public sale, in his judgment he may deem best for the interest of the county, and to make good and sufficient title to the purchaser or purchasers of said lands; provided that said lands, nor any part thereof, shall not be sold for a less price than \$1.50 per acre. It is further ordered that any sale made by said Perryman shall in no wise affect actual settlers of any rights acquired by them under the laws of this state; and the price of land to such actual settlers is fixed at \$2.00 per acre.' And also that said court on the same date made and entered on its minutes another order, as follows: 'It is ordered by the court that W. W. Perryman be and he is allowed 5 per cent. commission on all sales made by him of the Liberty county school lands.'

"(3) I find that W. W. Perryman, purporting to act as agent for the county of Liberty, under the above orders, on August 17, 1881, executed a deed to Walter H. Allen, conveying the said 10 tracts of land, patented as above found, aggregating 15,905½ acres, for a cash consideration of \$26,164.54.

"(4) I find that the above-mentioned consideration of \$26,164.54 was paid to W. W. Perryman by the grantee in said deed executed by said Perryman, and that 5 per cent. of said consideration (the same being the sum of \$1,308.22) was retained by said Perryman for himself, and that he kept and held said amount in his own right and applied same to his own use and benefit.

"(5) I find that on November 14, 1881, the commissioners' court of Liberty county made and entered on its minutes the following order: 'Whereas, it appears from the report of the county judge that he has in his hands the sum of \$24,843.32 from the sale of school lands: It is ordered by the court that the county judge deposit one-third of said amount with T. W. House, of Houston, one-third with City Bank of Houston, and one-third with the First National Bank of Houston, to the credit of the school fund of Liberty county.'

"(6) I find that the county judge of Liberty county deposited the said sum of \$24,843.32 in the three Houston banks mentioned above, and that thereafter, to wit, on June 29, 1882, the commissioners' court of Liberty county, by order entered on its minutes, directed that said sum of money be transferred from said banks at Houston and deposited with Ball, Hutchings & Co., bankers of Galveston, Tex., and further directed that said Ball, Hutchings & Co. invest said money in bonds of the state of Texas.

"(7) I find that in pursuance of said order of the commissioners' court last above mentioned said Ball, Hutchings & Co. did invest said sum of money in bonds as directed, holding said bonds on deposit, and paid the interest collected thereon to the county treas-

urer of Liberty county, Tex., and the same was by him placed to the credit of the available school fund of Liberty county.

"(8) I find that W. W. Perryman, who executed the deed to Walter H. Allen dated August 17, 1881, as above mentioned, was county judge of Liberty county during all of the years 1881 and 1882, and that he died prior to the institution of this suit.

"(9) I find that during the year 1885, 'in accordance with orders of the commissioners' court of Liberty county, said Ball, Hutchings & Co. sold a portion of said bonds which were on deposit with them, and the proceeds of such sale were invested in Liberty county jail bonds; the amount so invested being, at first, \$6,500, and later an additional sum of \$3,500. And I further find that these bonds in the sum of \$10,000 were placed on deposit with Ball, Hutchings & Co. of Galveston for safe-keeping. And I further find that interest on these bonds was paid to the county treasurer of Liberty county for a number of years thereafter, and the sums so paid were placed to the credit of the available school fund; but the evidence does not disclose exactly the amount so paid nor accurately the number of years such interest was paid.

"(10) I find that on September 5, 1890, the commissioners' court of Liberty county made and entered on its minutes the following order: 'It is ordered by the court that the \$12,100 of state of Texas 5 per cent. bonds belonging to the permanent school fund of Liberty county, and now in the hands of the treasurer of Liberty county, be sold by M. D. Rayburn, county judge of Liberty county, and delivered by him to the purchaser thereof. The proceeds to be paid over by him to the county treasurer of Liberty county to be hereafter invested as this court may decide.' And I further find that on the same date said court made and entered on its minutes this order, to wit: 'It is ordered that the proceeds of the sale of \$12,100 and the \$500 Refugio county bonds belonging to the school fund of Liberty county be invested in the 5½ per cent. interest-bearing script of Liberty county, and the money used in paying the back indebtedness of Liberty county. Also that 5½ per cent. interest-bearing script be issued in the sum of \$6,500.00 to the permanent school fund of Liberty county in lieu of \$1,500 illegally spent by the county by mistake and \$5,000 of jail bonds which were void for want of proper authority in their issuance, in July and December, 1885.'

"(11) I find that W. W. Perryman, who executed the deed to Walter H. Allen on August 17, 1881, for the lands in controversy (as found in paragraph 1 of these findings), made no written report of that sale to the commissioners' court of Liberty county, and that said sale was never expressly approved or ratified by said court.

"(12) I find that the defendants David L. Gallup and the East Texas Oil Company claim title by mesne conveyance to the land

in controversy through and under the deed from W. W. Perryman to Walter H. Allen dated August 17, 1881, referred to in the first paragraph of these findings of fact, and that said defendants now have and hold only such title as became vested in said Allen by virtue of said deed. And I further find that the defendant David L. Gallup paid in cash to Augustus F. Kountze a valuable consideration for the land in controversy when he bought same from said Kountze.

"(13) I find that 40,000,000 feet of timber have been cut from those tracts of land in controversy located in the counties of Polk and Tyler, under contract with parties claiming title to said lands under and by virtue of said deed above mentioned from W. W. Perryman to Walter H. Allen dated August 17, 1881, and that said parties were paid for said timber the sum of \$1.25 per thousand feet. And I further find that the present market value of said timber would be \$2 per thousand feet.

"Conclusions of Law.

"I conclude that the commissioners' court of Liberty county had no power to delegate to W. W. Perryman the authority to sell the lands in controversy as said court attempted to do in its order made and entered on July 1, 1881, as set out in above findings of fact, and therefore said order was and is null and void.

"(2) I conclude that the deed executed by W. W. Perryman to Walter H. Allen on August 17, 1881, conveying the lands in controversy, as set out in above findings of fact, is null and void, and that no title whatever passed thereby; the said Perryman being wholly without authority to execute the same. And I further conclude that neither the commissioners' court of Liberty county nor any act of said county has ever expressly ratified or confirmed said void sale.

"(3) I conclude that the title to the lands in controversy is vested in fee simple in the county of Liberty for the public schools of said county in accordance with the Constitution and laws of the state of Texas, and that therefore judgment should be rendered for said county of Liberty, plaintiff in this cause."

Opinion.

The first, second, and third assignments of error are directed against the first and second conclusions of law of the trial court. Every one of them is advanced as a proposition in itself. Under the three assignments this additional proposition is advanced: 'The order of the commissioners' court of July 1, 1881, was within the power of said court, and in all respects valid, and the sale and conveyance made thereunder by W. W. Perryman to Walter H. Allen was valid and effectual to convey, and did convey, to said Allen the land in controversy.'

Section 6, art. 7, of the Constitution as it

stood in 1881, so far as material to the question involved, is as follows: "All lands heretofore or hereafter granted to the several counties of this state for education or schools are of right the property of said counties respectively to which they were granted and title thereto is vested in said counties. * * * Each county may sell or dispose of its land, in whole or in part, in manner to be provided by the commissioners' court of the county —. Said lands and the proceeds thereof, when sold, shall be held by said counties alone as a trust for the benefit of the public schools therein; said proceeds to be invested in bonds of the state of Texas or of the United States and only the interest thereon to be used and expended annually." Section 18, art. 5, of the Constitution of 1876, provides that "The county commissioners, * * * with the county judge as presiding officer, shall compose the county commissioners' court, which shall exercise such powers and jurisdiction over all county business as is conferred by the Constitution or the laws of the state or as may thereafter be prescribed." After the adoption of the Constitution of 1876, and prior to 1881, the Legislature enacted the following provisions, which appear in the present revised statutes as articles 1550 and 4271, and, so far as material, are as follows: Article 1550: "It shall be the duty of the commissioners' court to provide for the protection, preservation and disposition of all lands heretofore granted, or that may hereafter be granted to the county for education or schools." Article 4271: "Each county may sell or dispose of the lands granted to it for educational purposes in such manner as may be provided by the commissioners' court of such county; and the proceeds of any such sale shall be invested in bonds of the state of Texas, or of the United States, and held by such county alone as a trust for the benefit of public free schools therein, only the interest thereon to be used and expended annually."

It is clearly seen from these constitutional provisions: That the land in controversy, it having been granted by the state to Liberty county for educational purposes, was the property of such county in whom the title vested; that the county was authorized to sell or dispose of the land, in whole or in part, in the manner to be provided by its commissioners' court; that the proceeds of sale should be invested in certain securities and held by the county alone as a trust for the benefit of public free schools therein; that only the interest thereon should be used and expended annually. In other words, Liberty county was of right the owner of the land, and empowered to sell the same in the manner provided by its commissioners' court. The manner of sale was not prescribed by law; but it was left to be provided by the county commissioners' court. In this case the county commissioners' court of Liberty county did provide, or attempted to provide, for

the sale of the land in controversy, as is shown by the order of said court copied in the trial court's second conclusion of fact. Was this order, under the law as interpreted by the Supreme Court, sufficient, in the manner it provided for the sale being made, to empower the county to sell its land? The order is predicated upon the express judgment of the commissioners' court that it was, when made, for the interest of Liberty county that its school lands described therein be placed upon the market for sale and the proceeds thereof invested as provided by law. It appointed W. W. Perryman agent of the county, with full power to sell the land, either at private or public sale, as in his judgment he might deem best for the interest of the county, and to make good and sufficient title to the purchasers, and provided that the lands, nor any part thereof, should be sold for a less price than \$1.50 per acre.

In the case of *Logan v. Stephens County*, 98 Tex. 283, 83 S. W. 365, a case very similar to this, it is said by the Supreme Court: "The Constitution, as before quoted, gives to the commissioners' court of each county ample powers to sell the school lands of the county; but it in terms declares that the counties hold 'the said land and proceeds thereof, when sold, * * * alone as a trust for the benefit of the public schools therein.' The county was in the attitude of trustee for the benefit of the public school fund in the handling and management of the land, and we must construe the power given to the commissioners' court in accordance with the rules which govern trustees in the discharge of their duties. * * * With reference to the constitutional provision now under consideration, the act of selling is necessarily the direct act of the county through its commissioners' court, which is empowered to transact all its business"—and that a sale by an agent would not be a sale by the county. Under the decision quoted from, the provision in section 6, art. 7, of the Constitution, "that such county may sell or dispose of its lands * * * in manner to be provided by the commissioners' court of the county," must be read and construed in connection with that part of section 18, art. 5, which provides that such "court shall exercise such powers and jurisdiction over all county business as is conferred by the Constitution and laws of the state," and, when so read, must be construed to mean that the sale of school lands, being the business of the county to which they belong, can only be made by the county through its commissioners' court as its agent. That the sale under which the appellants claim the land was by Perryman as its agent, and not by the county of Liberty, is apparent from the order of his appointment, as well as from the deed made in its pursuance. By the order he is given full power to sell the land. To hold such order valid would be to say that the county com-

missioners' court could divest itself of a power given it alone by the Constitution and delegate it to another, contrary to the principle, "Delegatus non potest delegare." The case in hand, as well as the one we have quoted from, is distinguishable from *Mata-gorda County v. Casey* (Tex. Civ. App.) 108 S. W. 477, in that the terms of sale in that case were fixed, and an agent was only appointed to make the sales on the specific terms prescribed by the commissioners' court. No power or discretion delegated by the Constitution and laws of the state to that court was divested by its order appointing Donald & Cobb its agents nor lodged in them; but such power and discretion had been fully exercised and discharged by the court, and they were only empowered to carry into effect sales, the terms of which had been definitely fixed by the court itself. Their authority was purely ministerial; nothing being left to their judgment or discretion.

We therefore think the question stated, involved in the assignments, should receive a negative answer.

The fourth, fifth, sixth, and seventh assignments of error, presented as original propositions, are as follows: "(4) The court erred in its third conclusion of law, which is as follows: 'I conclude that the title to the lands in controversy is vested in fee simple in the county of Liberty for the public schools of said county, in accordance with the Constitution and laws of the state of Texas, and therefore judgment should be rendered for said county of Liberty, plaintiff in this cause'—for that the undisputed and uncontradicted evidence in this case shows that the title to the lands in controversy in this case is vested in said David L. Gallup and East Texas Oil Company, because the sale made by W. W. Perryman, acting for and on behalf of the commissioners' court of Liberty county, Tex., to Walter H. Allen, has been ratified and confirmed by the plaintiff in this case and by the county commissioners' court of Liberty county, Tex., and said plaintiff has continuously retained and used the proceeds and benefits of said sale for a period of 26 years before the filing of this suit, and has thereby ratified and confirmed the same, and is estopped to deny the validity thereof. (5) The court erred in rendering judgment herein in favor of the plaintiff for the land in controversy herein against these defendants, and in failing and refusing to render judgment for said land in favor of these defendants against said plaintiff, for that the undisputed and uncontradicted evidence herein shows that these defendants held under Walter H. Allen, to whom the land in controversy was conveyed on August 17, 1881, by W. W. Perryman, acting for the plaintiff herein, and that the said plaintiff, with full knowledge of all of the facts connected with said conveyance and sale, and the said commissioners' court of Liberty county, with full knowl-

edge of all of the facts with said sale, accepted the benefits arising from said sale, and has continuously used and enjoyed the said benefits and proceeds of said sale for a period of 26 years before the filing of this suit, and has never tendered a return thereof to said Allen or his assigns, and the plaintiff is estopped from questioning and attacking the validity of said sale made to said Allen. (6) The court erred in rendering judgment in this cause for the land in controversy in favor of the plaintiff against these defendants, and in failing and refusing to render judgment in favor of these defendants against said plaintiff for said land, for that the undisputed and uncontradicted evidence shows that these defendants hold the title to said land under and through Walter H. Allen, to whom said lands were conveyed by W. W. Perryman, acting for the plaintiff herein, in 1881, and that since said time the county of Liberty, plaintiff herein, and the commissioners' court thereof, has continuously retained and used the consideration paid by said Allen, and have never tendered a return of said consideration to said Allen or his assigns, and that, by receiving and using the benefits of said sale, the said plaintiff herein has ratified and confirmed the said sale. (7) The court erred in rendering judgment herein in favor of the plaintiff for the land in controversy against these defendants, and in failing and refusing to render judgment for said land in favor of these defendants against said plaintiff, for that the undisputed and uncontradicted evidence shows that these defendants hold under Walter H. Allen, to whom the land in controversy was conveyed on August 17, 1881, by W. W. Perryman, acting for the plaintiff herein, and that the said plaintiff accepted the benefits arising from said sale, and has continuously used and enjoyed the said benefits for a period of 26 years before the filing of this suit, and has never tendered a return thereof to said Allen or his assigns, and that said plaintiff is estopped from questioning and denying the validity of the said sale made to said Allen."

And under the assignments are asserted these additional propositions: "(1) If the order of the commissioners' court of July 1, 1881, was not within the power of the court and in all respects valid, the sale and conveyance made thereunder by Perryman, acting for and on behalf of Liberty county, to Allen, has been ratified and confirmed by said county and the commissioners' court thereof, and is in all respects valid and binding on said county. (2) The county commissioners' court of Liberty county was vested with authority to make a sale of the land in question, being a portion of the school lands donated to said county by the state of Texas. If it be admitted that the order entered by said court, directing W. W. Perryman to sell the lands, was beyond the authority of the commissioners' court, yet, as the undisputed and uncontradicted evi-

dence in this case shows that Perryman, who purported to act as the agent of Liberty county, reported said sale to the commissioners' court, and that the commissioners' court of Liberty county, well knowing all of the facts connected with said sale, received the proceeds and benefits arising therefrom, and retained and used said proceeds and benefits, well knowing all the facts, for a period of 26 years before the filing of this suit, and has never tendered them to the purchaser from Perryman or his assigns, the county of Liberty has thereby ratified and confirmed the sale so made to Perryman, and, as appellants held the title of the purchasers from Perryman, the county of Liberty cannot now disaffirm said sale and recover the land involved therein, and it was error for the court below to render judgment in favor of the county. (3) Accepting and retaining the benefits arising from a conveyance by which one was not bound, or which was voidable as to him, with knowledge of the facts, is a ratification of such conveyance. This applies as well to municipal corporations and trustees as to any other class of persons. (4) The county commissioners' court of Liberty county and Liberty county itself, having full knowledge of all the facts and circumstances connected with the sale made to Allen by Perryman purporting to act as the agent for Liberty county and its commissioners' court, and having received the benefits arising from said sale, and retained and used said benefits for over 26 years after said sale was made, and having taken no steps during that time to disaffirm said sale, and having given no indication of any intention to so disaffirm said sale, and having allowed innocent parties, such as appellants herein, to purchase the title which passed from Allen, for valuable consideration, are estopped to deny the validity of said sale, and are estopped from claiming the title to the lands in question against appellants, and the court therefore erred in rendering judgment in favor of the county of Liberty and against appellants."

The principle is axiomatic that where one person executes a deed, purporting to be the act of another, without authority to do so, and the person for whom such act purports to have been done is fully apprised of all the facts connected therewith, and knowingly receives and uses the benefits derived from such sale, he thereby ratifies it and is estopped from asserting that the person purporting to act as his agent was without authority to make it. As is said: "Ratification is the election by a person, and the expression of such election by words or conduct, to accept an act or contract previously done or entered into in his behalf by another who had at the time no authority to do the act or make the contract on his behalf. If certain acts have been performed or contracts made on behalf of another without his authority, he has, when he obtains knowledge

thereof, an election either to accept or repudiate such acts or contracts. If he accepts them, his acceptance is a ratification of the previously unauthorized acts or contracts, and makes them as binding upon him from the time they were performed as if they had been authorized in the first place." Clark & Skyles on Agency, § 98. This principle applies to a municipal corporation the same as to an individual as to contracts which have been unauthorizedly entered into on its behalf, if it could have originally authorized such acts or contracts. If there is legal authority for the contract, though it be illegal because of some irregularity or informality in the manner or time of its execution, and therefore incapable of enforcement, it may be ratified by an acceptance of the benefits of the contract by the corporation; but, if there be no legal authority for the contract, that authority cannot be created through the application of any doctrine, or of principle of estoppel, acquiescence, or ratification. Clark & Skyles on Agency, § 121; Abbott on Municipal Corporations, §§ 279, 280; Smith's Modern Law of Municipal Corporations, §§ 258, 259.

The case before us does not disclose a sale beyond the scope and powers of Liberty county or of its commissioners' court, intrusted by the Constitution and laws of the state with its business, but one that the county is expressly authorized to make "in the manner to be provided by the commissioners' court of the county." The manner provided by the court was simply illegal. That is all. If the manner it provided had been legal, the sale would have been. Therefore we think the sale, though illegal, under which appellants claim the land in controversy, was such as could be ratified by the county, and that the facts found by the trial court show a full and complete ratification of it.

Wherefore the judgment of the district court, as against these appellants, is reversed, and judgment is here rendered against the appellee in their favor for the land in controversy.

On Motion for Rehearing.

The land sued for was, by virtue of section 6, art. 7, of the Constitution, expressly granted by the state to Liberty county for "education or schools," and was "of right the property of said county," in whom the title by virtue of the grant vested. The same constitutional provision which authorized the grant empowered the county to "sell or dispose of the land in manner to be provided by the commissioners' court of the county." Article 4271, Rev. St. 1895, added nothing to the county's power to sell or dispose of such lands, nor could it divest the county of such power conferred by the Constitution. The land was donated and dedicated for education or schools. To accomplish the purpose of the grant it was essential that it should

be sold or some other disposition be made of it. This disposition could only be made by the county, in the manner to be provided by the commissioners' court. In other words, it was for the county to dispose of it, and the commissioners to prescribe the manner of its disposition. As the land was the county's, its sale or disposition was "county business conferred by the Constitution of the state," and the power of the county to sell could only be exercised by the county commissioners' court in such a manner as it might prescribe; but it could prescribe no manner of selling or disposing of the land which would take from it and vest in another the discretionary power necessary to be exercised in making a sale, as is held by the Supreme Court in *Logan v. Stephens County*. When the court acts itself in the sale of county school lands, it can exercise to its fullest extent the power conferred upon it as a trustee by the Constitution; but, when it attempts to act through another as its agent, it can delegate none of its discretionary powers, for, under the rules governing trustees, the court itself must exercise the discretionary powers intrusted to it by the Constitution. *Meerschmidt v. Gardner* (Tex. Civ. App.) 107 S. W. 619.

The rule that a trustee, who is authorized to sell property under an instrument which does not contain any special direction as to the mode or time of sale, must exercise his own judgment in determining the time and mode of sale, and whether the amount offered shall be accepted or not, cannot, with respect to any of these matters, delegate the exercise of his judgment or discretion to another, is the one applied by the Supreme Court in the *Stephens County Case*; but, while the trustee may not delegate the exercise of the judgment and discretion reposed in him, he may employ agents to a limited extent to aid him in the execution of the powers intrusted to him. Still their employment should be restricted to carrying out what he has already determined upon, for the judgment and discretion must be that of the trustee, though, in accomplishing what his judgment has previously approved, he may call others to his aid. *Gillespie v. Smith*, 29 Ill. 473, 81 Am. Dec. 328; *Kennedy v. Dunn*, 58 Cal. 339; *Johns v. Sargeant*, 45 Miss. 332. Herein lies the distinction between the cases of *Logan v. Stephens County*, 98 Tex. 283, 83 S. W. 365, and *Matagorda County v. Casey* (Tex. Civ. App.) 108 S. W. 476. In the one case the county commissioners' court ordered that E. L. Walker be appointed commissioner for the sale of the Stephens county school lands and to make title to the same as such commissioner, which was clearly an attempt on the part of the court to delegate to another the judgment and discretion, the exercise of which was intrusted by the Constitution to it alone. In the other case the order was that Donald & Cobb be appointed as agents of the county of Matagorda for the management and sale of its school lands and

empowered them, as such agents, to sell and convey the lands at the prices specifically set forth in the order. From the order it is apparent that no judgment or discretion of the court was attempted to be delegated to Donald & Cobb, but that they were simply appointed for the purpose of carrying out what the court, in the exercise of its judgment and discretion, had already determined upon. Hence the sale in the first case was invalid, and in the other it was all right. While the surrender of its judgment and discretion and its attempted delegation by the county commissioners' court of Liberty county to Perryman was not as complete in the case at bar as it was in the *Stephens County Case*, it seems to us that enough was surrendered and sought to be delegated to him to render the sale made by him, through which appellants deraign title, invalid, when tested by the principles before enunciated.

This brings us to the consideration of the question whether the sale was susceptible of ratification. It is stoutly asserted and vigorously argued in this motion that we erred in deciding this question in the affirmative in our original opinion, and that we should, upon reconsideration, decide that the sale could not be ratified. There are certain contracts which are incapable of ratification; or, more properly speaking, there are certain transactions partaking of the color of contracts, which are not and never can become contracts according to the legal conception of the term. Such transactions as are directly or impliedly prohibited by the Constitution or statute; such as are clearly against public policy; or such as, were it not perforce of a statute, would be unauthorized, which do not comply, in manner and form of their execution, with the requirements of the statute authorizing them—are in no sense of the term contracts, and never can, by ratification, acquiescence, or any act of the parties, become contracts such as can be enforced through the medium of the courts. To illustrate: A., in consideration of a promise made to him by B. to pay him a designated sum of money upon his murdering C., commits the murder in the performance of his part of the agreement. B. then refuses to pay him the sum of money according to his agreement. Then A. sues him, setting up the terms of the agreement, the performance of his part of the agreement, and prays judgment for the sum of money B. promised to pay him for committing the felony. Any child in the land would know that such an agreement is not a contract, and the reason why it is not and could not be, that, though on account of the murder B. accepted pecuniary benefits arising from it, the transaction was such that it could not, in the sense of the law, be ratified by any subsequent act; that, if the law were enforced, instead of a judgment for money, B. would get one for a hangman's noose entitling him to dangle from a gallows by the side of A., his partner in the crime. That such a suit has never been brought is not because no such

agreement has ever been made, but on account of the knowledge, of those who have sunk to the lowest depths of human depravity, of the law. Take another case, of a character which has frequently arisen and been adjudicated, for illustration of the principle: A., knowing that B. desires to rent his house to be used for an illegal purpose—such as for gambling, a house of prostitution, storing smuggled goods, or secreting stolen property—rents it to him for the purpose of his carrying on such illegal business therein. B. takes possession of the building under the lease and uses it during the term for the purpose of carrying on such unlawful business. B. has not paid, but refuses to pay, A. the rental agreed upon, and the latter sues him for it. B. pleads in answer the illegality of the agreement, to which A., by his supplemental petition, replies: "You ratified the agreement by entering into possession of my house thereunder and occupying it during the entire term of the lease." The reply has no force, for the law pronounces the agreement illegal from its inception because the purpose for which it was entered into was contrary to the statute, as well as against public policy, and incapable of ratification. Such an agreement is so tainted by the putrefaction of immorality as to render it an absolute nullity, incapable of ratification in any manner.

It is not insisted in appellee's motion for rehearing that the case under consideration is of the class we have just illustrated, and we have offered the illustrations only for the purpose of demonstrating the principle that a contract which is in itself illegal is not susceptible of ratification. It cannot be said that the sale by a county of her public school lands is in itself illegal, for such a sale is expressly authorized by the Constitution, as well as by statute; nor can it be held against public policy for a county to do that which it is fully authorized by the Constitution and laws of the state to do. On the contrary, it would seem that it was the duty of Liberty county to sell such of her lands at the time her commissioners' court attempted to do so, and by its order of July 1, 1881, appointed W. W. Perryman the agent of the county to sell such lands; for it, at the same time, declared it to be the judgment of the court that it was for the interest of the county that all its school lands situated in the counties of Polk, Tyler, and Hardin be placed on the market for sale, and the proceeds thereof invested as provided by law. In this there was an exercise of the discretion and judgment of the court, which was, no doubt, properly determined, for the children within the scholastic age then residing in Liberty county were as much entitled to the benefaction provided by the state as the children who may reside within its limits a hundred years from now. In this view it would seem that the county had not only the right to place the lands on the market for sale at that time, but that it was its duty to do so, in order that

those who were entitled to the interest on the proceeds of the sale, invested as a permanent school fund, could get the benefit of it, as was intended by the state when the donation of the land to the county was made. It was certainly not contemplated by the "Fathers" that the children of their generation should be deprived of the fruits of the state's bounty in order that in the distant future a better price might be obtained and a larger permanent school fund realized for the children of future generations. It must have been contemplated that the children of those who "let down the gap and trod down the first grass, fought back the Indians and smoothed the trail for others," were entitled to some benefit from the donation of lands by the state to the several counties for school purposes.

So far there was no illegality in the order of the commissioners' court, nor would it have been illegal for the county, by its commissioners' court, to have sold the land and have carried into effect a sale made by it through the agency of Perryman, or any other suitable person. Its invalidity consisted in the order's giving him "full power to sell the land either at private or public sale, as in his judgment he might deem best for the interest of the county." Thus expressly delegating its powers of discretion and judgment, which, as we have seen, it alone could exercise. But the sale made by him was not like the sales in those cases where the commissioners' courts conveyed county school lands to parties in consideration of their locating and surveying such lands, which were invalid, because contrary to the Constitution and statute which provide that the proceeds of such lands, when sold, "shall be held by said counties alone as a trust fund for the benefit of the schools therein." Inasmuch as such sales were in consideration of services performed, the counties received nothing that could be held as a trust fund for the benefit of the schools. The trust expressly imposed by the Constitution upon the county was violated, and the source from which the trust fund was to flow was destroyed, by the very power intrusted by the law with its preservation. Hence such proceedings of the commissioners' court were absolutely void and incapable of ever being ratified in any way by any power in this world.

This case is not analogous in principle to *Nichols v. State*, 11 Tex. Civ. App. 327, 32 S. W. 452. In that case the plaintiff's demand against the state for payment for extra work upon the building could not be enforced because of the inhibition contained in section 44, art. 3, of the Constitution, which provides that: "The Legislature shall not grant money to any individual on a claim, real or pretended, when the same shall not have been provided for by pre-existing law." As there was no such pre-existing law authorizing payment for the extra work done by Nichols on the state's building, the acceptance and occupancy of the building by the state was not a

ratification of the pretended contract upon which his demand arose, and could not be, for the reason that the Legislature was by the Constitution expressly inhibited granting money on such a claim; no provision having been made by any law existing before the claim arose for its payment.

The cases of *Noel v. City of San Antonio*, 11 Tex. Civ. App. 580, 33 S. W. 285, and *National Bank v. Dallas* (Tex. Civ. App.) 73 S. W. 841, are ruled by the principle that a pretended contract by a municipal corporation, which the municipality is prohibited by the Constitution from making, is absolutely void and not susceptible of ratification. In the two cases mentioned no provision was "made to assess and annually collect a sufficient sum to pay the interest thereon, and to create a sinking fund." Therefore the claims sued upon were in direct violation of section 5, art. 11, of the Constitution, which declares that no debt shall be created by a city, unless at the same time provision be made to assess and collect a sufficient sum to pay the interest thereon and create a sinking fund of at least 2 per cent. thereon. Consequently, in accordance with the principle stated, it was held, as has been done in a number of similar cases, that the contracts sued on were absolutely void and incapable of ratification. Hence it appears that there is no analogy between that class of cases and the one at bar.

Nor is there any analogy between the case in hand and that of *Daniel v. Mason*, 90 Tex. 240, 33 S. W. 161, 59 Am. St. Rep. 788, wherein it was held by the Supreme Court that a married woman's deed to her separate property was void, although her vendee had no notice of her coverture, and though she accepted from him the cash consideration, appropriated, and never returned it. That decision rests upon the principle that where a contract, which could not under the common law be made, is authorized by a statute which prescribes the manner and form of its execution, it must be made in conformity to the statute which authorizes it, or else it will be void. In that case a married woman undertook to convey real estate, which was her separate property, without being joined in the conveyance by her husband, which was absolutely required by article 635, Rev. St. 1895, which conferred the right to make the conveyance and prescribed the manner and form of its execution. Hence the court held her deed was absolutely void and not susceptible of ratification.

In the case of *Logan v. Stephens County*, supra, there was no ratification of the sale attempted to be made by Walker under his appointment as commissioner for the sale of the county's school lands, nor was the question of ratification involved.

We have thus classified and analyzed the cases upon which appellee relies to show that the sale of the lands in controversy was void and incapable of subsequent ratification, disclosed the principle upon which each class

was decided, distinguished the case in hand from each class of such cases, and demonstrated that the principle by which it is ruled does not obtain and is inapplicable to the case under consideration.

The appellee in its motion makes this quotation from *Dillon on Municipal Corporations*: "A municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the scope of the corporate powers, but not otherwise. * * * But a subsequent ratification cannot make valid an unlawful act, without the scope of corporate authority. An absolute excess of authority by the officers of the corporation, in violation of law, cannot be upheld, and, when the officers of such a body fail to pursue the requirements of a statutory enactment under which they are acting, the corporation is not bound. In such a case the statute must be strictly followed. And a person who deals with a municipal body is obliged to see that its charter has been fully complied with. When this is not done, no subsequent act of the corporation can make an ultra vires contract effective." The argument its counsel bases upon the principle begs the question, in assuming that the sale of the land was not within the corporate powers of Liberty county, from which premise they reach the conclusion that it was ultra vires, and therefore incapable of subsequent ratification. Whether such premise is sound or not is the very question to be determined. If it is sound, the conclusion inevitably follows that the sale in question is not susceptible of ratification; but, if unsound, the conclusion fails with the premise. In the latter event some other premise must be formed as a basis for such conclusion. In the quotation the principle is clearly and unequivocally enunciated that "a municipal corporation may ratify the unauthorized acts and contracts of its agents or officers which are within the scope of its corporate powers." We have seen: That it was within the scope of the corporate powers of Liberty county to sell its school lands, such power being expressly granted by the Constitution and laws of the state; that the invalidity of the sale did not rest upon the principle of ultra vires; but that the vice lay in the manner in which the county exercised its corporate power to sell. As is said in *Abbott on Municipal Corporations*, § 279: "A contract may, because of some irregularity in the manner or time of its execution, be illegal because defective, and therefore incapable of enforcement. Such a contract the authorities hold may be ratified either by an acceptance of the contract by the public corporation, * * * or by acquiescence in existing conditions." See, also, the authorities cited in note 837, pp. 623, 624, vol. 1, of the work just quoted from.

There is no mandatory provision prescribed by either the Constitution or laws of the state, as in the case of the conveyance by a

married woman for the conveyance of her separate real estate, for the sale and conveyance by a county of her county school lands; but, as we have seen, it is left to the county commissioners' court to provide the manner of its sale and disposition. It is a general rule that, "if the invalid contract was one which the corporation could make and is not void because not in compliance with a mandatory provision of the law, it may be ratified." *Supervisors of Marshall County v. Schneek*, 5 Wall. 772, 18 L. Ed. 556; *State v. Milling Co.*, 156 Mo. 620, 57 S. W. 1008; *Bell v. Waynesboro Borough*, 195 Pa. 299, 45 Atl. 930. Hence we conclude that the sale of the land evidenced by the deed from W. W. Perryman, under which appellants claim, though invalid, was not void, and was therefore susceptible of ratification.

We omitted to express our opinion in the proper place upon the effect of Perryman's retaining 5 per cent. of the proceeds of the sale as his commissions for effecting the sale. It is that it does not affect the question of ratification. The commission was allowed by a different order of the commissioners' court from that which sought to empower Perryman to effect the sale of the land. The purchaser was not therefore charged with notice of it when he paid the purchase money, which was more than the minimum price for which the commissioners' court, as is shown by its order appointing him as agent of the county to sell, was willing for it to be sold. The court's allowing Perryman to retain the 5 per cent. was, in our opinion, simply a diversion of the money from the fund to which it belonged to the general fund of the county. Thereby the county commissioners' court created a claim by the school fund on the general county fund for the amount of money paid Perryman, and therefore the commissioners' court should restore the amount thus diverted from the school fund by taking it from the general fund to which it was diverted.

The sale of the land being susceptible of ratification, the next question is: Do the facts found by the trial court show its ratification by the county? As is said in our original opinion: "The principle is axiomatic that where one person executes a deed, purporting to be the act of another, without authority to do so, and the person for whom such act purports to have been done is fully apprised of all the facts connected therewith, and knowingly receives and uses the benefits derived from such sale, he thereby ratifies it, and is estopped from asserting that the person purporting to act as his agent was without authority to make it. * * * 'Ratification is the election by a person, and the expression of such election by words or conduct, to accept an act or contract previously done or entered into in his behalf by another who had at the time no authority to do the

act or make the contract on his behalf. If certain acts have been performed or contracts made on behalf of another without his authority, he has, when he obtains knowledge thereof, an election either to accept or repudiate such acts or contracts. If he accepts them, his acceptance is a ratification of the previously unauthorized acts or contracts, and makes them as binding upon him from the time they were performed, as if they had been authorized in the first place.' *Clark & Skyles on Agency*, § 98." Inasmuch as the evidence shows indisputably the presence of all the facts essential to a complete ratification, we think it is self-demonstrative. If a man, who had knowingly received from another the purchase money for an unauthorized sale of his land, invested the money in interest-bearing securities, collected and used the interest on the investment for over 20 years, should sue the purchaser to recover his property upon the ground that he never authorized the sale, his action would unquestionably be defeated by proof of such acts of ratification. To our minds it is equally clear that Liberty county cannot, for the same reason, recover in this action. The education of the children of Texas does not demand the sacrifice of public integrity. Such a sacrifice is too great for any purpose. No individual can afford to make it, and we do not think that any county of the great state of Texas is, or should be, allowed to make it. "Robbing Peter to pay Paul" has never been regarded as orthodox religion by any church, or as sound morals by any man; and it may be doubted whether Peter himself, with all his Christian forbearance, approved such conduct.

The motion is overruled.

STACY v. DELERY.

(Court of Civil Appeals of Texas. Oct. 23, 1909. Rehearing Denied Nov. 18, 1909.)

1. WATERS AND WATER COURSES (§ 87*)—UNLAWFULLY DETAINING WATER—ACTIONS—ISSUES, PROOF, AND VARIANCE.

Where a lower riparian owner, suing an upper owner for unlawfully appropriating the water of a stream, alleged that the upper owner impounded the water of one of the forks of the stream, and the evidence showed that the damages complained of were caused by dams on the other fork of the stream, there could be no recovery, because the evidence did not support the petition.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 87.*]

2. APPEAL AND ERROR (§ 731*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error "because the evidence is insufficient to support the verdict and judgment of the court" is too general to require consideration on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3017-3021; Dec. Dig. § 731.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. WATERS AND WATER COURSES (§ 78*)—USE OF WATER FOR IRRIGATION PURPOSES.

Each riparian owner has equal rights in the stream for irrigation purposes, and the use of each must be reasonable as to the rights of the others.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 67-69; Dec. Dig. § 78.*]

4. WATERS AND WATER COURSES (§ 78*)—USE OF WATER FOR IRRIGATION PURPOSES.

The right of a riparian owner to the water of a stream for irrigation purposes is not confined to a use of the water as it flows by, and while it is so flowing, but he may store the water in reservoirs for future use after it has ceased to flow so far as is consistent with the rights of the lower owners, but such use of the water by one owner as will prevent a lower owner from storing water for irrigation is not reasonable.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 67-79; Dec. Dig. § 78.*]

5. WATERS AND WATER COURSES (§ 78*)—USE OF WATER FOR IRRIGATION PURPOSES.

A lower riparian owner is not entitled to water which has been stored by an upper owner while the stream was running, unless such water also included water which the latter caught and stored by entirely obstructing the flow while the stream was running, to the former's damage.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 67-79; Dec. Dig. § 78.*]

Appeal from District Court, Liberty County; L. B. Hightower, Judge.

Action by William Stacy against W. S. Delery and another, in which defendant Delery pleaded in reconvention for damages against plaintiff. From a judgment for defendant Delery on the plea in reconvention, plaintiff appeals. Reversed and remanded.

Stevens & Pickett, for appellant. Baker, Botts, Parker & Garwood, for appellee.

REESE, J. This suit was brought by William Stacy in the district court to enjoin W. S. Delery and Jane Frisbie from cutting certain dams erected by Stacy on White's bayou. Both defendants answered. Delery also pleaded in reconvention for damages against plaintiff Stacy, occasioned by injury to his rice crop caused by unlawful detention and appropriation by plaintiff of water flowing in White's bayou. After answer by defendants, plaintiff dismissed his suit for injunction, with the allegation that such remedy was no longer necessary, and the cause, as between Stacy and Delery, proceeded to trial upon Delery's plea in reconvention. Upon trial without a jury judgment was rendered for Delery for \$823.25, from which Stacy appeals.

By the first, second, fifth, and tenth assignments of error appellant complains of the judgment as based upon a cause of action not embraced in the pleadings, but variant therefrom. The plea in intervention sets out: That appellee had rented a tract of land for the year 1907, upon which he

had planted, and was growing, a crop of rice. The land lay along White's bayou, a running stream from which appellee procured water to water the crop, catching and holding the water in a dam across the bayou, and pumping it out on his rice. That appellant, who was a rice grower on land above him, had placed a dam in White's bayou, and had thereby stopped the flow of the stream, appropriated all of the water, and prevented any of it from reaching appellee at a time when he was in pressing need of the same to water his rice crop, for lack of which water his rice crop was injured. It is further alleged in the pleadings: "That the stream known as White's bayou has its head at a point north or northwest from the town of Devers, on the north side of the Texas & New Orleans Railway track, and runs thence in an easterly direction through the Whittington league, owned by William Babcock, and turning south across said railway at a point east of the town of Devers, and enters the Benjamin Barrow survey of land, and continuing thence in a southwardly direction, passing through said land leased by the defendant, W. S. Delery, hereinabove described. That in recent years a gully has been washed out by the flow of water caused by rainfall, which gully begins on said White's bayou and the Benjamin Barrow survey of land, extending thence northwestwardly through said Barrow's survey, a part of the Chism survey, and on west of the town of Devers, the head of said gully being near to said White's bayou, northwest of said town of Devers; that this said gully is not now and has never been the main stream or waterway of White's bayou, but that same has only in recent years come into existence as a stream, and that by reason of natural rainfall and overflow of water from said White's bayou northwest of the town of Devers, which rainfall and overflow water, following a natural depression west of said town of Devers, has flowed southwardly into the said White's bayou again, and by reason of washing caused by said rainfall and said overflow of water from said White's bayou the said gully has been made. That one tract of plaintiff's land borders on said White's bayou, and said tract of land so bordering upon said White's bayou is shown on the map, which the defendant hereto attached, and same is marked for identification. That the other two tracts of land owned by plaintiff are on the said gully, which is located west of the town of Devers, as hereinbefore described and referred to. That the said two tracts of said land are so riparian to the said White's bayou, and the same do not touch or come in contact with the said White's bayou in its natural channel or proper basin. This defendant is informed and believes, and upon

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such information and belief avers, that said plaintiff's crop of rice referred to and described in his petition was grown upon said tracts, which are not riparian to the said White's bayou. This defendant says, therefore, that the plaintiff did appropriate the water from White's bayou to irrigate said tracts of land, which are not entitled to irrigation from it; that the supply of water from said White's bayou is wholly inadequate to irrigate the lands owned by plaintiff, which are not riparian to said White's bayou, and the land leased by defendant Delery, and upon which the said Delery was growing a crop of rice last year." A plat attached to the plea in reconvention and introduced in evidence shows the stream, the course of which has been shown, marked "White's bayou" and the other stream marked "White's bayou gully," the upper end of which is shown to be connected with White's bayou by a ditch, and which runs thence in about a straight line to connect with White's bayou, below the lands marked as Stacy's lands, and above the lands of Delery. The map also shows Stacy's cultivated land lying along this stream marked White's bayou gully, other lands intervening between them and White's bayou. The sketch also shows a dam on White's bayou just above the junction of the two streams, and another further up the stream marked "White's bayou gully."

It is further alleged "that the said tract of land which is located upon and which is riparian to the said White's bayou is south of and along the course of said White's bayou below the other tracts of land owned by plaintiff; that said tract of land riparian to said bayou is woodland, not adapted for the cultivation and growth of rice, and that no part of same is now in cultivation for the purpose of growing rice, and that none of the water from said White's bayou was used upon said land for the purpose of irrigating crops growing on same; that said plaintiff has constructed a dam across said bayou, and by means of said dam stops the water which should naturally drain past the land of the defendant, Delery, and confines same by said dam on the said tract of land owned by plaintiff, and within the banks of said White's bayou, and then pumps same from said dam back upon the lands owned by plaintiff, which are not riparian to White's bayou; that said dam practically consumes all of the water flowing through said White's bayou, and plaintiff is now appropriating and seeking to appropriate all of said water, and confines same by said dam, thereby preventing it passing beyond same to the land being cultivated by said Delery; that it is not necessary for the cultivation and growth of crops of rice upon said plaintiff's premises to appropriate all of said water, but that the said plaintiff is storing said water on his said land, instead of permitting the same to take its natural

course, which would permit it to reach the land leased and cultivated by said defendant, Delery."

It is made clearly to appear from the allegations of the plea that appellee intends to distinguish carefully White's bayou from the other stream which he calls a "gully," and which is marked on his sketch as "White's bayou gully," and the gravamen of his complaint is that by means of a dam across White's bayou, which is shown on the sketch, appellant has impounded the water coming down White's bayou, thus depriving appellee of the use thereof to water his lands lower down on the stream, and using the same to water his (appellant's) rice on land alleged to be not riparian to White's bayou, but lying along said gully. In every way appellee distinguishes White's bayou from White's bayou gully, and makes it clear that his ground of complaint is the damming up of White's bayou and the stoppage of the flow of water down this stream and using it to irrigate land on the "gully," and away from this stream. No reference is made to any dam on the stream which he distinguishes as White's bayou gully, or to any flow of water down said stream. By means of the allegations of the plea, in connection with the sketch, appellee puts his finger upon the objectionable dam across White's bayou, above the lower junction of that stream with the so-called gully.

The court found as a basis for the judgment (and the findings are not disputed) that White's bayou divides at the point where the ditch was cut and runs into two prongs (one being the stream called by appellee "White's bayou," and the other the stream which he denominates "White's bayou gully"), the two prongs uniting below appellant's and above appellee's lands, that both streams throughout their courses possess all the characteristics of water courses as defined by law, and that the water runs through both of them during all the year, except extreme dry weather in the summer time. The court in its findings speaks of the stream marked on the sketch as White's bayou as the east prong of the bayou, and the other as the west prong. The court in its findings treats each prong as White's bayou. The court finds that appellant had erected two dams across the west prong, and at a point lower down and a short distance above the junction had erected a dam "extending from the east bank of the east prong to a point about where Big Ben's marsh empties into the eastern prong, across to the western bank of the western prong." The court further finds that, "by reason of said series of dams, the plaintiff, Stacy, stopped entirely the flow of water in White's bayou, confining in said dams all the water that came down this stream, and permitting none of it to pass save that which wasted from his irrigated lands." The findings of the court leave no room for doubt that, when White's bayou is

spoken of, the stream embracing both prongs is meant, and that the judgment is based upon the stopping of the water flowing down both streams and obstructed in both by the "series of dams" mentioned.

It is further found that in 1907 the water ceased to run in the eastern prong (White's bayou) on July 1, 1907, and in the western prong (White's bayou gully) on July 25th, and it is so conclusively shown that appellee had sufficient water to thoroughly water his rice crop up to July 20th, and that he, in fact, watered his crop up to about July 25th. Appellee had a dam to catch the water at his place sufficient to hold enough water for his purposes. When we consider that the water ceased to flow in White's bayou or the eastern prong on July 1st, and continued to run in the western prong, or White's bayou gully, until July 25th, and that appellee had plenty of water at least as late as July 20th, it is clear that his damage was caused principally, if not entirely, by the erection of the three dams in the western prong across the stream called by him "White's bayou gully," and that the dam complained of by him in his plea across White's bayou, or the eastern prong, contributed very little thereto, if at all. Clearly this western prong carried the heavier flow of water. Eliminate all the dams on the western prong or gully, of which there is no mention in the pleading, and it does not appear that appellee would have suffered any damage, as he would have received the flow of that stream to fill his dam until July 25th. By the allegations of the plea appellant had no notice that any complaint was made of any of his dams on the western prong of the stream, as found by the court.

It is not necessary to cite authorities to sustain the proposition that facts proven, but not alleged, cannot form the basis of a judgment.

The several assignments referred to are well taken, and must be sustained.

The seventh assignment of error is as follows: "Because the evidence is insufficient to support the verdict and judgment of the court." The assignment is too general to require consideration, and would not be considered but for the fact that the judgment will be reversed on another ground, and, in view of another trial, it is proper that we express our views upon some of the propositions advanced under the assignment. *Miller v. Schmullen*, 37 Tex. 233; *Randall v. Carlisle*, 59 Tex. 70; *Yoe v. Montgomery*, 68 Tex. 342, 4 S. W. 622; *Bonner v. Whitcomb*, 80 Tex. 178, 15 S. W. 899. The error is not fundamental.

The first proposition under this assignment is that a riparian owner is only entitled to his proportionate part of the flow of a running stream, and, after a running stream has ceased to flow naturally, a lower riparian owner has no cause of action to an upper riparian owner, who during the time that

the stream flowed naturally stored in reservoirs a part of the water, provided that during the period of such storage by the upper owner the lower owner received his quota of the flow of the stream. The opinion of the Supreme Court in *Watkins Land Co. v. Clements*, 98 Tex. 578, 86 S. W. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653, must be taken as settling the law in this state as to the respective rights of riparian owners on the same stream in the water of the stream for irrigation purposes, and that "each riparian owner has equal rights in the stream of water which flows by him, and the use of each must be reasonable as regards the rights of others"; what is such reasonableness being a question for the jury in each case. *Clark v. Allaman*, 71 Kan. 206, 80 Pac. 571, 70 L. R. A. 971; *Crawford v. Hathaway*, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647. This right to take is not only to use the water as it flows by, and while it is so flowing, but also, so far as this can be done consistently with the rights of lower owners, the right to store it in reservoirs or confine it for future use after it has ceased to flow. *Long on Irr.* § 118. It was shown that the water in the east prong ceased to flow on July 1st and in the west prong July 25th, but that at a much earlier date appellant, by damming the water, appropriated all of it, and allowed none to get by to appellee's land where he was prepared to catch and store at least a part, if not all, of the flow. Perhaps if the water had been allowed to continue to run down to appellee's lands up to the time it ceased to run at all in both streams (if appellee's pleadings are so framed as to meet the case made by the findings of the trial court), he would have been able to catch and store a sufficient quantity of this continued flow to continue to water his rice and save his crop from damage. Such use of the water by appellant as would prevent his doing this could hardly be said to be a reasonable use consistent with the equal right of appellee to the use of the water. This view makes it important to determine upon another trial whether the damage to appellee's crop was caused by this stoppage of the flow while the water was still running in the streams, depending to some extent upon whether he was prepared to catch and hold this continued flow if it had not been stopped by appellant. The evidence does not make this entirely clear.

The judgment is not predicated to any extent, as shown by the findings of the trial court, upon the act of appellant in diverting the water from the east prong to the west prong by means of the ditch cut by him in 1895, more than 10 years before the institution of the suit. It does not appear to us that the second, third, and fourth propositions advanced by appellant under this assignment have any relation to the case made by the evidence.

What we have said disposes of the fourth

and sixth assignments of error, with this addition: Appellee would not be entitled to the water which had been caught and stored by appellant while the stream was running unless such body of water also included water which appellant caught and stored by entirely obstructing the flow while the stream was still running, to appellee's damage, as explained in this opinion.

There is no merit in the eighth assignment, in view of the decision of the Supreme Court in *Watkins v. Clements*, supra.

What we have said sufficiently disposes of the ninth and tenth assignments of error, which are overruled.

For the error indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

HAMILTON v. KEGLEY.

(Court of Civil Appeals of Texas. Oct. 20, 1909.)

APPEAL AND ERROR (§ 719*)—ERRORS REVIEWABLE IN ABSENCE OF ASSIGNMENTS OF ERROR.

There is no fundamental error apparent of record which alone can be considered in the absence of assignments of error, where the judgment, for the full amount of the claim, makes no provision for application in payment of it of money paid by defendant to plaintiff pending the litigation; plaintiff's testimony showing without anything to controvert it that on filing his amended petition he paid it into the registry of the court, where it is still held, there being nothing to prevent defendant withdrawing it and applying it on the judgment, plaintiff having lost all power and control over it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982; Dec. Dig. § 719.*]

Error from District Court, Bell County; John M. Furman, Judge.

Action by Jay Kegley against W. H. Hamilton. Judgment for plaintiff. Defendant brings error. Affirmed.

Durrett & Pendleton, for plaintiff in error.

RICE, J. Kegley sued Hamilton for a balance claimed to be due him from Hamilton arising out of a former partnership business conducted by them at Belton. There was a verdict and judgment in favor of Kegley for \$699.41, to reverse which Hamilton sued out this writ of error.

While plaintiff in error complains of numerous rulings of the court, yet there was no assignment of errors filed in the lower court, as required by law, and therefore none is brought up in the record. Hence we are not called upon to consider any error, except such as may be fundamental and apparent from the face of the record, which doctrine is admitted to be correct by counsel for plaintiff in error. See article 1018, Rev. Civ. St.; District Court Rules 97, 98 (67 S. W. xxvii);

Supreme Court Rules 22, 23; *Bopp v. Ganzer* (Tex. Civ. App.) 26 S. W. 444; *Lewis v. Steiner*, 84 Tex. 364, 19 S. W. 516; *Durham v. Garrett* (decided at the present term, not yet officially reported) 121 S. W. 1141.

Plaintiff in error, however, contends that there is fundamental error apparent of record, in this: That it is shown thereby that he had paid to defendant in error pending the litigation the sum of \$552.28, with which he has not been credited. While this is not denied, yet Kegley testified that this amount, upon the filing of his amended petition, had been paid by him into the registry of the court, and is still held there, and there is nothing controverting his statement. This being true, notwithstanding that the judgment of the court in Kegley's favor made no provision for the application of this money in payment of his judgment against Hamilton, yet there is nothing to prevent Hamilton from withdrawing this money and applying the same in satisfaction thereof; Kegley having lost all power and control over the same. It is true that the court might have provided for the application of the same in satisfaction pro tanto of the judgment rendered, but this does not prevent plaintiff in error so applying it; and doubtless the court, if it becomes necessary, will order the same paid over to Hamilton for this purpose. In the absence of an assignment of error, this failure on the part of the court to so provide does not in our judgment constitute such fundamental error as the authorities contemplate we should take notice of, and the judgment is therefore in all things affirmed.

Affirmed.

ESTES et al. v. ESTES et al.

(Court of Civil Appeals of Texas. Nov. 3, 1909.)

1. APPEAL AND ERROR (§ 731*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

An assignment of error that the verdict is clearly against the law, the evidence, the great preponderance of evidence, and directly against the admitted, agreed, and uncontradicted evidence, is too general and indefinite under Court of Civil Appeals Rules 22-28 (67 S. W. xv), relating to the preparing of causes for submission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3021; Dec. Dig. § 731.*]

2. APPEAL AND ERROR (§ 728*)—ASSIGNMENTS OF ERROR—SUFFICIENCY.

Assignments of error which do not identify the particular proceedings complained of in the record, as expressly required by Court of Civil Appeals Rules 25 and 26 (67 S. W. xv), are not sufficient; and hence an assignment merely urging that the court erred in several rulings in excluding legal and competent evidence offered by plaintiffs, to their great prejudice, all of which was duly excepted to by them, referring to bills of exception, was insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3010-3012; Dec. Dig. § 728.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS—SUFFICIENCY.

Where propositions under assignments of error are not germane to the assignments, or are general and indefinite, failing to specify with certainty the particular error complained of, they are insufficient under Court of Civil Appeals Rules 30-32 (67 S. W. xvi), prescribing the form of such propositions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

4. TRIAL (§ 256*)—INSTRUCTIONS—DUTY TO ASK.

It is not compulsory upon the judge to set out any more of the pleadings in his charge than he may deem necessary, and it is the duty of a party, if dissatisfied with the charge, to have prepared and presented a special charge, covering the supposed defect, and, if he does not do so, he cannot complain.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 628; Dec. Dig. § 256.*]

5. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—SEVERAL PROPOSITIONS OF LAW AS ONE PROPOSITION.

Assignments complaining of several separate charges, embracing several propositions of law as one proposition, are insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

6. APPEAL AND ERROR (§ 730*)—SUFFICIENCY—GENERALITY.

Assignments that the court erred in refusing to give charges requested by plaintiff because they were clearly the law arising on the issues and evidence, and were absolutely necessary, that the court, having failed to give any equivalent charge, wrought fatal injury to plaintiffs, and that the court erred in every paragraph of its charge from the fourth to the ninth, twelfth to the sixteenth, nineteenth, twentieth, twenty-first, and twenty-second paragraphs, because they were not warranted by the issues raised or the proof made, are too general and indefinite.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3013-3016; Dec. Dig. § 730.*]

7. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—INSUFFICIENCY OF STATEMENT.

An assignment of error complaining of the court's refusal to give requested charges, not followed by any statement, and an assignment urging that the court erred in certain paragraphs of its charge, followed by a statement not setting out the charges complained of, need not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

Appeal from District Court, Bell County; John M. Furman, Judge.

Trespass to try title by J. W. Estes and others against Florence Estes and others. Judgment for defendants, and one of the plaintiffs appeals. Affirmed.

See, also, 118 S. W. 174.

Saunders & Saunders and Woodward & Baker, for appellant. Tyler & Tyler and A. L. Curtis, for appellees.

RICE, J. J. W. Estes, Mrs. Margaret Murphy, joined by her husband, W. G. Murphy, and C. P. Estes, brought this suit against Mrs. Florence Estes and the other appellees herein, in the ordinary form of trespass to try title, to recover 700 acres of land in Bell

county. Appellants, except Murphy, were the children of E. T. Estes by his first wife, Jane Estes, and the appellees were the children and grandchildren of said E. T. Estes by his second wife, S. A. Estes. By amendment to the pleading, the suit was in effect one to recover on the part of said plaintiffs a one-half interest in said tract of land, basing their contention upon the theory that the land involved was purchased by E. T. Estes, their father, with the money realized by him from the sale of the homestead of himself and his said first wife, their mother. Appellees replied by general denial, plea of not guilty, and also pleaded the statutes of limitation of 3, 5, 10, and 4 years, and stale demand, and likewise pleaded by way of estoppel that E. T. Estes, the ancestor of both plaintiffs and defendants, and who held the legal title to the land in controversy up to his death in 1887, made a valid will, which was duly probated and in full force, by the terms of which he devised to said plaintiffs, J. W. Estes, C. P. Estes and Margaret Ann Murphy, certain lands in Grimes and Montgomery counties, amounting to 1,167 acres, and by the same will devised the lands in controversy herein and all his personal property to his said second wife (mother and grandmother, respectively, of appellees) during her lifetime, with remainder to the children of said E. T. Estes and S. A. Estes, some of whom are defendants herein, and others of whom are their descendants, charging said land and said personal property with the payment of his debts; that but for said will appellees would have been entitled by inheritance to their shares in said land in Grimes and Montgomery counties, so devised to appellants; but that said will excluded appellees from any interest therein, and also from any interest in the lands in controversy or in the estate of said E. T. Estes until the death of their mother, S. A. Estes, in 1905; that appellants have sold the lands in Grimes and Montgomery counties, appropriating the proceeds thereof to their own use; that appellants, excepting W. G. Murphy, who is a nominal party hereto, were wholly insolvent and cannot be compelled to restore said land or the proceeds thereof to be partitioned between appellants and appellees; that appellees and their mother, S. A. Estes, have long since paid off the debts and expenses of last illness, in accordance with said will; and that it would be inequitable now for appellants to share with appellees in the land sued for, whereby they are concluded and estopped from claiming any interest therein, and have elected to take said land in Grimes and Montgomery counties under the provisions of said will. Appellants by supplemental petition sought to avoid the effect of the statute of limitations, so pleaded by appellees, by alleging an agreement between Mrs. Estes and themselves, to the effect that if they would

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not disturb her possession during her lifetime they should be entitled to an undivided one-half of the same after her death, and denied that they had elected to take under said will, but asserted that the Grimes and Montgomery county lands had been paid for by them by work done for and money loaned their father during his lifetime. Said J. W. Estes pleaded that prior to the death of his step-mother, Mrs. S. A. Estes, he had an understanding and agreement with her to the effect that he should pay her during her lifetime a certain sum of money for her support, equivalent to the rental value of said land, and that said land should not be divided during her lifetime, and that he was in possession of said land at the time of her death under this contract, with which he had complied, and remained in possession after her death until 1907, when he was ousted therefrom by the defendants in a forcible entry and detainer suit. There were other pleadings on the part of appellees, unnecessary to notice. There was a jury trial and verdict and judgment in behalf of defendants, from which all of appellants prosecuted this appeal; but at a former term of this court, on account of an insufficient appeal bond, the appeal was dismissed so far as J. W. Estes and Murphy and wife were concerned; appellant C. W. Estes being allowed to give a new appeal bond, which he did, and now alone prosecutes this appeal. See *Estes v. Estes* (Tex. Civ. App.) 118 S. W. 174.

By his first assignment appellant contends that the verdict of the jury is clearly against the law and evidence, the great preponderance of the evidence, and directly against the admitted, agreed, and uncontradicted evidence. Appellees insist that this assignment is too general and indefinite, citing rules of Court of Civil Appeals 22 to 28, inclusive (67 S. W. xv), and likewise urge that appellant's propositions thereunder are not germane to the assignment, but are a complaint of the action of the court in excluding certain evidence, citing in support thereof rules 30 to 32 of Court of Civil Appeals (67 S. W. xvi); *Railway Co. v. Taylor* (Tex. Civ. App.) 58 S. W. 166; *Oil Co. v. Disborough* (Tex. Civ. App.) 83 S. W. 1004; *Railroad Co. v. Norris* (Tex. Civ. App.) 29 S. W. 950. We are inclined to agree with appellees in this contention and hold that the assignment is too general to require further consideration at our hands.

The second assignment of error merely urges that the court erred in several rulings in excluding legal and competent evidence offered in behalf of plaintiffs to the jury, to the great prejudice of the plaintiffs, all of which was duly excepted to by the plaintiffs, referring to bills of exception. The propositions under this assignment are likewise general and indefinite, failing to specify with certainty the particular error complained of. Appellees also except to this assignment, because of its failure to specify the particular

errors complained of. For the same reasons assigned above, we think this objection well taken, because it has been frequently held that assignments of error which do not identify the particular proceedings complained of in the record, as required by the rules, are not sufficient and cannot be reviewed. See rules 25 and 26, Court of Civil Appeals (67 S. W. xv); *Swift v. Bruce*, 31 Tex. Civ. App. 92, 71 S. W. 321.

The third assignment complains that the court in its charge omitted to make a full and correct statement of appellant's material allegations in his first supplemental petition. We have examined the charge, and, while it may have omitted to incorporate all of the issues raised by the pleadings, yet it is not compulsory upon the judge to set out any more of the pleadings of the parties in his charge than he may deem necessary. Besides, it was the duty of appellant, if dissatisfied therewith, to have prepared and presented a special charge covering the supposed defect, and, failing so to do, he is not in a position to complain. *Mo. Pac. Ry. Co. v. Lehmberg*, 75 Tex. 66, 12 S. W. 838.

By the fourth assignment it is insisted that the court erred in refusing to give to the jury the charges requested by appellant, because they were properly and clearly the law arising on the issues and the evidence, were absolutely necessary, and, the court having failed to give any equivalent charge, wrought fatal injury to plaintiffs. By his fifth assignment it is urged that the court erred in every paragraph of its charge from the fourth to the ninth, twelfth to the sixteenth, nineteenth, twentieth, twenty-first, and twenty-second paragraphs, because they were not warranted by the issues raised or the proof made in the trial of the case. There is no statement whatever under the fourth assignment, and the statement under the fifth does not undertake to set out the charges complained of. These assignments complain of several separate and distinct charges of the court, embracing different propositions of law. It has frequently been held that an assignment of error combining several propositions of law as one proposition is in violation of the rules. See *Street v. Robertson*, 28 Tex. Civ. App. 222, 66 S. W. 1120. Besides this, both of these assignments are subject to the objection that they are indefinite and too general, and, in addition thereto, they are not followed by such statements as the law requires. It is therefore not incumbent upon us to search the entire record in order to ascertain whether or not there may have been possible error committed, especially in view of the objection to their consideration on the part of appellees.

Because no such error has been pointed out by appellant as will require a reversal of the judgment, the same is, in all things, affirmed.

Affirmed.

MONTGOMERY v. AMSLER et al.†

(Court of Civil Appeals of Texas. Oct. 21, 1909. Rehearing Denied Nov. 18, 1909.)

1. PARTNERSHIP (§ 11*)—EXISTENCE OF RELATION.

That a broker having a contract with the owner of land for the sale thereof had an understanding with plaintiff, another broker, that, if plaintiff would send him a purchaser to whom a sale was made, the profits should be divided, no expenses or losses or profits to be shared unless a sale was effected by their joint efforts, did not make the parties partners, so as to render notice to the other broker of defects in the title notice to plaintiff.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 26; Dec. Dig. § 11.*]

2. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR.

In an action by a land broker for commissions, the erroneous admission of evidence showing notice to plaintiff of defects in defendant's title was harmless, where other evidence showed that plaintiff had such notice or had knowledge of facts sufficient to put a prudent person on inquiry, and which, if followed with reasonable diligence, would have resulted in his learning of the defects.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4166; Dec. Dig. § 1051.*]

3. BROKERS (§ 61*)—DEFECTS IN TITLE—NOTICE.

That a land broker was told by the owner that defects had been found in the title, but that he believed it was good, as they had owned the land 30 or 40 years, was sufficient to put the broker on inquiry and charge him with notice of the defects; the statement by the owner that the title was good for the reason given being merely an expression of opinion.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 61.*]

4. BROKERS (§ 61*)—COMMISSIONS—DEFECTS IN TITLE.

A broker knowing at the time he undertakes to sell land of defects in the title cannot hold the owner responsible for the failure of the sale of a portion of the land because of such defects.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 98; Dec. Dig. § 61.*]

5. ESTOPPEL (§ 63*)—GROUNDS.

In an action by a land broker for commissions on the sale of land at \$4 per acre, under a contract by which he was to receive all of the purchase price in excess of \$2.50 per acre, a plea that after the purchaser offered \$3 per acre, and said offer was rejected, and before the sale at \$4, plaintiff demanded of defendant 50 cents per acre as his compensation, and that defendant, when he sold the land at \$4 per acre, did so believing that plaintiff would demand no more than 50 cents per acre as his compensation, did not show an estoppel.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 63.*]

6. APPEAL AND ERROR (§ 1040*)—HARMLESS ERROR.

Where plaintiff was not entitled under any phase of the evidence to recover more than the amount awarded him, error in overruling an exception to a certain plea was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4102; Dec. Dig. § 1040.*]

7. BROKERS (§ 63*)—COMMISSIONS.

On the wrongful refusal of defendants to complete a sale of land made by plaintiff, a

broker, in accordance with his contract, they became liable to him in the amount to which he would have been entitled under the contract had they ratified the sale.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 79, 81, 94-96; Dec. Dig. § 63.*]

8. BROKERS (§ 87*)—ACTION FOR COMMISSIONS—DAMAGES.

Where a broker sued on his contract for commissions, his damages were limited to those he sustained by the breach of the contract, and he was not entitled to any part of the profits made by defendants on a subsequent sale of the land.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 131; Dec. Dig. § 87.*]

9. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR.

Alleged error in the refusal of an instruction will not be considered, where it is not copied or referred to in the statement following the assignment, and the contents are not shown.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

10. APPEAL AND ERROR (§ 500*)—ASSIGNMENTS OF ERROR.

An assignment of error complaining of the refusal to give certain instructions will be overruled, where the record does not show that appellant requested the instructions indicated in the assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2298; Dec. Dig. § 500.*]

11. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR.

Any error in the instructions was harmless to plaintiff, where he recovered all he was entitled to under the undisputed evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.*]

12. BROKERS (§ 7*)—CONTRACT OF EMPLOYMENT.

Where defendant, in reply to plaintiff's letter informing him that he thought he could sell defendant's land under certain conditions, wrote plaintiff that he would sell the land for \$2.50 per acre, net cash, and that he would write the deed to include plaintiff's profits, there was an employment of plaintiff as broker to sell the land.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 5-8; Dec. Dig. § 7.*]

13. BROKERS (§ 44*)—AUTHORITY TO SELL—WITHDRAWAL.

Though defendant reserved the right to withdraw at any time authority given plaintiff as a broker to sell land, he could not, having known that plaintiff was continuing his efforts to find a purchaser, and spending time and money in so doing, keep silent and withdraw his offer after plaintiff had procured a purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 45; Dec. Dig. § 44.*]

Appeal from District Court, Waller County; Wells Thompson, Judge.

Action by Jack Montgomery against Mrs. Julia Amsler and others. From a judgment for plaintiff for less than demanded, he appeals. Affirmed.

R. Hannay and Williams & Reid, for appellant. J. D. Harvey and Keet McDade, for appellees.

PLEASANTS, C. J. This suit was brought by appellant against Mrs. Julia Amsler, J. C.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

Amsler, and L. D. Amsler to recover the sum of \$5,815.50, alleged to be due appellant as commission or compensation for his services in the sale of 3,877 acres of land owned by appellees. Plaintiff alleges, in substance: That he contracted with appellees to procure a purchaser for said land, and did procure such purchaser in the person of one D. A. Odell, to whom defendants sold said land at the price of \$4 per acre; that plaintiff was the procuring cause of such sale; and that by the terms of their contract with plaintiff the defendants agreed and promised to pay to him, in consideration of his services in procuring such purchaser, whatever amount they might receive for said land over and above the sum of \$2.50 per acre. The defendants answered by general demurrer and general denial and by special pleas, in which they averred, in substance: "(1) That defendants withdrew, annulled, and terminated plaintiff's right and authority under said contract before a contract of sale was entered into. (2) That the sale as made was made by defendant, and not according to the terms of said contract of agency. (3) That said sale was not made through the efforts of plaintiff, nor were plaintiff's efforts the procuring cause thereof. (4) That plaintiff was acting as agent of the purchaser in said sale. (5) That a part of the land so contracted for was rejected by the purchaser on account of defective title, and that plaintiff knew of said defect when he procured the purchaser. (6) That plaintiff is estopped from claiming more than 50 cents per acre, because, after the purchaser had offered \$3 per acre, and said offer had been rejected by defendant, and before the sale at \$4 per acre had been made, plaintiff demanded of defendant 50 cents per acre as his compensation, and that defendant, when he sold said land to the purchaser at \$4 per acre, did so believing that plaintiff would demand no more than 50 cents per acre as compensation."

Plaintiff directed general demurrer to defendants' answer and special exceptions to that portion of it which seeks to set up and plead an estoppel against plaintiff's cause of action for more than 50 cents per acre commission or compensation, on the grounds that same is insufficient as a plea of estoppel, and the matters therein pleaded constituted no answer or defense to plaintiff's cause, and asked that the same be stricken from said answer. To defendants' answer plaintiff replied: (1) By general denial; (2) that defendants represented to him at the time of his employment by them that they had good title to said land and all of it, and that he relied upon said assertions and believed that they did have good title; (3) that Odell contracted to buy all of said land of defendants at \$4 per acre, and that if he failed or refused to buy any portion of said land it was because the defendants did not have a good and marketable title to the land which he refused to buy; (5) plaintiff admits that he

made the demand for 50 cents per acre as his compensation, but says that the same was made after the purchaser procured by him had offered defendants \$3 per acre cash for all of said lands and defendants had refused to convey, and before plaintiff knew that said land had been sold to the said Odell at \$4 per acre; (6) that plaintiff was the procuring cause of the sale of said land at \$4 per acre. Upon the trial in the court below, the trial judge instructed the jury to return a verdict in favor of the plaintiff for the sum of \$962.66, which amount was the aggregate of 50 cents per acre for all of the land sold by the defendants to Odell. Upon the return of such verdict judgment was rendered in accordance therewith.

The facts disclosed by the record are as follows: In August, 1906, appellee owned a body of land situated near Magnolia, in Montgomery county, Tex., supposed at the time to aggregate about 3,877 acres, but which in fact aggregated 3,867 acres. Said body of land consisted of the following tracts: 1,280 acres in the Jno. W. Niles survey; 441 acres in the James Pierpont survey; 580 acres in the James M. Hamm survey; 668 acres in the Wm. Stansbury survey; and 898 acres in the R. O. Lusk survey. Jno. C. Amsler is now, and has been ever since and prior to August, 1906, the general agent and manager for appellees, with full power and authority to contract in relation to said lands in behalf of appellees. Appellant is, and was at the time mentioned in the evidence, a land broker, residing in Conroe, Montgomery county, Tex., and known to be such by appellee and her agent, Jno. C. Amsler, both of whom resided, and still reside, in Hempstead, Waller county, Tex.

On August 25, 1906, appellant wrote and mailed to John C. Amsler the following letter with reference to the above-mentioned lands: "Conroe, Tex., 8/25/06. J. C. Amsler, Esq., Hempstead, Tex.—Dear Sir: I have a customer who I think will take your 3,877 acres north of Magnolia on condition that he be allowed to commence cutting pine pole ties after completing purchase on that part that had been cut over. This man is a tie and timber man, and proposes to clean the land of commercial timber, and then cut it up in farms. Of course he would buy subject to Mr. Lawson's contract, and would follow Lawson's chopping, taking off the tie timber and cordwood as fast as Lawson cut over the mill timber. Can this be arranged? Kindly answer at Magnolia, and oblige. Yours truly, Jack Montgomery."

On August 30, 1906, John C. Amsler, in reply to the above letter, wrote and mailed to appellant the following letter: "Hempstead, Tex., Aug. 30, 1906. Jack Montgomery, Magnolia, Tex.—Dear Sir: Replying to your favor of the 25th, will say that we will sell our lands at \$2.50 net to us cash. Will write the deed to include your profit. This is in no sense an option and subject to withdrawal

at any time. Trusting that you can make a deal, we are, Yours truly, C. Amsler Estate, Jno. C."

On September 22, 1906, appellant wrote and mailed to John C. Amsler the following letter: "Conroe, Tex., Sept. 22, 1906. John C. Amsler, Esq., Hempstead, Tex.—Dear Sir: Yours of 30th ult. is to hand, and am working on your lands with good prospects of selling same. I am putting out one hundred blueprints and 500 printed folders. Mr. F. W. Colby is working with me on the proposition. Yours truly, Jack Montgomery." No reply was made by Amsler to the above letter.

On February 24, 1907, appellant wrote and mailed to John C. Amsler the following letter: "Conroe, Tex., 2/24/1907. John C. Amsler, Esq., Hempstead, Tex.—Dear Sir: Kindly advise me by return mail whether your Magnolia 3,877 acres has been sold yet. Yours truly, Jack Montgomery. P. S. I have a northern man I want to show it to next week, say about Saturday or Sunday. J. M."

John C. Amsler replied to the above letter by writing on the bottom thereof, as follows: "Dear Sir: The land is still unsold. Although I have been dickering with some parties, there is no option. Yours truly, John C. Amsler."

On February 28, 1907, appellant wrote Jno. C. Amsler the following letter, to which Amsler made no reply: "Conroe, Tex., 2/28/07. Jno. C. Amsler, Hempstead, Tex.—Dear Sir: I have just returned from Magnolia, where I showed your lands to two parties from Wisconsin. They did not express themselves very favorably, but may call on you for better terms than I was authorized to grant them. Kindly protect me in the premises, as I priced it to them at \$3.50 cash. Yours truly, Jack Montgomery."

On March 19, 1907, appellant sent from Houston, Tex., the following telegram to John C. Amsler: "Houston, Texas, March 19, 1907. Jno. C. Amsler, Hempstead, Texas. Sold your land subject to your approval of terms. Coming on morning train with buyer. Jack Montgomery."

Appellant testified, in substance: That upon receipt of Amsler's letter of August 30, 1906, above quoted, he (appellant) began an active campaign of advertisement of said lands for sale, by sending out folders and blueprints and carrying advertisements in northern and western papers, etc., and continued working on the matter, trying to effect a sale, all fall and winter; that on March 16, or 17, 1907, he showed the land to D. A. Odell of Minnesota, who agreed with appellant to buy same at \$3 per acre, partly cash and partly on credit, and thereupon appellant and Odell went to Houston, Tex., and from the latter place appellant sent Amsler the telegram of March 19th, as before quoted. Odell was not the customer referred to by appellant in his letter to Amsler of date August 25th, above quoted. There is nothing in the evidence showing, or

tending to show, that appellee, or her agent, John C. Amsler, had any notice or knowledge of appellant's activities relating to procuring a purchaser for said lands, or that he was acting, or purporting to act, in appellee's behalf, save and except such as the correspondence above set out discloses. On March 20, 1907, appellant and Odell went to Hempstead, where they had a conversation with J. C. Amsler, in the course of which Odell offered to buy said lands at \$3 per acre, partly cash and partly on credit, which offer was refused by Amsler. Thereupon Odell offered to buy said lands at \$3 per acre cash, which was likewise refused. Appellant details such conversation as follows: "John C. Amsler came to the bank in a short time, and we took the matter up with him. He made no objections to the terms of part cash and part credit. He refused to deliver at \$3 per acre. I then had a consultation with Odell, and at my request he offered \$3 per acre all cash for the land. This offer was also refused by John C. Amsler. I spread my letters on the bank table and stated to Mr. Amsler that he knew he had authorized me to sell the land at that price. Mr. Amsler replied: 'Yes, I did; but I reserved the right to withdraw the land from your charge at any time.' I replied: 'Yes; but have you ever withdrawn it?' He replied: 'No, but I withdraw it now.'" John C. Amsler gives the following version of said conversation: "The day Mr. Montgomery and Mr. Odell came up here I was serving on the jury. When they first came up, I could not talk to them, but after a while I got off the jury and went down town to the bank, where they were, and we talked the matter over; but as soon as they spoke of the price at \$3 per acre I refused it. I never would agree to that price for the reason that lands in that vicinity had gone up in value since I wrote the letter to Mr. Montgomery of August 30th. It seems that Mr. Montgomery had represented to Mr. Odell that he (Montgomery) had an option on the land, for I remember Mr. Odell saying to Montgomery, 'Why, I thought you said you had an option on the land,' and Mr. Montgomery pulled out his letter from me of August 30, 1906, and spread it before us and said, 'Here is my option.' Mr. Odell said, 'That is no option.' I had reserved the right in my letter to Mr. Montgomery to withdraw that price at any time, and I did so that day. Mr. Odell at first wanted to pay one-third cash and the balance in one and two years, and then he offered \$3 cash for the land. I priced the land to them that day at \$4, or it might have been \$5 per acre for some, and \$4 per acre for the balance. * * * When Mr. Montgomery and Mr. Odell were in the bank, Mr. Odell offered to buy the land at \$3 per acre, and I refused the same. Mr. Montgomery said, 'You promised to deliver it at \$2.50 per acre.' I said, 'Yes, I gave you that price six or seven

months ago; but lands have gone up since, and I won't sell at that price now. I expressly reserved the right to withdraw at any time.' He said, 'You have never written me that you have withdrawn it.' I said, 'Well, I withdraw it now,' and walked out. Lands of that character in that community, in the vicinity where these lands lay, had at that time risen to from \$4 to \$6 per acre." After the above conversation, appellant and Odell departed from Hempstead, and afterwards, on March 23d, Odell, of his own volition, came back to Hempstead, and he and Amsler finally agreed upon and executed a contract of sale for said lands at \$4 per acre, partly cash and partly on credit. Pursuant to such contract of sale, appellee conveyed by warranty deed, to said Odell, the 1,280 acres in the Jno. W. Niles survey and the 441 acres in the James Pierpont survey for \$4 per acre, one-third cash, and balance in one and two years; but the lands in the Hamm, Stansbury, and Lusk surveys were rejected by Odell because of defects in appellee's title thereto.

John C. Amsler testified: "I made a trip down to Magnolia, Tex., to look after my mother's business down there. It was either July or August, 1906. I met Mr. Jack Montgomery at Magnolia, Tex., and he asked me if I had disposed of those overcut lands. I told him no; that I had given Mr. Colby an option on that land. It was for either 30, 60, or 90 days. That after a great deal of persuasion on Mr. Colby's part I had extended that option, and during that time I was continuously getting letters from Mr. Colby that the prospects were good. That he had taken his wife, and they were spending the winter in Missouri, and in the meantime I had an abstract made and had given them to Mr. Colby. I remember having the conversation with Mr. Montgomery prior to August 25, 1906. I told him that the deal with Mr. Colby had failed to materialize; that it did not go through; that Mr. Colby had found some defects in the title to the land (which is the same in controversy); that Mr. Colby raised a lot of complaint about it. Mr. Montgomery told me, at the same time, that he had a great many old lands in that condition, and that he had been quite successful in patching them up. I told Mr. Montgomery that we had owned the land for 30 or 40 years, and for that reason I thought the title was good."

Appellant testified: "Yes, I remember having a conversation at Magnolia with Jno. C. Amsler before I took the agency for the sale of this land. Yes, I remember that in this conversation with Mr. Amsler he stated that Mr. Colby had complained about some minor defects in Amsler's title to some of the land; but he (Amsler) in that conversation assured me that their title to it was good, stating that they had owned all of it for 35 or 40 years. I knew absolutely nothing about their title to it and supposed it

was good. There are minor defects in nearly all titles to lands in these older surveys; but they rarely ever prove to be serious. We can usually remedy them by getting proof of heirship, etc., and have record made of same."

The first assignment of error presented in appellant's brief is as follows: "The court erred in admitting the letter from Colby to Amsler in evidence, because it does not show, or tend to show, that plaintiff had either actual or constructive knowledge of defects in defendant's title that existed at the time of writing said letter by Colby."

The letter referred to in the assignment was written by Colby to Amsler on July 12, 1906, and contained this statement: "When I wrote you that your abstract showed two serious defects and asked you to explain same to relieve my mind, and you declined to do so, I of course stopped my advertising at the end of the contracts." This letter was offered and admitted for the purpose of showing that appellant had notice at the time he entered into the contract with appellees that the title to some of the land he was authorized to sell was defective. The theory upon which it was admitted was that the evidence shows that at the time it was written, and at the time appellant contracted with appellees, he and Colby were partners, and, the letter containing an admission by Colby that he had notice of the defects in appellees' title, such admission was evidence against appellant on the ground that he was charged with notice of any fact known to his partner in the undertaking. We do not think the letter was admissible as evidence of notice on the part of appellant of defects in appellees' title. The evidence fails to show that appellant and Colby were ever partners in a legal sense, so that either would be bound by the acts of the other, or that notice to one would be notice to the other. The relation between them is thus stated by appellant: "Yes, when Mr. Colby had the agency for this land, he and I were working on it together. I was to share the expenses with him of trying to sell it, and we were to divide the profits, if sale was made by our efforts, and when I got this agency for it we worked the same way. Mr. Colby had a contract of agency from Amsler to sell this same land prior to the time I got this contract. He and I were partners in the matter. We shared the burdens, losses, and expenses, and were to share the profits if a sale had been made; but none was made. If either of us made the sale, both would have shared in the profits. This same kind of an arrangement existed between Mr. Colby and myself in relation to my contract of agency with Amsler. We are partners in this matter. We shared the burdens, losses, and expenses, and also the profits, if there are any profits." On re-

direct examination the witness testified as follows: "I wish to explain my testimony of yesterday with reference to Mr. Colby and myself being partners. We were what you would probably call 'associate brokers.' It is this way: When a land broker gets an agency for a tract of land, he sends it out to other brokers, and whichever one of them brings him a purchaser, if either of them does so, they share the profits of the sale after deducting the expenses. When Mr. Colby got this agency, he sent his list to me, as well as to many other brokers, and if I had succeeded in helping him to make the sale—that is, if I had brought him a buyer, or put him in correspondence with a buyer, who purchased the land—I would have shared the profits of the sale after the expenses had been deducted. If no sale was made, as was the case while Colby had the agency, then each of us bear his own expenses. That was the arrangement between Mr. Colby and myself while he had the contract. When I got the agency, I sent it out to a great many other brokers, most of them in the north and west, and sent one to Colby. Colby brought Mr. Odell, and because of that fact he was entitled to share in the profits; but he looks to me, and not to Amsler, for his share. If any other broker had brought me the purchaser, or if I had found him myself without Colby's help, Colby would have had no share whatever in the profits."

While the original testimony of appellant might be sufficient to show that he and Colby were partners in the undertaking to sell appellees' land, in that they were to share in the profits and losses of the undertaking, his explanation on redirect examination shows that they were not. Appellant was not a party to the contract between appellees and Colby at the time the letter was written, and Colby was not a party to the contract between appellant and appellees. During the existence of Colby's contract, he had an understanding with appellant to the effect that, if appellant should send him a purchaser for the land, and a sale was made to such purchaser, he would share the profits of the sale with appellant. After Colby's contract with appellee expired, and appellant entered into his contract with them, he had a similar understanding with Colby. Under this agreement between them there was to be no sharing of the expenses or losses incurred by them, or of the profits, unless a sale of the property was effected by their joint efforts. An agreement by one person to give another a share in the profits of an undertaking as compensation for services to be rendered, provided such services contribute to the success of the undertaking, does not make such persons partners, and this is the relation shown to have existed between appellant and Colby. We think, however, that the error in admitting this testimony was immaterial because other

evidence before set out shows that appellant at the time he made the contract with appellees had notice of the defects in appellee's title, or had knowledge of facts sufficient to put a prudent person on inquiry, which, if followed with reasonable diligence, would have resulted in his ascertainment of knowledge of the defects in the title.

Appellee J. C. Amsler testified that, when the appellant first spoke to him in regard to selling the land for him, he told appellant: "That Colby had found defects in the title to the land; that Mr. Colby raised a lot of complaint about it. Mr. Montgomery told me at the same time that he had a great many old titles in that condition, and that he had been quite successful in patching them up. I told Mr. Montgomery that we had owned the land for 30 or 40 years, and for that reason I thought the title was good." The appellant admits that he had this conversation with Amsler; the only difference between his statement and Amsler's being that appellant states that Amsler spoke of the defects complained of by Colby as "minor defects," and that Amsler in that conversation stated that their title to it was good, that they had owned it for all of "35 or 40 years." No other reasonable interpretation can be given this testimony as a whole than that the assurance of Amsler that the title was good was nothing more than the expression of his opinion that, because appellees had held a title to the land for a long time, said title was good, notwithstanding the defects claimed by Colby to exist therein. The facts shown by this testimony were sufficient to put appellant upon inquiry, and that he would have learned of the defects in the title if he had used any diligence in making inquiry cannot be questioned. Such being the case, he is charged with notice of the defects in the title. Having this notice at the time he undertook to sell the land for appellees, he cannot hold appellees responsible for the failure of the sale of a portion of the land because of defects in the title. He undertook to sell the land with the defective title, and the failure to do so was not the fault of appellees.

This disposes of all of the assignments complaining of the ruling of the court in permitting the letter above mentioned to be introduced in evidence. The objections to the testimony of the appellee Amsler above set out, presented under appellant's tenth assignment, to the effect that the testimony was inadmissible because the statement made by Amsler as to the defects in the title was too vague and indefinite to put appellant upon notice, and because said testimony shows that Amsler told appellant that the title was good, and appellant was therefore not required to pursue the inquiry further, cannot be sustained. What we have before said in regard to this testimony disposes of the objection that it was too vague and indefinite to put appellant upon inquiry.

In regard to the second objection it is sufficient to say that the testimony objected to does not show that Amsler assured appellant that the title was good. All that he said was that appellees had owned the land for 30 or 40 years, and for that reason he thought the title was good. Appellants having been informed that Colby had complained of defects in the title to the land, ordinary prudence required of him that he should not rest satisfied with the mere opinion of Amsler that the title was good because appellees had owned the land 30 or 40 years.

The trial court erred in not sustaining appellant's exception to the plea of estoppel set out in appellees' answer. The facts pleaded do not constitute an estoppel. This error is immaterial, however, because appellant was not entitled under any phase of the evidence to recover more than the amount awarded him by the jury, and therefore was not injured by the error of the court in overruling the exceptions to the plea. The only sale effected by appellant was the one to Odell for \$3 per acre which appellees declined to ratify. It does not appear that appellant made any further effort to sell the land, or that he could have sold to Odell for cash for any greater amount. Under his contract with appellees he was only to receive the excess over and above a cash consideration to appellees of \$2.50 per acre, and the evidence shows that the cash consideration received by appellees in the sale made by them to Odell was less than that amount. This sale not having been made by appellant, and not being made in accordance with the terms of his contract, he would not be entitled to recover the compensation therefor named in his contract. Upon the wrongful refusal of appellees to complete the sale made by appellant to Odell in accordance with the terms of the contract, they became liable to appellant in the amount which he would have been entitled under the contract had they ratified the sale. Appellant's rights became then fixed, and would not be changed by a subsequent sale by the appellees upon terms different from those contained in the contract with appellant. Appellant sued upon his contract, and the liability of the appellees to him is limited to the damages which he sustained by the breach of said contract, and this breach was the refusal of the appellees to ratify the sale made by him to Odell. He is not entitled to recover any part of the profits that appellees may have made by the subsequent sale of the land to Odell.

The twelfth assignment of error complains of the refusal of the trial court to give special instruction No. 1, requested by plaintiff. The special instruction mentioned in this assignment is not copied or referred to in the statement following the assignment, nor are its contents shown. The statement is clearly insufficient to entitle the assignment to consideration.

The thirteenth and fourteenth assignments

complain of the refusal of the court to give certain instructions to the jury. The record does not show that plaintiff made any request that the court instruct the jury as indicated in the assignment, and for this reason the assignment should be overruled. In addition to this, as before said, appellant recovered a judgment for the full amount to which he was entitled under the undisputed evidence, and therefore any error in the submission of the case to the jury would have been harmless.

We find no reversible error in any of the assignments presented by appellant, and all of them are overruled.

Under an appropriate cross-assignment, the appellees urge that the judgment of the court below be reversed because "the evidence was insufficient to establish such a contract of employment or appointment by appellees of appellant, as broker, to find a purchaser for appellees' land," as would entitle him to recover thereon. We think this assignment is without merit. When appellee J. C. Amsler, in reply to appellant's letter of August 25th, informing him that the writer thought he could sell the land for him under certain conditions, wrote appellant that he would sell the land for \$2.50 (per acre) net cash, and that "he would write the deed to include appellant's profits," he thereby agreed and contracted that, if appellant should find a purchaser for the land who would pay appellees \$2.50 per acre cash therefor, appellant could have as profits, or compensation for his services, whatever amount in excess of \$2.50 per acre he might receive for the land. All of the correspondence between the parties indicates that appellant was acting under this understanding of the contract, and appellee Amsler does not deny in this testimony that such was the contract, but claims that by the terms of the contract he had the right to withdraw or rescind the agreement after appellant, without any notice of an intention to rescind on the part of appellee, had fully performed his part of the contract. No such construction should be given the contract. Appellee Amsler was informed by appellant from time to time that he was continuing his efforts to procure a purchaser for the land under his contract, and appellee, knowing this fact, could not keep silent and permit appellant to continue to spend his time and money in procuring a purchaser for the land, and withdraw his offer after appellant had earned his compensation by procuring a purchaser for the land under the terms of the contract. The right to withdraw at any time reserved in the contract could not be exercised by appellee after a performance by appellant of his part of the contract.

We are of opinion that the judgment of the court below should be affirmed, and it is so ordered.

Affirmed.

STATE v. TULLER.

(Kansas City Court of Appeals. Missouri.
June 14, 1909. Rehearing Denied
Nov. 1, 1909.)

CRIMINAL LAW (§ 15*)—STATUTORY OFFENSES
—REPEAL—EFFECT.

Rev. St. 1899, § 3047 (Ann. St. 1906, p. 1746), relating to the sale of liquors by druggists, was repealed, not merely suspended, by the adoption in a county of prohibition under the local option law, and one violating such section before the adoption of prohibition was thereafter subject to conviction under section 2392 (page 1466), providing that no offense committed previous to the repeal or amendment of any statutory provision shall be affected by such repeal or amendment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 19; Dec. Dig. § 15.*]

Appeal from Circuit Court, Caldwell County; Samuel Davis, Judge.

F. M. Tuller was convicted of violating Rev. St. 1899, § 3047 (Ann. St. 1906, p. 1746), relating to the sale of liquor by druggists, and appeals. Affirmed.

J. C. Wilson and Garland Wilson, for appellant. L. R. Kantz and D. E. Adams, for the State.

JOHNSON, J. Defendant and W. H. Edwards, who, as partners, were conducting a drug store in Caldwell county, were indicted for a violation of section 3047, Rev. St. 1899 (Ann. St. 1906, p. 1746). Edwards died before trial, and the prosecution was continued against defendant alone. The trial resulted in a conviction, and the cause is here on the appeal of defendant.

The alleged offense was committed in October, 1907, and defendant was indicted December 4th of that year. After the offense, but before the trial, a "local option" election was held in Caldwell county, and the vote was in favor of prohibition. It is conceded the election and proceedings were regular, and that prohibition became effective in that county December 16, 1907. The trial was had in June, 1908. Defendant contends that the effect of the adoption of prohibition in Caldwell county after the date of the offense and before the trial was to relieve defendant of criminal responsibility for the offense, under the common-law rule that there can be no legal conviction for an offense unless the act be contrary to law at the time it is committed, nor can there be a judgment unless the law is in force at the time of the indictment and judgment. Defendant argues that the provisions of section 2392, Rev. St. 1899 (Ann. St. 1906, p. 1466), that "no offense committed and no fine, penalty or forfeiture incurred or prosecution commenced or pending previous to or at the time when any statutory provision shall be repealed or amended, shall be affected by such repeal or amendment," has no application here for the reason that the effect

of the adoption of prohibition under the local option law was to suspend, not to repeal, the operation of the druggist act in Caldwell county, and, consequently, that section 2392 does not apply, since it relates only to repealed or amended laws.

This precise question was before the St. Louis Court of Appeals in *State v. Walker*, 129 Mo. App. 371, 108 S. W. 615, and was decided adversely to the contention of defendant; but the decision was deemed to be in conflict with the majority opinion of this court in *State v. Winfield*, 65 Mo. App. 602, and on that account the cause was certified to the Supreme Court. A careful investigation of the question convinces us of the correctness of the conclusion of the St. Louis court, and we refer to the opinion of Judge Goode in that case for a full expression of the views we entertain. To the extent that it may be in conflict with the present ruling, the decision in the *Winfield* Case is overruled.

Point is made that the verdict and judgment are not supported by evidence; but we find the evidence sufficient to sustain a conviction. *State v. Quinn*, 40 Mo. App. 627. Further, we find that the instructions given the jury properly stated the law of the case.

The judgment is affirmed. All concur.

STATE v. TULLER.

(Kansas City Court of Appeals. Missouri.
Nov. 1, 1909.)

CRIMINAL LAW (§§ 1109, 1130*)—APPEAL—ABSTRACT—BRIEF.

Under Rev. St. 1899, § 2716 (Ann. St. 1906, p. 1595), providing that no assignment of error or joinder in error shall be necessary on any appeal or writ of error, in a criminal case, etc., but the court shall without delay render judgment on the record before them, where defendant presents a complete record of the case, with the evidence, instructions, verdict, judgment, and motion for new trial and in arrest of judgment, and the ruling on them and the order granting an appeal, the appeal will not be dismissed for failure to file an abstract of the case and brief and argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2965; Dec. Dig. §§ 1109, 1130.*]

Appeal from Circuit Court, Caldwell County; Francis H. Trimble, Judge.

F. M. Tuller was convicted of illegally selling liquor, and appeals. Affirmed.

J. C. Wilson, for appellant. D. E. Adams, for the State.

BROADDUS, P. J. At the November term, 1907, of the circuit court of Caldwell county, the defendant was indicted by the grand jury of the county for the illegal sale of whisky. The indictment was in three counts. In the first count he was charged with the illegal sale of whisky as a dramshop keeper. In the second and third counts he was charged with the illegal sale of whisky as a li-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

censed druggist. The prosecuting attorney dismissed as to the first count of the indictment, and the cause was tried before a jury on the charges contained in the second and third counts, and defendant was convicted on both counts. The defendant in due time filed motions for a new trial and in arrest of judgment, which were overruled by the court, and judgment entered on the verdict of the jury. The defendant appealed. He has filed no abstract of the case and no brief and argument in this court. The state has moved to dismiss the appeal for such failure; but the motion is overruled.

Section 2716, Rev. St. 1899 (Ann. St. 1906, p. 1595), governing appeals in criminal cases, expressly provides that: "No assignment of error or joinder in error shall be necessary upon any appeal or writ of error, in a criminal case issued or taken," etc.; "but the court shall proceed upon the return thereof without delay, and render judgment upon the record before them." The defendant has presented to the court a complete record of the case, including the trial, with the evidence, instructions, verdict, judgment, and his motion for a new trial and in arrest of judgment, and the ruling of the court upon them and the order granting an appeal. In the pursuance of the mandate of the statute, we have examined the record, and find: That the indictment is sufficient; that the evidence justified the defendant's conviction of the crime with which he was charged; that there was no error in the admission or rejection of evidence; and that defendant had a fair and impartial trial.

Wherefore the cause is affirmed. All concur.

RIPPETOE v. MISSOURI, K. & T. RY. CO.
(Kansas City Court of Appeals. Missouri.
Nov. 1, 1909.)

1. WITNESSES (§ 379*)—IMPEACHMENT—PRIOR STATEMENTS.

A statement by a witness that his testimony could easily cause plaintiff to win or lose may be proved to impeach his credibility.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1220; Dec. Dig. § 379.*]

2. MASTER AND SERVANT (§ 284*)—INJURIES TO SERVANT—QUESTIONS FOR JURY.

Evidence held to make out such a case as entitled an injured employé to go to the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1000; Dec. Dig. § 284.*]

3. NEGLIGENCE (§ 139*)—INSTRUCTIONS.

While it is better to instruct the jury as to what constitutes negligence or carelessness, it is not necessary in all cases, as a jury of ordinary intelligence will understand the meaning.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 371; Dec. Dig. § 139.*]

4. APPEAL AND ERROR (§ 882*)—REVIEW—ESTOPPEL TO ALLEGE ERROR—INSTRUCTIONS.

A party cannot complain of an instruction which is the same as one asked by him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3602; Dec. Dig. § 882.*]

5. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS.
One cannot complain of an instruction which allows the jury to interpret the expression "carelessly and negligently" in the absence of a request for a more specific instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 637; Dec. Dig. § 256.*]

6. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.
It is not error to refuse to repeat instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

Appeal from Circuit Court, Cooper County. Action by James M. Rippetoe against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Geo. P. B. Jackson, for appellant. W. M. Williams and Roy D. Williams, for respondent.

BROADDUS, P. J. This is an action for damages for personal injuries sustained by plaintiff while working for defendant as engineer of a steam ditcher in use on defendant's railroad. The ditcher was set on wheels placed on rails laid on two flat cars, fastened together, which formed a part of one of defendant's trains. At the time of the accident it was standing on a side track. A crane was attached to the machinery with a bucket fastened to the end which operated as a shovel, and which took up the earth from the sides of the railroad, and deposited it on flat cars in the train. The crane moved in its station laterally and perpendicularly at the will of the engineer on application of power derived from the engine. The cars when loaded were moved away by an engine, and, after being unloaded at some other place, were returned to the ditcher to be again filled. Before being moved, the loaded cars were uncoupled from the ditcher. On the day in question the engine used to move the cars upon which the ditcher was carried from place to place came in on the side track to couple up with the cars upon which the ditcher was stationed. Plaintiff was on the flat car at the south end of the ditcher, and in the act of stepping up on the ditcher to his place as engineer, when the other cars of the work train attached to the engine struck the cars, carrying the ditcher, causing it to move south on the rails lying on the flat cars. Plaintiff's evidence tends to prove that, immediately before he was injured, he went under the machine to take some measurements; that, before doing so, he set the levers to keep the engine in place; that he supposed that in so setting the levers that they would hold the ditcher in its place as it had for some time previously; that the engine, when it coupled other cars to the cars upon which the ditcher was stationed in the usual manner, would not move the ditcher on the flat cars more than two or three inches; that plaintiff, after coming from under the ditcher, was about to step up to his place as en-

gineer, and was in front and on the south side of the ditcher, when the engine came in on the side track from the south, going north to couple with the flat cars carrying said ditcher, and struck them with unusual and extraordinary and unnecessary force; and that in consequence the ditcher moved forward a foot or more, running over both his feet, and mutilating the left foot so badly that an amputation became necessary, whereby he lost one foot. His evidence tended to show that his position at the time was the proper one; that it was convenient to step on the rail lying on the flat car, and then up to his place on the ditcher; that he was standing at least a foot in advance of the wheels of the ditcher; that it had been his custom to stand at this place while couplings were being made, and that it had not at such times moved much forward; and that the force of a coupling ordinarily made would not have moved the ditcher to the place where plaintiff was standing. The petition alleges that "defendant's said servants and agents in charge of said locomotive engine carelessly and negligently caused the engine and car attached thereto to suddenly strike the flat cars upon which said steam ditcher was standing with great, unnecessary and unusual force and violence, and, by reason of said carelessness and negligence in causing said cars to come together with sudden force and violence, said steam ditcher was thrown or moved forward in the direction of said engine and caused to run over and crush plaintiff's feet," etc. The answer was a general denial, except as to the allegations of the petition that defendant was a corporation, and was operating and controlling the railroad in question. The defendant's evidence tended to prove that the coupling in question was not made with unusual force and violence. The jury returned a verdict for the plaintiff for \$3,000, upon which judgment was rendered, and defendant appealed.

The defendant contends that the court erred in the admission of the evidence of witness Moss as to what defendant's witness Schaffer said to him on a former occasion. Schaffer was asked if he did not tell Moss that his testimony could easily cause plaintiff in the case to win or lose it. His answer was that: "I may have been joshing, or something like that. I don't believe I made it to the best of my recollection." When Moss was questioned as to the statement, defendant's attorney objected to the statement because it did not pertain to any material issue in the case. We think it was material. It went to show want of candor and truth on the part of Schaffer. It went to impeach his credibility. This is always admissible.

The defendant insists that plaintiff failed to make out such a case as entitled him to go to the jury; but, as plaintiff introduced evidence that went to prove the allegation of negligence and the extent of the injury he

sustained by reason of such negligence, it is useless to discuss the question. Defendant's counsel has argued the matter with much skill and great length, but, after all, we do not feel impressed with the correctness of his views.

An instruction given at the instance of plaintiff is criticised by defendant and alleged to be erroneous. The instruction is in the following language: "The jury are instructed that if they believe from the evidence that on or about the 15th day of June, 1905, plaintiff was in defendant's employ as engineer of a steam ditcher, and that said steam ditcher was set on wheels or rollers and placed on two flat cars fastened together, and which formed a part of one of defendant's work trains, and was being used in improving and repairing defendant's roadbed on the Columbia branch of defendant's railroad, and that while the flat cars carrying said steam ditcher were upon a side track defendant's servant in charge of its locomotive engine used in connection with said work train moved said locomotive engine and some cars attached thereto to the side track upon which said flat cars carrying said ditcher were standing, and undertook to couple the cars attached to said locomotive engine to said flat cars, and carelessly and negligently caused the cars attached to said locomotive engine to suddenly strike the flat cars upon which said ditcher was standing with great, unnecessary, and unusual force and violence, and that, by reason of the carelessness and negligence of defendant's said locomotive engineer in causing said cars to come together with such force and violence, said steam ditcher was moved forward on said flat cars in the direction of the locomotive engine, and was thereby, in consequence of said carelessness and negligence, caused to run over and injure plaintiff's right and left foot, while plaintiff was in the exercise of reasonable care, then plaintiff is entitled to recover, and the verdict should be in his favor." The criticism is that the words "carelessly and negligently" mean nothing in an instruction, and that they have the effect to turn "the jury loose to reach a conclusion upon any theory that may seem sufficient to them without advising them as to what the law requires." It would be better in all cases of negligence for the court to tell the jury what constituted negligence or carelessness; but that duty is often omitted. The appellate courts, however, hold that it is not necessary in all cases, for the reason that a jury of ordinary intelligence understand the meaning well enough. Defendant, however, is in no condition to complain as the court in instruction numbered 2, given at its instance, also left it to the jury to interpret the expression. Moreover, if defendant had desired a more specific instruction as to that, it should have asked for it. *Ashby v. Gravel Road Co.*, 111 Mo. App. 79, 85 S. W. 957; *Rattan v. Central Electric Ry. Co.*, 120 Mo. App. 270, 96 S. W. 735.

The court refused to give defendant's instruction numbered 4, which contains a proper theory of the case from the defendant's standpoint; but as instruction 9, given by defendant, contains the same elements, there was no error in the refusal to give the former. It is not necessary to repeat instructions to the jury. We find no error in the record.

The cause is affirmed. All concur.

STATE ex rel. DORAN v. JOHNSON COUNTY COURT.

(Kansas City Court of Appeals. Missouri.
Nov. 1, 1909.)

1. INTOXICATING LIQUORS (§ 60*)—PETITION FOR LICENSE—DUTY OF COUNTY COURT TO GRANT.

It is the mandatory duty of a county court to grant a liquor license on a petition signed in accordance with law, by two-thirds of the qualified petitioners in a block.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 73; Dec. Dig. § 69.*]

2. TIME (§ 6*)—NOTICE OF LOCAL OPTION ELECTION.

Notice of a local option election required to be published 4 consecutive weeks must be published for 28 days.

[Ed. Note.—For other cases, see Time, Cent. Dig. § 9; Dec. Dig. § 6.*]

3. INTOXICATING LIQUORS (§ 33*)—NOTICE OF LOCAL OPTION ELECTION.

If notice of a local option election which need only be published in one paper be published in more than one, it must be published in each for the full time.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 41; Dec. Dig. § 33.*]

4. INTOXICATING LIQUORS (§ 33*)—NOTICE OF LOCAL OPTION ELECTION.

If the last day of publication of notice of a local option election be the day after the election, it cannot be counted in determining the time.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 41; Dec. Dig. § 33.*]

5. INTOXICATING LIQUORS (§ 33*)—NOTICE OF LOCAL OPTION ELECTION.

Evidence held to show that the day of publication of a paper containing notice of a local option election was the date on which it purported to be actually published.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 41; Dec. Dig. § 33.*]

6. NOTICE (§ 11*)—TIME OF PUBLICATION.

The day a notice is set up in type and printed is not the day of publication, but publication takes place when the notice is seen and read in the paper by the public, though it need not reach every member of the public at the same time; and publication will date from the day when the public begins to receive it from the publisher.

[Ed. Note.—For other cases, see Notice, Cent. Dig. §§ 25-29; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5841-5846.]

7. INTOXICATING LIQUORS (§ 33*)—PUBLICA- TION OF NOTICES OF LOCAL OPTION ELEC- TION.

Where two papers were designated to publish a notice of a local option election, proper

publication only in the one designated as the official paper was insufficient.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 41; Dec. Dig. § 33.*]

8. INTOXICATING LIQUORS (§ 33*)—PUBLICA- TION OF NOTICES OF LOCAL OPTION ELEC- TION.

Whether an order for publication of a notice of a local option election is for "four full consecutive weeks" or for "four consecutive weeks," the time required is the same.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 41; Dec. Dig. § 33.*]

Application for mandamus by the State, on the relation of John T. Doran, against the County Court of Johnson County. An alternative writ is made peremptory.

J. W. Suddath & Sons, for relator. W. L. Chaney, Pros. Atty., and S. T. White, for respondent.

ELLISON, J. This is an original proceeding in this court by mandamus seeking to compel the county court of Johnson county to issue to relator a license to keep a dramshop in the city of Warrensburg, in such county, a city of more than 2,500 inhabitants. Due return was made to the alternative writ. Relator then moved for a peremptory writ based upon the return.

The case involves the validity of a local option election held in Warrensburg on the 6th day of February, 1908, to determine whether intoxicating liquors should be sold within the limits of such city, which resulted against the sale of such liquors. Afterwards the relator, conceiving the election to have been void, presented his application and petition to the county court of that county asking a dramshop license. Whether the petition was signed by two-thirds of the qualified petitioners in the block, as required by law, was a matter of dispute between the parties in this court. Five of those who signed are conceded to have been proper petitioners. Three others signed whose right is disputed. And three were qualified who did not sign. Thus eleven names were involved. If either one of the three who signed was not a proper petitioner, then the petition contained the names of two-thirds of the qualified petitioners, as determined by the appellate courts (Scarritt v. Jackson County Court, 89 Mo. App. 595); and it was the mandatory duty of the county court to grant the license (State ex rel. v. Turner, 210 Mo. 77, 82, 107 S. W. 1064; State ex rel. v. Meyers, 80 Mo. 601; State ex rel. v. McCammon, 111 Mo. App. 626, 86 S. W. 510; Scarritt v. Jackson County, 89 Mo. App. 585).

In passing on relator's motion for a peremptory writ on respondent's return, we concluded that the record showed him entitled to the license unless the local option has been legally adopted. We found that a determination of that question involved the fact whether proper legal notice of the election had been given—that is to say, whether the publi-

*For other cases see same topic and section NUMBER in Dec. & App. Digs. 1907 to date, & Reporter Indexes

cation of the notice had been made for the requisite time—and this made necessary the taking of evidence, which was heard by an officer agreed upon by the parties. The evidence has been written down and filed in court. It appears that the city authorities ordered the notice to be published in two weekly newspapers, the Weekly Journal-Democrat and the Warrensburg Daily Star. The law requires that such notice shall be published for 4 consecutive weeks, which have been repeatedly held to be for 28 days. *State ex rel. v. Tucker*, 32 Mo. App. 620; *State v. Dobbins*, 116 Mo. App. 29, 92 S. W. 136; *State v. Swearingen*, 128 Mo. App. 605, 107 S. W. 1; *State ex rel. Gunn v. Cordell*, 137 Mo. App. —, 117 S. W. 655. See, also, *Young v. Downey*, 150 Mo. 317, 330, 51 S. W. 751. And, while it is only necessary that it be published in one paper (either a weekly or daily), yet, if it be ordered published in more than one, it must be published in each for the full length of time. *State ex rel. v. Reid*, 134 Mo. App. 582, 114 S. W. 1116. The notice before us was published daily in the Daily Star for 28 days, and is conceded to have been properly published for the necessary time in that paper. But it was published in the Weekly Journal-Democrat in papers dated January 10, 17, 24, 31, and February 7, 1908, the last date being the day after the election, and proof of publication was made to the city council as of those dates. If we accept those dates as being the dates of publication, it is apparent that notice of 28 days was not had. The last day, being the day after the election, cannot be counted, and from the 10th of January to the 6th of February, the day of the election, there is not a space of 28 days to the election.

But it is sought to avoid this condition of the record by showing that in point of fact the publications were made one day ahead of each date; that is, on January 9th, 16th, 23d, 30th, and February 6th. This is the point in the case. We will not by any means say that a mere misdating of the distribution of a newspaper to the public would be conclusive of the question. *Riche v. Water Co.*, 75 Me. 91, 97. But we do not find that an error in dates was shown by the evidence. The evidence shows that the date of the paper was regarded as the time of its publication, and was in fact its publication, though it was printed the evening before, and, when printed, it was taken to the post office between 6 and 9 o'clock p. m. for distribution through the mail. The papers for each post office throughout the county, including route men in the city of Warrensburg, were tied up in separate bundles and put in sacks at the printing office, and then some time between 6 and 9 o'clock p. m. were taken to the post office, where the bundles for other offices were taken that night by the post office force to the trains to be transported to their respective destinations, and the bundles for the "routes" in Warrensburg were delivered

to route men by the postmaster the next morning, when they were distributed to the public. Clerks in the post office at Warrensburg testified that, when the papers were brought to that office (generally between 8 and 9 o'clock p. m.), those going to offices outside of Warrensburg were sent to the depot and were taken on trains east and west some time after midnight; that there were very few subscribers for the paper through the post office; that the most of the city circulation was put in the post office in bundles for "route men," who distributed them through carriers; and that the route men did not get them of the post office until next morning. A few took the paper individually through the post office, but these could only get it next morning, unless, in exceptional cases, where some one having a lock box might get his paper "late at night." We think it quite manifest from the evidence that the Journal-Democrat is actually published on the day it purports to be; that is, on the day of its date.

It would be unreasonable to say that a notice has been given when the medium of its publication is shut out from the eye of the persons for whom it is intended. To say that would justify the statement that a verbal notice was given when the thought of the notice was conceived or matured, instead of when the words were uttered. The publication of a notice in a newspaper is not the day it is set up in type and printed. It is the day that it may be seen and read in the paper by the public. Not that it must reach every member of the public, but its publication will date from the day when the public begin to receive it from the publisher. We do not think the case of *Leroy v. Jamison*, 15 Fed. Cas. 873, No. 8,271, and others cited by respondent, have application to the question in respondent's favor.

Respondent suggests that the Daily Star had been designated by the city authorities as the official paper for the city, and that, therefore, a proper publication in that paper would meet all requisites as to notice. We do not think the point well taken. There is a difference in the wording of the orders for publication. That in the Daily Star was "for four full consecutive weeks" while that in the Journal-Democrat was "for four consecutive weeks," omitting the word "full." Upon this difference respondent founds a suggestion that a less time was meant for the Journal-Democrat than for the Daily Star. We think there is nothing in the suggestion. Four full weeks are no more nor less than four weeks. If a week's time elapses, it is both a week and a full week.

After a careful examination of the record, we find that there was not a legal notice of the election, and that it is therefore void. We further find that relator has shown himself to be entitled to the license, and the alternative writ will be made peremptory. All concur.

CLARK et al. v. ST. JOSEPH & G. I. RY. CO.
et al.

(Kansas City Court of Appeals. Missouri. Nov. 1, 1909.)

1. CARRIERS (§ 228*)—CARRIAGE OF LIVE STOCK—NEGLIGENT DELAY—EVIDENCE.

Proof of delay in the transportation of live stock, unaccompanied by proof that it was caused by negligence, does not prove the negligence of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.*]

2. CARRIERS (§ 228*)—CARRIAGE OF LIVE STOCK—DELAY—BURDEN OF PROOF.

A shipper, suing a carrier for delay in transporting live stock, has the burden of proving that the delay was caused by the negligence of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 958; Dec. Dig. § 228.*]

Appeal from Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Action by William Clark and another against the St. Joseph & Grand Island Railway Company and another. From a judgment for plaintiffs, defendants appeal. Reversed.

Cyrus Crane, Geo. J. Mersereau, and R. A. Brown, for appellants. Culver & Phillip, for respondents.

ELLISON, J. Plaintiffs shipped a lot of fat cattle over the road of the defendant, the Grand Island Railway Company, from Gower, Mo., to Crider Bros. Commission Company, at Kansas City, Mo., for the market at the latter place. It is alleged by plaintiffs that the Grand Island Company transported the cattle to Kansas City, and there delivered them to the defendant the Kansas City Southern Railway Company, which company received them and agreed to deliver to the commission firm aforesaid. It is alleged by plaintiffs that there was such negligent and unreasonable delay in the shipment as caused the cattle to get in the stockyards too late for the day's market they were intended for, and that they lost in weight, etc. The judgment in the trial court was for the plaintiffs.

The foregoing statement suffices for disposition of the case in the view we take of it. The ground of plaintiffs' action is negligent delay. There was no evidence to sustain that ground. Conceding that there was evidence of delay in the transportation, there was no evidence that such delay was caused by negligence, and for aught that appears in the record the delay may have been unavoidable. Negligence is not shown by mere proof of delay. There must be something more, and the burden is on the plaintiff. Ecton v. Railway Co., 125 Mo. App. 223, 102 S. W. 575; Wernick v. Railway Co., 131 Mo. App. 37, 109 S. W. 1027; Anderson v. Railway Co., 93 Mo. App. 677, 87 S. W. 707; Wright v. Railway Co., 118 Mo. App. 392, 94 S. W. 555. The

reason upon which this rule is founded is fully explained in the foregoing cases. They are based on the following decisions of the Supreme Court: Witting v. Railway Co., 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636; Otis Co. v. Railway Co., 112 Mo. 622, 20 S. W. 676; Stanard Milling Co. v. Transit Co., 122 Mo. 258, 20 S. W. 704.

But it is stated by plaintiff that the St. Louis Court of Appeals has decided in Libby v. Railway Co. (Mo. App.) 117 S. W. 669, that mere proof of delay made a case for the jury. The case does not so rule. The court there state that there was a delay of several hours at each of three points en route. The court state specifically that "where it appears that unreasonable delays occurred without just cause therefor, as in this case," the question of negligence is for the jury.

No case was made for the plaintiffs. We do not regard the extract from the letter of the assistant freight agent as aiding the plaintiffs' evidence in any manner.

The judgment should have been for the defendants, and it is accordingly reversed. All concur.

UTZ v. INSURANCE CO. OF NORTH AMERICA.

(Kansas City Court of Appeals. Missouri. Nov. 1, 1909. Rehearing Denied Nov. 15, 1909.)

1. INSURANCE (§ 378*)—OTHER INSURANCE—NOTICE TO AGENT—"FURNITURE."

Notice to insurer's agent that insured had other insurance on his "furniture" was notice of other insurance on a piano.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 968; Dec. Dig. § 378.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3013-3016.]

2. INSURANCE (§ 668*)—ACTION ON POLICY—VEXATIOUS DELAY—STATUTORY PENALTY—QUESTIONS FOR JURY.

Under Rev. St. 1899, § 8012 (Ann. St. 1906, p. 3808), allowing insured, in an action on a policy to recover, in addition to the amount of the loss, damages not exceeding 10 per cent. thereof and a reasonable attorney's fee, if it appears that defendant has vexatiously refused to pay the loss, when there is competent evidence tending to prove vexatious delay, the question is for the jury.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 668.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by Michael Utz against the Insurance Company of North America. Judgment for plaintiff, and defendant appeals. Affirmed.

Reed, Atwood, Yates, Mastin & Harvey and Neville & Grier, for appellant. Brewster, Ferrell & Mayer and Culver & Phillip, for respondent.

ELLISON, J. Plaintiff instituted this action on a policy of insurance issued to him

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by defendant, and recovered judgment in the trial court for loss of his property, as well as for a penalty for vexatious refusal to pay the loss. The policy covered loss of plaintiff's house in the sum of \$700 and loss of piano in the sum of \$300.

It is contended by defendant that plaintiff had other insurance on the piano, of which it was not advised, and that therefore the policy was avoided under specific provisions therein to that effect. The evidence, as plaintiff interprets it, shows that defendant's agent was notified of the other insurance. Defendant concedes that its agent had notice of \$200 other insurance on his "furniture," but asserts that such notice was not a notice of insurance on a musical instrument, such as a piano. We do not think the point well taken. We held, in *Bowne v. Insurance Co.*, 46 Mo. App. 473, that where there was an insurance of \$1,300 on "household and kitchen furniture, useful and ornamental," it included a Japanese vase valued at \$500, although it was not specifically named. In *Crossman v. Baldwin*, 49 Conn. 490, there was a contract to purchase "all the furniture" in a certain hotel, and it was held to include a piano. In *Sumner v. Blakslee*, 59 N. H. 242, 47 Am. Rep. 196, pianos were held to be included in household furniture mentioned in a chattel mortgage. In *Alsop v. Jordan*, 69 Tex. 300, 6 S. W. 831, 5 Am. St. Rep. 53, it was held that an exemption from execution of "household and kitchen furniture" would include a piano. In *Lee v. Gorham*, 165 Mass. 130, 42 N. E. 556, the statute providing that conditional sales of "furniture or other household effects" should be in writing, was held to apply to the sale of a piano. An English case involved a bequest of "all and singular the household furniture and other household effects of and belonging to the testator in the dwelling house and premises at the time of his decease." There was found in the house and premises "four fowling pieces, a pair of pistols, lathes and apparatus for turning, models of a cutter and mortar, several paintings in frames, one hundred volumes of books, an organ, a parrot and cage, a grey pony, a cow, a haystack, and a considerable stock of wines and liquors." Upon this the Vice Chancellor said that "the words 'household furniture and other household effects' will comprise all property in the house and on the premises, intended for use or consumption therein, or for the ornament thereof. Elizabeth Cole is, therefore, entitled to the pistols, to the apparatus for turning, to the models, paintings, organ, parrot, books, and wine and liquors, but not to the pony, cow, or fowling pieces, unless it is proved that they were kept for the defense of the house. If the haystack was only for use, it would pass; if for sale, it would not pass." *Cole v. Fitzgerald*, 1 Sim. & St. 189. It follows, from the foregoing authorities, all

bearing on the very question here presented, that, when defendant's agent was notified of other insurance on plaintiff's furniture, it was notice of other insurance on his piano.

But defendant insists that it should at least be relieved of the penalty assessed under the provisions of the statute for vexatious delay. Section 8012, Rev. St. 1899 (page 3808, Ann. St. 1906). We held, in *Blackwell v. Insurance Co.*, 80 Mo. App. 75, that to justify a penalty for delay in payment of insurance the refusal must have been without reasonable excuse, and that the mere fact of it being found at the trial that the insurance money was due the assured would not alone determine that the delay was vexatious and without cause. But, where there is competent evidence tending to prove vexatious delay, a question is made for the jury, and we must accept the verdict. In this case no excuse appears, as did in the *Blackwell Case*, and we think the court properly submitted the question to the jury. It has been so determined by the Supreme Court (*Keller v. Insurance Co.*, 198 Mo. 440, 95 S. W. 903), and by this court in *Kellogg v. Insurance Co.*, 183 Mo. App. 391, 113 S. W. 663.

On the whole record, we find no reason for disturbing the judgment, and it is accordingly affirmed. All concur.

STATE v. CLAYBAUGH.

(Kansas City Court of Appeals. Missouri. Nov. 1, 1909.)

1. LARCENY (§ 3*)—ELEMENTS—CRIMINAL INTENT.

A criminal intent is the principal element of the offense of either grand or petit larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 3-10; Dec. Dig. § 8.*]

2. LARCENY (§ 3*)—ELEMENTS OF OFFENSE.

One who, in good faith and under color of a rightful claim, takes and converts to his own use the property of another, is not guilty of theft, and his liability is civil, not criminal.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 5; Dec. Dig. § 8.*]

3. CRIMINAL LAW (§ 741*)—TRIAL—PROVINCE OF COURT AND JURY.

It is the province of the court to pass on the question whether the state's evidence has enough probative force to raise an issue of fact.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1713; Dec. Dig. § 741.*]

4. LARCENY (§ 68*)—CRIMINAL INTENT—SUBMISSION TO JURY.

In a trial for larceny, where accused claims ownership of the property, and there is no substantial evidence of criminal intent, the court should not send the case to the jury.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 180, 181; Dec. Dig. § 68.*]

5. LARCENY (§ 68*)—CRIMINAL INTENT—SUFFICIENCY OF EVIDENCE—SUBMISSION TO JURY.

In a trial for larceny, evidence of a criminal intent held insufficient to warrant the submission of the case to the jury.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 180, 181; Dec. Dig. § 68.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Grundy County: G. W. Wannamaker, Judge.

Clarence Claybaugh was convicted of larceny, and appealed to the Supreme Court, which transferred the case to the Kansas City Court of Appeals on jurisdictional grounds. Reversed.

See 119 S. W. 333.

O. N. Gibson and Hubbell Bros., for appellant. Elliott W. Major, Atty. Gen., and James T. Blair, Asst. Atty. Gen., for the State.

JOHNSON, J. Defendant was indicted, tried, and convicted for petit larceny, and was granted an appeal to the Supreme Court; but that tribunal transferred the case to this court on jurisdictional grounds. The charge in the indictment is "that Clarence Claybaugh, * * * on the ——— day of December, 1904, at the county of Grundy, state of Missouri, eleven (11) turkeys, the property of W. O. Garnand, of the value of \$17.50, did unlawfully steal, take, and carry away; he, the said Clarence Claybaugh, then and there having no right or interest in said turkeys," etc. The record is very voluminous. The contest arose between neighboring farmers over the ownership of 11 turkeys, and the whole countryside appears to have participated in the trial. This great neighborhood ado must have disconcerted the court, since throughout the trial, and particularly in the instructions given the jury, we find the principal ingredient of the offense of larceny—i. e., a criminal intent—was entirely ignored, and the cause was tried as though it were one in replevin, or for conversion. The one great issue, fought at white heat, was whether the turkeys in controversy were Claybaugh's or Garnand's. The jury, immersed by the evidence in a mass of circumstances and details, emerged with a verdict that the turkeys were Garnand's, and convicted the defendant, a very young man, of spotless reputation and the mainstay of his widowed mother.

We shall not attempt to detail the "facts and circumstances." To do so would make this opinion as long as the briefs of counsel, and would but serve to confuse. The principal facts thus may be stated: The Claybaughs, Garnands, and Renfros, neighboring families, raised turkeys in the year 1904. The Garnand and Renfro broods were hatched by turkey hens, and, after the manner of their kind, became nomadic and predatory. They came home at rare intervals, and their owners seldom saw them. Most of the Claybaugh turkeys were hatched and mothered by chicken hens, and, under the wise guidance of their mothers, stayed at home and led a purely domestic life. As Thanksgiving Day approached, the Garnands and Renfros began an unsuccessful hunt for their turkeys. Their quest finally led them to the Claybaugh farm, where they found that two of the

turkeys, which at the time were roosting high (thieves had made inroads on the flock several nights before), looked like Garnand turkeys (old hens). Mrs. Claybaugh and her son claimed the hens as their property. There were 41 turkeys in the flock, and Mrs. Claybaugh, who had tended the flock all summer, claimed all of them. Some courteous, but strained, conversation ensued, with the result that the Garnands and Renfros withdrew with the understanding that the turkeys would not be sold for a few days, and that the claimants would return with proof of their claims. The Garnands claimed to own 11, and the Renfros 6, of the turkeys. Mrs. Claybaugh kept the flock intact for over a week, and then, thinking the claimants had abandoned their demands, proceeded to carry out the purpose she had entertained all along to sell the turkeys on the market. Accordingly her son, the defendant, started before daybreak one morning with a load of 30 turkeys, and drove to Trenton to sell them. The poultry dealer would give but 9 cents a pound—the market price had been 11 cents—and defendant returned home with the turkeys. Afterward Mrs. Claybaugh learned that a dealer in a small nearby town was paying 12 cents a pound, and defendant took a load to that town, and sold them to the dealer at that price. The dealer gave defendant a check on the bank for the purchase price, and defendant took the check home. Afterward, and within a week, defendant drove two other loads to the same town, and sold them to the dealer. Each time he surrendered the check previously given him, and received a new check for the purchase price of all the turkeys sold to that time. In this way, Mrs. Claybaugh disposed of the 41 turkeys.

Now, the dealer had heard in some way that the Garnands and Renfros claimed to own some of these turkeys, and he put them all in a pen and telephoned the claimants that he had them. He was notified not to dispose of them until the claimants had an opportunity to appear and claim their property. Accordingly, he stopped payment on the check and advised defendant of what he had done and why he had done it. Defendant, who had refrained from cashing the checks, expressed his satisfaction with the dealer's conduct, and at an appointed time met the Renfros and Garnands at the turkey pen. Defendant offered to settle the controversy, even if it cost him \$25, if it could be done in a way that would not amount to a confession that he had done wrong. He insisted that the turkeys belonged to his mother, but was willing to pay for peace. The Garnands and Renfros were obdurate. They demanded unconditional surrender; that is to say, they demanded unconditional orders from defendant on the dealer for the full value of the respective flocks claimed by them. Defendant refused, and the negotia-

identifications stopped. The identification of their property by the claimants appears to us very vague and unsatisfactory. They did not profess familiarity with the young turkeys. They did identify one old hen on account of the lightness of her color, and another by her unusually long and extremely red legs, and, by a sort of Sherlock Holmes process of deduction, observing that 17 of the turkeys, a little lighter in color than the others in the pen, herded together and would not associate with their darker fellow prisoners, concluded this exclusive bunch must be their property. Mr. Garnand was asked why he did not replevin his turkeys, or sue somebody for their value, and replied that it would be too much trouble and some expense. Afterward the dealer permitted defendant to cash the check, and later, when the grand jury met, an indictment was found against defendant.

It is elementary that a criminal intent is the principal element of the offense of larceny, whether the offense be grand larceny, and therefore a felony, or petit larceny, a misdemeanor. Often it is difficult to draw the line between theft and a mere unlawful conversion. If one takes the property of another and converts it to his own use, but takes it in good faith under color of a rightful claim, he is not a thief, but an honest wrongdoer, and his liability is civil, not criminal. Generally, the issue of whether the accused acted in good faith under color of right is one of fact for the jury. So frequently in criminal prosecutions for theft a mere pretense of ownership is used by the accused as a screen to a criminal intent that courts will not listen to such assertions, where the evidence discloses facts and circumstances tending to show that they are a mere pretense. "If the bare assertion of a claim to stolen goods shall prevent a conviction for larceny, there is no protection against the invasion of depredators." *Witt v. State*, 9 Mo. 672. But in such cases, as in all others, it is the province of the court to pass on the question of whether the evidence adduced by the state has enough probative force to raise an issue of fact. If there is no substantial evidence of criminal intent, the court should not send the case to the jury. And in the present case the evidence is so barren of even a reasonable suggestion of criminal intent that we cannot refrain from expressing our surprise at the action of the learned trial judge in overruling the demurrer to the evidence, and in refusing to set aside a verdict so grossly perverted of justice. Here we find a young man of unimpeachable character and reputation, acting on the word of his mother, who was a woman of good character and reputation, but in a manner thoroughly considerate of the rights of the claimants. He willingly gave them every opportunity to identify their property and to bring

suit for its recovery or value. There was no attempt at concealment. Everything he did was open and above board. There is no room for any reasonable mind to infer that he harbored a criminal intent. The prosecuting witness had no right to discard his civil remedy and invoke criminal process on account of the trouble and expense a civil suit might cause him. The criminal courts are neither a collection agency nor a forum for the trial of mere disputes over the ownership of property.

The judgment is reversed. All concur.

SLAGEL v. CHAS. H. NOLD LUMBER CO.

(Kansas City Court of Appeals. Missouri.
Nov. 1, 1909.)

MASTER AND SERVANT (§ 236*)—CONTRIBUTORY NEGLIGENCE—ASSURANCE OF SAFETY.

A teamster on a load of lumber, assured by his foreman that he could drive under an overhanging joist supporting the roof of a shed with safety, who slowly approaches the shed in daylight and is caught between the load and the joist and injured, is negligent and cannot recover, where, if he had stooped low enough, he could have passed in safety.

[Ed. Note.—For other cases, see *Master and Servant*, Cent.Dig. §§ 723-742; Dec. Dig. § 236.*]

Appeal from Circuit Court, Buchanan County; Lucian J. Eastin, Judge.

Action by William Slagel against the Chas. H. Nold Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Mytton & Parkinson, for appellant. Allen, Gabbert & Mitchell, for respondent.

ELLISON, J. This action is for personal injury. Defendant was the owner of a lumber yard, and in the prosecution of the business was engaged in the hauling of large loads of lumber from the yard; the plaintiff being one of his teamsters. On the forenoon of the 7th of April he was driving a gentle team with a large load of lumber out of the yard, and in doing so it was necessary to drive under a shed and out at an opening. The joist at the point in controversy supporting the roof of the shed was 8 feet 6 inches above the ground. The top of the load of lumber was 7 feet 8 inches above the ground, leaving a space of 15 inches between the top of the load and the joist, where the wagon should pass out from under the shed. Plaintiff was sitting on top of the load. Before starting, he made inquiry of the foreman if he could get through safely, and was told: "Yes; go ahead. There's men on bigger and higher loads than that that have driven through there hundreds of times." He then drove under the west end of the shed; but, as stated by him, the ground rises a little approaching the east end, "and as I drove under the east end of the shed I stooped to

get under. I stooped as low as I could, and the joist or cross-beam caught me at the back of the neck and shoulders and crushed my back." The trial court sustained a demurrer to the evidence, and plaintiff has brought the case here.

Notwithstanding the assurance given to plaintiff that he could drive under the shed, we are of the opinion that the trial court took the proper view of the case. An assurance of safety to the servant cannot be allowed to control his action as to that which is patently open to his observation. In cases of this nature apparently small differences in fact make a great difference in legal result. If plaintiff had been assured he could drive through safely, and on once starting could not clearly see where he was going, or the conditions into which he was moving, or if he could see, but could not stop after starting, we would have a totally different case from the one the record shows in this instance. Here the foreman told the plaintiff he could drive through; but the latter evidently saw, or should have seen, as he slowly approached the place, that he could not pass under unless he laid down on the load, or at least stooped quite low. There was no disturbance with his team or his wagon or harness, nor did anything happen to distract his attention. It was merely for him to indulge in a matter of common observation. It will not be pretended that he understood the foreman to say that he could get under by standing or sitting upright on the wagon. It was plainly nothing more than an assurance that he could get under, and so he could have, by lying down or stooping quite low.

Besides, notwithstanding an assurance of safety, the servant must not abandon all exercise of common sense and prudence. The situation in which plaintiff found himself did not involve a question of expert knowledge, or of superior knowledge of the foreman. As he came to the low place, he was in position to exercise better knowledge than the foreman had. We could well say here, as was remarked by Judge Lamm in *Knorpp v. Wagner*, 195 Mo., loc. cit. 666, 93 S. W. 961, that, "in pleading plaintiff's ignorance and defendant's knowledge, the learned counsel for respondent [appellant] doubtless had in mind pronouncements of courts in this class of cases, wherein there always appears an element of ignorance on the part of the servant and superior knowledge necessarily implied on the part of the master. * * * The trouble with respondents' [appellants'] case is that he had the superior knowledge * * *" of conditions at the time of his injury. We have recently had cases in this court bearing directly on the rule applicable to the facts shown by this record. *Meyers v. Glass Co.*, 129 Mo. App. 556, 107 S. W. 1041; *Pulley v. Standard Oil Co.*, 136 Mo. App. 172, 116 S. W. 430. For

other cases illustrative of the view we take of the case, see *Blundell v. Mfg. Co.*, 189 Mo. 552, 88 S. W. 103; *Mathis v. Stockyards Co.*, 185 Mo. 434, 448, 449, 84 S. W. 66, and other citations to be found in defendant's brief.

We think the judgment should undoubtedly be affirmed. All concur.

MERRITT CREAMERY CO. v. ATCHISON, T. & S. F. RY. CO.

(Kansas City Court of Appeals. Missouri. Nov. 1, 1900. Rehearing Denied Nov. 15, 1900.)

1. CARRIERS (§ 119*)—Loss of Goods—ACT OF GOD.

The flood on May 30 and 31, 1903, at the junction of the Kaw and Missouri rivers, at Kansas City, Mo., was an act of God, and a carrier was not liable for loss of freight in such flood.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 528; Dec. Dig. § 119.*]

2. CARRIERS (§ 119*)—Loss of Freight—ACT OF GOD.

Though defendant railroad was negligent in not getting the car containing plaintiff's butter out of its freight yards before the destructive part of an unprecedented flood, constituting an act of God, came, it was not liable, unless it was warned of the approach, not merely of a rise in the river, but of the flood.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 528; Dec. Dig. § 119.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by the Merritt Creamery Company against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Allen & Allen and Allen, Gabbert & Mitchell, for appellant. Thomas R. Morrow and Culver & Phillip, for respondent.

ELLISON, J. Plaintiff shipped in one of defendant's cars a consignment of butter from Great Bend, Kan., to Boston, Mass. The car left Great Bend on the night of May 27, 1903, and arrived in defendant's freight yards near Kansas City on the morning of May 30th, where, ordinarily, the car would be made a part of a train for Eastern points. But in this instance the car was not taken out of Kansas City, and on the night of May 30th, or during May 31st, the butter was destroyed by a flood. Plaintiff brought this action for damages. The defense was that the flood was an act of God. The plaintiff met this by the contention that defendant knew of the coming of the flood, or by proper diligence should have known it, in time to have taken the butter to a place of safety. At the trial the court gave a peremptory instruction sustaining defendant's case, and plaintiff duly appealed to this court.

That the flood here involved was of such unprecedented, terrific, and destructive nature as to properly be designated as the act of God has been several times determined

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

by this and other courts in cases arising over shipments of freight destroyed or lost in the different railway yards at and near Kansas City. *Moffatt Co. v. Railway Co.*, 113 Mo. App. 544, 88 S. W. 117; *Lamar Mfg. Co. v. Railway Co.*, 117 Mo. App. 453, 93 S. W. 851; *Lightfoot & Son v. Railway Co.*, 126 Mo. App. 532, 104 S. W. 482; *Empire Cattle Co. v. Railway Co. (C. C.)* 135 Fed. 135; *Rodgers v. Railway Co.*, 75 Kan. 222, 88 Pac. 885, 10 L. R. A. (N. S.) 658, 121 Am. St. Rep. 416. See, also, *Grier v. Railway Co.*, 108 Mo. App. 565, 84 S. W. 158, as to the same flood at St. Louis. But plaintiff insists that defendant had warning of the coming of the water in time to have saved the butter, and that it negligently laid by and failed to move the car out of danger. Plaintiff bases much of its case on the law as stated in *Pinkerton v. Railway Co.*, 117 Mo. App. 238, 93 S. W. 849. But in our opinion the facts of this case do not bring it within the rule in the *Pinkerton* Case. The law applicable here has been recently so fully discussed in the cases above cited that it can serve no purpose to restate it at this time, especially in a case involving the same flood at practically the same place.

Plaintiff's entire case turns on a mere question of fact; that is, did defendant know, or could it have known, of the coming flood? The Kaw river and the Missouri river meet at Kansas City; the former flowing into the latter. Both rivers were in excessive flood. The Kaw suddenly rose, at Topeka and above, ——— miles from Kansas City, in addition to its already overflowed banks, and much stress is put upon the knowledge which defendant's officers had obtained by telegraph of the coming of these waters. But it was shown that the amount of rise which these additional waters would have caused at Kansas City would have left plaintiff's butter unharmed in the position in which defendant had placed it. The cause of the great destruction and the overwhelming nature of the flood arose, in great part, from the unexpected volume of water added to the already flooded Missouri. The result of the floods of both rivers joining at Kansas City caused the great destruction of property which that catastrophe brought about in such short time that few escaped its fury. We have examined plaintiff's brief and written suggestions, in connection with the oral argument made when the cause was submitted, and have concluded that the record justified the action of the trial court.

It would not aid plaintiff's case, in practical result, if it should be conceded that defendant may have been negligent in not getting the car out of the freight yards before the destructive part of the flood came. The question is: Was it warned of the approach, not merely of a rise in the river, but of the unprecedented flood, which carried destruction

to all property within its reach? Though a party be negligent in transporting freight, he is not liable for every misfortune which befalls it, unless it can be connected with the negligence. This phase of the case was considered and determined in the case of *Moffatt Co. v. Railway Co.*, supra.

We have no other alternative than to affirm the judgment. All concur.

WILLIAMS et al. v. BEATTY.

(Kansas City Court of Appeals. Missouri. Nov. 1, 1909. Rehearing Denied Nov. 15, 1909.)

1. HIGHWAYS (§ 120*) — ALTERATION — POWER TO ALTER.

A person whose land abutted on a public road constructed on an embankment through lowlands, on the right of way of which, and on his side of the embankment, was a drainage ditch, had no right, without complying with Rev. St. 1899, § 9414 (Ann. St. 1906, p. 4327), requiring an application for the change of roads to be by petition to the county court, to obstruct the ditch and change the road by moving the embankment to the other side of the ditch and on his own land, and by placing culverts in the embankment so as to collect and throw onto land on the other side of the road surface water which formerly flowed through the ditch.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 374-378; Dec. Dig. § 120.*]

2. HIGHWAYS (§ 120*) — OBSTRUCTION — INJUNCTION BY ABUTTING OWNER — SPECIAL DAMAGES.

It clearly appearing that such a change in the road and ditch would not only be detrimental to the general public, but would inflict special damage to land on the other side of the road, the owner of the other land was entitled to enjoin the change, since an abutting owner has rights in the highway which are special to himself, such as the rights of ingress and egress.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 374-378; Dec. Dig. § 120.*]

3. EQUITY (§ 65*) — MAXIMS — CLEAN HANDS — APPLICATION OF RULE.

The fact that the complaining party had previously raised the grade of the road and removed culverts therein without formal authority would not preclude his injunctive relief under the maxim that he who seeks equity must do so with clean hands, as his prior acts were an entirely separate matter, and the maxim applies only to conditions related to the subject of litigation.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 185-187; Dec. Dig. § 65.*]

4. HIGHWAYS (§ 120*) — OBSTRUCTIONS — RIGHTS OF ABUTTING OWNERS.

The complainant's right to an injunction was not affected by an instrument executed by his grantor to the other party, giving him permission to construct a drainage ditch through the grantor's land; that right not being in controversy.

[Ed. Note.—For other cases, see *Highways*, Dec. Dig. § 120.*]

5. COVENANTS (§ 70*) — RUNNING WITH THE LAND — LICENSE — REVOCABILITY — "INCUMBRANCE."

An instrument, giving a person the right to construct a drainage ditch through the land of the person executing the instrument, being without consideration, and not acknowledged and recorded, was a mere license, revocable at the

will of the licensor and his grantee, and not a covenant running with the land, and did not constitute an "incumbrance" thereon which would prevent the conveyance of a fee-simple title by the grantor.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 70; Dec. Dig. § 70.*

For other definitions, see Words and Phrases, vol. 4, pp. 3519-3527.]

Appeal from Circuit Court, Macon County; Nat M. Sheldon, Judge.

Action by Barnett R. Williams and another against Samuel G. Beatty. Judgment for plaintiffs, and defendant appeals. Affirmed.

I. G. Ringoldsky and Guthrie & Franklin, for appellant. I. W. Barrow and Dysart & Mitchell, for respondents.

JOHNSON, J. This is an injunction suit, brought by the owners of a farm in Macon county, to restrain defendant, the owner of an adjoining farm, from interfering with the public road and drainage ditch separating the two farms. Both farms are in the valley of the Chariton river on the east side of that water course, and extend eastward to the hills. That of plaintiffs is on the south side of the public road, which runs east and west from the river to the hills, and is in sections 34 and 35, township 59, range 16. The farm of defendant is on the north side of the road, in sections 26 and 27. From the hills westward the roadway, for a distance of about half a mile, is 60 feet wide, thence to the river, a distance of between a quarter and a half of a mile, it is 80 feet wide. At the time this suit was begun the road had been improved by the construction, in 1897, of an embankment over the bottom land, by which the traveled way was elevated to a height sufficient to insure a good road in bad weather. A drainage ditch had been dug on the north side of the embankment and on the right of way from the hills to the river, to carry off the water, flowing in two streams, that come out of the hills and unite at the northeast corner of plaintiffs' land. Before the construction of the ditch the stream formed by this junction flowed in a northwest course onto the land of defendant, where it became diffused into a chain of ponds, swales, and marshy places, that extended first northwesterly, then curved around to a southwest course, until it passed from defendant's land to that of plaintiffs, at a point nearly a half mile west of its place of entry on defendant's land. After the drainage ditch was built, defendant, by running out auxiliary ditches from it, drained these ponds and low places into the drainage ditch, and we think the evidence shows that defendant's farm was greatly benefited by these improvements, and was not subjected to any additional servitude by them, though it appears that the flow of surface water from

his land to that of plaintiffs was stopped. The threatened acts of defendant, to prevent which this suit was brought, are these: Professing to have authority from two of the road commissioners so to do, he was about to change the road entirely by moving the embankment north of the drainage ditch and onto his own land, and by putting culverts in the embankment in a way to collect and throw on plaintiffs' land surface water which now flows through the drainage ditch.

What had been done, and is threatened to be done, by defendant appears in the following extract from the judgment entered by the trial court: "And the court finds from the evidence that there is a public road duly established and passing on or near the line between the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 35, and the N. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 34, township 59, range 16 on the south, and the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 26, and the S. E. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 27, township 59, range 16 on the north; that near all of the said distance the said road passes over bottom lands of the Chariton river; that at the time of the institution of this suit the said road was well graded up for nearly all of said distance, so as to make a good, permanent road, which was practically above high-water mark, and that at the time of the institution of this suit the said portion of said road was in better condition than it had ever been since it had been laid out and established; that the road right of way throughout near all of said distance was about 80 feet wide; that the said dump or grade was somewhat to the south of the center of said road, and that a ditch sufficient to carry the water had been made on the north side of said road to the river, which ditch was sufficient to carry the waters falling and collecting on the north side of the said roadway; that at the time of the institution of this suit the natural and best course for the waters falling and collecting on the north side of the said grade and roadway was on the side of the said graded roadway to the Chariton river, and that such waters, left to themselves, would find their way to the Chariton river on the north side of the said roadway, and through the ditch on the right of way on the north side of said grade; that the said right of way has ample width for a public road, and also for the ditch to carry all of said waters. The court further finds from the evidence that at the time of the institution of this suit the defendant constructed and was maintaining a levee, or levees, across the said ditch to the north side of the said graded way, so as to hinder the water from flowing in the said ditch, and that the said defendant was threatening to, and proceeding to, cut and injure the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

said graded roadway and dump and to place culverts in and across the said graded roadway, and to force the water through the same onto plaintiffs' land; that said acts were an injury both to the said roadway and to the plaintiffs herein and their lands south of the said roadway. And the court further finds from the evidence that the defendant, without any legal right to do the same, was threatening and attempting to move a portion of the said established roadway off of the established right of way thereof where the said road passes over the north side of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 35, township 59, range 16, and place the same on the south side of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 26, township 59, range 16; that no petition had ever been presented to the county court, as the law requires, asking for such change of the public road aforesaid; that the said acts of the defendant, threatening to be done by him immediately, would be to the great injury and annoyance and expense of the public, and to the great injury and damage of the plaintiffs." Following these findings of fact, which appear to be well supported by evidence, the court adjudged "that the temporary injunction granted in this cause be made perpetual, and that the defendant and his servants be both enjoined and restrained from filling or damming up and obstructing the ditches on the right of way of the said road, and from making or maintaining any levee, or levees, on said right of way, and from cutting, injuring, or destroying the grade or dump of the said road, or any part thereof, and from removing the said road-bed or grade from said right of way or from its present position and condition, and from putting any culverts or openings through the said road grade or dump, so as to force, or attempt to force, waters across said right of way onto plaintiffs' land, and from making or maintaining any ditches or levee or dump in any way on the said right of way of said road, so as to turn the water flowing along said right of way on plaintiffs' land, and from filling up or impeding the flow of the water in the ditches upon the said right of way."

We adopt the view of the law of the case thus applied by the trial court. Here we find established by constituted authority a good public road and a drainage ditch, obviously placed in the best position to carry to the river the surplus water of that drainage zone at a minimum of damage to the surrounding lands, including the farm of defendant. Further, we find defendant, assuming to act under authority received from two of the road commissioners, has obstructed the ditch, and is threatening to change the road from the present right of way, and to put in culverts in a manner to collect and precipitate surface water in a body on the land of plaintiffs. Such acts would be nothing short of an arbitrary ex-

ercise by defendant of the power of eminent domain, since they would be wholly unsupported by legal authority. Under the provisions of section 9414, Rev. St. 1899 (Ann. St. 1906, p. 4327) et seq., an established public road may be vacated or changed only by order of the county court, in a proceeding complying with the requirements prescribed. *State v. Wells*, 70 Mo. 635; *State v. Rhodes*, 35 Mo. App. 360. No such order was made in the present case, and defendant's proposed interference with the road and ditch were wholly without legal justification. As it clearly appears that if carried into effect the threatened changes not only will be detrimental to the general public, but will inflict special damage to plaintiffs' land, a proper case is presented for interposition by a court of equity. "An abutting property owner has the same right to the use of the street that the public have, and in addition thereto he has rights which are special to himself, as the rights of ingress and egress, and this right is a property right which he may protect. *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 487; *Glaessner v. Brewing Ass'n*, 100 Mo. 508, 13 S. W. 707. An obstruction in a street or highway may be both a public and a private nuisance, and in such cases the private citizen who is specially injured may have injunctive relief." *Schopp v. City*, 117 Mo., loc. cit. 135, 22 S. W. 898, 20 L. R. A. 783.

It is argued by defendant that plaintiffs do not come into a court of equity with clean hands because of the fact that, without authority, they removed culverts and raised the grade of the embankment some time before defendant initiated his project of changing the road. It appears from the evidence that work of this character was done by plaintiffs without formal authority, but it was orally approved and accepted by the members of the county court. We concede that plaintiffs were trespassers in doing that work, but we do not sanction the contention of defendant that a prior trespass on the public highway committed by plaintiffs is a justification of defendant's purpose to commit a similar trespass. By whatever means the public road was placed in its present condition, no private person possesses the right to change the road without formal permission of the constituted authorities. The issue before us is the legality of the proposed acts of defendant, not the legality of what others may have done in the past. "The maxim that he who seeks equity must do so with clean hands applies only to conduct related to the subject of litigation." *Hingston v. Montgomery*, 121 Mo. App. 457, 97 S. W. 202. The prior trespass of plaintiffs was an entirely different matter from that now before us. If defendant would have the road changed, let him proceed in a lawful manner to accomplish his end. The law does not tolerate the employment of the strong hand by an individu-

al to right his grievance, and since defendant has resorted to the strong hand, and plaintiffs are specially interested in the subject of the aggression, we do not think the past wrongs committed by plaintiffs should deprive them of injunctive relief.

Further, it is argued by defendant that the action should fail because of a parol easement or license given defendant in 1900 by plaintiffs' grantor. The instrument executed by the then owner of the land now owned by plaintiffs is as follows: "Ethel, Mo., Oct. 6, 1900. This entitles S. G. Beatty to construct a drain ditch through that portion of the N. E. $\frac{1}{4}$ of sec. 34, township 59, R. 16 Macon county, state of Mo. in such manner as the said S. G. Beatty should direct. It is agreed that the undersigned owner of said land above described shall bear no part of expense of above mentioned ditch. J. N. Fletcher." We do not think this instrument, if binding on plaintiffs, has any bearing on the present controversy. The issue here is not the right to maintain an established drainage ditch on the land of plaintiffs, but, as we have shown, is the asserted claim of defendant that he has the right to change a public road without authority conferred in the manner prescribed by statute. But the instrument invoked is worthless as an aid to defendant's position for another reason. It was without consideration, and was not acknowledged and recorded. It was a mere parol license, revocable at the will of the licensor and his grantees. *Dunham v. Joyce*, 129 Mo. 5, 31 S. W. 337. It was not a covenant running with the land, nor did it constitute an incumbrance that prevented the conveyance of a clear fee-simple title by Fletcher to plaintiffs.

The cause was tried without error, and manifestly the judgment is righteous. Accordingly, it is affirmed. All concur.

HALSEY v. RICHARDSON.

(Kansas City Court of Appeals, Missouri.
June 14, 1909. Rehearing Denied Nov.
1, 1909.)

1. MUNICIPAL CORPORATIONS (§ 485*)—STREET IMPROVEMENTS—TAX BILL—PRIMA FACIE CASE.

Tax bills issued against property owners for a municipal improvement, if regular in form, make out a prima facie case against an owner of the property.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1144; Dec. Dig. § 485.*]

2. MUNICIPAL CORPORATIONS (§ 305*)—STREET IMPROVEMENTS—CONTRACT—AS PART OF ORDINANCE.

Where specifications for a street improvement contained a form of contract which the city intended to employ in making the contract with the successful bidder, the fact that the ordinance referred to the plans and specifications on

file for information as to details did not make the form of contract a part of such ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 817; Dec. Dig. § 305.*]

3. MUNICIPAL CORPORATIONS (§ 304*)—STREET IMPROVEMENTS—PERFORMANCE—TIME—FAILURE TO SPECIFY—REASONABLE TIME.

Failure of a street improvement ordinance to specify any time within which the work should be completed was not a fatal defect, as it would be construed to require completion within a reasonable time.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 816; Dec. Dig. § 304.*]

4. MUNICIPAL CORPORATIONS (§ 362*)—STREET IMPROVEMENTS—COMPLETION—REASONABLE TIME—DETERMINATION.

Where a municipal improvement contract provides for excusable delay, and the contractor was required to complete the work within a reasonable time, whether the time consumed was reasonable was to be determined from the surrounding circumstances.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 894; Dec. Dig. § 362.*]

5. MUNICIPAL CORPORATIONS (§ 364*)—STREET IMPROVEMENTS—CONTRACT—PERFORMANCE—EXCUSABLE DELAY.

A street improvement contractor was not responsible for delay resulting from the city engineer's failure to set grade stakes, and from the delay of a street railroad company to replace the rails of its tracks, in the absence of proof that the delay was the result of collusion with the contractor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 897; Dec. Dig. § 364.*]

6. MUNICIPAL CORPORATIONS (§ 284*)—STREET IMPROVEMENTS—TIME—LEGISLATIVE POWER—DELEGATION TO CITY ENGINEER.

A street improvement contract, providing that the work shall be commenced within one week after written notice so to do from the city engineer, and should be carried on so as to insure completion within three months thereafter, etc., is not objectionable as delegating to the city engineer the exercise of legislative power of prescribing the length of time for the completion of the work, the engineer not being authorized to postpone the giving of notice either arbitrarily, fraudulently, or without reasonable cause.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 756; Dec. Dig. § 284.*]

7. MUNICIPAL CORPORATIONS (§ 414*)—STREET IMPROVEMENTS—"REPAIRS."

It was not improper to include, in an assessment for the improvement of a street, the cost of work performed on the sidewalks, curbing and guttering, on the theory that such work constituted repairs chargeable to the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1017; Dec. Dig. § 414.*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6096-6102; vol. 8, p. 7785.]

Ellison, J., dissenting.

Appeal from Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Action by F. E. Halsey against Maria C. Richardson. Judgment for plaintiff, and defendant appeals. Affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

H. K. White, for appellant. Charles E. Strop and Eugene Silverman, for respondent.

JOHNSON, J. Action to enforce the lien of two special tax bills issued in part payment of the cost of certain improvements made on Eighth street, in the city of St. Joseph. Each bill was made the subject of a count in the petition. The cause was heard by the court without a jury. Judgment was rendered for plaintiff on each count for the full amount demanded, with interest, and defendant appealed.

It is conceded that the tax bills, being regular in form, are sufficient to make out a prima facie case in favor of plaintiff, but their validity is attacked on several grounds in the answer and proof adduced by defendant. The improvement in question was made pursuant to a special ordinance passed by the city council on April 12, 1900, and entitled: "An ordinance to provide for the subgrading, paving, curbing, guttering and laying of sidewalks on Eighth street, from the south line of Olive street to the south line of Mitchell avenue." The ordinance contains no reference to the time of the beginning or completion of the proposed work, nor does it contain the details or specifications. It does provide that the improvement shall be made "in accordance with the specifications therefor on file in the office of the city engineer." No point is made that the specifications were not on file at the time of the passage of the ordinance, but one of the defenses we shall presently notice is based on the fact that attached to them, and therefor on file, was the form of the contract afterward entered into between plaintiff and the city. Among the stipulations of this contract, which was signed by the parties on May 29, 1900, are the following, which appear under the head of "Duties and Responsibilities":

"(9) The first party (the contractor) shall not be entitled to any claim for damages for any hindrance or delay from any cause whatever, in the progress of the work or any portion thereof; but such hindrance may entitle said first party to an extension of the time for completing this contract sufficient to compensate for the detention, the same to be determined by the city engineer, provided he shall have immediate notice in writing of the cause of detention.

"(10) The work embraced in this contract shall be commenced within one week after written notice so to do shall have been given to the contractor by the city engineer, carried on regularly and uninterruptedly with such force of men as to insure its full completion within three months thereafter; the time of beginning, rate of progress, and time of completion being essential conditions of this contract."

Under the head of "General Stipulations" is this provision: "If said work shall not be begun when, where, and as ordered by the city engineer, or if the rate at which said

work shall be performed shall not, in the judgment of the city engineer, be such as to insure its progress and completion in the time and manner herein stipulated, or if said work shall be wholly or in part improperly constructed, or in case the contractor shall from any cause abandon the work and cease to prosecute the same, then the city engineer shall certify the facts to the common council and the common council shall have the power to declare the contract forfeited, either as to a portion or the whole of said work, and to, at any time, relet the same, or order the reconstruction of the work, in whole or in part, if improperly done."

On the 5th of December, 1900, the engineer for the first time notified plaintiff in writing "to commence work within seven days upon the contract between you and the city of St. Joseph for paving Eighth street from Mitchell avenue to Olive street (Ordinance No. 2619), and to finish the same according to contract." December 18, 1900, the city council passed a special ordinance (No. 2935) extending the time for the completion of the work for a period of five months, and on April 15, 1901, passed another ordinance further extending the time for a period of four months. The work was completed within the period prescribed in the last ordinance mentioned, was accepted by the city, and the tax bills in payment of the cost thereof were issued October 2, 1901, and delivered to plaintiff. The long delay in the performance of the contract after it was made and approved by the city is the foundation of the attack against the validity of the proceedings. To free himself from the imputation of fault on account of this delay, plaintiff introduced evidence which tended to show that very shortly after the contract was ratified he began its performance by making brick, taking out guttering, resetting the curb and breaking rock for foundation, but could not proceed beyond the preparatory stage because of the failure of the city engineer to lay out the work and set stakes for his guidance. Further, it was shown that plaintiff was directed by the city engineer not to proceed with the paving of the street until after the street railway company had reconstructed its tracks thereon, and that, on account of its inability to obtain new rails from the manufacturers, the company was delayed in prosecuting the work of relaying the tracks and bringing them to the proper grade. These obstacles in the way of plaintiff continued for some time after the engineer served notice on him to proceed with the performance of the contract. Plaintiff still was unable to obtain the services of the engineer to give him the necessary grade stakes, and the street railway company could not and did not perform its task until the following spring. Cold weather set in shortly after December 5th, and the ground became frozen to an extent preclusive of the doing of any grading. Such was the situation when the first ordinance

was passed which extended the time. When the second ordinance was passed in the following April, the engineer and street railway company were still in default in the respects related. In short, the evidence of plaintiff casts the entire blame for the delay on the city, and the issue of fact thus raised was resolved by the court in favor of plaintiff. Defendant's evidence tended to show that 60 days afforded a reasonable time for doing the work, while that of plaintiff was to the effect that three months would have been required had plaintiff been given the opportunity of prosecuting the work without hindrance from the city.

Since the evidence introduced by plaintiff on these controverted issues of fact is substantial, no reason exists for interference on our part with the findings of the trial court on which, it is evident, the judgment for plaintiff was founded. As far as it may be material, we shall assume as established the fact that plaintiff in no wise was remiss in the performance of his contract but was retarded solely by the acts of the city, and, from this standpoint, shall consider the questions of law presented by the learned counsel for defendant in support of his contention that the tax bills should be declared invalid.

It is argued that, though the ordinance which authorized the improvement is silent on the subject of a time limit, the fact that it specifically referred to specifications on file to which, at the time, a form of contract was attached, made the stipulations contained in that form which related to the time in which the work was to be begun and completed a part of the ordinance itself; consequently that the ordinance should be held to have made time of the essence of the proceedings, and should be pronounced void because it attempted to delegate to the engineer the purely legislative function of fixing the time when the contractor should begin work. In support of this argument we are cited to *Barber Asphalt Co. v. Ullman*, 137 Mo. 543, 38 S. W. 458; *Galbreath v. Newton*, 30 Mo. App. 380; *Roth v. Hax*, 68 Mo. App. 283; *McQuiddy v. Brannock*, 70 Mo. App. 535. In these cases the rule is declared that, where the ordinance providing for the improvement omits specific mention of the details thereof and refers to plans and specifications on file for information respecting such details, the plans and specifications actually on file at the designated place become a part of the ordinance to the same extent and with the same effect as though they had been literally copied therein. But it does not follow from this rule that the adoption in this manner of specifications should be treated as the incorporation in the ordinance of such extrinsic matter as a form of contract from the mere fact that such form has been attached to the specifications. Had the city intended to embody in the ordinance the stipulations and conditions appearing in such form of contract, it hardly would have contented itself

with a reference only to the specifications, but would have referred also to the form of contract on file. The attachment of a form of contract amounted to nothing more than the expression by the city of an intention to employ that form in the preparation of a contract it would make with the successful bidder, but, until the contract was executed by the parties, the form was but so much paper, and did not operate to impose contractual obligations on either party. Neither by provision appearing on its face nor by reference to the specifications on file does the ordinance before us state a time limit. This omission does not invalidate the proceeding, but, under the rule adopted by the courts of last resort in this state, it requires us to construe the ordinance as containing the implied provision that the improvement must be completed within a reasonable time. *Allen v. Labsap*, 188 Mo. 692, 87 S. W. 926; *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163; *Hilgert v. Barber Asphalt Paving Co.*, 107 Mo. App. 385, 81 S. W. 496; *Curtice v. Schmidt*, 202 Mo. 703, 101 S. W. 61; *Schibel v. Merrill*, 185 Mo. 534, 83 S. W. 1069; *Jaicks v. Middlesex Co.*, 201 Mo. 211, 98 S. W. 759. Beyond the requirement that the work must be completed within such time, the ordinance does not make time essential, nor is there anything in the contract made by the parties indicative of an intention to depart in any respect from the ordinance. The stipulations of the contract are similar in effect to those considered by the Supreme Court in *Allen v. Labsap*, *Heman v. Gilliam*, and *Curtice v. Schmidt*, supra. In the first of these cases it is said: "In the absence of a city ordinance requiring the work to be completed within a definite time and in the presence, as here, of a contract provision specifying a definite time for the completion of the work, followed by other provisions, to which effect must be given, providing for deductions from the money due the contractor on a failure to complete the work within that time, the views of this court on full consideration have come to be that, if the work is completed within a reasonable time, the tax bills are not void—[citing cases]. No sufficient reason is suggested why the reasoning of these cases is unsound, nor why the doctrine should not be regarded as settled under the rule of stare decisis, and we accordingly hold the question no longer an open one in this state."

As in that case, the contract in the present instance contemplates and makes provision for the contingency of excusable delay in the completion of the improvement, and we must hold that under both ordinance and contract plaintiff had a reasonable time in which to do the work; and, further, that the question of whether he completed the improvement within a reasonable time is one of fact to be solved by the trier of fact in the light of the surrounding circumstances. *Hilgert v. Paving Co.*, supra; *Lapsley v. Howard*, 119 Mo. 489, 24 S. W. 1020; *State v. Harrison*, 53

Mo. App. 346. The parties themselves stipulated in the contract that a period of three months from the reception by plaintiff from the engineer of notice to proceed would afford a reasonable time. The trial court found this estimate to be approximately correct, and the finding, we think, is supported by evidence. In the absence of any showing that the delays, occasioned by the failure of the engineer to set grade stakes and of the street railway company to replace the rails of its tracks, were the result of a collusive understanding or agreement to which the contractor was a party, the time consumed by such delays should not be computed as time wasted by the contractor. *Curtice v. Schmidt*, supra. It clearly appears that he was ready and willing to proceed with the work immediately on the ratification of the contract, and would have been able to complete it in the time specified but for the fault of the city. It would be extremely unjust to punish him, not for any breach on his part of any contractual obligation or duty, but for the neglect of the other party to the contract.

What we have said necessarily leads to the conclusion that the tax bills should not be held invalid on the ground that the contract attempted to delegate to the city engineer the exercise of the legislative power of prescribing a time for the completion of the work. In *Allen v. Labsap*, supra, the contract contained the stipulation: "The work embraced in this contract shall be begun within one week after written notice so to do shall have been given to the contractor by the street commissioner." A similar stipulation appears in the contract considered in *Heman v. Gilliam*, supra. In neither case did the Supreme Court consider such provision as an attempt to delegate a legislative duty, and we are of opinion that it should not be construed as an attempt to delegate authority to the engineer to delay the initiation and completion of the improvement beyond a reasonable time from the approval of the ordinance. Obviously its purpose was to invest the engineer with sufficient supervisory authority to enable him to expedite the prosecution of the work in order that its completion might not be retarded beyond the time contemplated by the ordinance. It did not give him the right to postpone the giving of notice arbitrarily, fraudulently, or without reasonable cause. In this view, the stipulation under consideration cannot be said to evince an effort to invest a city officer with the right to exercise a legislative power. We do not find in the record that the provisions of this stipulation (No. 10, under head of "Duties and Responsibilities") appeared anywhere in the specifications on file to which the ordinance authorizing the improvement referred, and therefore, as we have shown, the ordinance did not by reference to the specifications either make time of the essence

of the contract or attempt to delegate a legislative function to the city engineer. The trial court properly held the tax bills valid.

Point is made that it was improper to include in the assessment the cost of the work performed under the ordinance and contract on the sidewalks, curbing, and guttering, for the reason that such work was in the nature of repairs, and, as such, was chargeable to the city. We had this precise question before us in the case of *Rackliffe v. Duncan* 180 Mo. App. 695, 108 S. W. 1110, and, for the reasons stated in the opinion in that case, must rule the point against defendant.

The judgment is affirmed.

BROADDUS, P. J., concurs.

ELLISON, J., does not agree that the record shows the facts in several material respects to be as stated by us, and therefore dissents.

LEWIS v. IMHOF et al.

(Kansas City Court of Appeals. Missouri.

Nov. 1, 1909.)

1. SALES (§ 201*)—TRANSFER OF TITLE—DELIVERY—DELIVERY TO CARRIER—"CONSTRUCTIVE DELIVERY."

Where there are no specific instructions as to shipment, a delivery by the seller to the usual carrier for the buyer, with proper directions, is a "constructive delivery" to the buyer and the goods immediately become his property, subject only to the right of stoppage in transitu.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 535; Dec. Dig. § 201.*

For other definitions, see *Words and Phrases*, vol. 2, pp. 1469, 1470; vol. 8, p. 7613.]

2. SALES (§ 150*)—LOSS OF GOODS—DELIVERY TO CARRIER—DUTIES OF SELLER.

In the absence of proof to the contrary, a seller shipping the goods to the buyer must make such a contract with the carrier as will afford the buyer a remedy against the carrier for the full value of the goods in case of their loss.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 355; Dec. Dig. § 150.*]

3. PRINCIPAL AND AGENT (§ 101*)—POWER TO CONTRACT—CUSTOM OR COURSE OF BUSINESS.

Where the seller of goods acts as the agent of the buyer in shipping the goods to such buyer, his authority to enter into a limited liability contract with the carrier may be implied from the course of dealing between the parties, or from a known custom to ship in that manner.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 256; Dec. Dig. § 101.*]

4. SALES (§ 150*)—LOSS OF GOODS—DELIVERY TO CARRIER—DUTIES OF SELLER.

A seller who, without receiving specific instructions as to shipment, ships the goods by express addressed to the buyer must show either express or implied authority to enter into a contract with the carrier, limiting its liability in case of loss, and such authority is not implied from the mere direction of a new customer to ship by express.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 355; Dec. Dig. § 150.*]

Appeal from Circuit Court, Buchanan County; L. J. Eastin, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Alfred Lewis against A. and B. Imhof. From a judgment for defendants, plaintiff appeals. Affirmed.

Allen, Gabbert & Mitchell, for appellant. Vinton Pike, for respondents.

JOHNSON, J. Action on an account for goods sold and delivered by plaintiff, a wholesale merchant in New York, to defendants, retail merchants in St. Joseph. The defense is that the goods were not delivered. The case was tried to the court on an agreed statement of facts, and judgment was entered for defendants. Plaintiff appealed.

The agreed statement of facts is as follows:

"(1) The plaintiffs are merchants doing business in the city of New York, and the defendants are partners engaged in business in the city of St. Joseph, Mo., and both parties were so engaged in business at all times herein mentioned. (2) On May 1, 1907, defendants gave the plaintiff's traveling salesman at St. Joseph, Mo., a verbal order for the goods sued for in this case, and said salesman of plaintiff's transmitted to the plaintiffs at New York a written order, of which a true copy is hereto attached, marked 'Exhibit A.' (3) On receipt of the order of plaintiffs, they in New York City, on May 4, 1907, packed the goods for transportation, and delivered the same to the American Express Company in said city of New York for transportation to St. Joseph, Mo., said express company limiting its undertaking, and not being further bound than by executing and delivering to plaintiff a receipt, of which the following is a copy: [Not necessary to be here set out.] (4) The American Express Company is a common carrier, whose line extended from New York City in state of New York to Chicago in the state of Illinois, said Chicago being the nearest point to destination (in this case St. Joseph, Mo.) reached by said carrier, and where it delivered the goods aforesaid to the Wells-Fargo Express Company (an independent connecting carrier), for carriage to St. Joseph, but said goods were never delivered by the latter express company, but were lost or destroyed by reason of its negligence while in its possession. (5) At all times herein mentioned there were express companies engaged in business as common carriers whose lines extended from New York City to St. Joseph, Mo., to any of which the goods in question could have been delivered for carriage to St. Joseph. (6) Said Wells-Fargo Express Company received said goods from the American Express Company at Chicago, and then and there undertook to carry said goods from Chicago to St. Joseph. (7) When the goods sued for were ordered by defendants of plaintiff's salesman at St. Joseph, the former directed that the said goods be shipped to them by express, without specifying any company or line, or terms of shipment, and the American Express Company was one of the carriers usually employed by plaintiff and oth-

er New York shippers for transportation of merchandise to St. Joseph, Mo. (8) It was customary with the manufacturers and wholesalers of the class of goods sued for in New York City to ship goods to purchasers by express, selecting any one of the various carriers whose contracts of shipment contained stipulations such as are found in the blank forms hereto attached. Exhibits B, C, and D. (9) The price of the goods sued for was \$162 at New York City, and they were to be shipped by express to St. Joseph—freight to be paid by defendants at destination. (10) Further, fuller, or better pleading is waived, and if upon the foregoing facts defendants are liable, plaintiffs may have judgment for \$162, with interest from December 15, 1907; if not, judgment shall be entered for defendants. The foregoing stipulation of facts is for all purposes of the case, and upon it alone the cause shall be submitted in the above court, and in any other court to which said cause may be appealed." The receipt or shipping contract issued by the American Express Company to plaintiff was made out on a printed form, which, among other stipulations, contained the following: "It is further agreed that this company is not to be held liable or responsible for any loss of, or damage to, said property or any part thereof, from any cause whatever, unless in every case the said loss or damage be proved to have occurred from the fraud or gross negligence of said company or its servants; nor in any event shall this company be held liable or responsible, nor shall any demand be made upon it beyond the sum of fifty dollars, unless the just and true value thereof is stated herein, and an extra charge is paid or agreed to be paid therefor, based upon such higher value." Across the bottom of the face of the contract in bold type is the further agreement that "the liability of this company is limited to \$50, unless the just and true value is stated in this receipt and an extra charge is paid or agreed to be paid therefor, based upon such higher value." A column for the insertion of the value of the property appears in the blank space provided for the description of the particular shipment. For the purposes of our inquiry there is no material difference between the blank form of receipt issued by the American Express Company and those used by other express companies, which are attached as exhibits to the agreed statement of facts. Plaintiff failed to have the value of the goods stated in the receipt, and shipped them on a valuation of \$50, and on a rate based on such valuation.

Recently, in an action brought against an express company by the consignee of goods shipped from New York to St. Joseph and lost in transportation, we said, speaking through Broadus, P. J.: "We believe it is entirely competent for a carrier to limit the amount of its liability for negligence,

where the shipper fixes a valuation upon the goods shipped, and agrees that the carrier's liability should not be in excess of such value, when it is shown that on goods of greater value a higher rate is exacted. In such cases a carrier may make reasonable regulations, graduating its compensation, and providing, in case of failure of the shipper to declare the value as required, it shall be deemed not to exceed a certain sum. *Ellott on Railroads*, § 1510." *Dry Goods Co. v. Express Co.*, 133 Mo. App. 683, 113 S. W. 1161. Under the doctrine of this decision, of the soundness of which we have no doubt, it is clear that, if the delivery of the goods by plaintiff to the express company constituted a constructive delivery to defendants, the recovery which defendants might enforce against the express company would be limited by the express terms of the shipping contract to \$50 for goods costing the defendants \$162. The rule is well established "that when goods are ordered and no specific instructions are given in regard to their shipment, * * * a delivery to the usual carrier for the purchaser, with proper directions, is a constructive delivery to the purchaser, and the goods, immediately upon such delivery, become the property of the purchaser, subject only to the right of stoppage in transitu." *Bloom's Son Co. v. Haas*, 130 Mo. App. 122, 108 S. W. 1073; *Graff v. Foster*, 67 Mo., loc. cit. 520; *Meyer Bros. Drug Co. v. McMahan*, 50 Mo. App. 18; *Milling Co. v. Stanley*, 132 Mo. App. 308, 111 S. W. 869. This rule is based on the legal fiction that in ordering goods to be transported by common carrier the vendee, by implication, appoints the vendor his agent to select a carrier usually employed in such shipments, and to contract with such carrier in the usual manner for the transportation. Where the vendor performs these duties of his agency, the carrier then becomes by implication the agent of the vendee to receive delivery of the goods. In the absence of proof to the contrary we must begin with the presumption that the usual and ordinary way requires the vendor, in the performance of his duties as agent of the vendee, to ship the goods under a contract that will afford the vendee a remedy against the carrier for their full value, if they be negligently lost by the carrier. This was the rule of the common law, and we perceive no reason in the changed conditions of modern commerce and means of transportation for departing from it. Lord Ellenborough said in *Clarke v. Hutchings*, 14 East, 475, a case where the carrier had a well-known regulation not to be answerable for goods above a certain value, unless entered and paid for as such, and the seller delivered goods of greater value without so entering them: "The plaintiff cannot be said to have deposited the goods in the usual and ordinary way, for the pur-

pose of forwarding them to the defendant, unless he took the usual and ordinary precaution, which the notoriety of the carrier's general undertaking required, with respect to the goods of this value, to insure them a safe conveyance; that is by making a special entry of them. He had an implied authority, and it was his duty to do whatever was necessary to secure the responsibility of the carrier for the safe delivery of the goods, and to put them in such a course of conveyance as that, in case of a loss, the defendant might have his indemnity against the carrier." 2 *Mechem on Sales*, § 1183, and note.

Arguendo, we agree with counsel for plaintiff that authority in the vendor to enter into a limited liability contract such as that under consideration need not be expressly conferred by the vendee, but may be implied, either from a course of dealing between the parties or from a known practice and custom of the merchants of New York to ship goods by express without declaring their value, unless otherwise directed by the customer. But this concession does not benefit plaintiff, for the reason that the sale in question was the first business transaction between the parties, and therefore no course of dealing existed between them, and the existence of a custom among the New York merchants not to state the value of goods shipped by express is not disclosed by the agreed statement. We cannot assume without proof that there was a custom of that kind. The eighth paragraph of the agreed statement goes no further than to say it was customary for New York merchants to ship by express on the forms of receipt attached, but it does not say that it was customary for them to fail to insert the value of the goods in the blank place provided for such statement. In other words the stipulation does not say that New York merchants were in the habit of sending out goods by express under shipping contracts which, in effect, greatly understated the value of the goods.

We conclude that the burden was on plaintiff to show either express or implied authority to ship the goods in the manner he did, and that such authority should not be implied from the mere direction of a new customer to ship "by express."

The judgment is affirmed. All concur.

SHELTON v. COOKSEY.

(Kansas City Court of Appeals. Missouri.
Nov. 1, 1909.)

1. APPEAL AND ERROR (§ 842*)—QUESTION OF LAW.

An instruction in the nature of a direction to the jury to find for the plaintiff raises a question of law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3316-3330; Dec. Dig. § 842.*]

2. FRAUDS, STATUTE OF (§ 63*)—CONVEYANCE OF LAND—ORAL AGREEMENT.

The title to land being in defendant, he orally agreed to reconvey the land to his grantor; the consideration being the unpaid purchase price. *Held*, that the agreement, not being in writing and signed by the parties, was void under the statute of frauds. Rev. St. 1890, § 3416 (Ann. St. 1906, p. 1949).

[Ed. Note.—For other cases, see *Frauds*, Statute of, Cent. Dig. § 100; Dec. Dig. § 63.*]

3. VENDOR AND PURCHASER (§ 266*)—CONVEYANCE OF LAND—ORAL AGREEMENT—VENDOR'S LIEN.

Where the grantee of land orally reconveys it to his grantor, the consideration being the unpaid purchase price, and the agreement is void because not in writing, the original grantor notwithstanding the oral agreement to reconvey retains a lien on the land and its proceeds for the amount of said purchase money unpaid.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 266.*]

4. EVIDENCE (§ 419*) — PAROL EVIDENCE — DEEDS—RECITAL OF RECEIPT OF CONSIDERATION.

A recital in a deed that the purchase price had been paid is as between the parties in the nature of a receipt and subject to explanation.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1912; Dec. Dig. § 419.*]

5. ESTOPPEL (§ 25*)—RECITALS IN CONVEYANCE—PAYMENT OF CONSIDERATION.

Defendant's son was the owner in fee of 26 acres of land. He conveyed nine acres to defendant, reciting in the deed a consideration of \$1,000 paid in full. The land was not paid for, and subsequently it was orally agreed that defendant should reconvey the land, and thereafter the land was treated as belonging to the son. The land was later sold by an agent for part cash and the balance in a draft. Plaintiff, a creditor of defendant, garnished the draft held by the agent. *Held*, that the defendant's son was not estopped to deny the truth of the receipt in the deed, as to plaintiff, since plaintiff, not having paid out anything on the strength of the recital, was not a purchaser, and was not prejudiced thereby.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. § 61; Dec. Dig. § 25.*]

6. GARNISHMENT (§ 206*)—JURISDICTION OF GARNISHEE—NOTICE TO CLAIMANT—FAILURE OF.

Rev. St. 1899, § 3459 (Ann. St. 1900, p. 1985), provides that if the garnishee disclose in his answer, and declare his belief, that the debt owing by him to defendant, or the supposed property in his hands, has been sold or assigned to a third person, and the plaintiff contests or disputes the existence, force, or validity of such sale or assignment, the court shall make an order upon the supposed vendee or assignee to appear at a designated time and sustain his claim to the property or debt. Defendant's son was the owner of 26 acres of land in fee. He conveyed 9 acres of the land to defendant. The land was later orally reconveyed to the son. Subsequently the land was sold by an agent, and the draft for the purchase price was garnished while in the agent's hands. The son was not notified nor made a party to the proceedings. *Held*, that the court had jurisdiction of the garnishee notwithstanding the failure to notify the son and to make him a party to the proceedings, since section 3459 is directory only, and the court had the right under the pleading to pronounce upon them in the son's absence, as neither party had demanded that he should be brought before the court.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. § 398; Dec. Dig. § 206.*]

7. GARNISHMENT (§ 52*) — POSSESSION OF AGENT AS POSSESSION OF PRINCIPAL—RULE NOT APPLICABLE.

The rule that the possession of the agent is the possession of the principal does not apply to garnishment proceedings, as the object there is to seize or detain the res, which is the subject-matter of the litigation.

[Ed. Note.—For other cases, see *Garnishment*, Cent. Dig. §§ 102, 104; Dec. Dig. § 52.*]

Appeal from Circuit Court, Grundy County; G. W. Wannamaker, Judge.

Action by Frank B. Shelton, as administrator of David B. Shelton, deceased, against Vincent Cooksey, defendant, and Mary A. Cooksey, as administrator of the estate of John S. Cooksey, deceased, garnishee. Judgment for plaintiff, and the garnishee appeals. Reversed and remanded.

Hall & Hall, for appellant. Harber & Knight, for respondent.

BROADBUSH, P. J. The controversy grows out of a garnishment proceeding. The plaintiff instituted suit in the circuit court of Grundy county and sued out attachment in aid thereof, by means of which a certain fund in the hands of John S. Cooksey was garnished. The garnishee answered that the fund did not belong to the defendant Vincent Cooksey, but that it was the property of George Cooksey. The cause was tried on the issues raised by the answer of the garnishee; the alleged claimant George Cooksey not having been made a party to the cause. For a long time prior to this suit defendant, Vincent Cooksey, was a resident of Mercer county, engaged in farming and dealing in stock. The plaintiff became surety for him to the extent of several thousand dollars, of which amount plaintiff was compelled as such surety to pay about \$600. Defendant then removed to Grundy county, and afterwards to the state of Arkansas, where the claimant, George, now resides. At the time George Cooksey removed from Missouri, where he had previously resided, to Arkansas in company with his father, the defendant, Vincent, he was the owner in fee of 26 acres of land in Grundy county. On August 19, 1903, he conveyed 9 acres of this tract to the defendant, in the deed to which there is a recited consideration of \$1,000 paid in full. The testimony went to show that it was worth about \$1,300. There was testimony given to show that the purchase price for the land had not been paid, and it is claimed that a short time after the date of said deed defendant proposed to reconvey the land to George in payment of the unpaid purchase price; that George agreed to the proposition, and thereafter, according to the evidence of both parties, the land was treated as belonging to George. For the purpose of sustaining his theory of the case, the garnishee introduced evidence tending to prove that, after his financial failure in

*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

Mercer county, the defendant had not been able to retrieve his losses, and therefore he could not have, and did not, pay the purchase price of the land. The defendant moved back to Missouri, and took charge of the land, rented it, received the money, paid the taxes, and it is alleged sent the rent mostly to George; but it was shown in the evidence that he informed the tenant that he was the owner of the land, and he made witness by the name of Lickey his agent to sell the entire 26 acres, but told him only 9 acres of it was in his name. The garnishee contracted a sale of the entire 26 acres to a Mr. Robinson for the agreed sum of \$1,800, and defendant and George and wife joined in a deed to the purchaser, who paid \$100 at the time the contract was entered into, and the remainder in a draft to the garnishee, which was garnisheed in his hands under the attachment herein. Other matters arising on the trial will be noticed hereafter. The finding and judgment were for the plaintiff, from which the garnishee appealed.

We will dispose of the first contention of the appellant, that the court erred in excluding certain evidence offered by him, by the statement generally that much of it was wholly incompetent and the residue immaterial. We do not understand that it is our duty to take up such matters in detail in order to show their competency or incompetency, their relevancy, or irrelevancy. The case was tried by the court upon the theory contained in instruction 1, given at the instance of plaintiff, which is as follows: "By the deed read in evidence of August 19, 1903, from George to Vincent Cooksey, for the nine acres mentioned by the witness, George Cooksey acknowledged to have received the full purchase price of said lands. And, even though the same may not in fact have been paid, and even though months thereafter the said Vincent may have verbally agreed to convey said lands to said George, or agreed that, when it was sold, the said George might receive payment of said purchase price, yet this did not operate to transfer any right, title, or interest in said premises to said George, or give him in this proceeding any rights as against plaintiff to the purchase price paid therefor by witness (Cooksey) Robinson, nor did it give to the garnishee, John S. Cooksey, any right whatever to hold the proceeds of said sale of said nine acres as against the plaintiff and proceedings of garnishment had herein. But said George having conveyed said premises to said Vincent, and there never having been any reconveyance thereof, the said Vincent had the right to sell and convey the same, and the proceeds thereof under the circumstances aforesaid were subject to attachment and garnishment herein; and, if the jury find from the evidence that after the proceeds of said sale of nine acres to said Robinson came into the hands of said John S. Cooksey, garnishee herein, he, the said John S. Cooksey, was

garnisheed, and this prior to remitting said proceeds to the said George Cooksey, the jury will find for the plaintiff as against said garnishee, and determine the value of the interest of the said Vincent Cooksey in said draft as in other instruction herein specified." The instruction was in the nature of a direction to the jury to find for the plaintiff. The question is therefore one of law; as the instruction is predicated upon the theory that, the title being in defendant, his agreement to reconvey the land to George Cooksey, the consideration being the unpaid purchase price, the agreement not being in writing and signed by the parties, is void under the statute. Section 3416, Rev. St. 1890 (Ann. St. 1906, p. 1949). The theory of the court was right in so far as such verbal agreement was concerned, but it is insisted, and correctly, that, notwithstanding said oral agreement of Vincent Cooksey to reconvey the land to George, the latter had a lien on the land and its proceeds for the amount of said purchase money unpaid; and such lien was enforceable both in law and equity. *Johnson v. Burks*, 103 Mo. App. 221, 77 S. W. 133. We do not understand that respondent seriously takes issue with appellant on that question, but denies it has any application by reason of the recitals in the deed that the purchase price of land had been paid. As between the parties, such a recital was, in effect, in the nature of a receipt, subject to explanation. *Wheeler v. Land Co.*, 193 Mo. 279, 91 S. W. 1050.

But it is insisted that such recitals acted upon by third parties in good faith without knowledge of the facts and to their prejudice operates as an estoppel, and parties making such recitals are precluded from denying their purport. It is said: "Where the vendor of property gives to the purchaser's agent, through whom the purchase was made, a receipt in full for the purchase money, and the purchaser, in good faith, relying on the truth and validity of the receipt, pay the amount to the agent, the vendor is estopped as between him and the purchaser from denying the truth of the receipt. * * *"
Miller v. Sullivan & Co., 26 Ohio St. 639. And a like holding is announced in *Bunton v. Palm (Tex.)* 9 S. W. 182; *Atkins v. Payne*, 190 Pa. 5, 42 Atl. 378; *San Luis Obispo County v. Pettit*, 100 Cal. 442, 34 Pac. 1082; *Turner v. Flinn*, 72 Ala. 532. While the law as thus stated has our unqualified approval, we are of the opinion that plaintiff has not brought himself within the scope of its protection. He was not a purchaser. He paid out nothing on the strength of the recital. It is true he has incurred costs in his effort to subject the proceeds of the sale of the land to the payment of his judgment; but that fact alone will not suffice. He has not been prejudiced in the sense meant by the use of that word. The instruction should not have been given.

The garnishee denies that the court had

jurisdiction of the garnishee because of failure to give notice and make the claimant, George Cooksey, a party. Section 3459, Rev. St. 1899 (Ann. St. 1906, p. 1985), provides: "If the garnishee disclose in his answer, and declare his belief, that the debt owing by him to the defendant, or the supposed property of the defendant in his hands, has been sold or assigned to a third person, and the plaintiff contests or disputes the existence, force or validity of such sale or assignment, the court shall make an order upon the supposed vendee or assignee to appear at a designated time and sustain his claim to the property or debt." This statute is held to be directory only, and the court had "the right under the pleadings to pronounce upon them, in the absence of the claimant, as neither party had demanded that he should be brought before the court." *McKittrick v. Clemens*, 52 Mo., loc. cit. 163; *Swartz v. Riner*, 66 Mo. App. 476; *Lindsay v. Brooks*, 82 Mo. App. 801.

There is a further contention by appellant that, as the garnishee was the claimant's agent, his possession at the time of the service of the garnishment was the possession of such claimant; and that, therefore, the judgment against him was wholly unauthorized. It is true that possession of the agent as a fiction of law is often treated as the possession of the principal, but this rule does not apply in cases like this, where the object is to seize or detain the res which is the subject-matter of litigation.

There was only one issue in the case, viz.: Was Vincent Cooksey indebted to George Cooksey for the purchase price of the land at the time of service of garnishment? And the case should be tried on that issue alone.

Reversed and remanded. All concur.

MURPHY v. ST. JOSEPH RY., LIGHT, HEAT & POWER CO.

(Kansas City Court of Appeals. Missouri. Nov. 1, 1909.)

STREET RAILROADS (§ 103*)—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE—HUMANITARIAN DOCTRINE.

Where the motorman saw, or could have seen, the peril of a person crossing the track in time to have avoided the injury, the company is liable, notwithstanding the negligence of the person injured.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. § 103.*]

Appeal from Circuit Court, Buchanan County; L. J. Eastin, Judge.

Action by Mary F. Murphy against the St. Joseph Railway, Light, Heat & Power Company. From a judgment for defendant, plaintiff appeals. Reversed.

Mytton & Parkinson, for appellant. R. A. Brown, for respondent.

ELLISON, J. Plaintiff seeks damages from defendant, a street railway company in St. Joseph, for personal injuries inflicted by one of its cars. The trial court sustained a demurrer to the evidence given for plaintiff.

The evidence in plaintiff's behalf tended to prove that she was a woman 68 years of age and was returning to her home with some provisions she had purchased from a nearby grocery. She was wearing a sunbonnet, and in consequence her vision to either side was greatly obstructed. When she came on the street near the place where she was injured, a car had just passed going south on the west track and stopped on the south side of the street. The car was standing there when plaintiff left the sidewalk to cross the street in which were the defendant's tracks. She did not look for a northbound car on the east track, but continued towards the tracks. She crossed the west track, and had just put her foot on the west rail of the east track, when she was struck by the northbound car. She walked slowly, and gave no evidence of knowledge of approaching danger. It is conceded she was guilty of negligence in not looking out for the car and avoiding a collision; but it is claimed that defendant's motorman saw her dangerous position, or should have seen it, in time to have stopped the car, and that therefore she made out a case within the humanitarian rule. We think the claim well made. There is no reasonable ground upon which to distinguish the case from that of *Waddell v. Ry. Co.*, 213 Mo. 8, 111 S. W. 542.

Defendant in argument endeavored to show that plaintiff's action in stopping a moment between the tracks was evidence to the motorman that she would not get into danger; but in point of fact there was evidence which tended to prove she was then in danger, unless the car stopped. If the testimony in plaintiff's behalf is to be accepted as true, the motorman should have seen her dangerous position, and could have stopped the car in time to have avoided striking her.

A case was made for the opinion of a jury, and the judgment is reversed, and the cause remanded. All concur.

CLAVER et al. v. WOODMEN OF THE WORLD.

(Kansas City Court of Appeals. Missouri. Nov. 1, 1909.)

1. APPEAL AND ERROR (§ 635*)—RECORD—DEFACTS—ABSTRACT.

An appeal will not be dismissed because the abstract of record fails to show the filing of a bill of exceptions, as the cause is still before the court on the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2776-2778; Dec. Dig. § 635.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. APPEAL AND ERROR (§ 635*)—RECORD—FACTS—ABSTRACT.

The failure of an abstract of the record to show the taking of an appeal justifies a dismissal of the appeal for want of jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2776-2782; Dec. Dig. § 635.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by Ethel N. Claver and another against the Woodmen of the World. From a judgment for plaintiffs, defendant appeals. Appeal dismissed.

Casteel & Bennett, for appellant. Brewster, Farrell & Mayer, for respondents.

PER CURIAM. This suit is founded on a death benefit certificate issued by defendant, a fraternal beneficiary society. Verdict and judgment were for plaintiff, and defendant appealed. After the submission of the cause, respondent filed a motion to dismiss the appeal on the grounds that the abstract of record filed by appellant fails to show the filing of an affidavit for appeal, motion for a new trial, motion in arrest, or bill of exceptions, and fails to show any ruling on motions for a new trial or in arrest, or that time was granted in which to file bill of exceptions.

We find the abstract to be deficient as charged in this motion. Respondent in answer to the motion confesses the insufficiency, and asks leave to file a supplemental abstract.

The failure of the appellant to show in his abstract the record entries relating to the bill of exceptions would not justify us in dismissing the appeal, since the cause would still be before us on the record proper; but the failure of the abstract to show the taking of an appeal is fatal to our jurisdiction over the cause and compels us to sustain the motion to dismiss. We do not think the appellant has disclosed a good reason for leave to file a supplemental abstract (*Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638; *Redd v. Railroad*, 122 Mo. App. 93, 98 S. W. 89), and the application for such leave is denied.

The order of submission is set aside, and the appeal dismissed. All concur.

DAWSON v. QUINOY, O. & K. C. R. CO.

(Kansas City Court of Appeals. Missouri. Nov. 1, 1909.)

1. CARRIERS (§ 229*) — CARRIAGE OF LIVE STOCK — NEGLIGENT DELAY — MEASURE OF DAMAGES.

A shipper of cattle is entitled to recover compensation for the actual loss he suffers on account of the negligent delay of the carrier, which loss may consist of depreciation in market value, of loss in weight, and of loss on account of the stale appearance of the animals.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 963, 964; Dec. Dig. § 229.*]

2. CARRIERS (§ 228*) — CARRIAGE OF LIVE STOCK—NEGLIGENT DELAY—DAMAGES—EVIDENCE.

In an action against a carrier for negligent delay in shipping cattle, a finding for plaintiff for the loss occasioned by the decline in the market between the time his cattle should have arrived and did arrive could not be sustained, where plaintiff did not show at what price he sold the cattle, but only proved the highest market price on the two dates, as neither the court or jury have the right to indulge in speculation or inference to supply an indispensable fact in the chain of proof.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.*]

3. APPEAL AND ERROR (§ 909*)—PRESUMPTIONS—CARRIAGE OF LIVE STOCK—NEGLIGENT DELAY—ASSUMPTION AS TO PRICE OBTAINED.

Nor could it be assumed on appeal that he sold for the highest market price on the day of the sale, as the court cannot say as a matter of law that he did not obtain a higher price.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. § 909.*]

4. CARRIERS (§ 228*) — CARRIAGE OF LIVE STOCK—NEGLIGENT DELAY—DAMAGES—EVIDENCE.

Nor could plaintiff recover for loss occasioned by the stale appearance of the cattle caused by such negligent delay, where it was not shown that the cattle were rendered stale by the delay, or that plaintiff on that account was compelled to sell them for a less price than otherwise should have been received.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 960; Dec. Dig. § 228.*]

Appeal from Circuit Court, Clinton County; A. D. Burnes, Judge.

Action by J. Lee Dawson against the Quincy, Omaha & Kansas City Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

H. T. Herndon and J. G. Trimble, for appellant. Pross T. Cross, for respondent.

JOHNSON, J. Plaintiff shipped two car loads of fat cattle over defendant's railroad from Trimble, Mo., to the Union stockyards at Chicago. The shipment left Trimble in the afternoon of October 5, 1903, and did not arrive at its destination until the afternoon of October 7th—too late for the market of that day. Plaintiff alleges that in the ordinary course of transportation the cattle should have reached the stockyards in time for sale on the market of October 7th, and that the delay was caused by the negligence of defendant. The evidence introduced by plaintiff tends to prove these allegations. A trial to a jury resulted in a verdict and judgment for plaintiff in the sum of \$200.67, and the cause is here on the appeal of defendant.

No point is made that the petition does not state a cause of action, or that the evidence of plaintiff is not sufficient to take the case to the jury on the issue of negligence; but it is argued by defendant that the evidence of plaintiff fails completely to show that plaintiff suffered any damage on ac-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

count of the delay, and therefore that he should not have been permitted to recover more than nominal damages. The petition alleges that plaintiff was damaged \$74.67 on account of depreciation in the market value of cattle, \$76.22 on account of loss in weight suffered by the cattle from the negligent delay, \$49.78 on account of the stale condition and appearance of the cattle caused by the delay, and \$5 on account of extra feed. The last item appears to have been abandoned at the trial. On the measure of damages the court, at the request of plaintiff, instructed the jury "that, if they find for the plaintiff, they will assess his damages at such sum as they may believe from the evidence he has sustained, by reason of the negligent delay in shipping, as follows: First. For any loss to plaintiff occasioned by any decline in the market at Chicago, if any, between the time plaintiff's cattle should have arrived and the time they did arrive, provided you find from the evidence said cattle did not arrive within a reasonable time, not to exceed the amount sued for on that account, \$74.67. Second. For any shrink in the weight of said cattle, over and above the ordinary and usual shrinkage of like cattle, from being shipped from the said station of Quincy to Chicago, if any, over the road of the Chicago, Burlington & Quincy Railway, not to exceed the sum of \$76.22. Third. For any loss to plaintiff occasioned by the stale appearance of said cattle, if any, caused by such negligent delay, if any, on the part of and while on the road of Chicago, Burlington & Quincy Railway Company in shipping, not to exceed the sum of \$49.78. The whole amount of your verdict not to exceed the sum of \$200.67."

It will be observed that the verdict of the jury was for the full amount of damages claimed by plaintiff. The rule for the measurement of damages in such cases is as stated in this instruction. The shipper is entitled to recover compensation for the actual loss he suffers on account of the negligent delay of the carrier. Such loss may consist of depreciation in market value, of loss in weight, and of loss on account of the stale appearance of the animals. But the trouble with the plaintiff's case is that he has failed to adduce any evidence to support the first and third of the items claimed. Relative to the first, he testified: "Q. Mr. Daw-

son, you say you sold your cattle on the 8th? A. The 7th. No; I sold them on the 8th: yes, sir. Q. State whether or not you are acquainted with the best market prices for cattle of the kind and character yours was in the Chicago market on the 8th day of October, 1903, the day on which you sold them? A. Well, there was a decline in the market. Q. I asked you if you were acquainted with the best price on the day you sold them? A. \$5.15. Q. You are acquainted with the prices? A. Yes, sir. Q. What was it? A. \$5.15. Q. Were you acquainted with the best market price for cattle of this kind and class on the 7th, the day before you sold them? A. Yes, sir. Q. What was it then? A. \$5.30." But he does not state, nor does the record show, at what price he sold his cattle. We are asked by counsel for plaintiff to assume that he sold them at the highest market price on the day of the sale. We cannot do this for the reason that we cannot say as a matter of law that he did not obtain a higher price. It devolved on him to prove his damages, and neither court nor jury have the right to indulge in speculation or inference to supply an indispensable fact in the chain of proof; and, further, should we assume that plaintiff sold at the highest market price for the class of cattle to which his belonged, then on what theory can the award of damages for the stale appearance of the animals be sustained? If the highest market value was realized, it is obvious no loss was incurred on account of their stale appearance, and that part of the verdict clearly was erroneous.

With reference to the third item plaintiff testified: "Q. Are you acquainted with the effect it had on cattle, if any, such as these were, to keep them in cars for a long period of time and hold them over on the market? A. Yes, sir; it gives them a stale appearance. Their hair looks bad, and it makes a difference in price." It is not shown that the cattle in question were rendered stale by the delay, or that plaintiff on such account was compelled to sell them for a less price than otherwise should have been received.

Thus it appears that with reference to the first and third items of damage the verdict, being wholly unsustained by evidence, is the mere product of conjecture, and it follows that the judgment must be reversed, and the cause remanded. All concur.

KEINSTRA v. KING.

(St. Louis Court of Appeals, Missouri. Nov. 17, 1909.)

LANDLORD AND TENANT (§ 207*)—RENT—LIABILITY.

An owner leased premises to individuals, who formed a corporation, and assigned the lease to the corporation. The property of the corporation was sold by a receiver, and a new corporation was organized, and was recognized as tenant. The president of the new corporation paid the rent by his individual check. The new corporation, while the president so paid the rent, carried on its business on the premises. *Held*, that the new corporation occupied the premises, and was the tenant, and the president was not liable for future rent, in the absence of evidence that he used the corporation which he controlled to evade personal liability.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 818; Dec. Dig. § 207.*]

Appeal from St. Louis Circuit Court; Chas. Claffin Allen, Judge.

Action by Anton Keinstra against John C. King. From a judgment for plaintiff, defendant appeals. Reversed.

This action was instituted before a justice of the peace, whence it proceeded to the circuit court. It is an action for three months' rent, to wit, from October 1, 1906, to January 1, 1907, at \$8.33½ a month for part of lot No. 1 of Ashland, a subdivision of part of the January farm in the city of Ferguson, county of St. Louis, and state of Missouri, being the same property described in the lease of said Keinstra to George W. Downs and others, dated June 1, 1895, so the complaint says. The written lease shows plaintiff had let the premises to George W. Downs, John M. Ashbrook, and Olive P. Downs on June 1, 1895, for a term commencing that day and to end June 1, 1912, at an annual rental of \$100, payable in monthly installments of \$8.33½. Those lessees formed a corporation known as the "Olive Branch Electric Company," in which the lessees owned the stock, and with the consent of plaintiff, the lessor, they assigned the lease to said company. That company erected an electric plant on the ground, and operated the plant until some time in 1898, we understand, when a receiver was appointed for it, and afterwards the property was sold by the receiver under an order of court and purchased by Ida A. King, defendant's wife. She conveyed the property to the King Electric Company, a corporation, and that corporation executed a deed of trust to her to secure the purchase money of \$10,000. The King Electric Company, of which defendant was president, operated the plant until 1901, or about three years, when it established a new plant at De Hodiamont and Bartmer avenues in St. Louis. The machinery of the plant on the leased property was moved out, but the buildings, a shed, and some poles were left

on the leased property. While the King Electric Company was in possession, some time after it abandoned possession and up to the maturity of the installment in suit, King, the president, paid the rent with his own checks most of the time, but he testified he paid out of the funds of the company, as he did other debts of the company. In every instance, save one, plaintiff gave receipts for the rent to King. Mrs. King paid the rent for a while with her personal checks plaintiff testified. King refused to pay the rent in controversy, saying he had nothing more to do with the property; that he had sold out his interest. It does not appear the lease, which had previously been assigned to the Olive Branch Electric Company, had ever been assigned to Mrs. King or the King Electric Company. The King Electric Company is still in existence operating a plant at De Hodiamont. Defendant and his wife each owned 49 shares of the King Electric stock and their son owned two shares. After the death of Mrs. King defendant owned 98 shares, and, the son having died also, two men named Herman and Grossman each owned a share. At the request of defendant, the court gave the following declarations of law: "The court declares the law to be that the defendant is not liable for the rent here sued for under or by reason of the lease read in evidence. The court declares the law to be that if the court finds from the evidence that the only acts of control which the defendant exercised over the premises involved in this suit were as president of the King Electric Company, and that said company was a corporation, then plaintiff is not entitled to recover, and the finding must be in favor of the defendant. The court instructs that the mere fact that Mr. King's personal check was used in paying the rent of the premises in question does not entitle plaintiff to recover in this suit. The court declares the law to be that the burden is upon the plaintiff to show by a preponderance of the evidence that at the time of the institution of this suit the relation of landlord and tenant existed between plaintiff and defendant as to the premises involved in this suit. The court declares the law to be that if the court finds from the evidence that when this suit was instituted the King Electric Company was in possession of the premises here in question, and that the rent of said premises was paid by defendant King as president of said company or in its behalf, then plaintiff cannot recover in this action. The court declares the law to be that, if the court finds from the evidence that the defendant John C. King was never individually or by agent in possession of the premises here in question, then the plaintiff is not entitled to recover, and the finding must be in favor of the defendant." No declarations were given at plaintiff's request, but the court found a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

verdict and judgment for plaintiff, and defendant appealed.

Kinealy & Kinealy, for appellant. Jas. W. Settle, for respondent.

GOODE, J. (after stating the facts as above). The way the court declared the law leaves but one ground on which defendant can be held personally liable for the rent; i. e., that the relation of landlord and tenant had become established between plaintiff and defendant by the latter's use and occupation of the premises. The court declared defendant was not liable by virtue of the written lease, or if the only acts of control he exercised over the premises were as president of the company; that the relation of landlord and tenant between him and plaintiff must have existed to lay him liable; that if the King Electric Company was in possession of the premises and defendant paid rent as president of said company, plaintiff could not recover, and, if defendant never was as an individual, or by agent, in possession of the premises, plaintiff could not recover. We can conceive of no possible theory under which defendant can be made liable in view of those declarations, unless he was found to have been personally in the use and occupation of the premises and the tenant of plaintiff. *Cohen v. Kyler*, 27 Mo. 123; *Hynes v. Ecker*, 34 Mo. App. 650, 658. The difficulty with this theory is there is no testimony to show defendant was ever as an individual in occupation of the premises or tenant of plaintiff. Plaintiff's own testimony shows he let to other individuals, permitted them to assign the lease to the Olive Branch Company, and, after that company had sold out under a receiver, and Mrs. King had purchased, and a new company, the King Electric, had been organized, recognized the latter as tenant and in possession, and had accepted rent first from Mrs. King and then from King. It is true he testified they paid by personal checks, but we regard this as an immaterial circumstance; for he swore the King Electric Company carried on business in the plant for five or six years, then moved the machinery away, and left the buildings there. Plainly under all the testimony it was the King Electric Company, and not defendant, who used and occupied the premises, and was the tenant of plaintiff. The point has not been made that defendant is liable for the rent as owner of practically the entire stock of the corporation, and, as far as the evidence shows, there were at least two other stockholders when this rent accrued who were not even members of defendant's family. Sometimes when an individual attempts to use a corporation which he substantially owns and controls as a cloak to evade personal liability, a court will disregard the corporate existence. *Cook, Corporations* (6th

Ed.) §§ 6, 663. Nothing had been advanced to show this case ought to be determined on that proposition.

The judgment is reversed. All concur.

WARNER et al. v. MICHEL et al.
(St. Louis Court of Appeals, Missouri. Nov. 2, 1909.)

1. TRIAL (§ 156*)—OVERRULING DEMURRER TO EVIDENCE.

Overruling a demurrer to plaintiff's evidence means only that as a matter of law there is some evidence to be weighed; so that there is no incongruity in doing so, and then finding for defendant on an equity count, and setting aside the verdict for plaintiff on a count at law, and granting a new trial thereon, this meaning that the evidence, when weighed by the court, was unsatisfactory.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 354; Dec. Dig. § 156.*]

2. NEW TRIAL (§ 72*)—WEIGHT OF EVIDENCE.

The evidence being conflicting, the trial court, considering the verdict contrary to the weight of evidence, could set it aside, and grant a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 146; Dec. Dig. § 72.*]

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Action by Franceska Warner and another against Frank H. Michel and others. From an adverse judgment and orders, plaintiffs appeal. Affirmed.

The petition in this case contains two counts, the first asking the cancellation of the record of a certain deed of trust given by plaintiffs, it being averred that the debt secured thereby had been paid and discharged in full, and that the plaintiffs had tendered the necessary fee fixed by law to entitle them to have the satisfaction of the deed of trust indorsed on the record thereof. In the second count, averring the payment of the debt secured by the deed of trust in full and the tender of the legal fee for the release thereof on the margin of the record, along with a demand that the release be indorsed, and averring the refusal of the defendants to release the deed of trust of record, plaintiffs demand the statutory penalty of 10 per cent. of the debt as damages for failure so to do. The answer admitted the execution of the notes and deed of trust, but denied all other allegations in the petition. The petition embracing legal and equitable causes of action in separate counts, by stipulation of parties and consent of the court both counts were tried at one and the same time, a jury being impaneled to try the issue involved in the second count of the petition, the court hearing the evidence as chancellor, so far as it related to the first count. At the conclusion of the trial, the court found, in favor of defendants on the first count, thus holding that the plaintiffs were not entitled to have the deed of trust released of record.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On the second count, however, the jury returned a verdict in favor of plaintiffs for \$150 damages for the defendants' failure to release the deed of trust of record. Both parties filed motions for new trial, and the court sustained the defendants' motion for a new trial of the second count, but overruled the plaintiffs' motion for a new trial of the first count, whereupon plaintiffs duly perfected an appeal to this court. It is not necessary to go over the testimony in this case any further than to state that it appears that, subsequent to the giving of the deed of trust which secured a note given by plaintiffs for \$1,500, one of the plaintiffs, John Warner, the husband of the other, went to the office of Hammell & Karleskind, real estate agents, who are two of the defendants here, and, talking about the debt, was told that he and his wife owed the firm \$65 for commissions in placing this loan, which it seems was a renewal of a former loan on the same property. Whereupon John Warner gave his note for the \$65. The secured loan not being paid when due, and plaintiffs having been notified that the holder of the note desired payment, the property was advertised for sale; the note not having been paid. Before the advertised sale took place, Mrs. Warner went to the office of Hammell & Karleskind and was shown the account, which covered the note, interest, costs of advertising, and a fee of \$5 for drawing up the advertisement. She was also asked what she was going to do about the \$65 note, which was then shown to her. It appears from the evidence that this was the first time Mrs. Warner knew of this note. She became angry when it was shown to her, and tore it up. One of the defendants picked up the pieces and fastened them together, and taking up the matter with Mrs. Warner, according to her testimony, the firm agreed to accept \$25 in payment of the note, which she agreed to pay, but according to the testimony of the defendants she agreed to pay them \$40 if they would give her two or three weeks to pay the difference between the money which she had brought with her and the amount which they claimed. Thereupon the note for \$65 was turned over to Mrs. Warner or her husband, and she paid defendants \$1,550, which was all the money she had with her. According to the statement which was given her at the time there was due on the note \$1,500 principal, \$37.50 interest, \$26.86 for advertising the sale, and a fee of \$5 for drawing up notice of sale, a total of \$1,569.30, and also \$40 on the note of John Warner, her husband, a total of both accounts of \$1,609.36. According to the defendants, there was still due them \$59.36 on the whole transaction, or \$19.36 on account of the deed of trust and the legal costs connected with the advertised sale under that. It is claimed by the plaintiffs that the \$1,550 which was paid was a settlement and was received in full in payment of the whole transaction, and that

one of the partners had told the attorney for the Warners that it was all a mistake to claim anything from them, that they had paid up in full. On the other hand, the defendants claim that the \$1,550 was paid on account merely, and that there was still due them on the deed of trust and the legal costs connected with it \$19.36, or on the whole transaction between them and the Warners \$59.36. They also gave evidence to the effect that the partner who had said the matter was settled was mistaken, and that the day after he had made that statement to plaintiffs' attorney over the telephone another partner had called on that attorney and explained the mistake. The court as chancellor found for defendants, while the jury found for plaintiffs. Thereupon the court, on motion of defendants, set aside the finding of the jury and awarded a new trial as before stated. The record contains the recital that the court sustained defendants' motion for new trial, "because the verdict is against the evidence and against the weight of evidence, and against the law under the evidence." In the record proper it is set out that the motion was overruled, obviously a clerical error, as other parts of the record and briefs and argument of counsel show that defendants' motion for a new trial was sustained "for the reasons set out in the first point of defendants' motion."

L. P. Crigler and D. Murphy, for appellants. J. L. Hornsby, for respondents.

REYNOLDS, P. J. (after stating the facts as above). Argument is made by the counsel for the appellants that, as the court had overruled demurrers interposed to the evidence at the close of plaintiffs' case, as well as at the close of the whole case, that its action was tantamount to holding that the plaintiff had made out its case. That does not follow. It has been held by our Supreme Court that: "Strictly speaking, sustaining a demurrer to the evidence in an equity case means the same that it means in a law case. It means that there is no evidence tending to sustain the plaintiffs' case, and therefore none for the trier of fact to weigh. In a law case the court might with propriety overrule a demurrer to the plaintiffs' evidence and the jury might with equal propriety find for the defendant; and the same is true in an equity case. The court might overrule the demurrer to the plaintiffs' evidence, and yet, when the case is submitted on the evidence, find for the defendant. In each case it means that as a matter of law there is some evidence to be weighed, but as a matter of fact the evidence when weighed by the trier of fact is not satisfactory." *Anthony v. Kennard Building Co.*, 188 Mo. 704, loc. cit. 718, 87 S. W. 921, 924. There is no incongruity, therefore, in the action of the court in at first overruling the demurrer to the evidence taken on each count and subsequently finding for the defendants, and

in refusing to take the case from the jury on the last count of the petition, and then setting that verdict aside. As will be noticed from the statement of the facts, which we have given very briefly and which we do not think it serviceable to extend, we find no error in the action of the trial court in awarding a new trial. The evidence was conflicting, and it was for the trial judge, if he considered the verdict contrary to the weight of the evidence, to set it aside.

Its judgment is affirmed, and the case remanded for further proceedings. All concur.

COOK et al. v. SPENCE et al.

(St. Louis Court of Appeals. Missouri. Nov. 2, 1909.)

1. COURTS (§ 17*)—JURISDICTION OF SUBJECT-MATTER.

A court of general jurisdiction is possessed of jurisdiction of the subject-matter if it has jurisdiction to hear and determine causes of the general class of the one under consideration.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 46; Dec. Dig. § 17.*]

2. APPEARANCE (§ 19*)—WHAT CONSTITUTES—ACQUISITION OF JURISDICTION.

Though the circuit court of B. county had no original jurisdiction in unlawful detainer touching lands in S. county, it yet had power to hear and determine the general class of actions of unlawful detainer, and, where the parties appeared in the circuit court of B. county on a change of venue, and proceeded to trial, the appearance of the parties gave the court jurisdiction over the person by consent, and the defendant thereby waived his right to object to the jurisdiction.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. § 79; Dec. Dig. § 19.*]

3. APPEAL AND ERROR (§ 1232*)—AFFIRMANCE OF JUDGMENT—EFFECT—APPEAL BOND.

Where a judgment was affirmed on appeal and determined to be valid, and the covenant of the sureties on the appeal bond was to pay a "valid" judgment, if such should be obtained against their principal, the judgment was within the covenant of the sureties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4753; Dec. Dig. § 1232.*]

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Action by Laura Cook and another against K. O. Spence and another. Judgment for plaintiffs, and defendant sureties appeal. Affirmed.

Wommack & Welborn, for appellants. N. A. Mozley and H. H. Larimore, for respondents.

NORTONI, J. This is a suit on an appeal bond. The plaintiffs recovered, and defendant sureties appeal. The principal in the bond abandoned the case after judgment against him in the circuit court, and the sureties only prosecute the appeal. The bond sued on was given upon the appeal of the case of Cook v. Penrod from a justice of the peace to the circuit court of Stoddard county. It

appears that Cook instituted an action of unlawful detainer against the defendant Penrod before a justice of the peace of Stoddard county. The plaintiff having prevailed in that action before the justice, the defendant, Penrod, perfected his appeal from the judgment of the justice to the circuit court. In connection with that appeal, the present defendants, Spence and Harper, executed the appeal bond now in suit as sureties for the defendant Penrod. Afterwards, Hon. Robert L. Wilson was selected as special judge to try the issues in the unlawful detainer case. It appears the case was tried before Judge Wilson, and he gave judgment for the defendant therein. From that judgment, an appeal was perfected to this court. This court reversed the judgment referred to and remanded the cause, as will appear by reference to Cook v. Penrod, 111 Mo. App. 128, 85 S. W. 676. Thereafter Judge Wilson, acting as special judge in the cause, declined to further proceed with the same; in other words, he disqualified himself, on his own motion, from sitting as special judge therein, and ordered the venue changed to the circuit court of Butler county. After the case of Cook v. Penrod for an unlawful detainer reached the circuit court of Butler county, and when it was upon the docket for trial, the defendant, Penrod, through his counsel, sought and obtained a continuance to a succeeding term of the Butler circuit court. Thereafter the cause came on for trial in Butler county, and the defendant, Penrod, together with his counsel, appeared and participated therein. The trial resulted in a judgment for the plaintiff for the possession of the real estate in controversy which was situate in Stoddard county, together with certain interests, damages, rents, and costs amounting in the aggregate to \$964. From that judgment the defendant, Penrod, appealed to this court, as will appear by reference to the case of Cook v. Penrod, 129 Mo. App. 377, 108 S. W. 583.

The principal argument advanced in this court for a reversal of the judgment on that appeal was to the effect that the circuit court of Butler county was without jurisdiction to proceed and give judgment in the cause referred to, for the reason that Hon. R. L. Wilson, the special judge, was without authority under our statutes to order a change of venue from the circuit court of Stoddard county on his own motion upon feeling himself disqualified because of interest, etc. On that appeal this court stated the question for decision, and expressed its views thereon in the following language: "The only point in the brief which need be adverted to as involving a question not previously decided is the contention that, as Hon. R. L. Wilson had disqualified himself to sit as special judge on account of his interest in the

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case, he had no authority to change the venue to Cape Girardeau in the first instance and Butler county in the second. Whatever merit there might have been in this position, if properly taken and held, the point was undoubtedly waived by the appearance of Penrod in the circuit court of Butler county and his contest of the issues there. Before he raised any objection to the jurisdiction of said court, he had been granted one continuance, and subsequently was granted another, and afterwards participated in the trial. Neither did he make any objection to Judge Wilson's ordering the venue changed to Butler county. Hence it follows he waived the point he now makes by not raising it at the time in the Stoddard circuit court. *Haxton v. Kansas City*, 190 Mo. 53, 88 S. W. 714." The judgment in the unlawful detainer case was affirmed by this court on the reasoning above, and the present plaintiff, who was plaintiff in that action, instituted the present suit on the appeal bond given by Penrod upon appealing the case from the justice of the peace of Stoddard county in the first instance.

Upon a trial of the issues in the present action on the appeal bond the circuit court gave judgment for the plaintiff. From that judgment the sureties on the appeal bond alone appeal, and insist that there has been no breach of their obligation for the reason the circuit court of Butler county was without jurisdiction to give a valid judgment against Penrod, the principal in the bond in the unlawful detainer suit of *Cook v. Penrod*, above referred to. Quoting from appellant's brief, they say: "The defense below, and the one to be urged here, is that the circuit court of Butler county did not have jurisdiction to render a judgment in the principal action which would be binding or affect these defendants as sureties on the appeal bond of *W. R. Penrod*. It may be simply stated that if the circuit court of Butler county had jurisdiction and authority under the law to render the judgment, which it did render, and thereby make these defendants liable as sureties on said appeal bond to pay said judgment, or any part thereof, then the judgment of the circuit court in this case is right, but, if the Butler circuit court did not have jurisdiction to render said judgment, then the judgment in this case is wrong and should be reversed." This being a suit on the appeal bond, it is important to examine the condition of that obligation. The bond referred to is in the penal sum of \$500, and conditioned as follows: "Now, if the said William Richard Penrod shall prosecute his appeal with effect and without delay, neither commit nor suffer to be committed any waste or damage on the premises whereof restitution is adjudged, and shall pay all rents and profits, damages and costs that may be adjudged against him, and shall otherwise abide the judgment of the circuit court in said cause, then this recognition to be void"—

and, of course, otherwise the bond shall remain in full force and effect.

Now it appears from the condition of the bond above quoted that the present defendants as sureties covenanted to pay all rents and profits, damages, and costs that might be adjudged against the defendant, Penrod, in the unlawful detainer action. From an inspection of the record we ascertain that a court of competent jurisdiction—that is, the circuit court of Butler county—entered a judgment against the principal in the bond, Penrod, for the sum of \$904, damages, rents, interest, and cost in that proceeding, and that none of this amount has ever been paid by him. That judgment when attacked in a direct proceeding by appeal was affirmed in this court, as will appear by reference to *Cook v. Penrod*, 129 Mo. App. 377, 108 S. W. 583, and the identical argument now advanced against the jurisdiction of the Butler circuit court therein was rejected. It is very true that under our statutes the circuit court of Stoddard county alone was possessed in the first instance of jurisdiction of the appeal from a justice of the peace in an unlawful detainer action concerning land situate in that county. However this may be, the circuit court of Butler county is a court of general jurisdiction, and was possessed of jurisdiction over the subject-matter of the action after it became lodged there. The doctrine in this state is that a court of general jurisdiction is possessed of jurisdiction of the subject-matter if it has jurisdiction to hear and determine causes of the general class of the one under consideration. Although the circuit court of Butler county had no original jurisdiction in the first instance pertaining to the controversy in unlawful detainer touching lands situate in Stoddard county, it nevertheless had jurisdiction of the general class of such actions and power to hear and determine them when presented. *Posthuma v. Ghiselin*, 97 Mo. 420, 10 S. W. 482; *Columbia Brewery Co. v. Forgey* (App.) 120 S. W. 625. We regard it wholly immaterial as to how the cause of *Cook v. Penrod* in unlawful detainer found its way into the circuit court of Butler county. It may be that Judge Wilson, the special judge, was without authority to order the venue changed from the circuit court of Stoddard county. This question we will not examine, and on it we express no opinion. It is sufficient to say that the circuit court of Butler county is possessed of power to hear and determine the general class of actions of unlawful detainer and that the parties appeared in that court and proceeded to trial of the issue in that cause. Of course, the appearance of the parties gives jurisdiction over the person by consent, and the defendant, Penrod, thereby waived his right to complain. The judgment in that case is valid as to him. *Cook v. Penrod*, 129 Mo. App. 377, 108 S. W. 583. However all of this may be, we regard

this matter as immaterial at this time when the judgment of the circuit court of Butler county in the case of *Cook v. Penrod* is subjected to a collateral attack as in the present proceeding. That judgment was affirmed when assailed by a direct attack on appeal, and it was determined to be a valid and binding judgment upon the parties. The covenant of these sureties on the appeal bond was to pay a valid judgment, if such should be obtained against Penrod, their principal, in the bond. It may be that the question as to the validity of that judgment is not res adjudicata in the present action in so far as these sureties are concerned who were not parties to that suit. Be this as it may, this court has declared that judgment to be valid against Penrod and will adhere to that ruling.

The judgment in that case being valid as to Penrod, it is within the covenant of the sureties, and they should respond in accord with the condition of their undertaking.

The judgment in the present case is for the right party, and should be affirmed. It is so ordered. All concur.

F. H. SMITH CO. v. LOUISVILLE & N. R. CO.

(St. Louis Court of Appeals. Missouri. Nov. 2, 1909. Rehearing Denied Nov. 16, 1909.)

1. SALES (§§ 291, 296*) — "STOPPAGE IN TRANSITU"—NATURE OF RIGHT.

The "right of stoppage in transitu" exists where the goods have not been paid for and the buyer is insolvent, but the right presupposes the vesting of title, but may be exercised before the expiration of the term of credit or the maturity of the buyer's note, at any time before the goods come to the possession of the buyer.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 27, 837; Dec. Dig. §§ 291, 296.*]

For other definitions, see Words and Phrases, vol. 7, pp. 6669-6672.]

2. SALES (§ 291*)—STOPPAGE IN TRANSITU—NATURE OF RIGHT.

The refusal of a buyer to honor drafts drawn by the seller for the price is not in itself evidence of the insolvency of the buyer essential to justify the exercise of the right of stoppage in transitu.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 830; Dec. Dig. § 291.*]

3. CARRIERS (§ 94*)—NONDELIVERY OF GOODS—ACTION BY BUYER—EVIDENCE.

Whether a buyer suing a carrier for non-delivery of goods had advanced money to the seller on account of the goods is a question of fact for the trial court to determine.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 94.*]

4. TRIAL (§ 386*)—TRIAL BY COURT—REFUSAL OF INSTRUCTIONS.

The court may refuse a requested instruction contrary to the facts found.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 901, 902; Dec. Dig. § 386.*]

5. SALES (§ 218½*) — DELIVERY — PRESUMPTIONS.

The delivery by the seller to the buyer of a bill of lading is strong presumptive evidence that title passes to the buyer named as consignee, but this presumption may be overthrown by evidence, and must be determined by the facts peculiar to the transaction itself.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 218½.*]

6. CARRIERS (§ 93*)—DELIVERY—LIABILITY.

A carrier, who has issued a bill of lading in favor of the buyer of goods, acts at its peril when, as carrier or as warehouseman, it diverts the goods, and it must ascertain the facts, and its justification in diverting the goods turns, not on its knowledge or want of knowledge of the facts, but on the facts themselves.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 343, 364-366; Dec. Dig. § 93.*]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by the F. H. Smith Company against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

Action by plaintiff, appellant here, against the respondent, to recover the value of three car loads of poplar lumber, plaintiff averring in the first count of its amended petition that the Nashville, Chattanooga & St. Louis Railroad Company, on the 23d day of May, 1906, received from the Kennesaw Hardwood Lumber Company, at Atlanta, Ga., consigned to plaintiff, a car load of poplar lumber for transportation and delivery to plaintiff at East St. Louis, Ill., and issued its bill of lading for the same, the lumber being contained in a car marked "Wabash, No. 66923"; that the bill of lading shows on its face that the Nashville, Chattanooga & St. Louis Railroad Company was to deliver the car to the defendant, Louisville & Nashville Railroad Company, and that that defendant was to deliver the car of lumber to plaintiff at East St. Louis; that defendant received and accepted the car for transportation to plaintiff at East St. Louis, but that it has failed and neglected to deliver it to plaintiff; that the plaintiff has made demand on defendant for the lumber contained in the car, and defendant refused to deliver said car load of lumber to plaintiff. The petition further avers that plaintiff "has purchased said bill of lading and the lumber contained in said car, and that he is the lawful and rightful owner of said lumber and said bill of lading." Averring that the lumber is of the reasonable value of \$417.76, plaintiff demands judgment for that amount, with interest. The second and third counts are similar to the first, with the exception that the lumber claimed in the second count was in a car marked "Penna., No. 76109," and valued at \$441, and in the third count the car is marked "Nashville, Chattanooga & St. Louis—6552," and the lumber valued at \$423.05.

The action seems to have been dismissed as to the Nashville, Chattanooga & St. Louis

Railroad Company, and thereafter prosecuted against the Louisville & Nashville Railroad Company alone. The latter company answered by a general denial, and by the specific averment that plaintiff did not at any time own or have any interest in, or have the right of possession of, the lumber described in the several counts of the petition. The case was tried before the court, a jury having been waived; and, while a great deal of testimony was introduced, the case appears to have been ultimately submitted on an agreed statement of facts. A comparison of that with the testimony shows that this stipulation covers practically all the essential facts. It is only necessary to add to it that, in addition to the facts there agreed upon, it is not disputed that before sending the telegram referred to in the stipulation as of date May 29th plaintiff, on May 28th, had sent to the Kennesaw Hardwood Lumber Company, at Atlanta, Ga., a telegram as follows: "Cannot accept drafts drawn; stop shipping poplar; grade not right."

This stipulation is as follows:

"A number of cars were shipped by Kennesaw Hardwood Lumber Company, and drafts were, on presentation by St. Louis bank, either paid or accepted by F. H. Smith Company, and bills of lading covering such cars were received by F. H. Smith Company, and the cars delivered to the F. H. Smith Company by the railroad on surrender bills of lading.

"Three Cars in Question.

"Wabash 66923. Lumber by Kennesaw Hardwood Lumber Company was delivered into this car at Atlanta, Ga., May 23, 1906, consigned by said lumber company to said F. H. Smith Company, East St. Louis, Ill. Bill of lading was issued on that date accordingly. Drafts for \$141.36, dated Atlanta, Ga., May 22, 1906, payable on June 7, 1906, to order of Kennesaw Hardwood Lumber Company, stating on its face 'one-half car from Atlanta, Georgia, W. R. R. 66923,' drawn on F. H. Smith Company, Commercial Building, St. Louis, Mo., drawn by Kennesaw Hardwood Lumber Company, of Atlanta, Ga., and another draft for \$141.37, dated May 22, 1906, payable June 6, 1907, to order of Kennesaw Hardwood Lumber Company, for one-half car from Atlanta, Ga., W. R. R. 66923, drawn on F. H. Smith Company by Kennesaw Hardwood Lumber Company, were transmitted for collection at Atlanta May 22, 1906, and were received and presented May 24th and 25th, respectively, by the National Bank of Commerce to F. H. Smith Company for acceptance, and acceptance and payment by F. H. Smith Company were refused, and drafts were at once returned to shippers at Atlanta. On May 24th F. H. Smith Company, which had on that day received bill of lading for this car, turned same over to defendant, requesting reconsignment from East St. Louis, Ill., to St. Louis Car Company, St.

Louis, Mo. On May 28th the Kennesaw Hardwood Lumber Company instructed the Nashville, Chattanooga & St. Louis Railway Company, the initial carrier, and the defendant, the next connecting and final carrier, to hold shipment subject to the order of the shipper, telling them that the shipment was the property of the shipper. The Louisville & Nashville Railroad Company held the car pursuant to this instruction until June 6th, when it was ordered diverted, and was diverted by defendant on the order of the shipper to Steger, Ill. On May 29th F. H. Smith Company telegraphed Kennesaw Hardwood Lumber Company at Atlanta, Ga., as follows: 'Will accept no more drafts or any more poplar. Stop. This imperative.' On May 29th the car arrived at destination in East St. Louis, Ill., where the car was held by the Louisville & Nashville Railroad, as above stated, subject to instructions from shipper. On May 31st Mr. Creelman, of the Kennesaw Hardwood Lumber Company, met Mr. Smith, of the F. H. Smith Company, at St. Louis, and a settlement of some sort was reached in regard to cars that had been shipped, and, as the F. H. Smith Company contends, in regard to car Wabash 66923. The Kennesaw Hardwood Lumber Company, however, says that no settlement was made on that day, or at any time, for this car. On June 6th the car was diverted by defendant to Steger, Ill., as above stated. The drafts for this car were never paid or taken up by F. H. Smith Company.

"Pennsylvania 76169. Shipped by Kennesaw Company to Smith Company from Atlanta to East St. Louis May 22, 1906, by way of Nashville, Chattanooga & St. Louis and Louisville & Nashville Railroad; consigned straight to F. H. Smith Company; bill of lading issued. Draft for \$208.58, dated May 21, 1906, payable June 5, 1906, on account car Pennsylvania 76169, was presented by National Bank of Commerce in St. Louis to F. H. Smith Company on May 24th, and acceptance or payment thereof refused. On May 24th F. H. Smith Company, having bill of lading for this car, inclosed same to Louisville & Nashville agent here, instructing diversion from East St. Louis, Ill., to St. Louis Car Company, St. Louis. May 28th shipper instructed Nashville, Chattanooga & St. Louis and Louisville & Nashville to hold this car subject to instruction from shipper. Car ordered by Louisville & Nashville so held. May 29th car arrived at destination at East St. Louis, Ill. On May 29th F. H. Smith Company telegraphed Kennesaw Hardwood Lumber Company at Atlanta, Ga., as follows: 'Will accept no more drafts or any more poplar. Stop. This is imperative.' On May 31st Mr. Creelman met Mr. Smith, as above stated, and some sort of settlement was reached. According to plaintiff, it covered this car; according to Kennesaw Hardwood Lumber Company, it did not cover this car. On June 6th this car, which had been held since

May 29th, as instructed, subject to order from shipper, was, on the order of the shipper, diverted from East St. Louis to Steger, Ill., by the defendant.

"N. C. & St. L. 6552. Shipped from Atlanta, Ga., to East St. Louis, Ill., May 23, 1906, by Kennesaw Hardwood Lumber Company to F. H. Smith Company by way of Nashville, Chattanooga & St. Louis and Louisville & Nashville Railroad; bill of lading issued, consigning shipment to F. H. Smith Company. On May 25th draft for \$289.81, payable June 9, 1906, to the order of the Kennesaw Hardwood Lumber Company, 'in full car from Atlanta, Georgia, N. C. & St. L. 6552,' was drawn on F. H. Smith Company by Kennesaw Hardwood Lumber Company, and was presented on May 28, 1906, by National Bank of Commerce in St. Louis to F. H. Smith Company. F. H. Smith Company refused to accept or pay draft, and the draft was at once returned by the bank to shipper. On same day, May 28th, F. H. Smith Company advised Louisville & Nashville Railroad that it held bill of lading for this car, but did not surrender bill of lading with its advice, which was by letter, and asked diversion of shipment from East St. Louis, Ill., to St. Louis Car Company, St. Louis, Mo. On the same day, May 28th, shipper instructed Nashville, Chattanooga & St. Louis and Louisville & Nashville not to deliver car to F. H. Smith Company, unless instructed so to do by shipper. May 29th car arrived at destination, East St. Louis. May 29th F. H. Smith Company wired Kennesaw Hardwood Lumber Company at Atlanta, Ga., as follows: 'Will accept no more drafts or any more poplar. Stop. This is imperative.' May 31st the Creelman-Smith settlement above referred to took place at St. Louis. On June 6th the Louisville & Nashville Railroad, having held the car subject to shipper's instructions, received instructions from shipper to divert from East St. Louis to Steger, Ill., which it did on that date."

At the close of the testimony plaintiff prayed the court for the following declarations of law: "(1) The court declares the law to be that, if the plaintiff, who was the consignee named in the bills of lading, had the bills of lading in his possession, and had advanced money to the shipper on account of the lumber contained in these cars, then the defendant had no right to divert these cars from the plaintiff, and the judgment must be for the plaintiff. (2) The court declares the law to be that, if the plaintiff, who was the consignee named in the bills of lading, had the bills of lading in his possession, and had paid the shipper for the lumber contained in the cars covered by the bills of lading, no matter whether the plaintiff at one time refused to pay for the said lumber or not, if, as a matter of fact, the said lumber was paid for, then

the defendant had no right to divert these cars from the plaintiff, and the judgment must be for the plaintiff." The court refused to give them, plaintiff excepting. Thereupon the court gave an instruction to the effect that plaintiff was not entitled to recover from the defendant, the Louisville & Nashville Railroad Company. Exception was duly saved to the giving of this instruction, and, the court finding for defendant, entered judgment accordingly. Plaintiff having filed its motion for a new trial, and that being overruled and exception duly saved, has duly prosecuted its appeal to this court.

Thos. F. Galt, for appellant. Bryan & Christie and Harold R. Small, for respondent.

REYNOLDS, P. J. (after stating the facts as above). At the outset of the case, it might be as well to observe that the very essential element involved in the right of stoppage in transit—that is to say, insolvency of the buyer—is not present in this case. The right of stoppage in transit (to quote from a very concise elementary work, Brown, *American Law of Sales*, p. 185) "exists where the parties live at a distance from each other; the goods are in course of transportation for delivery; have not been paid for; and the buyer is insolvent. In such circumstances the seller may retake the goods at any time before they come to the possession of the buyer. The right, like that of lien, presupposes the vesting of title, but it may be exercised before the expiration of the term of credit or the maturity of the buyer's note." There is no evidence in this case tending to show the insolvency of the buyer, plaintiff here. All that appears is that it refused to honor the drafts, not in itself evidence of insolvency. The case, therefore, turns upon the question as to whether or not there was a consummated sale and delivery of the lumber by the Kennesaw Hardwood Lumber Company to plaintiff, and whether that sale was subsequently set aside and repudiated by the parties to it, and, conceding that to have been done, whether a settlement and agreement was made between the parties at the interview which took place between them on the 31st of May, or before the 6th of June, by which title to the lumber in controversy again passed to the plaintiff.

It is argued by counsel for the appellant that, as by virtue of the bills of lading, executed by the carrier, plaintiff had acquired title to the lumber, and the defendant became the agent of the plaintiff to deliver the lumber to it, delivery by the consignor to the carrier was equivalent to delivery to the plaintiff. Plaintiff endeavored to cover this position by the instructions asked, but which the trial court refused to give. In the written opinion filed by the learned

trial judge, which is in the record before us, he states as a reason for his refusal to give the first instruction that it "is inapplicable to the facts in the case, as there is no proof before me that the plaintiff had advanced any money to the shipper on account of the lumber contained in the cars in controversy. The proof is directly to the contrary that every draft drawn on account of the shipments in controversy was refused and returned to the drawer, and that was the state of affairs when the shipper notified the railroad company in effect that it, the lumber company, was the owner of the property in question. If any money was advanced on account of these cars, it was advanced after May 29th." As the question of whether plaintiff "had advanced money to the shipper on account of the lumber contained in these cars" was a question of fact, it was within the province of the trial court to determine it, and it was within his province to refuse to declare, as this instruction did, contrary to what he found to be a fact. Hence this declaration was properly refused.

Passing on to the second declaration of law asked by plaintiff, the trial judge states that he refused that "because, as I have stated, the mere possession of the bills of lading is not conclusive evidence of ownership. Neither do I regard it as immaterial, as stated in the instruction, that plaintiff at one time refused to pay for the lumber. It makes a great deal of difference in my opinion as to whether the lumber was paid for or not under the contract which the plaintiff company had with Creelman; and, if the lumber as a matter of fact was paid for after May 28th or 29th, certainly the duty rested upon the plaintiff to advise the railroad company as to its rights." It will be seen that the learned trial judge, in passing on each of these instructions, holds that possession of bills of lading is not conclusive evidence of passing of title or vesting of title in the holder. This position is earnestly controverted by counsel for appellant, and he cites many authorities which he claims are in support of his contention. Those cited are 1 Hutchinson on Carriers, pp. 210, 211, pars. 193, 194; Benjamin on Sales (7th Ed.) § 804, par. 789; Mechem on Sales, §§ 740, 788, 789; Tiedeman on Sales, last paragraph, § 85, p. 121; second paragraph, § 332, p. 537; as well as the case of Wigton v. Bowley, 130 Mass. 252. In fact these citations are the ones relied on by counsel for all his contentions. An examination of the authorities cited, and even of the quotations from them by counsel, fails to sustain his contention. All of the authorities cited, and, so far as we know, all authorities, agree that, while the delivery of the bills of lading is strong presumptive evidence that title has passed to the party named therein or his assignee, yet this is a presumption which may be

overthrown by evidence, and is to be determined by the facts peculiar to the transaction itself. Thus in *Southern Express Co. v. Dickson*, 94 U. S. 549, 24 L. Ed. 285, the Supreme Court of the United States holds that the consignment by bill of lading is prima facie evidence only of the investiture of ownership of the goods in transit in the consignee.

Our court, in *Frazier v. Atchison, Topeka & Santa Fé Ry. Co.*, 104 Mo. App. 355, 78 S. W. 679, has distinctly held that the issuance of a bill of lading in the name of the consignee would not have conclusively conveyed to him title or right of possession to the goods shipped; "for a bill of lading is but prima facie evidence of the intent of the vendor to part with the title or interest in the property for which it was issued, and extraneous evidence is admissible for the purpose of showing the true intent of the parties." *Scharff v. Meyer*, 133 Mo. 428, 34 S. W. 858, 54 Am. St. Rep. 672, is cited in support of this proposition. So also in *Strauss, Pritz & Co. v. Hirsch & Co.*, 63 Mo. App. 95, the Kansas City Court of Appeals held that the vesting of title to goods may depend upon the purchaser's performance of some condition, in which case possession before the performance thereof does not pass title. In *Strother v. McMullen Lumber Co.*, 200 Mo. 647, 98 S. W. 34, our Supreme Court has held that the general rule laid down in the books is that the passing of title is one of intention, and that such intention must be deduced from the contract, construed in the light of the circumstances under which it was made, including the nature and character of the business and the subject-matter to which the contract relates. The discussion of the authorities in this *Strother* Case by Judge Gantt, who delivered the opinion, is so full that it is not necessary to refer to any other in support of the position taken by the trial judge on it as to the first declaration asked and repeated in his objections to the second declaration asked.

When we come to consider the second instruction, however, as a whole, and which the court refused to give, we are compelled to hold this refusal error. Under the facts in the case the lumber was most certainly delivered to plaintiff by turning it over to the railroad company, the initial carrier, consigned to plaintiff, and sending the latter the bill of lading, and prima facie that carried title. But it appears by the evidence that plaintiff had notified the Kennesaw Hardwood Lumber Company the day before not to ship any more lumber pending the adjustment of certain differences between these parties. There is a question that suggests itself to us from the evidence—whether this direction applied to this particular shipment, or was to apply to others subsequently to be made. Passing that, however, as not settled by any finding, and as rather ambiguous, the most that can be said in favor of the Kennesaw

Hardwood Lumber Company is that the title to the lumber was not to vest in plaintiff until it had accepted the drafts drawn on it, payable June 6th, but to be accepted at sight. Possibly the evidence in the case would justify the conclusion that title was not to vest in the plaintiff company until it had paid, or certainly until it had accepted, the drafts. The inference may be drawn from the evidence in the case that the sale was on credit, with the understanding that the drafts due from 5 to 10 days ahead should be accepted at sight. Assuming, however, that the trier of the fact might find that it was a condition precedent that the draft should be accepted on presentation, and might further find that plaintiff's notification to the Kennesaw Hardwood Lumber Company not to ship any more lumber, and that it would not accept drafts, applied to these particular shipments, and amounted to a repudiation of the sale, so that the title did not vest in plaintiff, and left the title in such shape that the Kennesaw Hardwood Lumber Company, as consignor, might order the railroad company to divert shipment to some other consignee, there is certainly evidence for plaintiff tending to prove that on May 31st the lumber in dispute was included in the settlement made, and that plaintiff then paid for it. If this is true, as plaintiff still held the bills of lading, or, more correctly, still held one, and had turned over two of them to the railroad company defendant, with orders to ship the lumber to a consignee designated by plaintiff, certainly title to the lumber then vested in plaintiff on May 31st. In the second declaration of law asked by the plaintiff the court ignores this proposition, in refusing to declare that if plaintiff had paid the shipper for the lumber contained in the cars covered in the bills of lading, then the lumber became the property of the plaintiff, and defendant had no right to divert it by shipping it to the order of the Kennesaw Hardwood Lumber Company. We cannot agree with the finding of the learned trial judge that plaintiff, or any one else, was bound to notify defendant of this new deal, and that failure to do so justified the defendant in diverting the shipment on the order of the shipper. Under the facts in evidence the railroad company held these cars, and did not reconsign them to the Kennesaw Hardwood Lumber Company's order until June 6th; and, if there had been any settlement on May 31st, it is very certain that there was no title at that time in the Kennesaw Hardwood Lumber Company, but title was in plaintiff, and the defendant company, in obeying the order of the Kennesaw Hardwood Lumber Company to ship to some other consignee, did so at its peril. The defendant would only be exonerated from liability to plaintiff in case the Kennesaw Hardwood Lumber Company, on June 6th, was the owner of the title to

the property and plaintiff was not. If there had been a settlement on May 31st as to these very cars, then the title on June 6th was in plaintiff, and when defendant reconsigned the lumber at the shipper's order, it converted it as against plaintiff. The learned trial judge, declining to pass on the question as to whether or not the settlement of May 31st covered the lumber in these cars, and resting his refusal to give the instruction on the proposition that the defendant was not chargeable with notice of that settlement until it had been communicated to it, was in error. Having issued bills of lading in favor of the plaintiff, the defendant, either as a common carrier or as a warehouseman and bailee, acted at its peril when, in disregard of the bills of lading and on the order of the consignor alone, it diverted the shipment. It was bound to ascertain the facts in the case, and its justification must turn in this case, not on its knowledge or want of knowledge of the facts, but on the real fact itself. The second declaration of law prayed for by plaintiff presented that hypothesis of the case, and there was error in refusing it.

The plaintiff under the facts in the case, to repeat, held *prima facie* title under its bills of lading, and when the railroad company defendant, on June 6th, obeyed the Kennesaw Hardwood Lumber Company's order to reconsign it, it did so at its peril. It was bound to know, bound to inquire, and bound to find out for its own protection, whether it was justified in ignoring the apparent title held by plaintiff as holder of the bills of lading, and that is a fact which must be submitted and passed on under the evidence in the case by the trier of fact. For this reason the finding and judgment of the circuit court is set aside, and the cause remanded for new trial.

GOODE and NORTONI, JJ., concur.

HEINZ v. UNITED RYS. CO. OF ST. LOUIS.

(St. Louis Court of Appeals, Missouri. Nov. 2, 1906.)

1. APPEAL AND ERROR (§ 1002*)—REVIEW—QUESTIONS OF FACT.

A verdict on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

2. DAMAGES (§ 216*)—INSTRUCTIONS.

An instruction in a personal injury case authorizing a recovery for doctors' fees and loss of time in excess of the amount claimed and proved is erroneous.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 216.*]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Action by Charles J. Heinz against the United Railways Company of St. Louis. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Boyle & Priest and F. J. Whitelaw, for appellant. Blevins & Jamison, for respondent.

GOODE, J. This plaintiff was hurt December 5, 1907, in a fall from one of defendant's trolley cars. The exact point where the accident occurred is in dispute, but it was somewhere about the intersection of Hickory street and Jefferson avenue, in the city of St. Louis. Jefferson avenue is a north and south thoroughfare, and Hickory street an east and west one. Where the two streets intersect, there is a jog in Hickory; its intersection with the east line of Jefferson avenue being some 50 feet south of where it opens into Jefferson on the west side of the latter thoroughfare. Plaintiff lived on west Hickory street, but the evidence for him is that he attempted to alight at the northeast corner of east Hickory street and Jefferson avenue, and was just at said spot. Plaintiff and three other men who had been attending a lodge meeting in the southern part of the city boarded a north-bound Jefferson street car at Arsenal street and traveled northward. When they passed Rutger street, which is the first one crossing Jefferson south of east Hickory, plaintiff rang the bell for a stop at east Hickory, and, as the car drew near that crossing, the conductor also rang a bell signaling the motorman to stop. Plaintiff went out of the car through the front door, stepped down to the lower step, the car being at that time still moving, but at the speed of a slow walk, and, just as plaintiff attempted to put his foot on the ground in his descent from the steps, the speed of the car was accelerated by a sudden movement forward as though the motorman had released the air which held the brakes. Plaintiff was thrown to the street, his nose broken, his tongue cut, and he was dazed and otherwise injured.

Testimony for the defense, as given by the motorman and conductor, is that, instead of plaintiff alighting at the intersection of east Hickory and Jefferson, the car had passed east Hickory, and was about halfway between it and west Hickory, and in the act of slowing down to stop at the latter street to allow plaintiff to alight, when he stepped off the car, and fell to the ground. It is apparent the evidence is contradictory as to the cause of the accident. Plaintiff's averments of negligence related to the sudden acceleration of the speed of the car as he was in the act of getting off; and the testimony for him would suffice to prove this occurred, thereby proving his injury was due to the negligence of the motorman, inasmuch as he was getting off at the front of the car under the motorman's eyes. Of course, it was incumbent on the motorman to allow him

to alight and not to start the car as he was in the act of doing so. On the contrary, if plaintiff attempted to get off while the car was in motion, but slowing down, and fell as he did so without any careless increase of the car's speed, no case was made against defendant. We are urged to deny a recovery on the ground of lack of evidence to support the case stated in the petition. This cannot be done without ignoring as worthless plaintiff's own testimony, and that of other witnesses who corroborated him, more or less. Whether any inconsistencies or discrepancies occurred in the testimony for plaintiff was for the jury to weigh.

The only other exception which need be noticed is the instruction on the measure of damages. It should be stated by way of premise the petition alleged plaintiff lost two weeks' time and his earnings of \$2.50 a day during that period; that his injuries were treated by a physician, and, on account of the services of the latter, plaintiff had become indebted to him for the reasonable value of the treatment, to wit, \$50. The instruction on the measure of damages told the jury to assess damages for any loss of earnings the jury might believe had been occasioned by the injuries and the reasonable expense, if any, he had incurred for medical treatment. The exception to the instruction is based on failure to limit recovery for loss of earnings and medical services corresponding to the damages charged in the petition to have been sustained in consequence of those items. We do not see how, in the face of the decisions of the Supreme Court in *Smoot v. Kansas City*, 194 Mo. 513, 522, 92 S. W. 363, and *Tinkle v. Railroad*, 212 Mo. 445, 471, 110 S. W. 1086, a reversal of the judgment on account of the instruction on the measure of damages can be escaped. In the first of those cases the Supreme Court condemned as erroneous an instruction which did not limit plaintiff's amount of recovery for loss of time to the amount claimed in his petition, and in the second case it was said a similar instruction ought to be corrected on the second trial. The decisions of *Tandy v. Transit Co.*, 178 Mo. 240, 77 S. W. 904, and *Lindsay v. Kansas City*, 195 Mo. 166, 93 S. W. 273, relied on by plaintiff, are not in point. In those cases there was testimony tending to prove the injured party would sustain loss of time in the future—that is, after the filing of the petition and even after trial—and for this reason it was held instructions on the measure of damages, which did not limit recovery to the loss of time alleged in the petition were not erroneous, since that allegation covered only time lost up to the day the petition was filed. But in the present case whatever time plaintiff lost and whatever expense he was put to for treatment by a physician had all been lost and incurred prior to the filing of the suit. He testified he had lost two weeks' time from work as alleged in the petition,

and had incurred a doctor's bill of \$50. There was no chance then, for other damages to accrue on account of those items continuing to entail damage after the case had been begun.

The point falls within the scope of the decisions of the Supreme Court first cited; and the judgment must be reversed and the cause remanded for new trial. All concur.

FLUCKS v. ST. LOUIS, I. M. & S. RY. CO.
(St. Louis Court of Appeals, Missouri. Nov. 2, 1909.)

1. CARRIERS (§ 298*)—DUTIES TO PASSENGERS.

It is the duty of railroads to operate their passenger trains so as to avoid unnecessary jars and lurches that may injure passengers while moving about in a car.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1205; Dec. Dig. § 298.*]

2. CARRIERS (§ 321*)—ACTION FOR INJURIES TO PASSENGER — INSTRUCTIONS — "SAFE SPEED."

An instruction, assuming that the operation of a train around a curve "at an unusually high rate of speed" was negligent, is erroneous, as a speed may be safe, though unusual.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1326; Dec. Dig. § 321.*]

For other definitions, see Words and Phrases, vol. 7, p. 6283.]

3. CARRIERS (§ 320*)—ACTION FOR INJURIES TO PASSENGER—NEGLIGENT SPEED—QUESTION FOR JURY.

Whether the speed with which a train was run around a curve was dangerous and negligent is a question for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1321; Dec. Dig. § 320.*]

4. TRIAL (§ 296*)—HARMLESS ERROR—INSTRUCTIONS—CURING ERROR BY OTHER INSTRUCTIONS.

The error of an instruction presenting a wrong theory of the entire case is not cured by other instructions on the right theory.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708; Dec. Dig. § 296.*]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action by Carl Flucks against the St. Louis, Iron Mountain & Southern Railway Company. From an order granting defendant a new trial, plaintiff appeals. Affirmed.

Wright & Cutler, for appellant. E. L. Clardy and H. O. Herbel, for respondent.

GOODE, J. This appeal was taken from an order allowing defendant a new trial on the ground of error in the first instruction granted for plaintiff. Before reciting the instruction, a summary of the facts of the case and a statement of the averments on which plaintiff sought to recover ought to be given. Plaintiff took passage on one of defendant's trains on December 5, 1906, at 8:30 p. m., at Union Station, in St. Louis, to go to Little Rock, Ark., and then to Morrilton, in the same state. The train was a fast one, known as the "Cannon Ball." It

left the station on time, ran southward toward Carondelet, where, about 30 minutes after its departure, plaintiff was hurt by being thrown across the arm of a seat as he was placing his hat in an overhead rack. When he entered the coach, he found all the seats taken except a chair at the rear end and next to the aisle. The adjacent chair by the window was occupied by a gentleman named Denny, with whom plaintiff fell into conversation, not attempting, at first, to deposit his hat in the rack. As said, he did this about half an hour after leaving Union Station, rising to his feet, and leaning over Mr. Denny toward the side of the coach, for the purpose. His first attempt to lodge the hat in the rack failed in consequence of there being some other articles in the rack which left little room for the hat. He attempted a second time to place it there, reached upward, and, while in the act of depositing it, the train ran around a curve at a speed estimated by plaintiff and Denny to have been 40 or 50 miles an hour, whereupon the train gave a lurch, throwing plaintiff first to the right and then to the left, so that he fell across the arm of the chair on the opposite side of the car, and was hurt. He continued on his journey, suffering considerable pain, and there was evidence to prove one or two ribs were broken, evidence, too, which tends to prove a speed of 40 or 45 miles an hour where the accident happened would have been too high for safety, and would have caused the train to lurch considerably. The speed allowed at the curve where plaintiff testified the accident happened—that is, Ivory curve, near Ivory avenue—was 20 miles an hour. It is the contention of defendant, and perhaps there is some evidence to support it, that another curve north of Ivory avenue was where the accident happened, but this seems to have been an immaterial fact. The testimony showed the particular curve was constructed for high speed; that is, so that trains might be operated around it at high speed. The negligence averred in the petition is the car was caused to give a sudden, violent, unusual, extraordinary, and, to plaintiff, unexpected, lurch through the carelessness and negligence of defendant's agents and servants in charge of and operating the train in running the same into and around the curve at a high and excessive rate of speed. It was further averred that, by reason of the lurch of the car, plaintiff was thrown across the aisle and against the arm of the seat on the opposite side with great force and violence, rendering plaintiff unconscious, and breaking and injuring five of his ribs.

The first instruction given for plaintiff, for error in which the court granted a new trial, reads as follows: "The court instructs the jury that if they find and believe from

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the evidence that plaintiff was a passenger on one of defendant's passenger trains leaving St. Louis, Mo., on the evening of December 5, 1905, and that he was riding in a chair car used by defendant for conveying passengers, and that in said car defendant had provided racks above the seats to be used by passengers, and that defendant invited its passengers in said car to use said racks for placing therein their hats and small packages, and if the jury further find and believe from the evidence that after plaintiff had been accepted as a passenger, and after said train had run a short distance from Union Station, St. Louis, Mo., plaintiff arose from his seat in said car for the purpose of placing his hat in one of said racks, and, when standing and in the act of placing his hat in said rack, the car gave a sudden, violent, unusual, extraordinary lurch, causing plaintiff to be thrown across the aisle and against the arm of a seat with great force and violence, thereby injuring him, and that said lurch was directly caused by the carelessness and negligence of defendant's agents and servants operating said train in running it into and around a sharp curve at an unusually high rate of speed at said place, and the plaintiff was in the exercise of ordinary care for his own safety, then your verdict will be for the plaintiff." One defense was plaintiff was guilty of contributory negligence in rising and leaning forward and upward while the train was running at a high speed. The argument has been pressed on us that plaintiff ought to be held to have been guilty of contributory negligence as a legal conclusion in view of his own testimony. We do not take this view of the case. The rack was placed in the car for passengers to deposit articles in, and there was no presumption of want of due care in plaintiff because he rose while the train was running rapidly to put his hat in the rack. It is the duty of railroad companies to operate their passenger trains so as to avoid unnecessary jars and lurches that may injure passengers while moving about in a coach. The issue of plaintiff's negligence was at most one for the jury.

The objection to the quoted instruction in our opinion is that it assumes the operation of the train around the curve "at an unusually high rate of speed" was negligence. It will be perceived on reading the instruction the court did not leave it to the jury to say whether the speed with which the train ran into and around the curve was a dangerous rate, but this was the essential fact to be found. Ordinarily the train might have run around the curve at 10 or 12 miles an hour, so that running at 15 or 20 miles an hour would have been unusual speed, though safe. Now, the latter part of the instruction allowed a verdict if the jury

found, among other things, "that said lurch was directly caused by the carelessness and negligence of defendant's agents and servants in running into and around a sharp curve at an unusually high rate of speed." Defendant's servants were not negligent if they ran around the curve at a higher speed than was usual, provided they kept within the margin of safety; and they were negligent if they ran only at the usual rate provided it was an unsafe one. The instruction begs the very point at issue in assuming that running at an unusual speed was necessarily careless conduct. This instruction presented a theory of the entire case that was radically wrong, and the error could not be cured by other instructions presenting a right theory. *Sullivan v. Railroad*, 88 Mo. 182; *Mansur-Tebbets Imp. Co. v. Ritchie*, 143 Mo. 612, 45 S. W. 634.

Therefore the court did right in ordering a new trial, which order is affirmed and the cause remanded. All concur.

BYRNE v. HAFNER FEED CO.

(St. Louis Court of Appeals, Missouri. Nov. 2, 1909.)

1. EVIDENCE (§ 317*)—HEARSAY.

In an action against a corporation for a debt owing by its general manager on the allegation that defendant had assumed the debt, testimony that in another action, to which defendant was not a party, a witness testified that defendant had assumed the debt in suit, is hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

2. EVIDENCE (§ 271*) — SELF-SERVING DECLARATIONS.

In an action against a corporation for a debt owing by its general manager on the allegation that defendant had assumed it, testimony that in another action to which defendant was not a party such general manager testified that defendant had assumed the debt is a self-serving declaration, and not binding on the defendant.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 271.*]

Appeal from St. Louis Circuit Court; Robt. M. Foster, Judge.

Action by Daniel P. Byrne against the Hafner Feed Company. From a judgment for plaintiff, defendant appeals. Reversed.

Jno. O. Marshall and Dalton & Harris, for appellant. Wm. A. Kinnerk, for respondent.

GOODE, J. This cause began before a justice of the peace by the filing of a complaint wherein plaintiff alleged defendant is a corporation; that Joseph Hafner is indebted to plaintiff in the sum of \$125, the amount of a judgment for debt, interest, and costs recovered by plaintiff against said Hafner before a justice of the peace; that subsequent to the recovery of said judgment defendant, the Hafner Feed Company, promis-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ed to pay said debt of Joseph M. Hafner to this plaintiff, wherefore plaintiff prayed judgment against defendant for the sum of \$125. The cause proceeded to the circuit court, where plaintiff obtained judgment, and an appeal was taken to this court.

Several reasons are assigned why the judgment of the circuit court should be reversed; i. e., failure of the complaint to state defendant assumed the debt of Joseph Hafner in writing, want of competent evidence to prove defendant assumed the debt at all, or promised to pay it, and that whatever evidence was received to prove the fact was too vague and uncertain to support a judgment. This plaintiff recovered a judgment, as alleged, against Jos. M. Hafner before a justice of the peace, and thereupon summoned the Oscar W. Blanke Ice & Coal Company as garnishee; we suppose on an execution issued on the judgment. The only evidence introduced in the present action to prove the Hafner Feed Company had promised for a valuable consideration after plaintiff obtained judgment against Hafner to pay the amount of it to plaintiff was the testimony of two witnesses, who said, in substance, that on the trial of the garnishment issue between Blanke Ice & Coal Company as garnishee and plaintiff, Jos. M. Hafner and John O. Marshall testified defendant corporation had assumed the debts of said Hafner, and Hafner had turned over his assets to the corporation in part payment of the capital stock of defendant; that Hafner further testified in the garnishment issue "he was what might be called acting as general manager for defendant—that is, the company kept on just the same—that he was an officer and general manager, the thing running just as it always did." It is obvious that what Marshall swore to in the other case, to which this defendant was not a party, was incompetent to establish liability against defendant, because it was hearsay as to this defendant, who had no opportunity to cross-examine said Marshall. The same is true as regards the testimony of Jos. M. Hafner, unless an exception is to be allowed to the general rule excluding hearsay testimony in favor of what he testified on the garnishment trial, because he was acting as general manager of defendant corporation. The contention is his statement was binding on the corporation because he was the chief officer of it. This view cannot be accepted. His testimony on the trial of the garnishment issue was a self-serving declaration, and defendant company had no opportunity to cross-examine him, since it was not a party to the cause. A corporation acts through its agents and officers, and many admissions and declarations of those persons made in the course of their duties in the transaction of the business of the company are binding on the latter for the same reason that a principal is bound by the declarations of his agent while engaged in the trans-

action of the principal's business and in reference to said business, provided the transaction falls within the scope of the agent's real or apparent authority. *Northrup v. Insurance Co.*, 47 Mo. 435, 4 Am. Rep. 337; *Western U. Tel. Co. v. Baltimore, etc., Tel. Co. (C. C.)* 26 Fed. 55; 3 Cook, Corporations (6th Ed.) § 726. And we are aware there are instances in which the admissions and statements of officers of a corporation are held to be binding on the company, even though they relate to past transactions. 4 *Thompson, Corporations*, § 4915. This case falls within no such exception. *Childs v. Ponder*, 117 Ga. 553, 43 S. E. 986; *Hoag v. Lamont*, 60 N. Y. 96. Defendant would be cut off from its right to search the conscience and knowledge of Joseph M. Hafner, and protect itself against his false or loose statements made to serve his own interest, if we were to admit his testimony on another trial, to which defendant was not a party, could establish liability against defendant. In *Bangs Mill. Co. v. Burns*, 152 Mo. 350, 380, 53 S. W. 923, the suit was to set aside a certain deed of trust in which a bank was beneficially interested as having been made to defraud the grantor's creditors. Different suits by creditors had been instituted assailing the deed of trust, and in one of them Calvin F. Burns, president of the beneficiary bank, had given testimony. It was sought to use that testimony in the case cited, *supra*, as a detrimental admission against the bank made by its president. On the offer of this testimony the Supreme Court said: "We fail to see from the transcript of the testimony offered how it could have in any wise been beneficial to appellants; but, considering it as containing according to appellants' contention a detrimental admission to the claim of the bank as to one of the notes secured by the deed of trust under which the interpleader claims the property in suit for the use of the bank and the Ayr Lawn Company, the transcript of the testimony was still inadmissible as evidence against the bank in this action. Neither the bank nor Calvin F. Burns was a party to the issues on trial in that case, and the statements then made by him, if any, detrimental to the present contention of the interpleader for the bank, could not be said to have been made by him as agent for the bank, but in answer to the compulsory process of the court that required his presence and commanded his answers. Neither the voluntary statement of an agent or officer of a corporation acting outside of and beyond the duties of his agency or those exacted and not afterwards ratified by the corporation can be held and treated as declarations or admissions binding upon the corporation in a suit afterwards between the corporation and a stranger." That ruling is in point, and it will be observed that, though the Supreme Court remarked neither Calvin F. Burns nor the bank were parties to the case in which said Burns had testified, the prin-

ciple on which the exclusion of the evidence was sustained shows the fact that the bank was not a party was the only material fact; and the mere circumstance that Hafner was a party to the suit in which the garnishment was issued does not serve to distinguish this case in principle from the one cited. In truth it may be said Hafner was no party to the garnishment proceeding which grew out of the case plaintiff brought against him; and hence the Supreme Court's decision was given on facts identical with those before us. If it was desirable to utilize the knowledge of Marshall and Hafner, they should have been put on the stand in the present case. One of them at least was present at the trial, Mr. Marshall. We have paid no attention to whether or not, even if the statements of Hafner and Marshall were competent, the proper procedure to hold defendant on its assumption of Hafner's debt was adopted.

The judgment is reversed and the cause remanded. All concur.

BARTLETT v. HELMBACHER FORGE & ROLLING MILLS CO.

(St. Louis Court of Appeals. Missouri. Nov. 2, 1909.)

APPEAL AND ERROR (§ 1015*)—REVIEW—DISCRETION OF COURT—NEW TRIAL ON CONFLICTING EVIDENCE.

Where there was a conflict in the evidence on material issues, the court's action in granting a new trial on the ground that the verdict was against the weight of evidence cannot be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3871; Dec. Dig. § 1015.*]

Appeal from St. Louis Circuit Court; Virgil Rule, Judge.

Action by Charles A. Bartlett, administrator of Guiseppe Pusateri, against the Helmbacher Forge & Rolling Mills Company. A judgment for plaintiff was set aside, and new trial granted. Plaintiff appeals. Affirmed and remanded.

Joseph Wheless, for appellant. McKeighan & Watts and Wm. R. Gentry, for respondent.

GOODE, J. Guiseppe Pusateri, a Sicilian, was killed in defendant's iron works on January 11, 1907, by the falling on him of a pile of iron bars. The bars were about 36 inches long, and the averment is they had been piled to an excessive and dangerous height, from 10 to 15 feet, unsupported in any way and insecure and liable from the great height and unsafe structure of the pile to collapse and fall. It was further averred the careless way in which the iron was piled, and the fact that the piles were dangerous and liable to fall, was well known to defendant, or could have been known to it by

the exercise of ordinary care for the safety of its employees. Plaintiff was working on a low pile a foot or so from the one which toppled over and killed him. This action was instituted by the administrator of his estate under the provisions of two statutes of the state of Illinois, where deceased resided and the accident happened. The evidence for plaintiff tended to prove the piles were 15 to 18 feet high, and, in truth, one witness for plaintiff swore the one which fell was 30 feet high. The evidence tended also to show the piles were negligently and insecurely stacked and liable to fall in consequence of the vibrations of trains passing near the foundry.

Plaintiff had a verdict, which the court set aside, granting a new trial on the ground the verdict was against the weight of the evidence. This appeal was prosecuted from the order for new trial; the contention being there was no substantial conflict in the evidence on any point affecting the merits of the case. We have read the evidence in regard to plaintiff's contention, and find it untenable. There was a sharp conflict of testimony as to the height of the pile which fell, some saying it was not more than four or five feet high; also, as to whether it had been piled straight, and was perpendicular at the time it fell, or had been piled slantingly and gotten out of plumb. There can be no question that a conflict of evidence occurred on material issues of the case, and therefore the action of the court in granting a new trial because the verdict was against the weight of the evidence cannot be set aside.*

The order for new trial is affirmed and the cause remanded. All concur.

GERMAN LITERARY SOCIETY v. BLOCH.

(St. Louis Court of Appeals. Missouri. Nov. 2, 1909. Rehearing Denied Nov. 17, 1909.)

JUSTICES OF THE PEACE (§ 133*)—REVIVAL OF JUDGMENT—TIME OF PROCEEDING.

Rev. St. 1899, § 4028 (Ann. St. 1906, p. 2195), providing that no justice's judgment shall be revived after 10 years from its rendition, fixes the limit of time in which the revival may be ordered, and not in which it may be applied for, so that application thereunder must be made at least 10 days before the limitation period has expired, in view of section 4024, providing that, upon the filing of an affidavit in a proceeding to revive such a judgment, the justice shall cause a citation to be served on defendant to appear at a time not less than 10 days, nor more than 30 days, from the issuing thereof, and show cause why the judgment should not be revived.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 415; Dec. Dig. § 133.*]

Appeal from St. Louis Circuit Court; Chas. Claflin Allen, Judge.

Action by the German Literary Society against John Bloch to revive a justice's judg-

*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Indexes

ment. From a judgment of revival reversed by the circuit court, plaintiff appeals. Affirmed.

Frank A. Hobein and Vital W. Garesche, for appellant. Lee Sale, for respondent.

GOODE, J. This is a proceeding by *scire facias* to revive a judgment of a justice of the peace. According to the stipulated facts, the judgment was rendered by the justice February 25, 1897, and on February 21, 1907, plaintiff filed a petition to revive it before the successor of the justice by whom it had been given. A citation was issued and delivered to the constable on the same day, commanding him to summon defendant to appear before the justice to whom the petition of revivor had been addressed on March 6, 1907, to answer the complaint of plaintiff, and then and there show cause, if any, why the judgment, describing it, should not be revived. This writ was served February 23, 1907. The cause was continued to March 28th, when defendant appeared by his attorney and moved the judgment be not revived because the justice was without jurisdiction, and because no proper citation had been directed or served on defendant according to section 4028 of the statutes (Rev. St. 1899 [Ann. St. 1906, p. 2195]), and for other reasons which need not be stated. The justice overruled defendant's motion, and entered judgment reviving the original judgment, whereupon defendant appealed to the circuit court, and there prevailed, causing plaintiff to appeal to this court, where defendant's counsel assigns as reason for upholding the judgment of the court below that the 10-year period in which the right to revive would be lost by statutory limitation had run prior to the date on which the citation served on defendant was returnable or could have been made returnable. Rev. St. 1899, § 4031 (Ann. St. 1906, p. 2196); Bick v. Wilkerson, 62 Mo. App. 31. This proposition becomes clearer when we scrutinize the statutory provision that no judgment of a justice of the peace "shall be revived after the lapse of ten years from the rendition thereof," or from the date of a previous revival. Rev. St. 1899, § 4028.

Defendant's counsel contends the language quoted from the statute forbids revival of any judgment unless application to have it revived is made long enough before the 10-year limitation has run to enable the writ of *scire facias* to be issued and served on the defendant in time to be returnable within the 10-year period; that is to say, the application for revivor must be made at least 10 days before the limitation period has expired, because by virtue of section 4024 (Ann. St. 1906, p. 2194), the shortest interval in which the writ can be made returnable is 10 days from the date of service. Support for this view of the law is found in *Teff v. Bank*, 36 Kan. 457, 13 Pac. 788. The Code of

Kansas says an order to revive an action against the representatives or successor of a defendant shall not be made without the consent of such representatives or successor unless in one year from the time it could first have been made. Another section of that Code says, if a judgment becomes dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment. The two provisions construed together prohibit an order to revive a judgment which has become dormant from being made longer than one year after it has become dormant; that is, the Kansas limitation period. In the case, *supra*, the Supreme Court of Kansas said the filing of the motion to revive and giving notice were not sufficient to bring the case within the limitation, but the point of limitation prescribed by the statute is the making of the order, and not the commencement of the proceeding to obtain the order; that a "party should at least commence proceedings in sufficient time to give the required notice to the adverse party of the hearing within the year, and the time fixed in the notice when the application is to be made should be within that period." The same court reiterated this doctrine in *Reaves v. Long*, 68 Kan. 700, 66 Pac. 1030, saying revivor is purely of statutory origin, and can only be accomplished in the mode and on the conditions prescribed by the statute; that, as the Kansas statute explicitly says an order of revivor should not be made without consent unless within one year of the time in which it could be made, a court was without power to make it later.

At this point in defendant's argument our attention is called to the Missouri statute concerning the revival of judgments in courts of record, which says: "The plaintiff, or his legal representative may, at any time within ten years, sue out a *scire facias* to revive a judgment or lien; but after the expiration of ten years from the rendition of the judgment, no *scire facias* shall issue." Rev. St. 1899, § 3715 (Ann. St. 1906, p. 2083). That language is contrasted with the language of the statute for the revival of judgments of justices of the peace, which says they shall not "be revived after the lapse of ten years from the rendition thereof" (Rev. St. 1899, § 4028; Ann. St. 1906, p. 2195), and it is argued the first section was intended to place a limitation on the commencement of proceedings to revive, whereas the latter was intended to put a limitation upon judgments of revivor. No doubt the language of the two sections is consistent with this conclusion, and the question is whether it compels the conclusion. If the section relating to judgments of justices absolutely forbids an order to revive a dormant judgment after 10 years from its rendition, singular consequences may ensue. The judgment creditor could apply long within the limitation period, and, from one cause or another, no hearing

be had until after the period had expired, in which case it might be out of the power of the justice to order a revivor; or an appeal might be taken to the circuit court, and the delay occasioned would carry the hearing of the application beyond the limitation period and that court be without power to revive. Those contingencies might or might not suffice to create an exception, or take the cause out of the statute. We decide nothing as to that. Probable mischiefs cannot overcome the effect of any statute if, fairly considered, it will bear but one meaning. Our statute on the subject in hand is less explicit than the Kansas one, for the latter says, in effect, an order to revive cannot be made except by consent of the parties after one year from the time the judgment becomes dormant; whereas, our statute says no judgment shall be revived after the lapse of 10 years from its rendition, but it is hard to discern how the words "no judgment shall be revived" can be held to mean no scire facias to revive a judgment shall be sued out or no application for revival shall be made.

Against our first impression we have come to the conclusion after study of the point that the statute fixes the limit of time in which a revival may be ordered, and not in which it may be applied for, as is the case in proceedings to revive a judgment in a court of record. What has led us to this conclusion, besides the positive terms of the statute, are the circumstances leading to the enactment of the limitation. It was decided in *Humphreys v. Lundy*, 37 Mo. 320, there was no statutory limitation of proceedings to revive justices' judgments, and they might be revived at any time; that the 10 years then prescribed for suing out writs of scire facias to revive judgments related only to those of courts of record. In fact, the statute regarding the revival of justice's judgments merely said "a judgment once revived may be again revived in the same manner and with like effect as the first revival was had." Gen. St. 1865, c. 182, § 12. In *Corby v. Tracy*, 62 Mo. 511, this decision of the point was followed, and in the opinion Judge Hough called attention to the anomalous rules of law relating to justices' judgments. He showed it was possible by revival to keep a judgment of a justice of the peace in force for more than 20 years, or the period in which it ought to be presumed to have been satisfied, and that in the particular case the judgment might be regarded as in force after 23 years. This and another incongruity not necessary to be mentioned were noticed. The opinion said: "With the hope that some remedy may be provided by the appropriate department of the government." No doubt in consequence of this opinion the Legislature, in revising the statutes in 1879, amended section 12 of chapter 182 of the General Stat-

utes of 1865 by adding these words: "Provided, that no judgment shall be revived after the lapse of 20 years from the rendition thereof, or from the date such judgment may have been revived as hereinbefore provided." Rev. St. 1879, § 3006. That amendment fixed the limitation period at 20 years from the date of a judgment or any previous revival of it as the time in which it must be revived or become defunct.

It is to be borne in mind the opinion of the Supreme Court in *Corby v. Tracy* had remarked upon the incongruity of permitting justices' judgments to be kept alive by revival for more than 20 years, or beyond the time when, according to analogy, they would be presumed to have been satisfied. Therefore it is unlikely the Legislature meant in the amendment to leave that incongruity intact. But if the 20-year period prescribed in the statute was meant to limit the time in which a scire facias could be sued out, and not in which a revival could be ordered, it was still possible, by applying for a scire facias a few days before the 20 years expired, and making the writ returnable after the expiration, and perhaps by continuing the proceeding, to keep the judgment alive after it ought to be presumed satisfied. The probable intention was in prescribing 20 years as the limitation to forbid a revival after that period. Thus the statute stood until 1895, when the amendment of the original enactment was itself amended by striking out the word "twenty" and inserting in lieu of it the word "ten," so that the language was: "Provided that no judgment shall be revived after the lapse of ten years from the rendition thereof or from the date such judgment may have been revived as hereinbefore provided." This is the language of the statute now in force, and we cannot escape the opinion that, whatever the Legislature may really have intended, the only intention that can be gleaned from a fair interpretation of the language used and the history of the enactment was to limit the time in which an order to revive could be made.

The judgment is affirmed. All concur.

REIS v. EPPERSON et al.

(St. Louis Court of Appeals. Missouri. Nov. 2, 1909.)

1. JUDGMENT (§ 525*)—CONCLUSIVENESS—RECITALS.

Where a court, even of limited jurisdiction, is acting within the limit of that jurisdiction; the recitals in its judgments are, at least, prima facie evidence of the facts there set out.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 568, 968, 962; Dec. Dig. § 525.*]

2. COVENANTS (§ 116*)—ACTION FOR BREACH—ISSUES.

In an action for breach of covenant of title, in that there were street assessment liens against the property, the petition alleged that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

grantee bought the land without any notice of such lien, and the answer, after denying "each and every allegation therein contained unless hereinafter admitted," admitted the execution of a deed, but alleged that it was a part of the real consideration that grantee should pay such assessments. Held that, in view of the pleadings, the grantor could not claim that the judgment confirming the assessment and declaring it a lien on the property in question was improperly introduced in evidence, because there was no proof other than the recitals of the judgment itself that there had been service of notice of the assessment on the grantor, since the pleadings admitted the existence of the lien.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 209; Dec. Dig. § 116.*]

3. JUDGMENT (§ 822*)—JUDGMENT OF OTHER STATE—CONCLUSIVENESS—RECITALS—SERVICE OF NOTICE.

Where, in an action for breach of covenant of title, in that there were outstanding street assessment liens against the property, which property was in another state, it was stipulated that the judgment confirming the assessment and declaring it a lien was to be treated as a judgment of a court of the resident state, and the statute of the foreign state showed that the judgment was entered by a court of record and of original jurisdiction in that class of cases, recitals in the judgment that service was had on the grantor, the defendants in the action, were prima facie true, and the burden was on defendant to overthrow the presumption.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1500; Dec. Dig. § 822.*]

4. COVENANTS (§ 96*)—COVENANT AGAINST INCUMBRANCES—BREACH—ASSESSMENT LIENS.

The existence of a street assessment lien, which is a valid lien against property at the time the owner deeds it by a statutory warranty deed to one having no notice of the lien, is a breach of covenant.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 119; Dec. Dig. § 96.*]

5. COVENANTS (§ 135*)—WARRANTY OF TITLE—BREACH—INSTRUCTIONS.

In an action for breach of covenant of title, in which plaintiff claims a breach by existence of assessment liens against property at the time of conveyance, and defendant claims that plaintiff had notice of such liens and assumed their payment as part consideration of the deed, an instruction that if the jury believe from the evidence that, at the time of execution and delivery of the statutory warranty deed offered in evidence, plaintiff, in addition to the consideration mentioned in the deed, agreed to assume all taxes for street improvements, then the jury are to find for defendant, properly submitted the issue to the jury.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 209; Dec. Dig. § 135.*]

6. COVENANTS (§ 118*)—WARRANTY OF TITLE—EXISTENCE OF LIENS—BURDEN OF PROOF.

In an action for breach of covenant of title, in that there were outstanding street assessment liens against property, an instruction placing the burden of proof on plaintiff to show that a consideration named in a statutory warranty deed was the true consideration, and that he did not assume the payment of such liens, and that, unless plaintiff show such fact by preponderance of the evidence, the jury should find for defendant, is erroneous.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 213; Dec. Dig. § 118.*]

7. TRIAL (§ 261*)—REQUEST FOR INSTRUCTIONS—ERRONEOUS REQUESTS.

Where, in an action for breach of covenant of title, requested instructions as to burden of

proof being on plaintiff, and that plaintiff must show the facts by a preponderance of the evidence, are erroneous, and are refused, further requested instructions defining the burden of proof and preponderance of evidence are also properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 660; Dec. Dig. § 261.*]

8. TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE.

The injection into a case by defendants of an affirmative issue does not change the rule as to the right of plaintiff to open and close; but it is only where plaintiff's whole case is admitted, and the defense, by new matter in avoidance or the like, undertakes to meet the admitted case, that the rule is changed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 47; Dec. Dig. § 25.*]

9. APPEAL AND ERROR (§ 994*)—REVIEW—WEIGHT OF TESTIMONY.

The weight to be given testimony of witnesses is a matter for the exclusive determination of the jury in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.*]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by Michael C. Reis against Ernest L. Epperson and others. From a judgment for plaintiff, defendants appeal. Affirmed.

On the 24th of August, 1901, defendants, who are appellants here, by their deed conveyed to respondent certain lots in Harris Place addition to the city of East St. Louis, St. Clair county, Ill., in consideration of \$1,200. The deed was executed in St. Clair county, Ill., and is the statutory form in use in that state of a warranty deed, reciting that the grantors, naming them (defendants here), for and in consideration of \$1,200 in hand paid, "convey and warrant" to plaintiff the lots described. The deed is properly acknowledged by all of the parties to it who are defendants here. The Illinois law, properly pleaded and introduced in evidence (section 9, c. 30, Starr & C. Ann. St. Ill. 1896), provides that every deed in substance in the form of the deed in evidence, "when otherwise duly executed, shall be deemed and held a conveyance in fee simple, to the grantee, his heirs or assigns, with covenants on the part of the grantor, (1) that at the time of the making and delivery of such deed he was lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described, and had good right and full power to convey the same; (2) that the same were then free from all incumbrances; and (3) that he warrants to the grantee, his heirs and assigns, the quiet and peaceable possession of such premises, and will defend the title thereto against all persons who may lawfully claim the same. And such covenants shall be obligatory upon any grantor, his heirs and personal representatives, as fully and with like effect as if written at length in such deed."

The petition in the case, after averring the execution and delivery of the above deed,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

avers: That prior to its execution certain special assessments had been levied against defendants, made pursuant to the laws of the state of Illinois, also pleaded, for the improvement of Baugh avenue, on which street the lots fronted, and that the special assessments, by virtue of these laws, had prior to the execution and delivery of the deed aforesaid become a valid lien upon the property; that plaintiff had no knowledge of the lien or special assessments when he accepted the deed and paid the consideration, and did not learn of the same until after the property had been sold pursuant to the laws of the state of Illinois concerning enforcement of the payment of that assessment; that plaintiff was compelled to, and did, redeem the property; that the total amount of the assessment was \$594.60, which amount plaintiff had been compelled to pay, together with penalties, interests and costs and expenses in the sum of \$400. Averring that the existence of the lien constituted a breach of the covenant in the deed and that plaintiff's damage thereby was \$994.60, judgment is prayed for that amount. The answer, after denying "each and every allegation therein contained, unless hereinafter admitted," admits the execution of the warranty deed, but alleges that the consideration in the deed was not the real and only consideration for the conveyance of the premises by defendants to plaintiff, but that there were other considerations, and that one of them was the payment by the plaintiff "of the very street assessment for the improvement of Baugh avenue set out in his petition." The answer then denies that plaintiff was without any knowledge of the lien or assessment or without any knowledge of the same until after the property was sold, but alleges and charges that the property was sold to plaintiff by defendants at about one-half of its value on the express consideration that plaintiff would pay all assessments for street improvements. "Defendants therefore deny that the existence of the lien of said special assessments constituted a breach of the covenant of defendant's deed aforesaid, and hence deny that they are indebted to plaintiff in the sum of \$994.60 or any other sum whatsoever." The reply was a general denial of this new matter.

On trial before a court and jury, the deed being introduced, as also the statutes of Illinois relating to conveyances of real estate and vesting power in the city council of East St. Louis to make the improvements, and conferring jurisdiction on the county court of St. Clair county to adjudge assessments for street improvements, plaintiff offered a transcript of the record of proceedings of the county court of St. Clair county relative to the special assessment for the Baugh avenue improvements. This transcript recites, among other things, and after a recital of the fact of the presentation of the petition for the assessment of the costs of the improvements: That it appears to the court

that the commissioners had given notice of the assessment, "and that the final hearing thereof would be had at this term of court as required by law, by sending through the mail to each owner of the premises assessed a notice of such assessment, giving the names of the owners, a description of the property, amount of the assessment, and that said assessment roll would be returned to the August term, A. D. 1900, of this court, which notices were in the form required by law, and signed by said commissioners, and were mailed to said parties more than 10 days prior to the first day of this term of court, and which were sent to each of the persons whose names appear on the said assessment roll filed in this cause. That said commissioners also gave notice of said assessment and its return to this court, by posting notices for 10 days prior to the first day of this said August term of court, in four public places in said city of East St. Louis, two of said places being in the neighborhood of said proposed improvement; and also by publishing said notices five successive days in the East St. Louis Daily Journal, a daily newspaper published in the said city of East St. Louis, said publication being also 10 days prior to the first day of said August term of this court. The court therefore entered a rule on all parties to this proceeding and all persons interested to make answer or file objections herein by the first Thursday of this term, August 9, 1900." It further appears by the recitals in the transcript that at the day named one of the parties, named Weinmann, appeared and filed objections to the confirmation of the assessment. The judgment of the county court then continues: "And as to each of the other parties herein judgment in this cause is hereby rendered against them by default." None of the appellants here, however, appeared. Afterwards, on the 20th of December, Weinmann withdrew her objections, and the city of East St. Louis, through its attorneys, asking for confirmation of the special taxes and the assessment, the court ordered and adjudged that the special taxes to pay the costs of the improvements as assessed in the assessment roll be levied and confirmed against the lots as assessed and entered on the roll. It appears by a subsequent order that this assessment was payable in five annual installments, each installment to bear interest.

When this "judgment roll," as for convenience we will call it, was introduced, counsel for defendants made the general objection that it was incompetent until it was shown, outside of this record, that there had been service on these defendants, expressly waiving, however, all other objections to it, and agreeing that it was to be treated exactly as if it was the record of a court of the state of Missouri. To put it accurately, after the court had sustained the objection to the admission of this record and had ruled the record out, the court asked counsel for de-

defendants if his position was that, for the purposes of this trial, the record was to be treated as if it was the record of a domestic, instead of a foreign, court? Counsel answered: That that was his position, and his objection lay to the lack of showing by evidence that necessary steps had been taken to create a valid lien against the property, in that it was not sufficient by its own recitals to prove the fact of service of notice as required by law on the defendants in this case; that it was incumbent on plaintiff to prove the service of notice on these defendants, outside of the recitals in the record; that plaintiff should be required to produce the affidavit of the publisher of the paper, or testimony of the party who had mailed or posted up the notices referred to in the judgment. Thereupon the court overruled the objection to the record and admitted it; defendants duly saving exceptions. There was evidence showing the amount that had been paid on account of this assessment by the plaintiff. Plaintiff positively denied having had knowledge of the assessment when he accepted the deed, and denied in very positive terms ever having agreed to pay the assessment. While plaintiff was under cross-examination, a contract was introduced in evidence which had been executed between the plaintiff and these defendants as to the sale of these lots, a contract executed prior to the delivery of the deed, which, under this contract, had been in escrow for some time after its date. This contract was dated the 12th of June, 1901, while the deed was dated August 24, 1901. It is not necessary to set it out, as, while it provides for assumption of various claims and liens by plaintiff, there is no specific mention of these assessments, and while defendants' witnesses testify that, when this contract was made, these assessments were spoken of as liens to be assumed by plaintiff, the latter denied this. On the part of the defendants, testimony was introduced strongly tending to show that it was distinctly understood between plaintiff and the defendants when this contract was made, and when the deed was made and delivered, that plaintiff had assumed and was to pay these assessments.

The court, at the instance of plaintiff, gave an instruction to the effect that the judgment of the county court of St. Clair county, Ill., introduced in evidence, fixed a valid lien against the property described in the petition in this suit, and that the existence of such lien and its nonpayment by defendants was a breach of the covenant of warranty in the deed of defendants to plaintiff, and it told the jury that, "unless you find from the evidence that plaintiff as a part of the consideration of said deed assumed and agreed to pay said assessments, your verdict must be for the plaintiff." The court further instructed the jury, at the instance of the plaintiff, that, if they found in his favor, their verdict should be in such an

amount as they found from the evidence plaintiff had been compelled to pay to protect his title, not exceeding the amount sued for to which sum they could add interest at the rate of 6 per cent. per annum from the 24th of May, 1904, to date. Exception was duly saved by defendants to the giving of these instructions. At the instance of the defendants, the court gave an instruction to the effect that if the jury "believe from the evidence that, at the time of the execution and delivery of the warranty deed offered in evidence, the plaintiff, in addition to the consideration of \$1,200 mentioned in said deed, agreed with the defendant Harris to assume all taxes for street improvements, then the jury are to find for the defendants." The defendants asked three other instructions, which the court refused. The first instruction asked was that under the law and the evidence the jury would find for the defendants. The second instruction asked was to the effect that the burden of proof was on plaintiff "to show that, when the warranty deed read in evidence was executed and delivered to plaintiff by the defendant, the consideration named therein was the consideration for the purchase of the lot described in the deed, and that the plaintiff did not assume to pay for the street improvement, and that, unless the plaintiff has shown the same by a preponderance of testimony, the jury should find for the defendant." The third instruction asked defined the meaning of the terms "burden of proof" and "preponderance of evidence." According to the abstract of the record, the defendants saved exception to the refusal of the second and third instructions; but they do not appear to have saved exceptions to the refusal of the instruction to the effect that under the law and the evidence the jury should find for the defendants. The jury returned a verdict for plaintiff and against defendants for \$416.88 for the debt and \$18.54 for interest; nine of the jurors concurring in the verdict. Defendants in due time filed a motion for new trial, which was overruled, exception duly saved, and the cause is here on the appeal of the defendants.

J. F. & R. H. Merryman, for appellants.
Harlan, Reis & Wagner, for respondent.

REYNOLDS, P. J. (after stating the facts as above). While by the answer in the case the defendants denied each and every allegation contained in the petition, they followed it with the clause, "unless hereinafter admitted." We are of the opinion that the allegations in the answer following this qualified denial, in effect, admitted the levying of the assessment for the improvements, and relied upon the claim that by outside agreements between plaintiff and defendants these assessments were excluded from the warranty and were assumed and were to be paid by the plaintiff; either that, or in one part

the answer defendants have denied and the other admitted the assessment and held that they were absolved from each of the warranty of nonpayment because plaintiff had himself assumed their payment. In point of fact that is the issue on which the case was presented to the jury by counsel for each of the parties. The jury instruction asked by defendants and given by the court at their instance carries with it the idea that these taxes and assessments for street improvements had been made and were a burden or lien upon the property. Apart from that, however, it was expressly stipulated that the judgment of the county court of St. Clair county, Ill., was to be treated exactly as if it was the judgment of one of our own courts. The statute of Illinois introduced in evidence showed that not only was the county court a court of record, generally, but, so far as this class of cases is concerned, was a court of original jurisdiction. However inferior a tribunal it may be, according to the well-settled rules of decision in our courts, when a court, even of limited jurisdiction, is acting within the limit of that jurisdiction, its recitals are at least prima facie evidence of the facts there set out. In point of fact many of our decisions go much further than that, and tend to uphold the recitals of jurisdictional matters by courts of inferior jurisdiction in cases within that jurisdiction as conclusive of the truth of those recitals. In either view of the case therefore no error was committed in the reception in evidence of this record of the county court of St. Clair county, Ill., and its recitals of the fact of service comply with the requirements in such cases, as was proven by the statute of Illinois, and are at least prima facie evidence that the defendants here were duly served and their property before that court for adjudication in this matter. If, from the return of process or proof of service by posting or publication, defendants desired to overturn those recitals, assuming for this case that that could be done, it was for them to have introduced evidence to that effect. They failed to do this and are bound by the recitals of the record in evidence.

There was no error in giving the instruction which the court gave at the instance of plaintiff. The instruction given at the instance of the defendants fairly put the contention of defendants to the jury, on the issues that had been tried before it, and defendants have no cause whatever to complain of that instruction as not properly presenting the issues and the evidence from their side of the case. The instruction as to the preponderance of the evidence and as to where the burden lay on the issue of the assumption, outside of the deed, of payment of this special assessment, was properly refused, and, that being properly refused, the

instruction defining "burden of proof" and "weight of evidence," of course, should not have been given. The learned counsel for defendants in this case have ignored or lost sight of the fact that this matter of payment or of assumption outside of the warranty of the deed was their affirmative defense—was the affirmative defense of the defendants. Hence the burden of proof of that was with the defendants, and the court very properly refused the instruction. Support is sought to be given to the argument for these instructions as to the burden of proof on the fact that plaintiff had the opening and closing of the case. That is always the rule, so long as any part of plaintiff's case is in issue. The injection into the case by the defendants of an affirmative defense does not change the rule. The rule is changed only when plaintiff's whole case is admitted, and the defense, by new matter in avoidance or the like, undertakes to meet the admitted case. That was not the situation here.

The weight to be given to the testimony of the different witnesses was a matter for the exclusive determination of the jury, and their verdict is conclusive on that matter; there being no error of law in the trial or instructions.

Finding no error, the judgment of the circuit court is affirmed. All concur.

BORCHERS v. BARCKERS.

(St. Louis Court of Appeals, Missouri. Nov. 2, 1909.)

1. INSURANCE (§ 212*)—LIFE INSURANCE—ASSIGNMENT—MENTAL CAPACITY OF ASSIGNEE—UNDUE INFLUENCE.

The assignment by a father of his interest in his life insurance policy to his son only a few days, at most, before his death, is akin to a testamentary act, and the rules regarding mental capacity and undue influence applicable to a testator ought to be applied in such case.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 212.*]

2. INSURANCE (§ 212*)—LIFE INSURANCE—ASSIGNMENT—MENTAL CAPACITY OF ASSIGNEE—QUESTION FOR JURY.

Evidence held to present a question for the jury as to the mental capacity of insured at the time of assigning his interest in a life insurance policy to one of his sons.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 212.*]

3. INSURANCE (§ 212*)—LIFE INSURANCE—ASSIGNMENT—"MENTAL CAPACITY" OF ASSIGNEE.

Mental capacity of insured to make an assignment of life insurance means intelligence sufficient to understand the act he is about to perform, the property he possesses, what disposition he is making of it, and the persons and objects of his bounty.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 212.*]

For other definitions, see Words and Phrases, vol. 5, p. 4475.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. INSURANCE (§ 212*)—LIFE INSURANCE—ASSIGNMENT—UNDUE INFLUENCE—SUFFICIENCY.

Evidence held not to prove undue influence as to an assignment by insured of his interest in a life insurance policy to one of his sons.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 212.*]

5. GIFTS (§ 36*)—PARENT'S RIGHT TO GIVE TO WAYWARD CHILD.

A parent has a right to give property to a wayward child; and neither his other heirs nor a jury are entitled to select the object of his bounty, and set aside a gift because they think it undeserved.

[Ed. Note.—For other cases, see Gifts, Dec. Dig. § 36.*]

6. CONTRACTS (§ 96*)—UNDUE INFLUENCE—EVIDENCE.

Influence to be exerted must not only exist, but there must be proof that it was effectually exerted.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 96.*]

7. CONTRACTS (§ 99*)—UNDUE INFLUENCE—EVIDENCE.

The exertion of influence and its effect in inducing a will or contract may be shown by circumstances, and need not be directly proved, but there must be some evidence, circumstantial or direct, tending to prove the facts, and not merely raising a suspicion of their existence, or showing opportunity for exercise of improper influence without showing that it actually was exercised.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1199; Dec. Dig. § 99.*]

8. CONTRACTS (§ 99*)—"UNDUE INFLUENCE"—EVIDENCE.

Weakness of a person's mind does not, ipso facto, prove he was unduly influenced, but circumstances must be proved pointing to the successful employment of undue influence or positive testimony to that effect.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 99.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172, 7823-7824.]

9. INSURANCE (§ 212*)—LIFE INSURANCE—ASSIGNMENT—UNDUE INFLUENCE—BURDEN OF PROOF.

In a suit by the administrator of insured to determine the right to proceeds of a life insurance policy, the burden is on plaintiff to establish that an assignment by insured of his interest in the policy to one of his sons was procured by undue influence.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 212.*]

Appeal from St. Louis Circuit Court; Jas. H. Withrow, Judge.

Action by John Borchers, Jr., administrator of John Borchers, deceased, against Henry N. Barckers, to determine the right to the proceeds of a policy of insurance on the life of plaintiff's intestate. From a judgment for plaintiff, defendant appeals. Reversed.

John Borchers died January 11, 1905, leaving as his children and heirs John Borchers, Jr., Ernest Borchers, Henry N. or "Nick" Barckers, defendant, and his two married daughters, Sivia Strotjost and Katherine Hombusch. Defendant has changed the spelling of his name to "Barckers." He is commonly

called "Nick" by his relatives and acquaintances. A policy of insurance in the Mutual Reserve Association was issued to John Borchers, Sr., on his life July 10, 1900. After he fell sick, to wit, January 4, 1905, he assigned his interest in the policy to his son Nick Barckers, dying, as said, a week later and intestate. His son John was appointed administrator of the estate, and both he and Nick claimed the proceeds of the policy—John as administrator and Nick as assignee. By agreement of the rival claimants, the liability of the company was settled for \$600. This sum was paid to a trust company to be held until the disposition of it was determined by suit, and John Borchers, administrator, filed the petition in the present suit, setting out the issuance of the policy, the death of his father intestate, his appointment as administrator, the settlement of the liability of the company for \$600, that defendant claimed to be assignee of the policy by an assignment and transfer made on January 4, 1905, while plaintiff claimed it as administrator of the estate, denied the right of Nick Barckers under the assignment, and prayed that the trust company be ordered to pay the fund to plaintiff. Henry Barckers answered, admitting the formal averments of the petition regarding the issuance of the policy, etc., and then alleged the deceased had on January 4, 1905, executed and delivered to defendant the following documents:

"Application for Change of Beneficiary.

"Mutual Reserve Life Insurance Company.

"I herewith return to you my policy No. 387,500, issued July 10, 1900, for \$2000, and direct that the beneficiary as therein stated be changed, and the policy now be made payable to Henry N. Barckers, 42, Son, St. Louis. State cause why change of beneficiary is desired: Love and affection for the proposed beneficiary.

"Dated St. Louis, this 4th day of January, 1905.

his
 "[Signed] John X Borchers."
 mark

"State of Missouri, City of St. Louis—ss.:

"On this 4th day of January, in the year one thousand nine hundred and five, before me, the subscriber, personally came John Borchers, to me known, and known to me to be the person mentioned and described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

"My term expires September 10th, 1906.

"[Signed] H. A. Loevy, Notary Public. [Seal.]

"Consent of Existing Beneficiary.

"(Should the beneficiary as at present stated in the policy be an adult, the following clause must be signed by such beneficiary, be-

fore sending this to the home office. If beneficiary be a minor, so state). I herewith consent to the above-mentioned change of beneficiary.

his
 "[Signed] John X Borchers."
 mark

The answer further averred that, by virtue of said assignment or change of beneficiary, he was entitled to the proceeds of the policy, and plaintiff had no right or title of any kind or nature. The trust company, which was made a party to the suit, filed an answer, admitting it held the fund to be paid to the party found to be entitled by the decree. In reply plaintiff denied John Borchers, deceased, on January 4, 1905, made, executed, or delivered to defendant the assignment or change of beneficiary set out in the answer, and denied, further, that by virtue of said assignment or change of beneficiary, or in any other manner, defendant was entitled to the proceeds of the policy; further averred that, by the terms of the policy, no valid assignment could be made unless the association consented to it, and the association had not consented to the one in question; further averred that at the time deceased signed his name to the assignment or change of beneficiary, if, in fact, he ever did, he was "not of legal capacity to sign such document, and therefore the said pretended assignment or change of beneficiary is not the act or deed of the said John Borchers, deceased"; further averred that, if the deceased signed said pretended assignment or change of beneficiary, he did so through the undue and improper influence of said Henry N. Barckers and without consideration; wherefore the pretended assignment or change of beneficiary, if signed by said deceased, was not his act or deed. After the evidence had been heard and instructions passed upon, the cause was submitted to a jury, which returned a verdict in favor of plaintiff, and, judgment having been entered accordingly, this appeal was prosecuted. The court left the case to the jury on the ground plaintiff was entitled to recover if the execution of the assignment was induced by undue influence exercised over the mind of the deceased, John Borchers, by his son Nick, or any other person for him. The instructions for plaintiff, in substance, told the jury as follows: Though they might believe from the evidence at the time of the execution of the so-called assignment of the policy deceased was of sound mind and memory and of sufficient mental capacity to execute said assignment, yet if they further found and believed from the evidence that at the time of the execution of said writing the mind of deceased was, from disease, age, decrepitude, bodily or mental attack, or other cause or causes, subject to the dominion and control of defendant, and that defendant or any person for him unduly exercised such dominion, power, or influence over the mind and will

of deceased when he executed said assignment, so as to destroy his free will and knowledge in the disposition of his property, so that such disposition was not his free will and desire, then the verdict should be for plaintiff. A second instruction for plaintiff defined the words "undue influence" as used in the instructions to mean any influence which restrained, controlled, directed, diverted, or coerced the will or overcame the mind and judgment, and directed the jury to give a verdict for plaintiff if they believed from the evidence Henry N. Barckers, or any other person or persons in his behalf, by persuasion or other device or machination, controlled, directed, restrained, or coerced the will, or confused the mind of John Borchers, deceased, or confused or overcame his power of judgment of the true relation between himself and those who were the natural objects of his bounty, in the execution of the paper or writing read in evidence as and for his assignment of said policy, so that said instrument does not express the will and desire of said assignor in the disposition of his property. The jury were further told to take into consideration the mental and physical condition of deceased at the time of executing the instrument, all the circumstances attending the execution, the instrument itself and its provisions in determining whether undue influence was used to procure its execution. The court held consent of the company was not material to the controversy between the parties to this suit, refused to declare the signature to an instrument made by the mark of a person, instead of writing his full name, was as valid in law as if the person had written his name, and refused, further, to instruct there was no evidence to prove deceased was not of legal capacity to sign the assignment at the time he signed, or that he did so through the undue or improper influence of defendant.

It is necessary to state the substance of the testimony. It will be observed the assignment or direction for change of beneficiary purports to have been acknowledged before H. A. Loevy, notary public, on January 4, 1905. Mr. Loevy testified that the morning of said day defendant had called at his office and asked him to come out during the day to take the acknowledgment. He went, taking his notarial seal, met defendant at a transfer point on the street railway, accompanied him to the place where deceased was, found the latter sick in bed, and his physician, Dr. Martin, there. He (Loevy) took the policy, and wrote out the assignment or application to change the beneficiary. The deceased got out of bed, walked to a table in the room, and made his mark in two places. The table was not very far from the bed. After doing this, deceased handed the policy to his son Nick. The deceased seemed to be ill with a cold and was coughing; said his son Nick had been kind to him, and he wanted to leave the policy

to said son. It should be stated deceased and defendant at that time were living in a two-story barn a short distance from where John Borchers lived. They had been living in the barn for about a year, and two other sons, or at least one other, had lived there also. Deceased took his meals at his son John's, and defendant prepared his own meals at the barn. Deceased was a dairyman, and until about two weeks before he died, had attended to his dairy business, caring for milk, delivering it, and the like. Mrs. Strotjost gave a great deal of testimony, most of which was immaterial, relating to the character of defendant, and tending to prove, as plaintiff's counsel said, he was a "black sheep," of idle habits, had gotten into trouble with his wife, or wives, and had called on his father to pay money for him. She said another son of deceased had died a month or so before, and her father was deeply affected by this loss and never was the same afterwards; that after he took to his bed, he was a very sick man, had a swollen neck, expectorated a great deal, and was weak, was back and forth in bed for two weeks, was only "right down in bed" about a week; that there was no trouble between the father and any of the other children except Nick. Her father while sick had very little to say; would talk about his own affairs; sometimes would come over to her house with his horse and buggy, and spend hours talking with her husband for advice, and also with her brother John, the plaintiff. We suppose these conversations were prior to his last illness. She said deceased was in the habit of telling about his business, but did not tell about having made the assignment. She was asked whether he was in such condition as to know what he was doing—whether he was of sufficient mental capacity to understand the paper or assignment, and answered: "No; Father would know nothing about such a thing as that in the condition he was in." Mrs. Hobusch gave similar testimony regarding the illness of her father; said he was weak mentally and physically; at times could comprehend his acts and at other times not; he could write his name, and she had repeatedly seen him sign it; said her father had lived in the house of his son John a while, but wanted to go back to the barn to be with Nick. John Borchers also gave much testimony tending to disparage defendant's character. He testified that in his opinion deceased was not fit to do any business, "sign things over one to another." As to the time in which he was in this condition, the witness limited it to "a short time before he died." Dr. Martin, who waited on deceased, gave testimony that the latter was pretty sick for four or five days before he died. A week before he was in a fair condition mentally, and only got in such shape he could not do anything on the last day of his life; became unconscious

on that day, and was unconscious until he died. The testimony of this witness had a slight tendency to prove the assignment was taken on the day deceased died, though the witness declined to fix the day positively, but said he never saw Mr. Loevy there but once. He was with the deceased every day during the last 10 days of his life. The week before he died he was in a fair condition, and able to transact business; had asthma and this developed into pneumonia. Isaiah Mandlestam testified that about a week before deceased died witness had seen him milking cows and delivering milk, working in the stable. Deceased had talked to witness about trouble with his children; said two boys, Herman and Ernest, were nearly always drunk. Deceased talked to him about insurance; said the two boys could run the dairy if they behaved themselves; that, if they did not, he would give the cows away; said he would give the oldest one a couple of thousand dollars. This was four or five weeks before he died. O. E. La Roage testified, among other things, Nick, defendant, attended to the dairy, worked around there and handled the milk. In October or November, 1904, the old gentleman was talking about his insurance and said he intended to give the insurance up. None of the family seemed to interest themselves in it. Nick, who was present, said he would keep it up; whereupon the old gentleman said he (deceased) would have nothing more to do with it. Joseph Wellmeyer stated that in April, 1903, deceased had applied to him for some money to pay the premium on the insurance policy, and had then said as long as he (deceased) had no wife he would leave the insurance to his son Nick. Deceased owned $4\frac{1}{2}$ acres of land near or in St. Louis on the Natural Bridge Road and other property that descended to his children equally.

H. A. Loevy, for appellant. Collins & Chapelle, for respondent.

GOODE, J. (after stating the facts as above). The assignment of the insurance policy to defendant is attacked in plaintiff's petition on three grounds: Lack of consent of the insurance company; want of mental capacity in the deceased to execute any document at the time this one was executed; and procurement of the assignment through undue influence exercised over the mind of the deceased by defendant. Only the last of the three grounds was submitted to the jury in the instructions, as one on which, if the evidence supported it, they might return a verdict in favor of plaintiff. It will be perceived the main instruction for plaintiff did not leave it to the jury to say whether deceased was of sufficient mental capacity to execute the assignment, but, taking for granted he was, directed the jury to find whether defendant, or any one for him, possessed and wielded an undue influence over

deceased, and thereby brought about the assignment without its being the individual act of deceased. There is some evidence in this record, though slight, from which an inference of want of mental capacity in the deceased to execute the assignment might be deduced. The act was akin to a testamentary one; and the rules regarding mental capacity and undue influence applicable to the case of a testator ought to be applied here. The two daughters and the son gave testimony tending to prove their father's lack of mental capacity during his illness to know what he was doing, though when scrutinized this testimony is not cogent. Then there is the fact of the mark instead of the signature of deceased being affixed to the policy, and Dr. Martin's testimony which tended to prove the assignment was on the day deceased died and when he had lapsed into a semiconscious condition. The doctor's statement was so uncertain on this point as to be of little weight; but is perhaps a circumstance on the issue of mental capacity. All the evidence on this issue sufficed to send the case to the jury, as it was tried by a jury, though it appears to be in the nature of a suit in equity. What would constitute capacity to make the assignment will be understood from declarations of the Supreme Court that legal competency to transact business, or rather to make a will, means intelligence sufficient to understand the act the testator is about to perform, the property he possesses, what disposition he is making of it, and the persons and objects of his bounty. *Sehr v. Lindemann*, 153 Mo. 286, 288, 54 S. W. 537; *Riley v. Sherwood*, 144 Mo. 354, 363, 45 S. W. 1077.

We find no proof of the exercise of undue influence over the mind of deceased by defendant or some person for him in order to induce the assignment of the policy to defendant. The members of the court have perused the evidence several times, and consider it a blank as regards proof of this charge. The only other person than defendant who could have been meant as the one who might have influenced deceased unduly is Mr. Loevy, an attorney, but who acted in this matter as notary public, and simply took the acknowledgment of deceased. For aught shown, he did literally nothing else. The only circumstance to prove any conversation had passed at any time between defendant Nick Barckers and his father during the latter's last illness about a transfer of the policy to defendant is that the latter requested Mr. Loevy to go where deceased lay sick, and take an acknowledgment of the assignment. If credible witnesses are to be believed, deceased had expressed an intention before he fell ill to transfer this policy to defendant. A great deal is said about defendant's being a "black sheep"; and we think this charge was dwelt on at the trial more than it deserved. As said, there was some proof defendant of late years had been idle and maybe troublesome to his father; but

there is other evidence to prove he helped carry on the dairy business, and that the father was attached to him. A parent has the right to give property to a wayward child; and neither his other heirs nor a jury are entitled to select the object of his bounty and set aside a gift merely because they think it was not deserved. The questions for the triers of the fact were the mental competency or incompetency of the deceased, and whether the act was his own or he was overcome, coerced, or overpersuaded so as to make it the result of the influence of another over him, exercised to a degree that dominated his will. A reading of the cases wherein transactions were assailed as having been induced by undue influence will show the Supreme Court of Missouri has taken strong ground regarding the right of a person to dispose of his property by contract or will, and against the policy of setting transfers and wills aside on slight proof that they were brought about by such an influence. The weight of authority supports said court in its positions, which we venture to remark are wisely taken; for it is common for persons who are disappointed in their expectations of patrimony to attempt to cast suspicion on bona fide transactions. For one thing, there is a dearth of evidence in the present record to show defendant had any special influence, due or undue, over the mind of deceased. The tendency of the evidence for plaintiff was to prove deceased was out of patience with defendant and unlikely to listen to him. For influence to be exerted it must, of course, exist. But it must not only exist, but there must be proof that it was exerted, and effectively. *Brinkman v. Rueggessick*, 71 Mo. 553; *Riley v. Sherwood*, 144 Mo. 354, 366, 45 S. W. 1077; *Crowson v. Crowson*, 172 Mo. 691, 703, 72 S. W. 1065. The exertion of it and its effect in inducing a will or contract may be shown by circumstances, and need not be directly proved. But there must be some kind of evidence, either circumstantial or direct, tending to prove those facts, and not merely to engender a suspicion of their existence, or show opportunity for the exercise of improper influence without showing it actually was exercised. *Teckenbrock v. McLaughlin*, 209 Mo. 533, 551, 108 S. W. 46; *Doherty v. Gilmore*, 136 Mo. 414, 419, 37 S. W. 1127. We are not unmindful of the fact in this connection of there being evidence which would tend to show a weakened mental condition in deceased, which, though not amounting to legal incapacity to transact business, would render him the more susceptible to improper influences. But his weakness of mind, if such there was, does not ipso facto prove he was unduly influenced. If it did, many wills which are perfectly valid would be set aside for having been executed when the testators were languishing in their last illnesses. What we hold is there must be circumstances proved which point to the successful employment of undue influence or positive tes-

timony to that effect, and there was neither in the present case. *Riley v. Sherwood*, 144 Mo. 364, 366, 45 S. W. 1077; *Sehr v. Lindemann*, 153 Mo. 286, 289, 54 S. W. 537. We hold, too, the burden was on plaintiff to establish the assignment was thus procured, as it is in most cases where undue influence in bringing about a transaction is alleged. *Tibbe v. Kamp*, 154 Mo. 545, 580, 54 S. W. 879, 55 S. W. 440. If deceased was of sufficient mental capacity to participate in a transaction, then tested by the principles declared in the foregoing decisions of the Supreme Court and other decisions of the same court referred to in the cases cited the present record is barren of evidence to prove the assignment of the policy of insurance to defendant was other than the voluntary, spontaneous, and unsolicited act of the deceased, prompted by paternal affection for defendant, and a desire to make some provision for him. Similar doctrines to those set forth have been declared by the Supreme Court in cases involving dispositions of property by transfers inter vivos. *McKissock v. Groom*, 148 Mo. 459, 50 S. W. 115; *Chadwell v. Reed*, 198 Mo. 359, 95 S. W. 227.

The judgment is reversed and the cause remanded.

NORTONI, J., concurs. REYNOLDS, P. J., concurs in reversing the judgment, but not in remanding the cause.

A. C. L. HAASE & SONS FISH CO. v. MERCHANTS' DESPATCH TRANSP. CO.
(St. Louis Court of Appeals. Missouri. Nov. 2, 1909.)

1. APPEAL AND ERROR (§ 171*)—ADHERENCE TO ISSUES BELOW.

Where an action against a carrier was tried on the theory of liability for negligent delay in transporting freight, the common-law liability of the carrier for delivery in damaged condition will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171.*]

2. CARRIERS (§ 177*)—LIABILITY OF INITIAL CARRIER.

A carrier issuing a through bill of lading, by which it agrees to transport freight from the initial point to destination part of the distance by a ship and the balance by rail, becomes thereby a carrier for the entire route, and is liable for the negligence of any carrier transporting the property under an arrangement with it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 779-790; Dec. Dig. § 177.*]

3. CARRIERS (§ 99*)—DELAY OF SHIPMENT—LIABILITY.

A statute providing that, when a carrier summoned as garnishee in an action has goods in its possession shipped by or consigned to defendant in the action, it shall not be liable for its failure to transport the goods until it is discharged, exonerates the carrier garnished in an action against the shipper or consignee from liability for delay caused by the garnishment, but a carrier merely alleging that a third person

was in possession of the goods at the time he was garnished and omitting to allege any fact showing that the possession of the third person was the possession of the carrier is not within the protection of the statute.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 422; Dec. Dig. § 99.*]

4. PLEADING (§ 311*)—EXHIBITS.

An exhibit attached to a pleading is not a part thereof, and an answer which merely alleges that a matter was attached to the petition as an exhibit does not make the same a part of the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 945; Dec. Dig. § 311.*]

5. CARRIERS (§ 156*)—CARRIAGE OF FREIGHT—BILL OF LADING—LIABILITY.

Proof that brine had run off fish shipped in barrels, and that the barrels during transportation had been punctured, and that the fish were injured thereby, did not prove a leakage within the bill of lading, relieving the carrier from liability for damages caused by leakage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 698; Dec. Dig. § 156.*]

6. CARRIERS (§ 104*)—DELAY IN TRANSPORTATION—NEGLIGENCE—BURDEN OF PROOF.

One suing a carrier for negligent delay in transporting freight must prove negligence and the consequent damage, and the mere fact that the freight was shipped in apparently good order and properly packed, and was in a deteriorated condition when delivered after a delay, is not sufficient to require the carrier to show that it was not negligent.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 439; Dec. Dig. § 104.*]

Appeal from St. Louis Circuit Court; Daniel C. Taylor, Judge.

Action by the A. C. L. Haase & Sons Fish Company against the Merchants' Despatch Transportation Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Plaintiff recovered judgment for damage to a cargo of pickled mackerel, shipped from Liverpool, England, and consigned to defendant in East St. Louis, Ill. The mackerel were purchased in the north of Ireland by John Murray, an agent of defendant, were shipped in barrels by the steamship *Sagamore* from Liverpool to Boston, and thence transported by rail to East St. Louis. There were 303 barrels of mackerel, and the petition avers defendant, a transportation company, undertook, for a consideration paid by plaintiff, to carry them from Liverpool to Boston, and therefrom by rail to East St. Louis, within a reasonable time after December 21, 1905, the date defendant received the fish in Liverpool for transportation; that defendant carried the cargo to Boston, where it arrived January 3, 1906, and it then became defendant's business to transport it to East St. Louis, which would require four to six days, but, in disregard of its duty, defendant failed to deliver the fish until late in January or early in February, or four weeks later than a reasonable time. It is further averred that, in consequence of the long delay in transporting and delivering the fish at East St.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

Louis, part of them became spoiled and deteriorated, some of the barrels in which they were packed were broken in transit, and the brine escaped from them in consequence of the length of time consumed in transportation; that the market value of mackerel depreciated between the early part of January, when the fish in question should have arrived in St. Louis, and the latter part of January or early in February, when they did arrive; that, by reason of those matters, plaintiff had sustained damage in the sum of \$909.75, for which judgment was asked. The answer originally filed, besides a general denial, contains a special defense of the following tenor: Whatever delay occurred in the transportation of the fish to destination was caused by their being attached under process of law issued out of the municipal court of the city of Boston, Mass., in a suit brought by trustee process (i. e., garnishment) by Thomas Woodward, plaintiff, against John Murray, defendant, Geo. H. Warren and the American Express Company, trustees, the said writ of attachment having been issued January 3, 1906, and duly served on said Warren and the express company, returnable on January 13, 1906, to said municipal court, which is one of record and had jurisdiction of the subject-matter of the action and of the parties; that under said writ so issued the fish were seized by an officer having authority to do so, as the property of John Murray, of county Clare, Ireland, who was the shipper of the goods. The seizure occurred while the property was in possession of Geo. H. Warren, doing business as Warren & Co., and the owner of the steamship Sagamore, in which the fish had been carried across the Atlantic; that plaintiff was notified of the institution of the said suit in the municipal court of Boston, of the seizure of the property, and plaintiff declined to appear in the cause or defend it; that the fish at the time of the commencement of said suit and attachment were in the possession of Warren and mostly in the hold of the steamship Sagamore, but partly on the dock in the city of Boston, and the attachment was levied on said goods before they were taken from said hold and dock, and before they could be delivered by Warren to defendant, as required by the bill of lading. None of the fish were turned over to defendant by Warren & Co. until January 24, 1906, and, as soon as they were, defendant transported them without delay to East St. Louis, and delivered them to plaintiff; that defendant was not made a party to the suit above described in the Boston municipal court; that there was in force in Massachusetts at the time the suit was instituted a statute of said state, as follows: "That all personal actions except actions for tort, for malicious prosecution or for libel or for assault and battery or actions of replevin, may be commenced by a trustee process, and any person or corporation may

be summoned as trustee of defendant therein, but a person who is not an inhabitant of the commonwealth or a corporation which is not established under the laws shall not be summoned, unless he or it has an established place of business in the commonwealth." Rev. Laws, c. 189, § 1. There was also in force in Massachusetts an act (Acts 1906, p. 241, c. 324) which is as follows: "Provided, when a common carrier summoned as trustee in an action at law, has in his possession or its possession, goods shipped by or consigned to the defendant in such an action, such carrier, in the absence of collusion on his or its part, shall not be liable to the owner or consignee by reason of his or its failure to transport and deliver the said goods until the attachment is dissolved or the carrier is discharged as trustee." It was further averred Geo. H. Warren and the American Express Company were common carriers in the commonwealth of Massachusetts, had established places of business there, and were summoned in said suit by virtue of its laws. The foregoing special defense was struck out on motion of plaintiff, and an exception was saved to the ruling. Another special defense was based on the provisions in the bill of lading, purporting to exempt defendant or any carrier handling the goods from liability for loss or damage to them before arrival at the port of Boston, due to causes beyond the control of the carrier, or unless claim was made for the damage or loss while the goods were in the actual custody of the carrier; further providing no common carrier should be liable for loss or damage caused by shrinkage, leakage, or breakage, or packing the goods in packages of insufficient size or strength; also claiming the benefit of other exemptions in the bill of lading relating to losses subsequent to the arrival of the merchandise at the port of Boston, which said no carrier or company in possession of the property should be liable for loss or damage to the goods due to causes beyond its control by breakage, leakage, or chafing; or for loss or damage not occurring on its own line or its portion of the through route; or unless claim should be made in writing in 30 days after the delivery of the property to the consignee. The answer alleged that, if damage occurred to plaintiff's property, it was due to the causes mentioned for which defendant was not liable under the terms of the bill of lading, and that no claim was made within 30 days for any damage, alleged, further, that under the laws of England, where the bill of lading was issued, the consignor and consignee were allowed to enter into valid contracts, stipulating for exemptions such as we have stated, that any loss or damage which happened to plaintiff's property as alleged in its petition was due to the negligence of the consignor in failing to pack the property properly for its journey. Evidence was in-

troduced tending to sustain the averments of the petition regarding the prolonged delay in transporting the fish to East St. Louis, and the damaged condition in which they arrived. It was proved brine had leaked from a great many of the barrels and in consequence the fish had become what is called "rusty," and were worth not more than half they would have been worth if in good condition. It was also proved some of the barrels had burst about their heads, and the staves were pierced with holes.

The instructions for plaintiff required the jury to find as grounds of a verdict against defendant that it had delayed the transportation of the fish longer than was necessary to carry them from Liverpool to East St. Louis by the exercise of reasonable care, and that, when they reached destination, they were not in good condition in consequence of the delay. In other words, it was necessary to find the delay was negligent and caused damage to the fish in order to return a verdict against defendant. Several instructions were given at the request of plaintiff predicated liability on negligence, and several at defendant's request, the purport of which was, if the jury found the fish had been damaged by storms, heavy seas, or perils incident to navigation, and not by any negligence of defendant, plaintiff could not recover. Further, if the jury believed they were damaged partly in consequence of the kind of cask in which they were packed for shipment, or because of the way in which they were packed in the casks, and partly by reason of the delay in transportation, and the jury were unable to separate the damage due to the two causes, then plaintiff could not recover; and, if the jury were able to separate the damage due to the two causes, plaintiff could recover only for damage due to the negligence of defendant. Further, if the jury found the damage or loss to the fish was due to the nature of the goods or the insufficient packing, the verdict should be for defendant. The defendant requested and the court refused to instruct plaintiff could not recover for damage to the fish due to leakage, and refused several instructions to the effect that delay caused by the proceedings in the court at Boston constituted a defense to any claim for damage suffered by plaintiff on account of such delay.

Defendant appealed from the judgment for plaintiff given on a verdict in its favor.

Geo. F. McNulty and Jas. R. Van Slyke, for appellant. Rassieur, Schnurmacher & Rassieur, for respondent.

GOODE, J. (after stating the facts as above). The instructions requested show both parties tried the case on the theory that plaintiff was counting on the negligent delay of defendant in carrying the fish, whereby they were damaged, and not on any common-law liability for delivering the fish

in a damaged condition. *Hurst v. Railroad*, 117 Mo. App. 25, 37, 94 S. W. 794. The cause was submitted on the theory that there must have been careless and unreasonable delay in the transportation of the goods from Liverpool to East St. Louis to lay defendant liable, and damages could not be recovered for losses due to delay or other injurious incidents of the voyage across the Atlantic, caused by contrary winds, heavy seas, or the perils of navigation generally, for which defendant was not to blame. Hence we shall not consider the appeal with reference to a possible common-law liability of defendant. It had issued in Liverpool a through bill of lading by which it agreed to transport the fish from that port to East St. Louis, agreeing to carry first to Boston by the ship Sagamore and from there to East St. Louis by rail. Defendant therefore became a common carrier for the entire route, and was liable for the negligence of any carrier which transported the property under an arrangement with it. *McCann v. Eddy*, 133 Mo. 59, 33 S. W. 71, 85 L. R. A. 110.

One point of controversy is over the court's action in striking out the special defense based on the trustee process or garnishment issued by the Boston municipal court, wherein Warren, owner of the steamship, and at the time actually the custodian of the fish, and the American Express Company, the agent of defendant in issuing the bill of lading, were garnished. The court not only struck out this defense and excluded evidence to support it, but refused instructions to the jury on the issue, thus carrying out consistently the theory that the garnishment of Warren and the American Express Company was no excuse for the detention of the fish three weeks or more in Boston. It is to be remembered the gravamen of this action is the negligent delay in transit and damage caused thereby, and not conversion of the property by defendant; and the question urged is whether the garnishment of the owner of the steamship who had the fish in custody and his refusal to relinquish the property to defendant 'until the garnishment suit was dismissed, thereby preventing defendant from forwarding the goods promptly to destination, in law excuses defendant's delay. There is some conflict between the courts regarding whether a common carrier which has goods in its hands and actually in transit, as these were, can be garnished in an action against the owner of the goods, and perhaps the weight of authority is against the right to levy such a garnishment. 2 Hutchinson, Carriers (M. & D. Ed.) § 746, orig. § 402; 4 Elliott, Railroads (2d Ed.) § 1538, and cases cited; *Stevenot v. Koch*, 61 Minn. 104, 63 N. W. 256, 28 L. R. A. 600, and note; *Baldwin v. Railroad*, 81 Minn. 247, 83 N. W. 986, 51 L. R. A. 640, 83 Am. St. Rep. 370. The point has not been passed on in this state, though in *Landa v. Holck & Co.*, 129 Mo. 663, 31 S. W. 900, 50 Am. St. Rep. 459,

it was held a railroad company which had received goods for shipment, but had not yet started them in transit, might be garnished in respect of such goods, and this is the general doctrine. The law in Massachusetts is contrary to the weight of authority, and there are peculiar statutes on the subject in that state, as will be seen *supra*. In *Adams v. Scott*, 104 Mass. 164, it was held a common carrier may be summoned in garnishment in an action against the owner of the goods actually in transit. That decision was given on a construction of the Massachusetts statute first quoted above. A fact much relied on by this plaintiff is that trustee process in the Boston municipal court was sued out, not against plaintiff, but against Murray. The second Massachusetts statute quoted, *supra*, says a common carrier summoned as trustee and having in its possession goods shipped by or consigned to the defendant in such an action, in the absence of collusion on its part, will not be liable to the owner or consignor by reason of its failure to transport or deliver the goods until the attachment is dismissed or the carrier discharged as trustee. That statute exonerates a carrier garnished in an action brought against either the shipper of the goods or the consignee from liability to the owner or the consignee for delay occasioned by the garnishment. The shipper in the present case was John Murray, and under the statute it looks like garnishment of the carrier of the fish in an action against Murray would, in Massachusetts, be a good excuse for delay in transportation due to the garnishment in favor of the party summoned as garnishee. The act was passed according to the answer in 1895, and perhaps in consequence of the decision given in 1870, in *Edwards v. White Line Transit Co.*, 104 Mass. 159, 6 Am. Rep. 213, that garnishment was no defense to the carrier if it was in an action against any person other than the owner of the goods. In said case the garnishment was in an action against the shipper, just as here; and, the carrier having been sued by the owner for delay thus caused, it was held the garnishment was no defense. Plaintiff says the defendant was not in possession of the goods at the time of the garnishment, and so alleges in the portion of the answer which was struck out. The answer does not say in so many words defendant was not in possession at the time of the service of garnishment, but says Warren & Co. were, and the goods were not delivered to defendant until the latter part of January. Nothing is alleged either in the answer or the petition about Warren & Co. being the agent of defendant, or any other fact which would make the custody of Warren & Co. the possession of defendant. *Landa v. Holck & Co.*, 129 Mo. 663, 671, 31 S. W. 900, 50 Am. St. Rep. 459. The only reference in the answer which shows the facts about this matter says it was attached to the petition as an exhibit. This fact did not make it a

part of the petition, much less of the answer. *Bowling v. McFarland*, 38 Mo. 465; *Pomeroy v. Fullerton*, 113 Mo. 440, 21 S. W. 19. It follows we are compelled to dispose of an interesting question on a point of pleading. The part of the answer struck out avers possession of the property in another than defendant when trustee process was served; also, avers defendant was not a party to the proceeding, and hence states defendant outside the scope of the Massachusetts statute, which purports to protect only carriers who are in possession of the property and those summoned as trustees. We will not determine whether summoning an agent of defendant, if Warren & Co. was such, would have given defendant the benefit of the statute. What we hold is that having alleged Warren & Co. was in possession of the property at the time trustee process was served, and having omitted to allege any fact to show custody or possession of that garnishee was the possession of defendant, no defense was stated under the Massachusetts statute.

Complaint is made because the court refused to charge that, before plaintiff could recover, it must prove by a preponderance or greater weight of the evidence any damage done to the goods by leakage was directly caused by some act of negligence on the part of defendant, its agents, or servants. But the requested instruction said plaintiff admitted the damage to the mackerel was caused by leakage, and there was no such admission either in the pleadings or proof. It is true plaintiff's secretary testified the brine had run off the mackerel in some of the barrels, but he said the barrels were stove in at the head, and in some places holes had been run through the staves. The escape of brine through openings knocked in the casks was not leakage within the meaning of the bill of lading, nor was testimony of its escape in that manner equivalent to admitting the damage was due to leakage.

For plaintiff the court instructed the jury that if the mackerel were shipped in apparently good order and condition and properly packed, and when delivered to plaintiff by defendant some of the casks were broken open and the brine had escaped, and the mackerel become deteriorated, then the law presumed the negligence of defendant caused said condition, and this presumption would obtain until defendant showed by the greater weight of evidence that its negligence did not bring about the condition, and, unless defendant had proved to the satisfaction of the jury by the greater weight of evidence the condition of the mackerel was not produced by defendant's negligence, and the jury should find the mackerel were not transported and delivered in the usual time, the verdict must be for plaintiff. Plaintiff counted in its petition on negligent delay of defendant in transporting the fish, and it will be perceived the instruction just epitomized told the jury the law presumed negligence if the mackerel

were delivered to defendant in good condition and delivered by defendant to plaintiff in a deteriorated condition. This is not the law. It was incumbent on plaintiff to establish its charges of negligence and consequent damage to the mackerel. In support of the instruction, we are cited by plaintiff's counsel to Kirby v. Express Co., 2 Mo. App. 369. That decision does support it, but it was rendered on the authority of Levering v. Union, etc., Co., 42 Mo. 88, 97 Am. Dec. 320, and Ketchum v. Express Co., 52 Mo. 391, and those decisions were expressly overruled in Witting v. Railroad, 101 Mo. 631, 14 S. W. 743, 10 L. R. A. 602, 20 Am. St. Rep. 636, wherein the court said it must be taken as the established law of this state that, when the cause of action stands on the ground of negligence on the part of the carrier, the burden of proof is upon the plaintiff, that the party who founds his cause of action on negligence must be prepared to establish the assertion by proof, and the burden of proof is on him from the beginning to the end of the case. This decision was reaffirmed in Stanard Mill. Co. v. Transit Co., 122 Mo. 258, 276, 26 S. W. 704.

The judgment is reversed and the cause remanded. All concur.

EPSTEIN v. PENNSYLVANIA R. CO.

(St. Louis Court of Appeals. Missouri. Nov. 2, 1909. Rehearing Denied Nov. 16, 1909.)

1. DAMAGES (§ 185*)—PERSONAL INJURIES—IMPOTENCY—SUFFICIENCY OF EVIDENCE.

In an action for personal injuries, evidence held sufficient to sustain a finding by the jury that plaintiff was rendered impotent.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 185.*]

2. NEGLIGENCE (§ 121*)—PROXIMATE CAUSE—BURDEN OF PROOF.

In an action for personal injuries, it is incumbent upon plaintiff to show that the accident directly caused the injury complained of.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 228; Dec. Dig. § 121.*]

3. NEGLIGENCE (§ 134*)—PROXIMATE CAUSE—SUFFICIENCY OF EVIDENCE.

In an action for personal injuries, evidence held to sustain a finding that plaintiff's impotency directly resulted from the accident.

[Ed. Note.—For other cases, see Negligence, Dec. Dig. § 134.*]

4. WITNESSES (§ 188*)—COMPETENCY—HUSBAND AND WIFE—NONACCESS—PROOF OF IMPOTENCY.

In an action for personal injuries, it was competent for plaintiff to prove impotency as a result of the accident by testimony that since it occurred he had not been able to have intercourse with his wife.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 188.*]

5. APPEAL AND ERROR (§ 1056*)—REVIEW—HARMLESS ERROR—EVIDENCE.

In an action for personal injuries, the exclusion of the depositions of two physicians who assisted the principal physician in the examination and treatment of plaintiff while in a hos-

pital, containing evidence bearing directly on the condition, symptoms, and acts of plaintiff and observations made and conclusions arrived at on an inspection and conversation with him, could not be sustained on the ground that the evidence was immaterial and its exclusion was harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1056.*]

6. TRIAL (§ 56*)—CUMULATIVE EVIDENCE—RIGHT TO EXCLUDE.

Neither were the depositions objectionable as being merely cumulative of other testimony received; it being proper and right to have all witnesses heard who had knowledge of facts and circumstances bearing on the case.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 131, 132; Dec. Dig. § 56.*]

7. WITNESSES (§ 219*)—COMPETENCY—PRIVILEGED COMMUNICATIONS—WAIVER—PHYSICIAN AND PATIENT.

Where three physicians were in attendance on plaintiff at a hospital, one as principal physician and the others as assistants, the failure of plaintiff in an action to recover for his injuries, to invoke his privilege as to the principal physician when called by the defense under Rev. St. 1899, § 4659 (Ann. St. 1906, p. 2539), providing that a physician or surgeon is disqualified from testifying concerning information acquired from a patient while attending him in his professional character, was not a waiver of his right to invoke his privilege as to the assistants.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 769, 781, 782; Dec. Dig. § 219.*]

8. DEPOSITIONS (§ 107*)—OBJECTIONS TO AT TRIAL.

Under the express provisions of Rev. St. 1899, § 2906 (Ann. St. 1906, p. 1671), the admissibility of evidence in a deposition may be objected to upon the trial, though such objection was not made at the time of taking the deposition.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 309-319; Dec. Dig. § 107.*]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by Samuel Epstein against the Pennsylvania Railroad Company to recover for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed. Certified to Supreme Court on conflict with Kansas City Court of Appeals.

This is an action for personal injuries alleged to have been incurred by plaintiff, respondent here, in a wreck on defendant's railroad on the night of January 6, 1906. Adopting the statement of counsel for appellant, "the only question raised at the trial was as to the extent of the injuries resulting to plaintiff." Without stating them with very great particularity, it is sufficient to say that it is charged in the petition that plaintiff was caught and pinioned in the wreckage of the train upon which he was a passenger, his ankle sprained, his leg, knee, and person, stomach, and liver wounded, crushed, bruised, cut, contused, externally and internally, and he was greatly and permanently injured, and has been confined to his bed and house by reason thereof for a long time, has been prevented from attend-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing to his business as a wholesale dry goods, merchandise, and notions dealer, to his great loss and damage; that he was and has been and will be unable to give his ordinary and usual time, care, and diligence to his business, prevented from work, labor, and services, thereby greatly impairing his earning capacity; that he has been and will be compelled to procure medical attention, medicines, nursing, nurse hire, and expenses for them and for physicians, which expense he sets out in detail, averring that these services were, now are, and will continue to be necessary for an indefinite period; "that, by reason of such great injuries and the horror of said wreck, his nervous system was caused to collapse, and his sexual powers to become impotent, and he has been, and will in the future be, by reason of said injuries and nervous shock, permanently injured, has suffered, and will in the future suffer, great mental pain and bodily anguish." Judgment is demanded in the sum of \$30,000. The answer was a general denial, contributory negligence, want of due care, inattention to his injuries after they had been received, want of knowledge or information sufficient to enable defendant to form a belief as to whether or not plaintiff was permanently injured, but that, if he did receive permanent injuries at that time and place, they were due to his own negligence and carelessness.

A great amount of testimony was introduced at the trial by the respective parties. Plaintiff testified to the accident and nature and extent of his injuries; his testimony tending to prove them as set out in his petition. In the course of his direct examination this appears: "Q. Before you were injured, were you able to have intercourse with your wife? Mr. Pattison: I object to going into that question for two reasons: In the first place, it either requires expert testimony to support that charge of the petition, or else there must be testimony of non-access. I say, under the uniform, unbroken current of decisions, this witness cannot testify as to non-access, and this witness has not qualified as an expert. I object to the question as incompetent. (The objection was overruled, to which ruling of the court defendant, by counsel, then and there duly excepted.) A. Yes, sir. Mr. Bond: Since your injury have you been able at any time to have intercourse with your wife? Mr. Pattison: I object to the question on the same grounds. (The objection was overruled, to which ruling of the court defendant, by counsel, then and there duly excepted.) A. No, sir." Plaintiff further testified that before his injury his physical condition was "all good," had never been sick in his life. There was no other testimony in the case on this particular point of impotency, either by plaintiff or any other witness, nor did any of the physicians who were examined in the case testify in reference to it, except that

one physician called as a witness by defendant testified that he had made an examination of the plaintiff's person, and found no indication of any disease or injury to his private parts, and no abnormality. Asked, on cross-examination, whether or not a man who had been in a railroad wreck and suffered shock under the circumstances attending the wreck which were detailed to him, and who had been injured and laid up for a long time, would be apt to be affected in his sexual organs, he answered that he did not think so, did not think that that would necessarily follow, and did not think that such result would come from these injuries or from this shock; that he might be more or less shocked from fright. On redirect examination, this witness testified that he was not a neurologist. Counsel for plaintiff, then calling his attention to the fact that he had been asked some questions about the possibility of the fright such as plaintiff had spoken of, affecting the size, etc., of the genital organs, asked him what he would say about it as to whether he (the physician) knew anything about that, and whether that came in the line of his practice, to which he answered: "No; I think I would not have anything to say about that. I do not know." All he does know, he testified, is that he found the organs in a normal condition.

It also appeared in evidence that, when plaintiff was first injured, he was taken to a hospital, and there attended by a Dr. Elston. Dr. Elston was called as a witness by the defendant, and he testified as to the condition in which he found plaintiff at the hospital, and to what had taken place there during his examination of the plaintiff, and also testified that he had with him at the time two assistants, Dr. Phelps and Dr. Christie. Plaintiff himself had testified to his treatment in the hospital, and that, when he was treated by Dr. Elston, the other two doctors were also there. At the trial, counsel for defendant stated that he desired to ask the court to pass upon the question whether or not the two physicians who assisted Dr. Elston in the hospital, and whose depositions had been taken and were on file, are competent witnesses to testify as to what they saw, and he offered their depositions, which are in the record and are statements of the observations of these two physicians and surgeons as to the nature of the injuries and their extent and probable duration. Counsel for plaintiff objected to their depositions being read on the ground that these two surgeons were assistants of Dr. Elston, and that they and Dr. Elston were plaintiff's physicians, and that whatever took place between him and them was a privileged communication. The court sustained the objection and excluded the depositions, defendant duly excepting.

The deposition of a witness named Andrews, taken on behalf of defendant, was

read in evidence. In that deposition Andrews was asked by counsel for defendant this question: "You didn't observe the injuries he complained of, did you?" To this he answered: "The physicians were there. They examined him, and said there were no bones broken." This answer was objected to at the trial by counsel for plaintiff, objection sustained, and the answer excluded, defendant duly excepting. On this witness being re-examined, as appears by the deposition, he said, in answer to a question, that his impression was that the physician told Epstein, the plaintiff, that there were no bones broken. This was objected to, the objection sustained, and the answer excluded.

At the instance of plaintiff, the court gave several instructions; and, while defendant excepted to the giving of all of the instructions, the particular instruction now objected to in the brief and argument submitted to us, and the only one now objected to, is that part of the instruction covering the measure of damages, and occurring in the fourth instruction given at the instance of plaintiff. After instructing that the jury was entitled to assess his damages in such sum as will reasonably compensate him for whatever injuries complained of by plaintiff in his petition the jury believed from the evidence he has sustained, if any, the court, after defining what reasonable expenses could be included and that pain of body and mind, peril, and fright, if any, could be taken into consideration and that nervous shock, if any, directly caused by the injury could be taken into consideration, instructed that the jury might also consider, in estimating damages, "the impotency to his sexual organs, if any, which he has suffered from such injuries and directly caused thereby." On the part of the defendant, the court instructed the jury that it was for plaintiff to prove the injuries which he claimed he had suffered from the accident, and that he is entitled to recover for only such injuries as set forth in the instructions herein as it appears from the preponderance of the evidence that he has suffered. The jury were further instructed at the instance of defendant that the evidence admitted in the trial as to plaintiff's inability to attend to business is to be considered only so far as it tends to prove that plaintiff was suffering physically and mentally as the result of the accident; that the jury are not to take into consideration, as tending to prove damages, any loss arising from plaintiff's past or present inability to attend to business, and the jury in assessing damages were not to take into consideration any loss of time since the accident and up to the time of the trial during said period to attend to business, "since these do not under the pleadings and evidence in this case constitute any element of damage for which plaintiff is entitled to recover." The third instruction, given at the instance of the defendant, was to the effect that the opinions of the physicians who have

testified in the case are merely advisory, and not binding on the jury, and that the jury would give them such weight as they believed from all the facts and circumstances in evidence they are entitled to receive, and are at liberty to disregard all or any part of their opinions which appear to the jury to be unreasonable. The fourth instruction told the jury that they would not be warranted in giving plaintiff any damages for future or permanent injuries, unless there is such a degree of probability that the injuries would be permanent or at least continue in the future as amounts to a reasonable certainty that the result will follow from plaintiff's original injury. By the fifth instruction the jury were told that plaintiff was not entitled to recover for any trouble with his stomach which he did not have before the accident, unless they believed from the evidence that that trouble is the result of the wounding, etc., of his stomach, "and from that cause alone he is entitled to recover for stomach trouble, if any, caused by nervous affection, whether or not you believe such nervous affection to be the result of the accident."

The defendant also asked three instructions, marked "A," "B," and "C," which the court refused. Instruction A was to the effect that, if the jury believed from the evidence that plaintiff's injuries were not properly treated at the hospital and that the result of his injuries was on that account aggravated, the jury were not to take into consideration the circumstances of the improper treatment, if it was found to be improper, and that plaintiff was not entitled to recover any damages whatever for or on account of such improper treatment or aggravation. Instructions B and C, which were asked by defendant and refused, are as follows:

"(B) Plaintiff alleges in his petition that one result of his injuries is that he has become sexually impotent. You are instructed that there is no evidence in support of this allegation, and in making up your verdict you will not take it into consideration.

"(C) Plaintiff alleges in his petition that one result of his injuries is that he has become sexually impotent. You are instructed that there is no evidence that his impotence, even if you find it to exist, was caused by the injuries received in his accident, and in making up your verdict you will not take into consideration this alleged impotency."

Exception was duly saved to the refusal of these instructions. The jury returned a verdict in favor of plaintiff for \$4,000, nine of the members of the jury concurring. A motion for new trial was duly filed and overruled, exception saved, and an appeal duly taken to this court by the defendant.

Everett W. Pattison, for appellant. Jesse A. Wolfert and Sterling P. Bond, for respondent.

REYNOLDS, P. J. (after stating the facts as above). In the presentation of this case

to this court the learned counsel for the appellant, in a very exhaustive brief and argument, makes seven points against the action of the trial court. The first, second, and third points relate to the refusal of the court to give the instructions marked, "Defendant's instructions B and C," and in giving the fourth paragraph of the instruction covering the measure of damage; that is to say, the paragraph based on the impotency of plaintiff. The fourth point of error assigned is to the admission of the testimony of plaintiff as to his nonintercourse with his wife. The fifth point alleges error to allow two of the physicians to give their opinions as to the nervous condition of plaintiff; it being claimed that it was in evidence that these physicians could not give such an opinion without relying more or less upon the statements plaintiff made to them. The sixth error assigned is to the action of the court in excluding the testimony of the two physicians whose depositions were offered, and the seventh error assigned is to the action of the court in excluding the testimony of the witness which we have quoted, as to statements made by a physician to the plaintiff, in the presence and hearing of the witness, as to the extent of the plaintiff's injuries.

Taking up these propositions in the order made, we dispose of the first one by saying that we do not consider it well taken. We have set out the testimony of the plaintiff himself bearing on the fact of impotency. On that testimony the conclusion of alleged impotency must rest. It is true there was testimony of a physician called as a witness by the defendant, and which we have set out in the statement, to the effect that in his opinion impotency was not a necessary result of the accident to plaintiff. But that physician on redirect examination by counsel for defendant testified that he did not consider himself competent to answer or to pass upon that fact. Even if this witness had not almost entirely destroyed the probative force of his testimony by this very frank admission, the fact of whether impotency had been proven was one for the determination of the jury, who were the judges of the weight to be given to the testimony concerning it. The jury had before it the declaration of this plaintiff as to nonintercourse, and counsel for appellant argue and present this case on the theory that testimony of nonintercourse is evidence of impotency. His argument is that impotency is sought to be proven by the fact of nonintercourse, and that plaintiff, as husband, is disqualified from testifying as to the fact of nonintercourse, and, as he is not shown to be an expert, he cannot testify as an expert. These are substantially his objections made to the question as to nonintercourse when that question was asked plaintiff at the trial, and it is on these objections that his brief and argument before us rests. There was no contradiction

of this bald and plain statement of a fact by plaintiff. The jury saw and heard the plaintiff, and it was within their province to determine, on his testimony, whether the fact existed. The learned counsel for the appellant, however, very strenuously argues that the court in inserting in the instruction which it did give on this subject the words "and directly caused thereby" was instructing without evidence on which to base this clause, contending that there was no evidence whatever in the case to show that the impotency complained of or injury to the organs was directly caused by the accident. Counsel presents a vast array of authorities in support of his position that it must appear that the accident directly caused the injury complained of. There is no doubt whatever that this is as thoroughly settled as any legal proposition can be said to be settled. The assumption, however, upon which the argument rests, is erroneous. The testimony of plaintiff himself was that before this wreck he was a perfect man in all respects. His testimony tended to prove that after that he had become impotent. The fact of the accident was beyond question. He was injured in the wreck. There is no pretense of any intervening or intermediate fact to which the change in his condition can be attributed. On these facts the jury had a right, as sensible men, as men of even ordinary intelligence, to form their own conclusions as to whether or not the alleged result was directly caused by the accident. Even assuming that the testimony of the physician in the face of his own declaration of nonexpertness on such matters is to be taken as the testimony of an expert that impotency does not follow such injuries as were testified to as having been received by plaintiff, and assuming, which was not true in this case, that witnesses of established reputation as experts on this branch of pathology had testified that impotency could not arise from or be directly caused by such injuries or from such an accident, we have in this case the express declaration of the court, given at the instance of defendant's counsel himself in his third instruction: "You are instructed that the opinions of the physicians who have testified in this case are merely advisory, and not binding on you. You should accord to them such weight as you believe from all the facts and circumstances in evidence they are entitled to receive, and you are at liberty to disregard all or any part of their opinions which appear to you to be unreasonable." So that, under this, the jury has the undoubted right to determine as between the testimony of plaintiff and the theoretical, somewhat mythical, testimony of experts. Our conclusion is that there was no error in giving this part of the instruction and in including impotency as an element of damage, and it follows that there was no error in refusing instructions B and

C asked by defendant, unless it is true that the fact of nonintercourse, on which the presumption of impotency rests, cannot be proven by the testimony of the husband, he not being an expert, nor qualified as such, and being incompetent, as husband, from testifying to the fact of nonintercourse.

Counsel for appellant has cited in support of his contention that error was committed in allowing plaintiff to testify as to nonintercourse, 3 Am. & Eng. Ency. of Law (2d Ed.) p. 878, as also *Dennison v. Page*, 29 Pa. 420, 72 Am. Dec. 644; *Tloga County v. South Creek Township*, 75 Pa. 433; *Shuman v. Shuman*, 83 Wis. 250, 53 N. W. 455; *Mink v. State*, 60 Wis. 583, 19 N. W. 445, 50 Am. Rep. 386; *Bell v. Oklahoma*, 8 Okl. 75, 56 Pac. 853; *Chamberlain v. People*, 23 N. Y. 85, 80 Am. Dec. 255; *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654, 38 Am. Rep. 260; *Boykin v. Boykin*, 70 N. C. 262, 16 Am. Rep. 776; *Scanlon v. Walshe et al.*, 81 Md. 118, 31 Atl. 498, 48 Am. St. Rep. 488; *Bowles v. Bingham*, 2 Munf. (Va.) 442, 5 Am. Dec. 497; *Corson v. Corson*, 44 N. H. 587; *Legge v. Edmonds*, 25 L. J. Ch. (N. S.) 125. Referring to the encyclopedia on the page given by counsel, it will be found that the text relied upon is under the title, "Bastardy." Most, if not all, of the cases which he cites are cases of bastardy or cases between the husband and wife, in which it was held, as it undoubtedly has been held in like cases in our state, not only by decision, but by statute, in all cases where the question of competency of the witness is concerned, that the husband in such cases is not a competent witness as to transactions between himself and his wife. It is the shield thrown by the law around the relation of husband and wife, and in the cases referred to by counsel it was invoked either where the husband was suing the wife or vice versa, or in cases of bastardy, or where the question of the legitimacy of the children was in issue. On a careful examination of every one of these cases, we have come to the conclusion that they do not meet the issue, and do not sustain the proposition made in this case by counsel.

In *Corson v. Corson*, supra, cited by appellant, the ruling of the court that the husband is not a competent witness to prove want of access is distinctly limited to proof of want of access in a proceeding in a libel for divorce, although it is true that in that case authority is cited for the position that nonaccess cannot be proved by either husband or wife in any cause. This is followed, however, by the limitation, "whether to recover property as heir at law or in a bastardy or settlement case." It would seem, therefore, that in all the cases in which this matter of testimony as to nonaccess has been passed upon the legitimacy of children was involved, or they were cases between husband and wife for alleged unfaithfulness or inattention to marital obligations, or the

like. This is no proceeding affecting the wife or in which she is involved with respect to the relations between her and her husband, no property rights of the husband and wife inter sese or as to their children are involved, no question of legitimacy or of inheritance of the children is involved, and no disclosure of the relationship of husband and wife of such a character as renders it against public policy for either to testify, is presented by this case. We have been referred to no case in which the rule has been extended to cover cases such as the one at bar, where the husband, suing for damages, one of the elements of which was alleged impotency, has been excluded from testifying as to a fact which is a very strong element in the establishment of impotency. It seems to us that the plaintiff was competent to testify as to the fact, "because of the necessity of the case." *Cramer v. Hurt*, 154 Mo. 112, loc. cit. 117-120, 55 S. W. 258, 77 Am. St. Rep. 752. 1 Greenleaf Ev. (14th Ed.) § 348, is cited and quoted by Judge Burgess in support of the rule that the necessity of the case makes an exception to the rule itself. No human being but himself or his wife could in modesty or morals or in law possibly know of the existence of the fact. The testimony of any other witness would be theoretical merely. Our conclusion is that there was no error in the admission of this testimony of the husband, and that there was, therefore, no error in the refusal of defendant's instructions B and C, or of the embodying of the fourth clause of the instruction concerning the elements of damage which the court gave at the instance of plaintiff.

The fifth point or proposition made by counsel is not tenable. The two physicians referred to show by the examination to which they were subjected that they were fairly competent to testify as experts on the line upon which their evidence was sought.

The sixth point made as to the error of the court in excluding the depositions of Dr. Phelps and Dr. Christie, who were present assisting Dr. Elston in the examination and treatment of plaintiff while in the hospital, in our opinion, is not tenable. It appears that plaintiff objected to these parties as witnesses on the ground that they were his physicians, and therefore, without his consent, not competent witnesses as to what had taken place. Our statute (section 4659, Rev. St. 1899 [Ann. St. 1906, p. 2539]) holds a physician or surgeon disqualified and incompetent to testify "concerning any information which he may have acquired from any patient while attending him in a professional character and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon." Counsel for plaintiff argue that the evidence which it was proposed to elicit from these two witnesses is not set out, and that it cannot be determined whether it

was relevant or not. But it appears from the abstract of the record furnished by appellant that the depositions of each of these witnesses was offered to be read, but excluded, save a sentence or two from that of Dr. Phelps, which was read in evidence. The substance of the depositions was very properly inserted in the record, and they are before us. It is argued that the testimony in them is merely cumulative of the testimony already in, and that no reversible error was made in excluding them. We cannot agree to this. The depositions disclose that the testimony offered bore directly on the condition and symptoms and acts of the plaintiff at the hospital as the witnesses saw them, and the testimony of these surgeons bore directly on what they had observed and the conclusions they had arrived at from inspection of and conversation with the plaintiff. It cannot be said that this testimony was immaterial. Nor can we assent to the proposition that it was merely cumulative, or that it was proper to exclude it because merely cumulative. It was more than that. It was independent testimony in corroboration of defendant's theory that the injuries to plaintiff were not of the serious nature claimed. A party has a right to have all the witnesses heard who have knowledge of facts and circumstances bearing on the case. Limitation of the number of what are called "character witnesses" is an exception to this rule. Possibly there are other exceptions. But this is within the rule. Therefore the exclusion of these depositions must rest solely on the question of whether the witnesses come within the statute quoted as excluding physicians and surgeons from testifying, and whether the privilege of exclusion, vested in plaintiff, has been waived.

Cramer v. Hurt, supra, is one among the many cases in which our Supreme Court has held that waiver of the privilege of exclusion rests in the patient alone. It seems to be conceded in this case that Dr. Elston was plaintiff's attending surgeon, and that Drs. Phelps and Christie assisted him; that they were in attendance on plaintiff in that capacity. There is nothing in the records to show that the relation of surgeon and patient did not exist between them and plaintiff as fully as between him and Dr. Elston. Weitz v. Mound City Ry. Co., 53 Mo. App. 39, loc. cit. 44. So that unless it be that, by testifying as to the injuries and treatment himself and waiving the privilege as to Dr. Elston, plaintiff must be held to have waived it as to these two surgeons, there is no force in the point made by defendant. We are referred to Webb v. Met. Street Ry. Co., 89 Mo. App. 604, a decision by the Kansas City Court of Appeals, and to Highfill v. Mo. Pac. Ry. Co., 93 Mo. App. 219, a decision by the same court following it, as holding that by going into detail showing that he had been treated by certain doctors at certain times

for certain disorders plaintiff had thrown down the bars and forfeited his right of exclusion of the testimony of the physicians who attended him. We cannot, after careful consideration of that case and opinion and of the cases referred to therein, agree to this. If by testifying to his injuries and what was done and said by his attendant physicians the patient has thrown down the bars, then our statute is abrogated. Nor do we interpret the decision of Mellor v. Railway, 105 Mo. 455, 461, 16 S. W. 849, 850, 10 L. R. A. 36, as sanctioning any such rule. In this latter case Judge Thomas for the court in banc, adopting the opinion of Judge Barclay given in Division No. 1, distinctly held that by calling one physician to testify the plaintiff had not waived his right to claim privilege as to others. The case at bar is much stronger than that, for Dr. Elston was not called by plaintiff. He, plaintiff, merely failed to invoke his privilege against Dr. Elston testifying. Furthermore, as we understand the decision of our Supreme Court in Holloway v. Kansas City, 184 Mo. 19, 82 S. W. 89, plaintiff by testifying to his injuries and treatment and by failing to assert his privilege as against the testimony of Dr. Elston, a witness called by the defendant, did not waive his privilege to object to the testimony of Drs. Phelps and Christie.

The final point made by counsel for appellant is on the exclusion of evidence of certain statements made by a physician to the plaintiff as to the extent of his injuries. The point of this objection seems to be that when the deposition was taken no such objection was made. This assignment is not tenable. Rev. St. 1899, § 2006 (Ann. St. 1906, p. 1671).

Finding no reversible error, we think the judgment should be affirmed, but, as our decision on the point indicated is in conflict with that of the honorable the Kansas City Court of Appeals in the two cases cited, we certify the case to the Supreme Court.

BATSCH v. UNITED RYS. CO. OF ST. LOUIS.

(St. Louis Court of Appeals. Missouri. Nov. 2, 1909.)

1. EVIDENCE (§ 539½*)—OPINION EVIDENCE—COMPETENCY OF EXPERTS.

Motormen with many years' experience with hand brake cars, who have either observed cars with air brakes or operated them for several months, can testify as experts to the distance in which a car of the latter kind can be stopped.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2351; Dec. Dig. § 539½.*]

2. STREET RAILROADS (§ 117*)—OPERATION—INJURIES—QUESTIONS FOR JURY.

Whether a motorman failed to keep vigilant watch to avoid a collision is a question for

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the jury where there is evidence that the danger was visible 300 feet away, and that he made no effort to check the speed of the car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 244, 253; Dec. Dig. § 117.*]

3. NEGLIGENCE (§ 140*)—INSTRUCTIONS—PROXIMATE CAUSE.

An instruction authorizing a recovery if the jury find defendant's negligence "directly contributed to cause" the injury, instead of requiring them to find said negligence caused the injury, is erroneous, where the defense of contributory negligence is in the case.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 378-381; Dec. Dig. § 140.*]

4. WITNESSES (§ 388*)—IMPEACHMENT—INCONSISTENT STATEMENT—FOUNDATION FOR PROOF.

The admission by a witness that he signed an impeaching writing shown to him is a sufficient foundation for its reception in evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1239, 1240; Dec. Dig. § 388.*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Joseph E. Batsch against the United Railways Company of St. Louis. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

This is an action to recover for personal injuries to plaintiff, and also damage to his horse, wagon, and merchandise in the wagon. His head was bruised and his right arm fractured both above and below the elbow, leaving the arm stiff, he testified. His horse was alleged to have been damaged to the amount of \$50, the wagon to the amount of \$100, and the merchandise in it to the amount of \$25. These injuries were caused by a collision with one of defendant's street cars on Lee avenue, an east and west thoroughfare in the city of St. Louis, on June 22, 1907. Mr. Glendy Arnold's brief for defendant states the facts thus: "Plaintiff was a man 47 years of age, an old resident of St. Louis, and for many years prior to his injury on June 22, 1907, had been engaged in the nomadic and mellifluous pursuit of peddling candy to whomsoever would buy his wares. He was a denizen of the streets, knew its juggernauts, and was proud of his skill in handling the reins, although it appears his experience as a whip had been limited to old plugs and candy wagons—plugs, and particularly the poor old victim of his skill at the time and place in question, so gentle that children could be intrusted to their fostering care. In fact, nothing short of an explosion of dynamite under his tail, or a steam roller belching smoke and steam like a volcano, could arouse this old nag out of a jog faster than the second coming of the Messiah. But, when he did get woke up with fright, he just 'pranced and danced,' so that any durned fool motorman a mile off could tell he was just waiting to plunge head first into the front end of his car. It was on a bright sunny day and a dry level track that

plaintiff was ushered into his forty-sixth year and this little mix-up with a west-bound car. He said he never would forget it, as it was on his birthday. Lee avenue is a public highway, and runs east and west. Pansy and Fair avenues intersect Lee avenue a block apart, running north and south; Pansy avenue lying to the west of Fair avenue. Lee avenue between the above-named streets was in the course of reconstruction, excepting the sidewalks and the space occupied by defendant's tracks. The car tracks afforded the only place for wagon traffic between Pansy and Fair avenues. Plaintiff entered the aforesaid block at Pansy avenue trailing the east-bound track. He had not gone more than 125 feet east of Pansy before his progress was suddenly halted by his gentle steed taking fright at a steam roller within 5 feet of said east-bound track and about 30 feet away, which was, to the great dismay of this erstwhile specimen of gentleness and amiability, emitting steam and black smoke, whereupon Old Remus woke up, and before the skill of Joe Batsch, for henceforth he must be known to fame as a great candy whip, could prevent, he had planted his forefeet between the two tracks, and pulling and tugging at the lines, but not moving an inch, he disjoined every vertebra from hames to crupper, trying to get his head right square in the middle of the west-bound track; and there he stuck until the stuffing was rammed out of him by the car. And, when Old Remus got his forefeet between the two car tracks and his head out in the middle of the west-bound track, how he did 'prance.' (Batsch lisps his c's.) He did every acrobatic feat that a man or horse can do, except skin the cat. A blind motorman a block away could have seen the anxiety of this fool horse to enjoy the delightful sensation of a head-on collision. We are advised by Mr. Batsch, under the sanction of his oath, that, when Old Remus established his headquarters on the west-bound track, leaving his hindquarters and Batsch to fight it out on the east-bound track, the oncoming car was then at Fair avenue, which by a most favorable computation was a distance of 300 feet."

Instead of the car stopping as it had time to do, before hitting the horse, according to plaintiff's witnesses, it came along at a rapid rate and collided with the horse and wagon, inflicting the injuries mentioned. The testimony for defendant tended to prove the horse did not swerve into the north car track until the car was within 30 feet of it, and so near it could not be stopped quickly enough to prevent a collision. The negligence pleaded was disregard by the motorman of what is called the "Vigilant Watch Ordinance" of the city of St. Louis, a municipal regulation which requires motormen of street cars to keep a vigilant watch for persons and vehicles on the car track or ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

proaching it and in danger of being injured, and, on the first appearance of such danger, to stop the car in the shortest time and space possible with the means and appliances at hand. The gravamen of the petition is the motorman failed to do as the ordinance required, both as regards a vigilant outlook and stopping the car as soon as possible on the first appearance of danger to plaintiff, thereby "directly contributing" to cause the injuries to plaintiff and his property. The answer was simply a general denial; no plea of contributory negligence having been put forward.

Two witnesses, Carter and Hurley, testified as experts as to the distance in which the car, which had an air brake, could have been stopped. Carter testified he had had 10 years' experience as a motorman, but never on a car having air brakes; knew the cars that ran on the particular track where the accident happened; had seen them passing up and down there; they were equipped with air brakes when he was running; and he presumed they had hand brakes at the time of the accident. He testified the track was dry at that time and the grade very slightly upward; that with a good track and a hand brake an ordinarily prudent motorman could stop a car going at the speed of the one in question in 2 car lengths, or 40 to 45 feet. His testimony was excepted to on the ground he had not qualified as an expert. So was Hurley's. This witness said he had operated street cars as a motorman for about 11 years in St. Louis, and for about 8 months had run cars equipped with air brakes at the World's Fair Grounds; knew the cars operated on the Lee avenue line at the date of the accident, or knew similar cars; that such a car equipped with a hand brake, running 8 or 10 miles an hour, with a load of 4 or 5 passengers, would be stopped by an ordinarily prudent motorman in 10 feet. A witness by the name of Maud Knickmeyer had testified for plaintiff. At the time of the accident her name was Maud Fleshman, but she had married subsequently. On September 25th she gave a statement regarding the accident which tended to contradict her testimony given on the stand in respect of the distance the car was from the horse when the latter first swerved on the north track. This statement was offered in evidence, but excluded by the court, and an exception was saved to its exclusion.

The main instruction given for plaintiff authorized a verdict in his favor, provided the jury found the facts of negligence predicated in it had occurred, and that they had directly contributed to cause plaintiff's injuries. The instruction on the measure of damages was also excepted to because it allowed damages to be awarded for such pain of body and mind as plaintiff might suffer from his injuries in the future, when, as defendant contends, there was nothing to prove

he would have such sufferings in the future. Complaint is made of the refusal of the court to grant an instruction requested by defendant which said plaintiff could not recover unless the jury believed the car was at Fair avenue at the time plaintiff got on the track and in a situation of danger from the car; also, because the court refused to instruct plaintiff was not entitled to recover on the charge that defendant's motorman was negligent and failed to use ordinary care to watch for and discover plaintiff's horse in a situation of danger on the track. The ground of the refusal of this instruction is the supposed lack of evidence tending to prove defendant's motorman failed to keep a vigilant watch.

Plaintiff had a verdict, and, judgment having been rendered on it, defendant appealed.

Boyle & Priest and Glendy Arnold, for appellant. A. R. & Howard Taylor, for respondent.

GOODE, J. (after stating the facts as above). We overrule the assignment of error relating to the supposed incompetency of the two witnesses, Carter and Hurley, to testify as experts regarding the distance in which the car could have been stopped. These men had had many years' experience as motormen in operating electric cars, though it is true Carter never had operated one which was equipped with an air brake. Hurley had had eight months' experience with that kind of a car. The testimony shows without dispute a car with an air brake could be stopped in a shorter time and space than one equipped with a hand brake. Both men testified as to the distance in which the car could have been stopped if equipped with a hand brake, and also as to the time in which it could have been stopped with an air brake. Though Carter had not operated cars of the latter kind, his long experience with hand brake cars and his subsequent observation of those equipped with air brakes we think qualified him to testify as an expert. Hurley's qualifications were beyond question.

We overrule, too, the exception to the hypothetical question propounded to these experts, or at least to one of them. This question is said not to have included all the essential facts, but we think it did. The car in question was thoroughly described, and the testimony shows it did not materially differ from other cars which had been in general use in the city and operated and observed by the witnesses. The essential facts were covered by the question, and that was enough. *Gourley v. Railroad*, 35 Mo. App., loc. cit. 92.

It is contended the court should have instructed against a recovery for lack of vigilant watch by the motorman because there was no evidence to show he was not keeping vigilant watch. This position is untenable. There was much evidence that the perilous

position of plaintiff and his property was visible to the motorman from 300 to 600 feet away if he was watching. If witnesses for plaintiff are to be believed, the motorman made no effort to check the speed of the car, and the jury might infer this was due to negligence in failing to look ahead as he should have done, and hence failing to see plaintiff's danger, or else to take proper precautions to stop the car after he saw the danger. The latter would be the less charitable view, and the other was warranted by the evidence. The court did right to submit both grounds of recovery; for there was evidence to prove both.

We do not perceive the force of the assignment of error because of the refusal to instruct against a recovery unless the jury believed the car was at Fair avenue when the horse got on the track and in a situation of danger. The essential point was not whether the car was as far east as Fair avenue when plaintiff's peril became visible, but whether it was far enough away for the motorman to stop by the use of ordinary care in time to avoid a collision.

As the judgment in the case must be reversed for another error, we will not take up the question of whether the main instruction for plaintiff was erroneous in directing a verdict in his favor if the jury found defendant's negligence directly contributed to cause the accident, instead of requiring them to find said negligence caused the accident. No doubt, the charge would be erroneous if the defense of contributory negligence had been set up and supported by testimony. *Hof v. Transit Co.*, 213 Mo. 445, 111 S. W. 1166. But, as no such defense was in the case, we are not sure that decision of the Supreme Court is in point.

Mrs. Knickmeyer had given a statement regarding the accident to a man named Kavanaugh September 25, 1907, some three months after it occurred. We suppose Kavanaugh was an employé of defendant. In this statement she said that on June 22, 1907, at about 11 o'clock in the forenoon, she was cleaning windows at her home on Lee avenue, standing on the ground in the front of her house; that she saw plaintiff's candy wagon passing along on the track to the east, watched his horse to see how he would act, as she had seen other horses "cut up" as they passed the steam roller; that, when plaintiff's horse came to the roller, it was puffing and making a noise, and, "when the horse came up to it, he became frightened and suddenly swung over onto the west-bound track directly in front of a car which was coming west, and which was not over 15 feet east of where the horse swung over. The car struck the horse, knocked it over to the east-bound track, and the horse was lying about the rear end of it when it stopped." She said, further, she heard no gong rung, and the car was running at a pretty good rate of speed. This statement was signed by

her under the name of Maud Fleshman, her maiden name. On the witness stand at the trial this witness testified, among other things, about the roller in the street, and that, when she first noticed plaintiff and his wagon, she was in the front yard cleaning windows; that she yelled to a friend there was going to be an accident, she was sure; that the next thing she saw Mr. Batsch fall into the street, and strike his head on a manhole. She then testified as follows: "Q. When the horse began to prance, how far away was the car? A. It was near Fair avenue." Now Fair avenue, according to the witnesses, was 300 feet or more away, and this testimony of the witness on the stand was in conflict with her written statement that, when the horse turned on the north track, the car was only 15 feet away; at least, it appears to have been, and the jury might find it was. On cross-examination she was asked if Kavanaugh interviewed her about the accident on September 27, 1907, and said he did; that she told him all about it in the presence of her mother and thought he wrote down what she said; that at least he wrote down on a paper things she said about the accident. Thereupon her written statement was handed to her, and she was asked to examine it, and see if it was the paper she had signed. She read the paper, and answered that it was her statement with her signature at the bottom in her own handwriting, and her mother was present when she made the statement. The document was afterwards offered in evidence by defendant's counsel as an impeaching one, and plaintiff's counsel objected to its reception on the ground that no proper foundation for its introduction had been laid. The court sustained this objection, and defendant excepted. This ruling was clear error. We have been cited by plaintiff's counsel to no authority which would support it; all that is said being that the written statement was not part of the *res gestæ*, and hence inadmissible on said score, and no foundation was laid for its reception to impeach the witness. It was not offered as part of the *res gestæ*, but as a statement made by the witness out of court which contradicted what she testified on the stand; and that, too, on the most material issue of the case. It is insisted she should have been interrogated by defendant's counsel as to whether she made certain of the statements contained in the document, particularly whether she said the horse swung over on the track directly in front of the car when it was not more than 15 feet away. If the attempt to impeach her had been by contradictory oral statements out of court, this position would be well taken; but it is untenable as the attempt was to impeach her by a writing she unqualifiedly admitted having signed as her narrative of the facts of the occurrence. Mr. Greenleaf says a sufficient foundation is laid for the admission of an impeaching writing signed

by a witness by the acknowledgment of the witness that it is his writing. 1 Greenleaf, Evidence (Lewis' Ed.) § 463. In *State v. Stein*, 79 Mo. 330, it was sought to impeach a witness by a letter. During cross-examination of the witness the letter was handed to him, and he was asked if he wrote it, to which he gave an affirmative reply. After the witness left the stand, counsel offered to read the letter, it was objected to, and the court excluded it on the ground the witness ought first to have been examined as to its contents. The Supreme Court held this ruling was erroneous, and proceeded on the theory only applicable to verbal statements offered to impeach a witness; that, when the impeaching evidence is a writing made by the witness, the writing must first be shown to him as the foundation for its introduction, and, if he admits he wrote it, the writing must then speak for itself—citing *Greenleaf*, supra. In *State v. Gonce*, 87 Mo. 629, testimony given by the defendant was impeached by an affidavit for continuance he had made. He was not interrogated regarding the contents of the affidavit, but it was shown to him, and he admitted the signature was his. This was held to be a sufficient foundation for the reception of the writing.

There was evidence to prove plaintiff would suffer in the future from his hurts, and so the court rightly instructed regarding future suffering.

The judgment is reversed, and the cause remanded. All concur.

HEDRICK v. CITY OF ST. JOSEPH et al. (Kansas City Court of Appeals. Missouri. Nov. 1, 1909.)

1. WATERS AND WATER COURSES (§ 171*)—OBSTRUCTION—"NUISANCE."

An obstruction in a stream caused by filling it, and resulting in damages to property through water being set back, is a "nuisance."

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 216; Dec. Dig. § 171.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

2. WATERS AND WATER COURSES (§ 171*)—OBSTRUCTION—LIABILITY.

Where an embankment maintained by defendant street railway company over a stream, on which it had laid its tracks, caused an overflow and damage to plaintiff's property, it was immaterial whether defendant's acts in raising the height of and repairing the embankment had any effect in causing or contributing to the backing up of the water.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 219; Dec. Dig. § 171.*]

3. WATERS AND WATER COURSES (§ 171*)—OBSTRUCTION—LIABILITY.

Where defendant maintained a nuisance consisting of an embankment in a stream which caused the water to overflow onto plaintiff's land, it was not necessary in an action for damages therefrom to show that defendant had any-

thing to do with the erection of the embankment; proof of knowledge of its existence and that it obstructed the flow of water sufficing.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 219; Dec. Dig. § 171.*]

4. MUNICIPAL CORPORATIONS (§ 834*) — OBSTRUCTION OF STREAM—NUISANCE.

Where a fill in a stream formed part of a street, and constituted a nuisance by obstructing the flow of water, that some city employees had removed debris from the mouth of the culvert under the fill, and that the city by its non-action permitted the obstruction to remain after the territory had been brought within the city limits by being platted and laid off into blocks with streets by the owners, did not show that the city had assumed jurisdiction and supervision of the street, so as to render it liable for damages to plaintiff's property resulting from the overflow of the water.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1784; Dec. Dig. § 834.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by Robert H. Hedrick against the City of St. Joseph and the St. Joseph Railway, Light, Heat & Power Company. Judgment for defendants, and, from an order granting a new trial, they appeal. Affirmed as to defendant company, and reversed as to defendant city, and judgment ordered entered in its favor for costs.

W. B. Norris and O. E. Shultz, for appellant City of St. Joseph. R. A. Brown, for appellant St. Joseph Ry., Light, Heat & Power Co. Kendall B. Randolph, for respondent.

BROADBUDS, P. J. This is an action to recover damages against defendants for the maintenance of a nuisance. The facts are as follows: There is running into and through the city of St. Joseph a natural water course, which crosses Jule street between Twenty-Eighth and Twenty-Ninth streets. In the year 1889, before the territory in the locality mentioned was within the city limits, a fair association in constructing its race track made a fill in the stream, in which was placed a culvert about five feet in diameter, which was sufficient to carry off the water under ordinary conditions. Afterwards the race track was abandoned by the association, and later on the property was platted into blocks and lots, and the city extended its limits beyond the locality of the stream and embankment. There was evidence to the effect that the entrance and outlet of the culvert were both on private property. A portion of the old race track that crosses the stream forms a part of Jule street. Jule street at this point has never been improved by the city. The defendant street railway company built its tracks over this embankment in 1889, but had abandoned them for a time until about 1902 or 1903, when it resumed possession, at

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

which time the embankment had been partially washed away. The railway company at the latter date repaired the damages before relaying its tracks, and also raised the height of the embankment. The city was shown to have had knowledge that Jule street was an obstruction to the flow of water in the stream, and at different times through its employes removed the debris that had accumulated at the culvert. The plaintiff's house is located south of Jule street and a short distance east of the stream. In July, 1907, there was an unusual precipitation of rain, and, the culvert not being sufficient to discharge the water that flowed through the stream, it was retained by the embankment and caused to flow back and into plaintiff's house, whereby it was greatly damaged. The verdict of the jury was in favor of the defendants. The plaintiff asked for a new trial, which the court sustained on the ground that the verdict was not supported by the evidence. From the action of the court granting a new trial the defendants appealed. The case of *Martin v. City of St. Joseph* (Mo. App.), wherein the plaintiff therein claimed damages caused by the same conditions, was before the court, and is reported in 117 S. W. 94. The cause was reversed for the reason that the court failed to instruct the jury that, in order to hold the city liable, they must find it had knowledge of the nuisance and a request to abate it. The defendant Railway, Heat & Power Company was not a party to the case in this court. That the obstruction of the stream in question causing damage to the property of owners in the vicinity is a nuisance we take for granted is conceded.

It being conceded that the embankment is a nuisance, we have no hesitation in saying that the defense relied on by the company should have been disregarded by the court. This defense is fully explained in instruction No. 8 given by the court. It is as follows: "Even if you (the jury) should believe from the evidence that the defendant St. Joseph Railway, Heat & Power Company did at some time or times prior to the overflow described in evidence level up the surface of Jule street, and thereby fill certain holes and gullies in said street, or that it raised the grade of said Jule street, yet, if you further believe that the filling up of such holes or gullies and the raising of said grade of Jule street did not in any way cause or contribute to the damages sustained by the plaintiff, then he cannot recover against said St. Joseph Railway, Heat & Power Company, and your verdict will be in its favor." It was altogether immaterial whether the acts of the company in raising and repairing the embankment had any effect in causing the backing up the water, as the embankment admittedly did cause the overflow and damage to plaintiff's

property. The defendant had been and was maintaining the embankment at the time, and it was in so doing maintaining a nuisance. It was not necessary to show that it had anything to do with the erection of the embankment. All that was necessary was to show that the company had knowledge of its existence, and that it obstructed the flow of water in the stream. *Pinney v. Berry*, 61 Mo. 359; *Dickson v. Railroad Co.*, 71 Mo. 575; *Wood on Law Nuisance*, § 838, p. 968. We are of the opinion that the action of the court in setting aside the finding of the jury as to the defendant company was justified, as the plaintiff had made out his case against it.

But a more serious question arises as to the action of the court in reference to the finding for the defendant city. It is true there was evidence tending to show that the city had been notified of the obstruction of the stream by the embankment and a request to enlarge the outlet for the passage of the water. But it was necessary for the plaintiff to also show that the city had assumed control and supervision of Jule street at that particular point. The facts that some city employe may have removed debris from the mouth of the culvert at some time or another, and that the city by its nonaction permitted the obstruction to remain after the territory had been brought within the city limits by being platted and laid off into blocks with streets by the owners, in our opinion did not show that the city had assumed jurisdiction and supervision of the street. In *Downend v. Kansas City*, 156 Mo. 60, 56 S. W. 902, 51 L. R. A. 170, it is held that the approval by a city council of a plat of a proposed addition to a city "is in no sense an acceptance of a street thereon as a public highway, nor does it cast upon the city the duty of keeping such street in repair. Not until the properly authorized city officers do some act evidencing an intention to assume jurisdiction over the street does the obligation of the city to keep it in repair begin, and not till then is the city liable for a failure to do so." And: "Mere user by the public will not establish a street nor impose on the city a duty to keep it in repair." And so it is held in *Carle v. City of Desoto*, 156 Mo. 443, 57 S. W. 113; *Moore v. City of Cape Girardeau*, 103 Mo. 470, 15 S. W. 755. The plaintiff has called our attention to the case of *Johnson v. City of St. Joseph*, 96 Mo. App. 663, 71 S. W. 106, in order to support his theory of the liability of the city under the evidence. But it will be seen that that case is entirely different as to facts. There the city had by its acts assumed supervision and control of the street in question. Other cases cited by plaintiff are not in point.

In our opinion there was a failure of proof going to show that the defendant city was liable for the nuisance, as it had noth-

ing to do with it. There is nothing to show that it ever assumed jurisdiction or control officially in any manner whatever.

It is therefore ordered that the cause be affirmed as to the defendant company, and reversed as to the city, and that judgment be entered in its favor for its costs. All concur.

MORRIS v. BUTLER.

(Kansas City Court of Appeals. Missouri. Nov. 1, 1909.)

1. BILLS AND NOTES (§ 63*)—EXECUTION—DELIVERY—"CONTRACT FOR PAYMENT OF MONEY."

Where the president of a bank authorized to lend plaintiff's money on real estate security only loaned it to a partnership consisting of himself and his cashier, for which he took notes, two of which were signed by himself and one by himself and the cashier, which he kept with his private papers in the bank, plaintiff having no knowledge that the money had been so loaned until after the failure of the bank, the notes did not constitute contracts for the payment of money for want of delivery.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 95; Dec. Dig. § 63.*]

For other definitions, see Words and Phrases, vol. 2, p. 1530.]

2. APPEAL AND ERROR (§ 154*)—RIGHT TO APPEAL—JUDGMENT—ACQUIESCENCE.

The president of a bank, having money to loan for plaintiff on real estate security only, loaned it without authority to a partnership consisting of himself and his cashier, and held the notes executed therefor without delivery. A receiver in bankruptcy having been appointed for the bank and for the president individually, plaintiff sued to recover the notes from the receiver, and obtained a judgment that she was entitled to the possession, and, having elected to take the value of the property, judgment was rendered in her favor against the receiver for the amount due thereof, whereupon the receiver, after appeal, filed a claim in the bankruptcy proceedings that the president was indebted to him as receiver of the bank in a specified amount, including one of the notes, "liability for which had been adjudicated" against the bank. *Held*, that plaintiff's judgment did not determine that the notes were a part of the estate of the bank, and hence the receiver's claim did not constitute a recognition of the conclusiveness of the judgment on him such as would effect an abandonment of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 957; Dec. Dig. § 154.*]

3. WORDS AND PHRASES—"EXECUTE."

While, in strict legal understanding, the verb "to execute" as applied to notes, deeds, or written contracts, includes both signing and delivery, in popular speech it is often limited to the mere act of signing the instrument, and it was in this sense that it was used in an admission by defendant that the notes in question had been executed by the parties they purported to be executed by, both parties having subsequently treated the question of delivery as a controverted issue—[citing 3 Words and Phrases Judicially Defined, 2568].

4. PRINCIPAL AND AGENT (§ 166*) — UNAUTHORIZED ACTS—RATIFICATION.

Where an agent had no authority to loan plaintiff's money except on real estate security, and she did not know at the time she demanded possession of notes evidencing loans made by

the agent to others without authority that they were not notes of third persons secured by real estate, her demand for delivery did not constitute a ratification of the agent's act in making such loans and accepting the notes.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 627; Dec. Dig. § 166.*]

Appeal from Circuit Court, Bates County; Argus Cox, Special Judge.

Action by Celina Morris against W. J. Butler, as receiver of the Bates National Bank. Judgment for plaintiff, and defendant appeals. Motion to dismiss appeal denied. Judgment reversed.

John A. Eaton, E. H. McVey, and W. O. Jackson, for appellant. Thos. J. Smith, for respondent.

JOHNSON, J. At the March term this court, speaking through Broadbuss, P. J., announced the following opinion, reversing the judgment pronounced by the trial court in the case under consideration:

"The plaintiff sues the defendant as receiver in bankruptcy of the Bates County National Bank in replevin for the possession of two promissory notes made payable to her and purporting to have been executed by F. J. Tygard, and one note payable to her and purporting to have been executed by the said Tygard and J. C. Clark.

"The facts are that Tygard was the president, and Clark was the cashier, of said bank at and prior to the dates of said notes. The plaintiff placed in the hands of Tygard a certain sum of money with the understanding that he was to lend it for her on real estate security. Tygard, instead of lending the money, made some other disposition of it and wrote the notes, two of which were signed by himself and one by himself and Clark, but kept by himself with his private papers in the bank. Tygard was also declared a bankrupt, and said notes were taken possession of by the receiver in these proceedings. Plaintiff testified that she had no knowledge of the existence of the notes until after the bank and Tygard ceased to do business. A jury was waived, and the cause tried before the court. The finding was that the plaintiff was entitled to the possession of the so-called notes, and, as she elected to take the value of the property, judgment was rendered for her for the face value of the notes, less credits indorsed thereon. The defendant appealed. The plaintiff moves to dismiss the appeal on two grounds, only one of which we deem of sufficient importance to discuss.

"One of the grounds in respondent's motion to dismiss appeal is based upon the fact that since the appeal in this case he has appeared before the Honorable T. T. Crittenden, referee in bankruptcy, and made the following claim, to wit: 'That F. J. Tygard, against whom a petition for bankruptcy has been filed, is indebted to him as receiver of said

bank in the sum of \$34,204.25, the consideration for which is as follows: Then follows a long statement of items, in which are included the three notes mentioned, viz.: 'One certain promissory note dated August 11, 1903, for \$35,000, payable to Mrs. J. W. Morris, with interest, * * * liability for which has been adjudicated against the Bates National Bank, and on which there is a balance due in the sum of \$1,155.98.' A similar statement is made of the other two notes. The defendant in response to said motion says: 'Appellant further states that the filing of the claim in bankruptcy was for the purpose of preserving the estate of the receiver-ship in the event of the happening of a contingency—I. e., liability under the controversy herein; that, if said claim is for no other or further purpose, then it is for the benefit of respondent, Celina Morris, as well as for the benefit of the appellant, in that each have a contingent interest. Appellant further states that the issue raised by the filing of the claim in bankruptcy is an issue of fact which this court will not pass upon. Appellant for further resistance states that no benefits have been received; that said claim has merely been filed, and action thereon awaits the result of this appeal, and that the said claim will remain in statu quo until the final determination of the appeal; that there has been no settlement of the controversy, or of the merits of the case, or no satisfaction of the judgment and no acquiescence therein.'

"Under the facts as a matter of law plaintiff was not entitled to recover as against the receiver. We will not attempt to review the authorities of the defendant to sustain his position that the plaintiff failed to make out a case. It is sufficient to say that the so-called notes were not contracts for the payment of money as they had never been delivered. There was no agreement that Tygard and Clark would execute the papers, or that plaintiff had accepted them after they were made. And the claim of ownership of the papers made by the defendant as receiver of the bank ought not to preclude him from a hearing on this appeal. The judgment in this case does not determine that the notes in question are a part of the estate of the bank. It determines, on the contrary, that they are the property of this plaintiff which defendant wrongfully detains as such receiver. If the claim of defendant is to be construed according to the language used, his claim cannot have any reference to the adjudication in this case, as there was no such adjudication. And an exhibit of the judgment and proceedings in this case would not support his claim before the referee. And no proof that he could make allude of the record would support any such claim. Therefore we hold there is no such claim in fact before the referee that would amount to an abandonment of this appeal or a recog-

nition of its conclusiveness upon the defendant. The judgment herein has no basis whatever for its support, and it would be a great injustice to let it stand against defendant and the creditors of the bank, whom he represents."

A motion for rehearing filed by plaintiff was sustained, and the cause was resubmitted at the present term. A thorough reconsideration of the briefs and arguments of counsel has resulted in the conviction that we properly dealt with the case in our former opinion, and we readopt that opinion as a correct expression of our views of the questions discussed. The learned counsel of plaintiff press on our attention other questions, not referred to in the opinion, with so much earnestness and evident sincerity that we deem it but due counsel to specially determine these questions in a supplemental opinion.

First, it is contended that the fact on which our decision turned, that there had been no delivery of the notes to plaintiff by Tygard, was withdrawn from the issues in the case by the following admission of counsel for defendant, made of record at the beginning of the trial: "Counsel for Plaintiff: You admit these notes to have been executed by the parties they purport to be executed by? Counsel for Defendant: Yes, sir; these are the notes described in the petition. Counsel for Plaintiff: These are the genuine notes? Counsel for Defendant: In our opinion." It is argued the admission that the notes were executed necessarily implied that they were delivered to plaintiff the payee as well as assigned by the makers. In strict legal understanding the verb "to execute," as applied to deeds, notes, or written contracts, includes signing and delivering, but in popular speech it is often used to express merely the act of signing the instrument. *Rapalje & Lawrence's Law Dictionary*; *Anderson's Dictionary of Law*; *Webster's International Dictionary*; 3 Words & Phrases Judicially Defined, 2558. The admission that the notes offered were those executed by the parties was contractual in its nature, and became binding on the parties. *Hannah v. Baylor*, 27 Mo. App. 312. It belonged to the class of admissions which fall under the head of conclusive presumptions of law, and its recitals to the extent of their legitimate scope must be presumed to be true. *Moling v. Barnard*, 65 Mo. App. 603. "There is never need to prove that which your adversary concedes." *Bank v. Bank*, 90 Mo. App. 399. But the interpretation of such admissions should be controlled by the dominant rule employed in the construction of other contracts. The mutual intention and understanding of the parties to be collected from what was said and done at the trial where the admission was made and acted on is the true touchstone. We therefore turn to the record to ascertain whether the parties and the trial court understood defendant's counsel to use the word in

its strict technical sense or in the popular sense. If he intended to admit that the notes had been delivered to plaintiff before the failure of the bank, he admitted away the only fact on which he could predicate a defense to the merits of plaintiff's demand. His conduct throughout the trial demonstrates that he was alive to the importance of the fact, and did not intend to abandon it, but did intend to use it as his chief defense. In his cross-examination of plaintiff and in the direct examination of Tygard, he carefully elicited the fact, without objection by plaintiff, that there had been no delivery of the notes. The issue of delivery or no delivery was contested, preserved, and relied on by defendant; and that plaintiff recognized it as a live issue appears not only in the proceedings at the trial, but in her first brief filed in this court. We quote from the brief as follows: "Although the notes in question were not, in fact, manually delivered to the plaintiff in this case prior to the time of the institution of the suit, the record shows that they were executed for actual money received, and demand made of the maker (Tygard) for the possession of the notes, which facts constitute a ratification by the plaintiff of the fact of the taking of the notes and of a constructive delivery of the same to her. It is well settled that a subsequent ratification is equivalent to a prior authorization in matters of this character." Since it is apparent that the parties and the court used the word in its popular sense, we will give it that definition, and accordingly hold that the admission included only the fact of the signing of the notes.

The next point made by plaintiff is that there was a constructive delivery of the Tygard and Clark note to plaintiff. It is argued that, when Clark signed that note and handed it to Tygard, he thereby delivered it to the agent of plaintiff authorized to receive a delivery. The scope of the agency of Tygard was to lend plaintiff's money on real estate security. Instead of doing this, he lent the amount of the note in question to a partnership composed of himself and Clark, which was the same thing as lending it to himself. The transaction was beyond the apparent as well as the actual scope of his employment, and the supposititious delivery by Clark was no delivery to plaintiff for the simple reason that Tygard had no authority to accept a note of that character.

Further, it is argued that there was a constructive delivery of all the notes because shortly after the bank failed plaintiff ratified the acts of Tygard in lending her money to himself, and asked him to give her the notes. We quote the testimony of plaintiff on which this proposition is founded: "Q. I believe you said you never had had the notes in your possession at all? A. I never did.

Q. You never authorized the taking of them? A. What? Q. You never authorized Capt. Tygard to give these notes of his in his name? No. I didn't know he had any. I didn't know he had the money even. I supposed it was out in real estate, and they were other people's notes. By the Court: Q. Well, how did Capt. Tygard come to take these notes? Did he have the money for the purpose of loaning it? A. When I came in possession of this money, I turned it over to Capt. Tygard to loan for me on some real estate security, and I didn't know where the notes were, nor who held the notes. I was away in Chicago most of the time until I returned, and, when the bank closed, I spoke to Captain about the notes, and he said they were among his private papers in the bank, and I said, 'Well, I want possession of the notes,' and would go to the receiver and just get them, and Captain informed me I could not get possession of them because the receiver was in possession, and he couldn't get his private papers, and consequently I couldn't get mine, and then, when the overdraft came, of course, I was wonderfully surprised, because I knew I had no account in the bank— By Mr. Smith: You needn't state about that because the court held that was immaterial. By the Court: Well, your understanding of the way these notes came to be given was from the fact that Capt. Tygard had your money for the purposes of loaning it? A. Yes, sir; to be loaned on real estate." This testimony does not bear out the contention of plaintiff's counsel that there was a ratification. It is evident plaintiff still thought at the time of her interview with Tygard that he had lent her money to other parties on real estate security, and she asked him to turn over to her such notes—not notes that he had executed himself for the money he had appropriated to his own use.

We have considered the point that the record made by defendant in the trial court is not sufficient to preserve the issues we have determined, and find it to be without merit. The judgment embraces findings of fact, and we think the motions for a new trial and in arrest bring the case before us for review.

The judgment is reversed. All concur.

SPAHR et al. v. CAPE et al.

(St. Louis Court of Appeals, Missouri. Nov. 2, 1900. Rehearing Denied Nov. 16, 1900.)

1. COVENANTS (§ 73*)—BUILDING RESTRICTIONS—ENFORCEMENT—ABANDONMENT OF RESTRICTIONS.

That the platters of an addition, after plaintiffs had bought lots therein subject to a covenant against erecting thereon any building to be used for any purpose other than a private residence, and defendants had bought lots therein subject to like restriction, abandoned such scheme of restriction, did not affect plaintiffs'

right to enforce the restriction against defendants.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 77; Dec. Dig. § 78.*]

2. COVENANTS (§ 51*)—BUILDING RESTRICTIONS—ENFORCEMENT—CHANGE IN SUB-BOUNDINGS.

The right to enforce the covenant, subject to which lots in an addition were sold, against erecting thereon any building to be used for any purpose other than a private residence, is not affected by a street railway, with a loop and station therefor, being built in front of certain of the lots, and they becoming more valuable for business than residence purposes; the mere presence of the railway not turning the street from a residence into a business thoroughfare.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 50; Dec. Dig. § 51.*]

3. ESTOPPEL (§ 95*)—SILENCE.

One is not estopped by silence where both parties know or have equal means of knowing the truth.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 285-287; Dec. Dig. § 95.*]

Appeal from Circuit Court, St. Louis County; John W. McElhinney, Judge.

Action by Walter H. Spahr and others against Leander W. Cape and others. Judgment for plaintiffs. Defendants appeal. Modified and affirmed.

Adopting, in substance, the statement of counsel for appellants in their principal brief, this is an action to restrain appellants, defendants below, from erecting a store or business house on certain lots in Maplewood subdivision, on Sutton avenue, in St. Louis county. Maplewood subdivision was laid out in the county, and the lots of the subdivision, except those fronting on Manchester avenue, were conveyed to different parties, subject to certain conditions and restrictions, including the following:

"First. When a building is erected on said lot the front of said building shall not be less than twenty feet distant from the line of the street on which it fronts; but this provision shall not apply to the foundations of pillars, or open porches or verandas which may be built on the front of said residence.

"Second. Not to erect or permit to be erected, occupied or used on said property any dramshop, or saloon, or livery stable, tannery, slaughterhouse, dairy, boneyard, public cattle shed, glue factory, nor any building designed or intended to be used for such purpose or purposes; also not to establish, maintain, or permit any nuisance of any character on or adjacent to said property, and not to erect any building on said property to cost less than \$1,800 when completed.

"Third. Not to erect or cause to be erected on said premises any building designed or intended to be used for any purpose except as a private residence.

"Fourth. It shall be lawful for any other person or persons owning any lots or parts of lots in said Maplewood subdivision, in behalf of and for the benefit of either them-

selves or the said owner or owners, or for any or either of them, to prosecute any proceeding at law or in equity against a person or persons infringing or attempting to infringe, or omitting to perform or to keep, observe or abide by said provision or provisions, for the purpose of preventing them from so doing, or collecting damage for such infringement or omission, or both."

It is further alleged in the petition that plaintiffs are owners of certain lots in the subdivision, and that the defendant Cape is the owner of the west 50 feet of lots 1, 2, and 3, of block 4, having a front of 150 feet on Sutton avenue, by a depth of about 50 feet on Maple avenue; "that Cape received property subject to said restrictions, but nevertheless is proceeding to erect thereon a building designed to be used as a store or business house and flats; that the front of said building as now planned will not be 20 feet distant from the line of the street on which it fronts; and that defendants Granon and Koester are the contractors erecting the same. The plaintiff thereupon prayed for an order restraining the erection of said building, and for a further order restraining defendants from erecting at any time a store or business house or flats or any other building on said lots except a private residence to cost not less than \$1,800, the front of which to be not less than 20 feet distant from the line of the street on which it fronts."

The answer of defendants admits the facts set out in the petition as to the subdivision of Maplewood, the conveyance of the lots subject to said restrictions, and admits that the restrictions are truly set forth in the petition, and that defendant Cape is the owner of the west part of lots 1, 2, and 3, in block 4, of said subdivision, and that the same is subject to the conditions, restrictions, and terms hereinbefore admitted to exist except so far as they may have been determined, abrogated, changed, or annulled by the acquiescence and consent of the owners and grantors of said subdivision. Defendant Cape also admits that he is proceeding to erect a building on the west part of lots 1 and 2, of block 4, being a brick store and for office purposes, and that the same will not be within 20 feet of Sutton avenue, and is designated to be constructed of brick, two-stories high, at a cost of about \$5,000. The answer further alleges: That the subdivision referred to in the petition was surveyed and laid off in lots before the conditions were made and imposed thereon, and that lots 1, 2, and 3, of block 4, and all other lots of said subdivision adjoining Sutton avenue, in blocks 4 and 6, fronted on Sutton avenue, and not on the streets intersecting Sutton avenue, but that, before defendant Cape acquired title to said parts of said lots, the-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

Maplewood Realty Company had abandoned the plan and design of said survey and divided and sold a large number of lots on Sutton avenue, among others the said parts of said lots in question, by dividing and selling said lots along Sutton avenue at right angles to the plan of the original survey. That at the time the subdivision was laid out there were no street railroad tracks along Sutton avenue, and that since said time a double-track railway has been laid along said avenue, and are in frequent daily and nightly use. That immediately opposite the lots in question there has been constructed a loop and depot building for the use of the said railway, and a depot building in constant use for railway purposes. That on a number of the lots of said subdivision fronting on said Sutton avenue parties have without any objection made by any of the property holders in said subdivision or by these plaintiffs erected and now maintain buildings which are not used for residence purposes, but are maintained and used for business purposes, that cost less than \$1,000, and are built within less than 20 feet of the front of the lots on said avenue. That on the opposite side of said avenue numerous other kinds of business are now and for a long time have been carried on. That by reason of the premises said Sutton avenue and the lots fronting thereon in said subdivision have ceased to be desirable for purely residence purposes, and are only desirable or valuable for business purposes.

In reply to this answer, the plaintiffs admit that there is a street railway in operation along Sutton avenue, and the loop has been erected opposite the lots in question, and they also admit that there have been business houses erected on Sutton avenue north and west of Maplewood subdivision, and that there are two small temporary buildings on said Sutton avenue, in said subdivision, one of which is owned by defendant Koester, and used by him as an office, and the other one is owned by Dr. Townsend, but that the buildings are small, temporary structures, set upon small posts, and costing only a nominal sum, and they deny that they ever consented to the erection of said small buildings and their present use.

Still following the statement of appellants' counsel, the facts in evidence are that the subdivision called "Maplewood" was platted in 1891. The property lies immediately west of the city limits on the Manchester road. At the time the subdivision was made it was a raw piece of land, and Sutton avenue was simply an unimproved country road. Maplewood subdivision proper is set out on a plat attached to plaintiffs' abstract of the record, and is bounded by Marshall avenue, Manchester road, Elm avenue, and Sutton avenue. All the lots in the subdivision were disposed of by the company, and, with the exception of the lots fronting on the Man-

chester road, the deeds conveying the same contain the restrictions set out in the petition. As an inducement for the street railway company to build to their subdivision, the realty company built the station opposite the property in question, and induced the railroad company to make a five-cent fare to the station. The street railroad was built about 12 years ago, coming out the Manchester road and turning south on Sutton avenue to the station, where the cars turn, and other cars carry passengers farther west to Kirkwood and Webster and Meramec Highlands from this point. The station consists of a waiting room, confectionery store, and place for sale of soft drinks, and is used up to 2 o'clock in the morning for passengers who are transferred from western to eastern cars, and vice versa. Large crowds often congregate in front of this station, and there is much noise and confusion by these people at all hours up to 2 o'clock. Sutton avenue is also used as a traffic way and thoroughfare for hauling freight from the Missouri Pacific Railroad on the south to the business establishments located in Maplewood on Manchester road and elsewhere. "According to the testimony of Mr. Koester, there are 31 business establishments on Sutton avenue between Manchester road and the Missouri Pacific Railroad. They include a grocery store, tombstone shop, two paint shops, tin shop, a gas-fitting shop, real estate office, lumber yard and office, two doctors' offices, and contractor's office on the east side of the street, and a concrete and coalyard, a real estate office, the loop, and station heretofore mentioned, a drug store, butcher shop and grocery, tin shop, two-story steam power planing mill, real estate and paint shop, undertaking establishment and livery stable, storage room, machine shop, and hardware store, all on the west side of Sutton avenue. It further appears from the testimony of Mr. Koester that the lots of Maplewood subdivision fronting on Sutton avenue are occupied by two doctors' offices, and two double store buildings occupied by contractors, painters, real estate agents, architects, and stenographers, a photograph of which is shown on plate, Exhibit 1. These business establishments have been erected and carried on in this restricted property for some four or five years without objection by any one. It also developed from the testimony that there is not a single residence fronting on Sutton avenue from Manchester avenue south to Elm avenue, and that said Sutton avenue is wholly devoted to business purposes in the vicinity of the lots in controversy. Testimony of real estate agents of the neighborhood and others who had knowledge of the surrounding property in Maplewood was to the effect that the lots fronting on Sutton avenue had a very small or no value for residence purposes, but were only valuable for business."

There was no claim or pretense of lack of notice to defendants of the restrictions on the subdivision and on these lots. There was testimony tending to prove that no injury to the property of plaintiffs or of any lot owner in Maplewood subdivision had been sustained by reason of business being carried on on Sutton avenue, either by depreciation in values or by way of noise or other causes, nor was there any testimony tending to show that the building contemplated to be erected by defendants would cause any actual damage to plaintiffs or other property owners in the subdivision. The court rendered a decree finding the issues for plaintiffs, and making the temporary injunction which had been issued permanent. Plaintiffs in due time filed their motion for new trial which was overruled, exceptions saved, and the case brought to this court on appeal.

G. A. Wurdeman and J. C. Kiskaddon, for appellants. C. J. Harrison, J. O. Marshall, and W. F. Smith, for respondents.

REYNOLDS, P. J. (after stating the facts as above). Cases involving the question of infringement and enforcement of restrictions on the use and occupation of lots and tracts of land, particularly in and adjoining the city of St. Louis, have been before this court, and have been so carefully considered and the law relating thereto so clearly stated and settled that it is not necessary to undertake any extensive discussion of the principles underlying this class of cases. In *Hall v. Wesster*, 7 Mo. App. 56, decided in 1879, in a carefully considered opinion, delivered by Judge Bakewell, this court announced the rule to be (loc. cit. 60) "that a party will not be permitted to use land in a manner inconsistent with the contract entered into with his vendor, and with notice of which he purchased. And if the right at law under the covenant is clearly established, and the breach is clear, and the covenant one that can be specifically enforced, the courts will not, unless under exceptional circumstances, take into consideration the comparative injury to the parties from granting or withholding the injunction." The court further said (loc. cit. 61) that the action in such case "is based upon the mere fact that there has been a breach of covenant; that the plaintiff had a right to enjoy his property in the manner and form provided by the stipulation in his deed and in that of the defendant; and that he has a right to judge whether the agreement shall be preserved or whether he will permit it to be violated." Calling attention to the fact that there are cases in which there has been no appreciable or substantial damage, in which an injunction will be refused, the court holds (loc. cit. 62): "Where all the purchasers of an estate are bound by restrictive covenants not to use their houses

for certain purposes, an injunction will be granted to restrain a breach of the covenant, without any regard to the question of the character or degree of annoyance. The objection may be founded on the merest whim."

In *Coughlin et al. v. Barker*, 46 Mo. App. 54, a decision rendered in 1891; and in which full consideration to questions involved in cases of this character was given by Judge Seymour D. Thompson, the distinction between covenants running with the land, and those personal to the parties, is gone into, and the conclusion of the court is that, if the owner of several adjoining lots conveys one of them with a restriction as to the manner of building thereon and subsequently conveys another, if said restriction was intended for the benefit of the last-mentioned lot, and not merely as a covenant for the benefit of such owner personally, the grantee of such last-mentioned lots and his assigns can enforce such restriction against every one of the grantees of the first-mentioned lot, acquiring title under or through such conveyance, and taking with notice, actual or constructive, of the restriction, and that the absence of a specific restriction in the deeds or of an express intention that they are made for the benefit of the adjoining land is an evidentiary circumstance tending to show that the restriction was intended by the grantor of the lot for his own benefit personally, and not for the benefit of the adjoining land; that whether the easement is a personal right, or one pertinent to the land, is generally to be determined by a fair interpretation of the grant or reservation creating it, aided, if necessary, by reference to the situation of the property and the surrounding circumstances. It was further held in that case that the terms of the conveyance, when construed with reference to extrinsic circumstances, did not establish the necessary intention, but only established such intention conditionally. In *St. Louis Safe Deposit Bank v. Kennett's Est., etc.*, 101 Mo. App. 370, 74 S. W. 474, Judge Goode, in a thoroughly considered opinion, held, all the members of the court concurring, that a party may restrain a continuous breach which is beneficial to him and stand on the very letter of his obligation, for a party cannot make a solemn obligation and then disregard it on the plea that no harm will result to the other party, the court further holding in that case that the mere failure to object at the time to a violation of the covenants and restrictions as to building contained in the deeds of the parties was not such acquiescence as estopped the plaintiff from subsequently suing to enjoin the continuance of the violation of the restriction. In that case this court, following *Hall v. Wesster*, supra, in our state, and many cases from other jurisdictions, further held

that, while the extent of the injury is vital, when a nuisance, unrelated to contractual rights, is the gravamen of the action, if parties settle their rights in regard to a parcel of land by covenants, these must be observed, whether their nonobservance will inflict injury or not, the plaintiff having the right to restrain even a continuous breach which is beneficial to him, and to stand on the very letter of his obligation, "for a party may not make a solemn engagement, and then disregard it on the plea that no harm will result to the other party." In *Sanders v. Dixon*, 114 Mo. App. 220, 89 S. W. 577, the same question of building restrictions came before this court, and Judge Goode, again speaking for the court, repeated that where covenants containing the restrictions inured to the benefit of the complainant, and were broken in a substantial way by the defendant, it was unnecessary to show that damage resulted from the breach. That was a case in which the covenant was against the erection of more than one dwelling house on the same lot. Referring to *St. Louis Safe Deposit Bank v. Kennett's Est.*, supra, Judge Goode said that, while the courts have some discretion in granting an injunction respecting restrictive covenants affecting the use of lands, "they are disposed to uphold such restrictions according to their true meaning and this court is strongly of that disposition." In *Semple v. Schwarz*, 130 Mo. App. 65, 109 S. W. 633, Judge Bland, delivering the opinion for the court, and with the concurrence of all the court, held that the fact that the evidence showing that different restrictions were imposed in the conveyances of lots in another addition adjoining, laid off and conveyed by the same grantor, were inadmissible. In that case it was also held that the fact that the defendants had set apart a room in their residence for the express purpose of receiving patients, and that the defendant physician had let his patients know that they might call upon him there professionally between certain hours, and that he had advertised this particular room as his office by tacking his professional card on the door, constituted the "doing of business," in violation of the covenant against doing business or carrying on business in a house erected on the lot, and the court enjoined the continuance of that use of any part of the premises.

Applying the principles in these cases to the facts in evidence in the case at bar, it appears in the first place that the defendant Cape had notice and knowledge of the restrictions; that he bought subject to them; that the proposed construction of a building in which a professional office or drug store could be conducted was in the mind of the defendant in the erection of the proposed building; and that the covenants covered all of the property and were common in the

deeds of all the grantees is very clear, and that these covenants inured to the benefit of all purchasers in the addition is also evident. The argument that the parties laying off the Maplewood addition or the originator of the scheme for the Maplewood addition had abandoned or modified the original scheme, and that that scheme had been "determined, abrogated, changed or annulled by the acquiescence and conduct of the owners and grantors of said subdivision," does not bring this case within the *Coughlin Case*. In the case at bar the original covenants as to improvements affected all the lots covered by them. It was beyond the power of the originators of the scheme or owners of other lots to change them without the consent of all who had purchased under those covenants; those covenants, at the time of the purchase by plaintiffs of these lots, covering and being in force upon the lots purchased, and plaintiffs not being of those who had assented to any change or release of the covenants.

Our attention is specifically called by one of the learned counsel for the appellants to the cases of *Trustees of Columbia College v. Thacher*, 87 N. Y. 311, 41 Am. Rep. 365; *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691, 32 Am. St. Rep. 476, and *Parker v. Nightingale*, 6 Allen (Mass.) 341, 83 Am. Dec. 632, as controlling under the facts in this case. In the *Columbia College Case* it was held that the new conditions had so entirely and completely changed the situation, these conditions being the erection of the structure for and operation of an elevated railway in front of the premises, as to render the restrictions no longer servicable. In the *Jackson Case*, at the time of the establishment of the restrictions, the neighborhood was intended to be and was used as a residence district; and in the *Parker Case* it is held that circumstances may exist which would warrant a refusal to grant equitable relief, even when it was made to appear that there had been a failure to use and occupy the premises in accordance with the terms of the deed by which they were conveyed. These cases have all been before our court in one or more of the cases before referred to, on different branches of them to be sure, but they are not cases with which this court is unfamiliar. An examination of them shows that they are not applicable to the case at bar. It appears that, when Maplewood subdivision was laid out, the railroad did not extend to or through it, although the plat in evidence shows the road, a surface road, operated by electricity, as running through it and forming a loop through the block immediately west of the block in which these lots are situated. The cars run around this loop. All that the evidence tends to show is that the property adjoining this loop, as do the lots here involved, is more valuable for business than for residence purposes. It does not convince us that it has become un-

suitable for residence purposes, and so does not come within the three cases cited. The mere fact that it is more valuable or suitable for the one purpose than the other is not enough to justify a court in overturning and nullifying the solemn covenants in the deeds. Nor is it true that the mere presence of a street railway along a street turns that street from a residence into a business thoroughfare. In brief, it does not strike us that the conditions developed by the testimony bring this case within the exceptions noted in the three cases relied upon by counsel. Neither do we think there is any violation of any principle of equity, on the facts in this case, in holding the parties to their own deliberately made and accepted covenants. Nor is there such a state of facts in this case as raise an estoppel against plaintiffs. Citing and quoting *Bales v. Perry*, 51 Mo. 449, our Supreme Court, in *Harrison v. McReynolds*, 183 Mo. 533, loc. cit. 550, 82 S. W. 120, 126, said: "Though silence in some cases will estop a party from speaking afterwards, yet 'it is only when it becomes a fraud that it postpones.' If, therefore, the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel." In the case at bar the acts relied on as estoppels did not go even far enough to make a resort to this rule necessary. There were no acts proven that by any application of the rule of estoppel can be said to have constituted an estoppel. On consideration of the evidence in the case and of the law as laid down by this court and enforced in the cases referred to, our conclusion is that the case was rightly determined. In entering up the decree, however, the injunction is made to cover all of lots 1, 2, and 3, whereas the evidence shows, and the trial court found, that appellant is owner, not of all of these lots, but of the western 50 feet thereof. Evidently that is a mere inadvertence in entering up the decree, possibly a clerical error, as the court distinctly found as a fact that appellant Cape was owner of only the western 50 feet of the lots.

Accordingly, the decree is modified so as to extend the injunction over the western 50 feet of lots 1, 2, and 3, of block 4, and, as so modified, it is affirmed. All concur.

AMERICAN COPYING CO. v. MULESKI.
(Kansas City Court of Appeals. Missouri. Nov. 1, 1909.)

1. EVIDENCE (§ 441*)—PAROL EVIDENCE AFFECTING WRITTEN INSTRUMENT.

Where no fraud is charged, and no reason given why a writing does not represent the agreement of the parties, it cannot be affected by a parol contemporaneous agreement.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2030; Dec. Dig. § 441.*]

2. CONTRACTS (§ 42*)—"EXECUTED"—DELIVERY.

Though a contract is signed by a party, it is not "executed" until delivered.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 207; Dec. Dig. § 42.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2558-2561.]

3. PLEADING (§ 291*)—VERIFICATION—DENIAL OF EXECUTION OF CONTRACT.

In an action on a contract signed by a party, but not delivered, its execution must be denied under oath.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 804; Dec. Dig. § 291.*]

4. CONTRACTS (§ 342*)—ACTIONS—DEFENSES—ILLEGALITY—PLEADING.

In an action on a contract, the defense of illegality must be specially set up.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1716; Dec. Dig. § 342.*]

5. APPEAL AND ERROR (§ 959*)—DISCRETION OF COURT—AMENDMENT DURING TRIAL.

Granting leave to amend pleadings during the trial is largely in the trial court's discretion, and its ruling will not be disturbed, unless an abuse of discretion is apparent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3830; Dec. Dig. § 959.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by the American Copying Company against Felix Muleski. Judgment for plaintiff, and defendant appeals. Affirmed.

Mytton & Parkinson, for appellant. J. B. Shackelford and John A. Connett, for respondent.

ELLISON, J. Plaintiff's action is for damages for breach of a written contract. The case was referred to a referee, whose findings for plaintiff were approved by the trial court, and judgment accordingly entered.

It appears that defendant, who is a retail butcher in St. Joseph, signed a written instrument whereby he agreed to purchase of plaintiff certain advertising stamps advertising defendant's business, which were to be given out by defendant to his customers, one for each 10 cents' worth purchased, for which defendant was to pay plaintiff 30 cents per hundred stamps so obtained of plaintiff and given out by defendant. It was further agreed that plaintiff would consign to some merchant in St. Joseph "one Cleveland special automobile." The writing then proceeded as follows: "For the compensation received by you from us for said stamps you are to print our name and business on your Automobile Stamp Directory for this town and appoint some person or firm in this town to give to each of our customers for each filled Automobile Stamp Directory containing one hundred of such purchase stamps a ticket, giving to the holder an undivided interest in said automobile upon the termination of this proposition, and the faithful compliance upon our part of its conditions. It is understood that

you have the right to accept propositions from other merchants of this town, and that customers holding tickets from all such merchants who have complied with the terms of their agreements with you shall have equal interest with ours. That is, the automobile, upon the termination of this agreement and other similar agreements you may have with other merchants of this place, shall become the sole property of the holders of tickets obtained in the above-described manner. It is further understood that upon each ticket will be printed a certain date, said date to be within one month of the termination of this agreement, upon which a meeting of the holders of all tickets issued shall be held, to agree upon what disposition shall be made of said automobile. At that meeting each ticket holder shall be entitled to one vote for each ticket held that was secured in the above-described manner, the majority of such votes at such meeting to determine the disposition to be made of said automobile."

The petition charges a failure on defendant's part to carry out his contract in purchasing the stamps, or to carry out other parts of the contract. The referee found that defendant paid \$15 for 5,000 stamps, but after such payment refused to comply further with the contract, and found plaintiff's damages to be \$493.36. Defendant's answer was a general denial, though we gather from the record, brief, and argument in this court that his defense was that at the time he signed the written contract it was understood, and verbally agreed by him and plaintiff's agent, that that portion of the contract requiring defendant to purchase the stamps of plaintiff and give them to customers was to be erased, and was not to be a part of the proposition to be sent to plaintiff at the home office. The further defense was that the contract was a mere gambling or lottery scheme concocted by plaintiff to sell the automobile. After the trial had opened and partly progressed with the hearing of evidence, defendant asked leave orally, and formally by written request to the court, to be allowed to proceed with his defense in the examination of witnesses, on

the basis of an amended answer which he filed setting up the defenses just noted and verified by his affidavit. He was refused, and his amended answer was stricken out.

Defendant felt that, on account of the verbal agreement, the writing did not represent the real contract, and that therefore he should deny it under oath. The claim is made that on account of confusion arising over a former decision of the Supreme Court Commission (*Hammerslough v. Cheatham*, 84 Mo. 13) it was thought that, as defendant did actually put his signature to the paper, he could not deny the execution of the contract, thus actually signed. But, however, defendant may have been misled, the fact remains that the defense thus attempted is not allowed by the law. A contemporaneous agreement cannot be allowed to affect the writing. No fraud is charged and no reason suggested why the writing did not represent the agreement. It was defendant's duty to see that it did. *Johnston v. Ins. Co.*, 93 Mo. App. 588. Besides, even though a contract be signed by a party, until delivered it is not executed, and when not delivered there should be a denial of execution under oath. *Hart v. Harrison Wire Co.*, 91 Mo. 414, 422, 4 S. W. 123; *B. & L. Ass'n v. Obert*, 169 Mo. 507, 517, 69 S. W. 1044.

As to the defense of plaintiff's project being a lottery scheme, that was a matter that should have been specially set up in defense. *McDermott v. Sedgwick*, 140 Mo. 181, 39 S. W. 776; *St. Louis Ass'n v. Delano*, 108 Mo. 217, 18 S. W. 1101.

But, aside from the foregoing, we would not feel at liberty to interfere with the judgment for the reason that the matter of leave to amend pleadings in the course of a trial is largely in the trial court's discretion, and the court's ruling should not be disturbed, unless it should be apparent that the discretion has been abused. *Weed Sewing Machine Co. v. Philbrick*, 70 Mo. 646.

There are other suggestions of errors, but we do not think either of them affected the result, and we affirm the judgment. All concur.

BROOKS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 10, 1909.)

CRIMINAL LAW (§ 494*)—OPINION EVIDENCE—EVIDENCE OF HANDWRITING BY COMPARISON—SUFFICIENCY.

In a prosecution for forging a check, evidence alone of the cashier of the bank upon which the check purported to be drawn that the signature was not that of either of two persons by that name who had accounts in his bank is insufficient to support a conviction under Code Cr. Proc. 1895, art. 794, providing that evidence of handwriting by comparison made by experts or by the jury is competent, but that proof by comparison only shall not be sufficient to establish the handwriting of the witness who denies his signature under oath.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1081; Dec. Dig. § 494.*]

Appeal from District Court, El Paso County; James R. Harper, Judge.

George Brooks, alias George Schofield, was convicted of forgery, and appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of forgery, and his punishment assessed at two years' confinement in the penitentiary.

The facts show that appellant passed as true to Mrs. J. F. Primm a check for the sum of \$71.10, signed "J. A. Campbell." The check was drawn on the American National Bank of El Paso. The cashier of the bank testified that there were two men by the name of J. A. Campbell that had money deposited in his bank. After the check was delivered by appellant to the prosecuting witness, Primm, to pay for room rent in her boarding house, Mrs. Primm gave appellant a check on her account at the above-named bank for the difference between \$71.10 and the amount appellant owed her, which was about \$18. This check, however, she subsequently had the bank refuse to pay. Appellant presented the check for \$50 given by said Primm to the bank, and there was informed that the check had been ordered not to be paid by Mrs. Primm. He left the bank without saying anything, except expressing regret that they would not pay it. Neither of the men by the name of J. A. Campbell, who had deposits in the above-named bank, testified in this case; but the cashier alone of the bank testified that the signature on the check for \$71.10, which was delivered, as stated above, by appellant, was not the signature of either of the J. A. Campbells who had money in his bank.

So we have a case that turns upon the question as to whether or not a comparison of handwriting alone will justify a conviction for forgery. Article 794 of the Code of Criminal Procedure of 1895 reads as follows: "It is competent in every case to give evidence

of handwriting by comparison made by experts or by the jury, but proof by comparison only shall not be sufficient to establish the handwriting of the witness who denies his signature under oath." See, also, *Batte v. State* (decided at the present term) 122 S. W. 561. It follows, therefore, that the evidence is insufficient to support the verdict.

This being true, the judgment is reversed, and the cause remanded.

O'NEAL v. STATE.

(Court of Criminal Appeals of Texas. Nov. 10, 1909.)

WITNESSES (§ 372*) — IMPEACHMENT — ILL FEELING.

Accused could show, on cross-examination, that the state's witness had requested accused to furnish money to pay witness' fines when he was a convict, and became angered on accused's refusal to do so, to show bias.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.*]

Appeal from Grayson County Court; J. W. Hassell, Judge.

Horace O'Neal was convicted of violating the local option law, and appeals. Reversed and remanded.

E. J. Smith and J. Q. Adamson, for appellant. F. J. McCord, Asst. Atty. Gen., and J. P. Haven, Asst. Co. Atty., for the State.

DAVIDSON, P. J. Appellant was convicted for violating the local option law; his punishment being assessed at \$75 fine and 40 days in jail.

The action of the court in having talesmen summoned is not discussed, as it may not occur upon another trial.

Whitehead was used as a witness by the state, and on his testimony the conviction was obtained. He was very closely cross-examined; the testimony showing that he had been convicted in several local option cases, and had several still pending against him. Appellant, among other things, desired to elicit from the witness on cross-examination the fact that he had approached appellant, while he (the witness) was a county convict, with the request that appellant furnish the money to pay his (witness') fines, and became angered with appellant because he refused. In other words, the cross-examination in regard to this matter was urged in order to elicit from the witness his adverse personal feelings toward appellant. The court refused to permit this testimony to go before the jury.

In this there was error. Animus, motive, or ill will of a prosecuting witness is never a collateral or irrelevant question in a criminal case. The bias or prejudice can thus be shown, and is in most cases of great importance, and is always material, in order to enable the jury to form a correct judgment as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to the credit to which the testimony of the witness is entitled. *Rosborough v. State*, 21 Tex. App. 672, 1 S. W. 459; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188; *Gregory v. State* (Cr. App.) 48 S. W. 577; *Reddick v. State* (Cr. App.) 47 S. W. 993. And for a great number of authorities see *White's Ann. Code Cr. Proc.* § 1108.

The judgment is reversed, and the cause is remanded.

ALEXANDER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 10, 1909.)

1. WEAPONS (§ 11*)—CARRYING WEAPONS—PERSONS PRIVILEGED—TRAVELERS.

One who was a traveler, within the statute, could not carry concealed weapons around a town in his pocket while he was making purchases, but could leave them in his wagon on going out in town, and place them in his pocket again on returning to the wagon, without violating the law.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 11; Dec. Dig. § 11.*]

2. WEAPONS (§ 17*)—CARRYING CONCEALED WEAPONS—PROSECUTION—SUFFICIENCY OF EVIDENCE.

In a prosecution for carrying brass knucks about accused's person, conflicting evidence held to sustain a conviction on the theory that accused, who was a traveler, had the weapon on his person when he left his wagon and went into town.

[Ed. Note.—For other cases, see *Weapons*, Cent. Dig. § 29; Dec. Dig. § 17.*]

Appeal from Wood County Court; R. M. Smith, Judge.

Columbus Alexander was convicted of carrying brass knucks concealed about his person, and he appealed. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of carrying about his person brass knucks. The evidence in substance shows that appellant had gone from one county to another on a hauling expedition. When he reached the town of Winsboro, he left his wagon, and went about the streets, and made some purchases. The officer who arrested him testifies that he saw defendant in the town of Winsboro, going towards his wagon, and followed him; that he was about 15 or 20 steps behind him, and reached him just as the appellant got in his wagon, and arrested him. Upon searching him, he found the knucks in his hip pocket under a bottle of whisky or alcohol. This witness says the defendant did not get the knucks out of the wagon; that he had not had time to do so; that he had just reached the wagon and picked up the lines, when he (the officer) arrested him. Under his (the officer's) testimony appellant would not have had time to have got the knucks from any part of the

wagon and placed them in his hip pocket where the officers found them. He denies seeing a sack of flour in the wagon. The deputy city marshal also testifies that he was present when defendant was arrested; that, when he first saw him, he was going from Thomas' store to his wagon; that appellant then went to Harris' saloon, where he bought a bottle of whisky or alcohol. The defendant's evidence goes to show two facts: First, that he was a traveler, within the purview of the statute. This is not denied, nor in any way controverted. The second is that he found the knucks on the side of the road, and placed them in his wagon, and did not carry them about the town with him, but placed them in his pocket after returning to the wagon.

This is the case in a nutshell. If the testimony of the officers is correct, then appellant was guilty of violating the law. If a traveler, he had no right to carry the brass knucks around the town, where he was making purchases. *Stilly v. State*, 27 Tex. App. 445, 11 S. W. 458, 11 Am. St. Rep. 201. Under the officers' testimony, appellant left his wagon while in the town of Winsboro, went about the town to different houses, and the testimony also shows he purchased a bottle of whisky at a saloon and a sack of flour at a grocery store. This, under the case of *Stilly v. State*, supra, and the line of cases in harmony with that case, would support the conviction. Under his testimony there was no violation of the law. He was not guilty of violating the law in carrying the knucks in his wagon, and if, on returning to the wagon, he took them out of his wagon and placed them in his pocket, he would not be guilty of violating the law. The case was tried before the court, and, he having found the facts against appellant, we do not feel justified in setting aside the conviction.

We are therefore of opinion there is evidence sufficient to support the conviction, and the judgment is therefore affirmed.

LUCAS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 8, 1909.)

GAMING (§ 98*)—PROSECUTIONS—ACTIONS—SUFFICIENCY OF EVIDENCE.

In a prosecution for gaming, evidence held not to sustain a conviction.

[Ed. Note.—For other cases, see *Gaming*, Dec. Dig. § 98.*]

Appeal from Johnson County Court; J. B. Haynes, Judge.

Sam Lucas was convicted of playing and betting at a crap game, and he appeals. Reversed and remanded.

Phillips & Bledsoe, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant in this case was convicted in the county court of Johnson county of the offense of unlawfully playing and betting at a game played with dice, called "craps," and his punishment assessed at a fine of \$50.

Many questions are raised on the appeal, which we deem unnecessary to notice. Under our view of the case, the evidence is so manifestly insufficient to sustain a conviction that the same must be reversed on that account. This is a case almost identical with, and is a companion case of, *Looper v. State* (Tex. Cr. App.) 120 S. W. 880, where we held the facts insufficient. It may suffice to say that the main witness relied upon by the state, John Steakley, constable of precinct No. 1, on cross-examination, among other things, testified as follows: "I did not see any dice there. I did not see the defendant with any dice that night. When I was testifying about dice being shot in there, I was just testifying from the noise I heard. I did not see any dice. I did not see anybody shoot any dice. It is what I thought they were doing. That is what I thought from what I heard. I did not see the defendant with any money that night. I do not know whether the defendant had any money that night, or not. I did not see the defendant make a bet or wager of any kind that night."

The disposition to be made of the case renders it unnecessary to notice the many other assignments of error relied on by appellant.

The judgment is reversed, and the cause is remanded.

ROBERTS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1906.)

1. CRIMINAL LAW (§ 737*)—TRIAL—QUESTION FOR JURY—WEIGHT OF EVIDENCE.

The jury are the exclusive judges of the facts proved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1703; Dec. Dig. § 737.*]

2. CRIMINAL LAW (§ 742*)—TRIAL—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.

The jury are the exclusive judges of the credibility of witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1719; Dec. Dig. § 742.*]

3. CRIMINAL LAW (§ 941*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Where, in a homicide case, there was considerable evidence introduced, pro and con, as to whether there was sufficient timber, weeds, and brush to obscure the presence of decedent when he was shot, so that accused could not see him, as accused claimed, alleged newly discovered testimony, relating to the physical condition of the ground and surroundings of the scene of the tragedy, embracing photographic views taken of the place from different angles of view, was

merely cumulative, and not ground for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2329; Dec. Dig. § 941.*]

Appeal from District Court, Houston County; B. H. Gardner, Judge.

Henry Roberts was convicted of manslaughter, and appeals. Affirmed.

Moore & Sallas, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for manslaughter; the punishment being assessed at four years in the penitentiary.

It would be difficult to read a record where the contradictions are more numerous or more critical than is evidenced by the facts found in this record. The appellant is a stepson of the deceased, and was at his home when the deceased came by and was shot. The son of deceased, stepbrother of appellant, testified, as did another witness, that appellant shot the deceased because he was whipping his half-sister, the daughter of deceased. This daughter, who is said to have been chastised by her father, testified that she was not there and her father had not whipped her; that she was at home, her father's residence, at the time of the homicide, doing a day's washing, and knew nothing of the transaction until some hours after the shooting occurred, and after her father was brought home shot. The deceased lived some time, and made statements in regard to how the shooting occurred, and he stated each time that the shooting was accidental. The theory of the defendant was that the deceased was passing his house bee-hunting, and introduced evidence to that effect, and that he and his stepbrother, Marshall, son of deceased, had been shooting at a target, and that he (appellant) fired the pistol, not knowing that his stepfather was passing; that deceased could not be seen by him, on account of weeds, timber, and brush, and the shooting was purely accidental and unintentional. One of the state's witnesses, who testifies to the shooting as being criminal, was shown not to have been present at the time of the shooting. The whole record is full of direct contradictions as to the witnesses and their presence or nonpresence at the time of the difficulty.

In this view of the record we are asked to reverse the case on account of want of sufficient evidence to justify a verdict. We are of opinion that this contention ought not to be sustained. The jury are the exclusive judges of the facts proved and the credibility of the witnesses. Whether the state's witnesses swore falsehoods or not we cannot say, and the jury saw proper to believe their version of the matter, and convicted. It was their province to reconcile these contradictory statements, if they could, or to believe such testimony as occurred to them to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be proper to be credited. There was a good deal of testimony, also, in the record with reference to the condition of the place, as to whether the deceased could not have been seen, as contended by appellant. The issue on this phase of the testimony was decidedly sharp, as it was in regard to the other issue in the case, that appellant shot his stepfather on account of the chastisement of his sister, and whether he shot him accidentally and unintentionally. These matters were fairly submitted to the jury in the charge of the court, and, in fact, there is no complaint in regard to the court's charge in relation to these issues.

The motion for new trial is mainly based upon alleged newly discovered testimony. We are of opinion this evidence is not newly discovered, within the contemplation of the law; but, put in its strongest light for appellant, it is purely cumulative, and related only to the physical condition of the ground and surroundings of the scene of the tragedy. It is contended that it could be proved by these witnesses that the state's testimony was not correct in regard to the timber, brush, and weeds about the place. To support this, after the trial, photographic views were taken of the place from different angles of view, and these are appended to the motion for new trial and sent up in the record. As before stated, as to whether or not there was sufficient timber, weeds, and brush to obscure the presence of deceased at the time of the shot, so that appellant could not see him, there was considerable evidence introduced, pro and con, during the trial. It is therefore evident that the testimony upon which appellant sought his new trial, in regard to this phase of the case, is purely cumulative. Under an unbroken line of decisions in Texas, a motion for new trial is not authorized under such circumstances.

This disposes of the questions suggested for revision, and we are of opinion that, as presented, we are not authorized to reverse the judgment.

Therefore it is affirmed.

ENGLISH v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909.)

CRIMINAL LAW (§ 1109*)—AFFIRMANCE—SUFFICIENCY OF RECORD.

Where, on appeal from a conviction, the record contains neither a bill of exceptions nor a statement of facts, and the motion for a new trial is not sent up in the record, and the transcript contains only the judgment overruling the motion for a new trial, a notice of appeal, and an order granting time in which to prepare a bill, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2897-2902; Dec. Dig. § 1109.*]

Appeal from Hill County Court; Horton B. Porter, Judge.

Tom English was convicted of violating the local option law, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This record is before us without a statement of facts or bills of exceptions. The motion for new trial is not sent up in the record. The transcript contains a judgment of the court overruling the motion for new trial, a notice of appeal, and an order granting 20 days in which to prepare his bills of exceptions. No bills were prepared, we presume, as none are found in the record.

There being no question suggested for revision, the judgment will be affirmed; and it is so ordered.

ENGLISH v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909.)

CRIMINAL LAW (§ 1094*)—AFFIRMANCE—SUFFICIENCY OF RECORD.

Where, on appeal, the record contains neither bill of exceptions nor statement of facts, the judgment will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2807, 3204; Dec. Dig. § 1094.*]

Appeal from Hill County Court; Horton B. Porter, Judge.

Tom English was convicted of violating the local option law, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

We find neither bill of exceptions nor statement of facts in the record. This being the condition of the record, there is nothing authorizing a reversal of the case, and the judgment is affirmed.

LEE v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909.)

1. LARCENY (§ 12*)—ELEMENTS OF OFFENSE—EVIDENCE.

Accused drove a herd of cattle to town for shipment to market. A third person drove another's cattle into the herd, and requested accused to take them to market and remit to him the money after a sale of the cattle. The third person was seen in conjunction with accused in driving the cattle. Held, that accused, if not engaged in the original taking, could at most be convicted of receiving stolen property, knowing it to be stolen.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 22; Dec. Dig. § 12.*]

2. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction, on a trial for theft, that possession of recently stolen property, without an opportunity to explain possession, does not justify a conviction, but should be considered as a circumstance, and that, if accused failed to explain his possession, which was of a character demanding an explanation, the jury must be satisfied, to warrant a conviction, that his possession was personal, recent, and exclusive, was erroneous, as on the weight of evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. §§ 763, 764.*]

Appeal from District Court, Young County; E. W. Nicholson, Special Judge.

H. L. Lee was convicted of cattle theft, and he appeals. Reversed and remanded.

John C. Kay, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft of cattle, and his punishment assessed at two years' confinement in the penitentiary.

The evidence in this case shows that appellant, while driving some cattle to Graham for shipment to Ft. Worth, passed through the prosecuting witness' pasture. Appellant swears one Ed Poe drove a bunch of cattle into the herd that was being driven by him (appellant). Appellant further states that Poe subsequently requested him to take the cattle that he had placed in appellant's bunch to Ft. Worth, and remit the money to Poe after selling the cattle at Ft. Worth. The evidence shows, from other witnesses, that Ed Poe was seen, in conjunction with appellant, driving a bunch of cattle at the time in question.

1. Under this state of facts the court charged the jury as follows: "The defendant sets up as a defense in this case that the head of cattle mentioned in the indictment, together with 15 others, were by one Ed Poe turned into a bunch of about 40 head of cattle which defendant owned and was then driving to Graham, Tex., for shipment to and sale at Ft. Worth, and that the said Poe directed defendant to ship said cattle to Ft. Worth and sell same with his (defendant's) cattle, and to send him (Poe) at Ardington, Ind. T., a check for the proceeds of same. Now, if you find and believe, from the evidence in this case, that the said Ed Poe did turn into defendant's bunch of cattle, the head of cattle mentioned in the indictment, with others, and that the said Poe did instruct the defendant to ship the same to Ft. Worth and sell the same with his (defendant's) cattle, and to send to him (said Poe) at Ardington, Ind. T., a check for the proceeds of same, and if you further believe that the defendant accepted said cattle for shipment and sale as aforesaid, and that he did ship the said cattle to Ft. Worth, and there did sell the same and remit the proceeds by

check to the said Ed Poe at Ardington, Ind. T., and if you further believe that the defendant took no part and had nothing to do with the original stealing or taking of the cattle (that is, if they were stolen, or taken) then you will acquit the defendant and say by your verdict not guilty."

This charge is erroneous. Appellant would not be guilty of the theft of the cattle, if Poe, without appellant consenting, drove the cattle into appellant's bunch. He might, under a proper state of facts, be convicted of receiving stolen property; but if appellant had nothing to do with the original taking of the cattle, but subsequently received same from Poe, and carried them to Ft. Worth, and sold them, the utmost that he should be convicted for would be for receiving stolen property, knowing it to be stolen. It follows, therefore, the charge of the court is erroneous. *Tucker v. State*, 21 Tex. App. 699, 2 S. W. 893; *Boyd v. State*, 24 Tex. App. 570, 6 S. W. 853, 5 Am. St. Rep. 908. It follows that the court should have instructed the jury, as above suggested, that, if appellant was not engaged in the original taking of the cattle in question, they should find him not guilty, regardless of whether he sold the cattle subsequently or not.

2. The sixth paragraph of the court's charge is as follows: "You are further instructed that if you believe, from the evidence, that the property alleged to have been stolen (if stolen) was recently thereafter found in the possession of the defendant, and that the circumstances connected with his possession were of such a character as to demand of him an explanation of his possession, and he failed or refused to make such explanation, then you are instructed that, before you would be warranted in finding him guilty from such circumstances of possession alone, you must be satisfied that his possession was personal, was recent, was exclusive, was unexplained, and that it involved a distinct and conscious assertion of property by the defendant, and if any of these constituents are wanting, the defendant is entitled to be acquitted." The seventh paragraph of the court's charge is as follows: "You are further instructed that possession of recently stolen property, without an opportunity of explaining his possession, is not sufficient, of itself, to warrant a conviction for theft, but should be considered by you as a circumstance in the case, in connection with the other evidence in the case." These charges are not correct. See *Wheeler v. State*, 34 Tex. Cr. R. 350, 30 S. W. 913; *Berry v. State*, 37 Tex. Cr. R. 44, 38 S. W. 812; *Webb v. State*, 8 Tex. App. 118; *Mask v. State*, 34 Tex. Cr. R. 136, 31 S. W. 408. These charges are upon the weight of evidence.

For the errors pointed out, the judgment is reversed, and the cause is remanded.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

WHITE v. STATE.

Court of Criminal Appeals of Texas. Nov. 3, 1906.)

1. WITNESSES (§ 361*)—IMPEACHMENT—CORROBORATION.

In a prosecution for theft of a lawn mower, testimony of an officer, who recovered the mower at accused's house, offered after the owner had testified to going with the officer there and identifying it, and after evidence had been introduced impeaching the owner's general reputation for truth, as to statements by the owner as to how he identified the mower, was not admissible to show that the owner made the same statements out of court as to its identification as at trial; accused not being present when such statements were made.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1167; Dec. Dig. § 361.*]

2. LARCENY (§ 52*)—ADMISSION OF EVIDENCE.

In a prosecution for theft of a mower, accused, claiming that he bought it from others, and paid part down, and subsequently paid the remaining 25 cents, could show that he paid the money for the mower, and evidence that he stated at the time what he paid the 25 cents for, was admissible.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 147; Dec. Dig. § 52.*]

3. WITNESSES (§ 337*)—IMPEACHMENT—CONVICTION OF CRIME—REMOVEDNESS.

In a prosecution for theft, evidence that accused had been sent to the penitentiary 24 or 25 years before for robbery was not admissible, being too remote; but evidence that he had pleaded guilty to the crime of theft 4 or 5 years before was admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1132; Dec. Dig. § 337.*]

Appeal from Ellis County Court; J. T. Spencer, Judge.

Ed White was convicted of theft, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft, and his punishment assessed at a fine of \$25.

1. Appellant was charged with stealing a mower. Bill of exceptions No. 1 shows the state introduced Sim Allen, prosecuting witness, who testified that, a short while prior to August 1, 1908, his lawn mower was stolen from where he kept it under the floor of his house; that he notified the officers, and about August 10, 1908, the deputy sheriff came to him and had him go to defendant's house, to see if he could identify a mower there, which he did, and which was exhibited to the court; and said witness said he could identify the mower by the manufacturer's brand upon it, the number, the fact that it had been filed on the wrong side of the blade, and by a little cord, which had caught in the axle, and worked down into an opening, and twisted around the axle. Thereafter the state introduced the deputy sheriff, who testified to the fact of Sim Allen reporting the theft of his lawn mower, and, further, that he found the lawn mower

exhibited in court at appellant's house, and went to Sim Allen's house to get him to see if he could identify it, and took him to where the mower was. The state asked him what Sim Allen said he could identify it by. The witness was asked if defendant was present when Sim Allen told him how he identified the mower, and he said, "No." Appellant objected to him detailing the statements so made; the defendant not being present, same being hearsay and immaterial. "Be it further remembered that appellant had theretofore introduced witnesses who testified that Sim Allen's general reputation for truth and veracity in the neighborhood where he lived was bad, but no evidence was or had been offered to impeach him, in that he had made contradictory statements. The state insisted that, inasmuch as the defendant had introduced evidence impeaching Sim Allen's general reputation for truth and veracity, they had the right to strengthen and corroborate his testimony by showing that he had made the same statements out of court that he did in court. The objection being overruled, the witness testified as follows: 'When Sim and I got to the mower, Sim looked at it and said he thought it was his. He then got down over it and positively identified it as his, and said he knew it by the brand, and by the fact that there were some scratches where his boy had filed the blades on the wrong side, and by the fact that a little string had become wrapped somewhere on the mower, I cannot say exactly where he said the string was. I did not examine, nor see the string. Defendant was not present when these statements were made.'" This testimony was not admissible. The evidence for the defense shows that appellant agreed to pay \$2.50 for the mower, but at the time he bought same from two strange white men he only had \$2.25; that subsequently he paid them the 25 cents.

The defense, as shown by bill of exceptions No. 2, placed a witness on the stand, and asked the witness the following question: "Did defendant then and there state what he paid the men the 25 cents for?" This testimony was admissible. It was proper to prove that he paid the money.

2. Bill of exceptions No. 3 shows that, while appellant was on the stand in his own behalf, on cross-examination, the state's counsel asked him the following question: "Have you ever been in the penitentiary?" Appellant objected, on the ground that the question was too general, and did not limit the time to a time sufficiently recent to make proof of a felony charge for impeachment purposes, and that the answer would be irrelevant, immaterial, and prejudicial. The court overruled appellant's objection, and compelled appellant to answer that he had once been in the penitentiary. When witness was tendered back to appellant's coun-

sel for further examination, appellant said it was 24 or 25 years ago that he was sent to the penitentiary for robbery. Appellant then asked that the jury be instructed to disregard the testimony that appellant had been to the penitentiary for any purpose, which request was overruled. The court approves the bill, with the explanation that "defendant admitted, in addition to the matters alleged in the foregoing bill, he had 4 or 5 years ago pleaded guilty to the crime of theft in the county court of Ellis county." The latter statement is not remote, and therefore admissible; but the former statement was clearly inadmissible, on the ground that same was too remote.

For the errors suggested, the judgment is reversed, and the cause is remanded.

EVANS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909.)

1. CRIMINAL LAW (§ 686*)—EVIDENCE—WITNESSES.

The county attorney may put any witness on the stand he sees fit, and he need not call the prosecutor as a witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1567-1575; Dec. Dig. § 686.*]

2. CRIMINAL LAW (§ 392*)—EVIDENCE—WITNESSES.

The county attorney may, to explain why the prosecutor is not called as a witness, prove by a qualified witness that prosecutor is insane.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 852; Dec. Dig. § 392.*]

3. ASSAULT AND BATTERY (§ 67*)—SELF-DEFENSE.

Where it reasonably appeared to one, judging from the circumstances surrounding him at the time when an assault was made on him, that he was in danger of death or serious bodily injury, he could act on the appearances, whether subsequent events showed that the appearances were real or not.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 96; Dec. Dig. § 67.*]

4. ASSAULT AND BATTERY (§ 97*)—VERDICT—SUFFICIENCY.

The jury, on a prosecution for assault, must find the grade of the offense, whether aggravated or simple assault; and a verdict merely finding accused guilty, and assessing his punishment at a fine, is insufficient.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 151; Dec. Dig. § 97.*]

Appeal from Delta County Court; C. C. Dunagan, Judge.

Tab Evans was convicted of an assault, and he appeals. Reversed and remanded.

Lane & Ratliff, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault, and his punishment assessed at a fine of \$5.

1. Bill of exceptions No. 1 complains that the court refused to require the county at-

torney to place upon the witness stand the alleged injured party, Andrew Winfrey, in order to test his mental qualifications as a witness; the said Andrew Winfrey being present in court, and the county attorney having placed Andrew Winfrey's father, I. N. Winfrey, upon the witness stand for the purpose of proving said Andrew Winfrey's mental incapacity, because under the direction of the court the mental qualifications of the alleged injured party should have been tested, before offering proof by some other person that he was mentally unable to testify, and because the best evidence of which the case was susceptible should have been introduced, if possible. In the first place, the county attorney could put any witness on the stand he saw fit. There is no law that requires him to put the prosecuting witness on the stand, whether he is crazy or not; and if the father of the prosecuting witness was placed upon the stand, and properly qualified to testify about his insanity, there could be no error in this action, in order to explain why the main witness and party aggrieved was not placed upon the stand. The insanity of the prosecuting witness might also be quite germane, to indicate whether or not appellant had any reason for making an assault upon him. This matter, however, is not presented in such way that we can tell for what purpose this testimony was introduced.

2. Appellant excepted to the ninth paragraph of the court's charge, because the court instructed the jury that a person has a right to defend himself against any assault or threatened assault upon his person calculated to inflict serious bodily injury, and to a violent attack, because this instruction limited defendant's defense to serious bodily injury, and to a violent attack. The charge of the court is as follows: "You are instructed that self-defense is a defensive, not an offensive, act, and must not exceed the bounds of mere defense and prevention. There must be an apparent necessity to ward off by force some unlawful and violent attack; and a person attacked must decide for himself, at his peril, as to whether the circumstances in which he is placed, and upon which he acts, are such as to furnish a reasonable apprehension of danger. A person has a right to defend himself against any assault or threatened assault upon his person calculated to inflict serious bodily injury, and it is not essential to his perfect right of self-defense that the danger be real or actually exist, if it is apparent." This charge is erroneous, in that it limits appellant's right of self-defense, by stating that he must decide whether the assault is violent at his peril. It is true, in a subsequent portion of the charge, this is somewhat changed or qualified; but still appellant does not have to decide at his peril that the assault is being made or about to be made. If

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

it reasonably appeared to him, judging from all the circumstances surrounding him at the time the assault is made, that his life or person was in danger of death or serious bodily injury, he has a right to act on said appearances, regardless of whether subsequent events show said appearances are real or not. So there is nothing that a defendant, acting upon the perfect right of self-defense, has to do at his peril. The charge is incorrect.

3. The fourteenth paragraph of the court's charge is as follows: "If you should find the defendant not guilty of an aggravated assault and battery, but believe that the defendant is guilty of a simple assault and battery, the form of your verdict will be: 'We, the jury, find the defendant guilty, and assess his fine at \$—, filling in the — the amount agreed upon by you, to be not less than \$5 nor more than \$25.'" The objection to said instruction is that it does not tell the jury to find the grade of the offense, and, if they found him guilty of simple assault, to so state in their verdict. This question has been repeatedly before this court, and with unbroken uniformity we have held that a jury must find the grade of the offense. In this case the jury merely found appellant guilty, and assessed his punishment at a fine of \$5, without stating the grade of the offense. *Hays v. State*, 33 Tex. Cr. R. 546, 28 S. W. 203; *Bowen v. State*, 28 Tex. App. 498, 18 S. W. 787; *Aycock v. State* (Tex. Cr. App.) 115 S. W. 590; *Moody v. State* (Tex. Cr. App.) 105 S. W. 1127.

For the error suggested, the judgment is reversed, and the cause is remanded.

BOYD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 10, 1909.)

1. CRIMINAL LAW (§ 364*)—EVIDENCE—RES GESTÆ.

A statement by accused, just prior to his entering a schoolhouse and disturbing religious worship, in answer to a warning by witness that, if the meeting was disturbed, somebody would report accused and his companions, "By God, you would not do it," was admissible as *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 808, 810; Dec. Dig. § 364.*]

2. CRIMINAL LAW (§ 1169*)—ADMISSION OF EVIDENCE—PREJUDICE.

Where accused was subjected to the minimum punishment for disturbing a religious assembly, he was not prejudiced by the erroneous admission of evidence of a state's witness that, after warning defendant and his companions not to disturb the meeting, witness left the services because he thought there was going to be a disturbance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3143; Dec. Dig. § 1169.*]

Appeal from Kaufman County Court; Thos. R. Bond, Judge.

Carl Boyd was convicted of disturbing religious worship, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of disturbing religious worship, and his punishment assessed at a fine of \$25.

The bill of exceptions in the record discloses the following facts: M. A. Thomas, state witness, in his examination in chief by the county attorney, after he had already testified that he went out of the schoolhouse and met Henry Pritchett, Lacy Jones, and defendant, Carl Boyd, near the door thereof, and warned them not to go in the house, and not to disturb the people, as, if they did, somebody would report them, and defendant then and there said, "By God, you would not do it," etc., and that when he went out of the house he went out to the arbor and sat down, and never went back any more, then the county attorney propounded to him the further question, to wit: "Why did you leave the house, and go to the arbor, and sit there until the services ended in the schoolhouse?" to which question the witness answered that he left the house, and went out to the arbor, and stayed there until the services were over, because he thought there was going to be disturbance. Appellant objected to the answer of the witness, because it was the expression of witness' opinion, because it was irrelevant evidence, and incompetent, and was calculated to unjustly influence the minds of the jury against defendant. Part of this testimony was admissible, because same was part of the *res gestæ* of the act of disturbing the congregation, since appellant immediately entered the house where religious worship was in progress, and there the disturbance took place. This declaration of appellant to the witness was part and parcel of one continuous transaction. We do not believe that the reason why witness did not also enter the house was admissible; but, in view of the fact that the jury gave appellant the minimum punishment, it could not operate a reversal of the case.

There are various exceptions urged to the charge of the court; but the same is in the usual stereotyped form, and properly presented every phase of the evidence to the jury.

Finding no error in the record, the judgment is affirmed.

ELKINS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 10, 1909.)

1. CRIMINAL LAW (§ 614*)—CONTINUANCE—ABSENT WITNESS.

In a burglary case, where an application for second continuance showed that a nonresident witness, who was sick, would testify that the goods that accused was found in possession of, and that were claimed by prosecuting wit-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ness as having been stolen from his store, were the property of such absent witness, she having had a store in the village where the burglary was alleged to have occurred, and that none of the property relied upon by the state to convict accused by possession alone was taken from prosecuting witness' house, except a pair of shoes, about which accused's testimony showed the absent witness knew nothing, the witness' testimony was material, and it was error to refuse the continuance.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 614.*]

2. CRIMINAL LAW (§ 369*)—ADMISSIBILITY OF EVIDENCE—IDENTIFICATION OF GOODS IN ACCUSED'S POSSESSION AS BELONGING TO THIRD PERSONS.

In a burglary case, evidence of the identification of goods in accused's possession by third persons as belonging to them was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 369.*]

3. BURGLARY (§ 31*)—ADMISSIBILITY OF EVIDENCE—SUING OUT OF SEARCH WARRANT.

In a burglary case, evidence that a search warrant had been sued out, either by the prosecuting witness or by a third person, was inadmissible.

[Ed. Note.—For other cases, see Burglary, Dec. Dig. § 31.*]

4. CRIMINAL LAW (§ 427*)—ADMISSIBILITY OF EVIDENCE—ACTS NOT BROUGHT HOME TO ACCUSED.

In a burglary case, evidence of acts of third persons as to carrying property from the burglarized house and secreting it, not brought home to accused, was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 427.*]

Appeal from District Court, Wilson County; E. A. Stevens, Judge.

George Elkins was convicted of burglary, and appeals. Reversed and remanded.

F. H. Burmeister, C. F. Elkins, and J. E. Canfield, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary.

Appellant filed a second application for continuance for the want of the testimony of Ola Elkins, his daughter, which witness resides in the city of San Antonio, Bexar county. The application discloses that on April 19, 1909, appellant applied to the clerk of the court for a nonresident subpoena for the witness, which was duly issued and sent to the sheriff of Bexar county by due course of mail, which subpoena was returned May 10, 1909, indorsed and duly executed as to the witness Ola Elkins; that on the call of the docket May 10, 1909, the appellant caused an attachment to issue by order of the court for the said witness Ola Elkins, and on May 14, 1909, the appellant again caused an attachment to issue for the absent witness, directed to the sheriff of Bexar county; that none of the attachments have been returned to the court, showing how same have been executed, but on the 17th day of May, 1909, J. E. Wiseman, the district clerk

of the court, received the following letter: "Dear Sir: Witness Miss Ola Elkins is sick and unable to attend court. The doctor's certificate and return will follow to-morrow. Respectfully, B. L. Lindsey, Sheriff." Subsequently the attachments were returned, together with the doctor's certificate. Appellant further showed to the court that said witness Ola Elkins is now sick in bed, and under process, and unable to attend the present term of court. The application, in substance, shows that appellant would have proved by said witness, if present, that the goods appellant was found in possession of, that were claimed by prosecuting witness as having been secured by burglarizing his store, were the property of said Ola Elkins, she having had a store in the village where the burglary is alleged to have occurred and accumulated the property in question from divers and sundry parties; that the witness would have sworn that none of said property relied upon by the state to convict appellant by possession alone was taken from the prosecuting witness' house, save and except a pair of red shoes, that seemed to have been missed, according to the testimony, from prosecuting witness' house some two or three weeks before appellant was arrested. But, notwithstanding that, appellant swears that this particular pair of shoes was taken from prosecuting witness' house by a Mexican, and put under the side of the house of prosecuting witness, and that he subsequently went and took same to his home, thereby excluding the idea that his daughter knew anything about this particular pair of shoes. Yet the record is replete with the fact that divers and sundry other goods were claimed by prosecuting witness as his property that were found in possession of the appellant, in addition to the pair of shoes. So we cannot say to what extent the jury convicted appellant of burglary on the theory of his possession of the other goods other than the pair of shoes. This, then, makes the testimony of the absent witness quite material. Appellant swears, however, that the witness knew the goods in question were her goods, and the diligence, while controverted, is not sufficiently combated to have authorized the court to refuse the second application for continuance. It follows, therefore, that the court erred in refusing same, for which the judgment must be reversed.

In view of another trial, we would suggest that no evidence of the fact of other parties identifying goods in possession of appellant as belonging to them be admitted. Nor does the fact that a search warrant was sued out by another and different party than the prosecuting witness, or that the prosecuting witness sued out a search warrant, if he did sue out one, constitute legitimate evidence to be introduced against appellant. For a discussion of this matter, see *Denton v. State*,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

42 Tex. Cr. R. 427, 60 S. W. 670. The learned trial court, it might be added, explains the bills of exception complaining of the introduction of the matters suggested by stating no exception was taken to same. We therefore suggest upon another trial that this testimony should not be introduced. We might further add that the extraneous acts of third parties as to carrying property from the house and secreting same in a water-closet, or in the weeds, which acts were not brought home to appellant, should also not be admitted.

For the error pointed out, the judgment is reversed, and the cause is remanded.

WALKER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909.)

INTOXICATING LIQUORS (§ 239*)—GIVING LIQUORS TO MINOR—PROSECUTION—INSTRUCTIONS.

Acts 30th Leg. 1907, p. 216, c. 116, providing for the punishment of one who shall sell, give, or cause to be sold or given, or "be in any way interested in the sale, gift, or delivery" of liquors to a minor, enlarges the scope of Pen. Code 1895, art. 400, providing for the punishment of any person who shall knowingly sell, give, or cause to be sold or given any liquor to a minor. *Held* that, where an information was based on Pen. Code 1895, art. 400, an instruction authorizing a conviction if defendant "was instrumental or in any way concerned" in giving liquor to a minor was erroneous.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 343, 345; Dec. Dig. § 239.*]

Appeal from Delta County Court; C. C. Dunagan, Judge.

Tullie Walker was convicted of unlawfully giving intoxicating liquor to a minor, and he appeals. Reversed and remanded.

Lane & Rathliff, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was charged, by information filed in the county court of Delta county, with unlawfully giving intoxicating liquor to a minor, and his punishment assessed at a fine of \$25.

The charge is made substantially in this language: " * * * Did then and there unlawfully and knowingly give and cause to be given spirituous, vinous, and intoxicating liquor to Wm. Gillespie, the said Wm. Gillespie then and there being a person under the age of 21 years, without the written consent of the parent or guardian, or of some one standing in the place and stead of the parent and guardian, of him, the said Wm. Gillespie." The evidence showed, in substance, that Wm. Gillespie was a minor, and at some time in December, 1908, appellant, Gillespie, Emmet Taylor, and Roland Walker went to what they called a box supper at Jackson's Chapel, in Delta county; that at the time appellant

had a bottle of whisky; and that during the journey to their destination Gillespie took several drinks of this liquor. Gillespie does not make it quite certain in his testimony who it was that gave him the whisky, though he does say that appellant was present at the time when he drank. Testimony was offered by appellant to the effect, in substance, that Gillespie had stated to some of the witnesses that appellant did not give him any whisky. To others he made the statement that some one in the crowd gave it to him, but he did not know who it was.

1. In this condition of the record the court charged the jury, in substance, as follows: "If you believe, from the evidence in this case, that the defendant, Tullie Walker, in Delta county, Tex., on or about the 19th day of December, 1908, did unlawfully and knowingly give and caused to be given, and was instrumental or in any way concerned in giving, whisky to one William Gillespie," etc., they would find him guilty. This charge was excepted to at the time, and the claim is made that the addition of the words "was instrumental or in any way concerned in giving" was a submission of an issue not charged in the complaint and information, and authorized a conviction on a basis and charge not laid in the complaint. There would seem to be at this time two definitions of this offense, or, rather, two statutes covering the same general subject. Article 400 of our Penal Code of 1895 is as follows: "Any person who shall knowingly sell, give or cause to be sold or given any spirituous, vinous or intoxicating liquor to any person under the age of twenty-one years without the written consent of the parent or guardian of such minor or some one standing in their place or stead shall be fined not less than twenty nor more than one hundred dollars." The Thirtieth Legislature (Laws 1907, p. 216, c. 116) enacted a statute, in part, to this effect: "That any person who shall knowingly sell or give or deliver or caused to be sold, given or delivered or be in any way interested in the sale, gift or delivery of any spirituous, vinous or intoxicating liquors to any person under the age of twenty-one without the written consent of the parent or guardian of such person who is under the age of twenty-one years or some one standing in their place or stead, shall be guilty of a misdemeanor and shall be fined therefor not less than twenty-five nor more than one hundred dollars." It will thus be noted that this last act goes in its language somewhat beyond the scope of article 400 of the Penal Code above quoted, in the addition of the words "or be in any way interested in the sale, gift or delivery of any spirituous, vinous or intoxicating liquors."

It is urged by the state here that the use of the language in the charge "interested or concerned in such sale or gift" does not en-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

large the scope of the charge, but it has, in substance, the same meaning as the terms "caused to be sold, given or delivered." We are scarcely prepared to agree to this contention, but must believe that the Legislature had in mind to enlarge the scope of the statute; otherwise the addition of the words "be in any way instrumental in such gift," etc., would have been both unnecessary and meaningless. Nor can it be said, we think, where the charge was excepted to at the time, that this addition incorporated in the court's charge was, under the facts of this case, harmless. It was conceded here that these boys had some whisky. Most of the evidence tended to show that the whisky belonged to appellant. Some of the testimony indicated that, if he did not give the whisky to Gillespie, at least it was given in his presence. However, there is testimony in the record that Gillespie did not know who gave him the whisky, and a condition of the facts shown from which the jury might, under a proper charge, have found that, whether the whisky belonged to appellant or not, he was absolutely blameless in the matter of giving the whisky to Gillespie, unless blame might be attached to him in the single and sole fact of his having possession of the whisky under the circumstances here shown. It is barely possible the jury might have believed, under the language of the charge "or was in any way instrumental or concerned in the giving," that the mere fact of possession of the whisky, under the circumstances, notwithstanding he neither knew nor consented to the gift to Gillespie, would be sufficient to sustain a verdict. The objection here considered was made at the time, saved by proper exception, and it is undeniable that the language of the court's charge did go beyond the terms of the information and complaint, which seemed to have been founded on article 400 of the Penal Code above quoted. As presented, in view of the evidence, we think we must hold this charge erroneous.

2. There are a number of other questions raised on the appeal; but they are not likely to arise on another trial, and do not now demand attention.

The judgment is reversed, and the cause is remanded.

GLOVER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1906.)

1. FALSE PRETENSES (§ 26*)—SWINDLING—INVALID CHECK—FALSE REPRESENTATIONS—INDICTMENT.

An indictment for swindling, charging that defendant procured certain clothing from prosecutor's clerk in exchange for a check on a bank, which defendant represented would be paid on presentation from funds which defendant falsely claimed to have on deposit therein, that the check was not good, that defendant had no right

to draw it, etc., and that payment was refused, stated an offense.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 26.*]

2. CRIMINAL LAW (§ 814*)—INSTRUCTIONS—NONDISPUTED FACT.

Where, in a prosecution for swindling by obtaining clothing in exchange for a worthless check, there was no dispute that the check was delivered to prosecutor's clerk, the court did not err in refusing to charge that the state was bound to prove that the check was delivered by defendant to the person alleged in the indictment.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 814.*]

3. FALSE PRETENSES (§ 38*)—INDICTMENT—ISSUES AND PROOF.

Where, in a prosecution for swindling by giving prosecutor's clerk a worthless check in payment of goods, the clerk had testified that the check in question, which was on a specified bank, was the check defendant gave witness for the goods, evidence that after witness had sold the goods to defendant, and after defendant stated he wanted to pay for them with a check, witness asked defendant if he had money in the bank, and defendant answered that the check would be honored and that he had money, was not objectionable because the indictment did not charge that defendant had represented to witness that he had on deposit money in the bank on which the check was given.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 38.*]

4. FALSE PRETENSES (§ 38*)—SWINDLING—CHECKS—EVIDENCE.

In a prosecution for swindling by obtaining goods with a worthless check, the check was admissible, though it did not show whether the bank on which it was drawn was a corporation or a joint-stock company, or where it was situated, and though the indictment did not allege that the bank was engaged in the banking business in the city and county of its location.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 38.*]

5. FALSE PRETENSES (§ 41*)—SWINDLING—EVIDENCE.

In a prosecution for swindling by means of a worthless check, evidence of the bookkeeper of the bank on which the check was drawn that the check was presented to the bank for payment, and payment refused, was proper.

[Ed. Note.—For other cases, see False Pretenses, Dec. Dig. § 41.*]

6. CRIMINAL LAW (§ 413*)—EVIDENCE—SELF-SERVING DECLARATION.

In a prosecution for swindling by obtaining goods by means of a worthless check, evidence of defendant's mother that after his arrest she saw him in jail, and he then stated to her that it was his intention and belief, at the time he signed the check, that it was drawn on a different bank, and that he had money therein to pay the check, was inadmissible, as self-serving.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.*]

7. CRIMINAL LAW (§ 418*)—EVIDENCE—DECLARATIONS OF THIRD PERSON.

In a prosecution for swindling by means of a worthless check, evidence that, after defendant's arrest, his mother told him that she had neglected to put his money in a different bank from that on which the check was drawn, and that defendant thereupon cried, was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 418.*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

G. C. Glover was convicted of swindling, and he appeals. Affirmed.

O. T. Plummer, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of swindling, and his punishment assessed at a fine of \$100 and 60 days' imprisonment in county jail.

The charging part of the indictment is as follows: "One G. C. Glover, in the county of Johnson and State of Texas, did then and there, unlawfully devising and intending to secure the unlawful acquisition of certain property, one suit of clothes, of the value of twenty-five dollars (\$25.00), one overcoat, of the value of twenty-two dollars and fifty cents (\$22.50), one pair of shoes, of the value of six dollars (\$6.00), one suit case, of the value of six dollars (\$6.00), one hat, of the value of four dollars (\$4.00), two shirts, of the value of two dollars and fifty cents (\$2.50), one stick pin, of the value of one dollar (\$1.00), one pair of cuff buttons, of the value of two dollars and twenty-five cents (\$2.25), four collars, of the value of fifty cents (50 cents), and the whole of the above-described bill of goods amounting to sixty-nine dollars and seventy-five cents (\$69.75), then and there the corporeal personal property of and belonging to J. H. Douglass, and with the further intent on the part of him, the said G. C. Glover, to appropriate said property when so acquired to his own use, did then and there unlawfully and fraudulently acquire possession of said property from Ed Gregory, who was then and there the agent of the said J. H. Douglass, by means of false and deceitful pretenses, devices, and fraudulent representations, then and there unlawfully, knowingly, and fraudulently made by him to the said Ed Gregory, then and there the agent of the said J. H. Douglass as aforesaid, in this, to wit: The said G. C. Glover did then and there falsely pretend and fraudulently represent to the said Ed Gregory, then and there the agent of the said J. H. Douglass, that he, the said G. C. Glover, had the authority and the right to dispose of a certain check of tenor the following, to wit: 'Cleburne, Texas, 12/26, 1908. No. ———. Farmers' & Merchants' National Bank: Pay to J. H. Douglass or bearer \$69.75, sixty-nine and ⁷⁵/₁₀₀ dollars. G. C. Glover.' And did falsely pretend and fraudulently represent to the said Ed Gregory, then and there the agent of the said J. H. Douglass, that the said writing obligatory (check), on the Farmers' & Merchants' National Bank of Cleburne, Texas, was a valid, legal, and valuable obligation, and did then and thereby, by means of said false pretense and fraudulent representation, fraudulently induce the said Ed Gregory, then and there the agent of J. H. Douglass as aforesaid, then and there to sell and exchange his said property for the

said pretended writing obligatory (check) as above described, the said check then and there being the corporeal personal property of and belonging to the said G. C. Glover, and by reason of said false pretenses, devices, and fraudulent representations so made by the said G. C. Glover to the said Ed Gregory, then and there the agent of J. H. Douglass, he, the said Ed Gregory, then and there the agent of J. H. Douglass, was then and there induced to part with, sell, and exchange, and did part with, sell, and exchange, the said property, and deliver the title and possession of the same, to the said G. C. Glover for, and did receive therefor from the said G. C. Glover, the said writing obligatory (check) as above described, falsely and fraudulently presented as aforesaid by the said G. C. Glover as a valid, legal, and valuable obligation; whereas, in truth and in fact, the said pretended writing obligatory was not a valid, legal, and valuable obligation, for the reason following, to wit: Because the said G. C. Glover fraudulently and falsely represented to the said Ed Gregory, then and there the agent of the said J. H. Douglass, that he, the said G. C. Glover, owned six hundred and forty acres of land at Bono, Johnson county, Texas, and that he, the said G. C. Glover, had raised, picked, and marketed thirty-five bales of cotton this year, A. D. 1908, and the proceeds realized from the said thirty-five bales of cotton was and is deposited in the aforesaid bank, and that the above set out check was a good, legal, and valuable check, and would be paid when presented to the aforesaid bank for payment; whereas, in truth and in fact, the said G. C. Glover did not own any land, and did not raise any cotton, and did not have credit at the aforesaid bank, and did not then and there have a right to draw a check for sixty-nine dollars and seventy-five cents against said bank and dispose of the same, and the said check so drawn as aforesaid by G. C. Glover was not paid by said bank when presented for payment. And the said pretenses and representations so made and devices as used by the said G. C. Glover to the said Ed Gregory, then and there the agent of the said J. H. Douglass, in order to acquire the title and possession of the said property from the said Ed Gregory, then and there the agent of the said J. H. Douglass as aforesaid, were false and fraudulent when so made, and he, the said G. C. Glover, then and there well knew the said pretenses, devices, and representations to be false and fraudulent when he made and used them as aforesaid, against the peace and dignity of the state." See Moore v. State, 20 Tex. App. 233.

1. Appellant's first special charge is as follows: "You are instructed that the indictment in this case does not charge the defendant with any offense, and that the evidence does not show or establish any offense against defendant for swindling as mentioned in the indictment, and you are instructed to return

a verdict for defendant, and this should be the form of your verdict: 'We, the jury, find the defendant not guilty.' There was no error in refusing this charge. The evidence supports the allegations in the indictment.

2. Appellant's second special charge is as follows: "The indictment in this case charges defendant by selling and exchanging and delivering a certain check on the Farmers' & Merchants' National Bank, payable to J. H. Douglass, to one Ed Gregory. Now it devolves upon the state to show by the evidence beyond a reasonable doubt that said check was delivered by defendant to Ed Gregory, and to no other person; and if you should have a reasonable doubt on this question you will acquit the defendant, and so say by your verdict." There is no cavil over the question that the check was delivered to Ed Gregory, clerk of the prosecuting witness, Douglass, and therefore there was no error in refusing this charge.

3. Bill of exceptions No. 1 complains that on the trial of this case the state was permitted to prove by Ed Gregory that after he had sold the defendant the clothing mentioned in the indictment, as he and defendant were going towards the office, he asked defendant, after defendant said he wanted to pay for the clothing with a check, if he, the defendant, had money in the bank, and that defendant said, "Yes," and that "the check will be honored," and that "I have got the money." Appellant objected to this, on the ground that it was not alleged in the indictment that defendant had represented to Ed Gregory that he had on deposit any money in the Farmers' & Merchants' National Bank of Cleburne, Tex. The bill is allowed, with the explanation that the witness had already testified that the check mentioned above was the check defendant gave witness for the clothing sold him. We see no error in the ruling of the court.

4. Bill of exceptions No. 2 objects to the check offered in evidence, because said check does not show that the Farmers' & Merchants' National Bank is a corporation, or a joint-stock company, or show where it is situated, and that said indictment does not allege that the Farmers' & Merchants' National Bank is engaged in the banking business in the city of Cleburne, Johnson county, Tex. This was not necessary.

5. Bill of exceptions No. 4 objects to the state proving by Price Allard that he was bookkeeper of the Farmers' & Merchants' National Bank of Cleburne, and that the original check mentioned and described in the indictment was presented to said bank for payment, and that payment was refused by said bank. This testimony was highly germane and proper.

6. Bill of exceptions No. 5 shows that appellant offered to prove by Mrs. E. M. Stewart,

appellant's mother, that when she came to Cleburne, the first time she saw him after he was arrested and found him in jail, he stated to her that it was his intention and belief, at the time he signed the check described in the indictment, said check was drawn upon the First National Bank at Rogers, Tex.; that at the time he purchased the goods from Mr. Ed Gregory he informed him that he had money deposited in said bank, and wished to use it in payment of the goods which he purchased from Mr. Douglass. This testimony was not admissible; same being self-serving. Nor would the fact that the mother told defendant that she had neglected to put his money in the bank at Rogers, and defendant cried, be admissible.

Finding no error in the record, the judgment is affirmed.

HARRYMAN et al. v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909.)

BAIL (§ 93*)—SCIRE FACIAS—SUFFICIENCY OF RETURN.

To support a judgment by default, making final a judgment nisi forfeiting a recognizance bond, the officer's return must show that each of the defendants was served in person with a copy of the writ, giving the date and place of such service, under Code Cr. Proc. 1893, art. 480, providing that citation in such proceedings shall be served and returned as in civil actions, and a return: "Came to hand 22d day of August, 1908, and executed on C. 22d day of August, 1908, in B., Texas. Served on H. September 2, 1908, in B., Texas; S. 4th day of November, 1908, at 2:30 p. m. in B., Texas * * *"—was insufficient.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 409; Dec. Dig. § 93.*]

Appeal from Brown County Court; A. M. Brumfield, Judge.

Action by the State against R. W. Harryman and others to forfeit a recognizance bond. There was a default judgment of forfeiture, and defendants appeal. Reversed and remanded.

Scott & Foster, for appellants. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. This is a suit by the state of Texas, forfeiting a recognizance bond entered into by Roy Harryman, principal, and J. C. Couch, R. W. Harryman, and Lee Son, sureties, in a case appealed from the county court of Brown county, Tex., and in the course of which forfeiture judgment nisi was taken at the July term, 1908, of the county court of Brown county, upon which judgment nisi a scire facias was issued to said parties, commanding them to show cause at the October term, 1908, of said court, why such judgment nisi should not be made final, and, they failing to answer, the judgment was made final by default at the said October term, 1908, of said court.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The first error assigned is that the court erred in rendering judgment by default against defendants J. C. Couch, Lee Son, and R. W. Harryman, because the officer's return is insufficient to support the judgment by default, being as follows, to wit: "Came to hand 22d day of August, 1903, and executed on J. C. Couch 22d day of August, 1908, in Brownwood, Texas. Served on R. W. Harryman September 2, 1908, in Brownwood, Texas; Lee Son 4th day of November, 1908, at 2:30 p. m., in Brownwood, Texas. [Signed] Frank Emison, Sheriff, by O. E. Kitchen, Deputy." Appellants contend that, to support the judgment by default, the officer's return on the scire facias must show that each of the defendants were served in person with a true copy of the writ, giving the date and place of such service. This contention is correct. Article 480, White's Code Cr. Proc. 1895; Batt's Ann. Civ. St. art. 1225; Fulton v. State, 14 Tex. App. 32; Rutherford et al. v. Davenport et al. (Tex. App.) 16 S. W. 110; Russell et al. v. Butler et al. (Tex. Civ. App.) 71 S. W. 395.

The judgment is accordingly reversed, and the cause remanded.

PARRISS et al. v. JEWELL et ux.†

(Court of Civil Appeals of Texas. Oct. 20, 1909. On Motions, Nov. 17, 1909.)

1. CONTRACTS (§ 71*) — CONSIDERATION — ABANDONING WILL CONTEST.

Abandonment of a contest of a will is a sufficient consideration for the devisee's contract to deliver to the contestant a certain amount of the proceeds of the sale of the devised land.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 295-297, 316-324, 327; Dec. Dig. § 71.*]

2. HUSBAND AND WIFE (§ 223*) — DEATH OF PARTY—CONTINUANCE OF ACTION.

Under Rev. St. 1895, art. 1246, providing that, when a plaintiff dies before verdict, the action shall not abate, but the heirs of the deceased plaintiff may appear, and, on suggestion of the death, may be made plaintiffs, the husband, in an action by husband and wife, having filed suggestion of her death, intestate, stating that she left her minor children as her heirs, and that they inherited the cause of action, and prayed to be allowed to prosecute the action for and on their behalf, and he having in open court disclaimed and released any interest, the case, on the court granting the prayer of the suggestion, properly proceeded in the name of the original parties for the benefit of the minors, without necessity for another petition, as the suggestion is to be regarded as part of the pleadings to the extent of substituting them for their mother.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 759, 765, 773, 783; Dec. Dig. § 223.*]

3. HOMESTEAD (§ 95*)—PRIORITY OF RIGHTS.

Any homestead right of defendant's wife in land, having been acquired after defendant contracted to deliver to plaintiff a certain part of the proceeds of his contemplated sale of it, was subordinate to plaintiff's right under the contract.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 141-146; Dec. Dig. § 95.*]

4. INJUNCTION (§ 208*)—PERMANENT INJUNCTION.

The judgment for plaintiff in an action to recover part of a certain fund claimed by a defendant, and in the possession of another defendant, was erroneous, in so far as it perpetuated the injunction against disposal of the fund, without any provision for its dissolution on payment of the judgment.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 208.*]

5. INFANTS (§ 105*) — ACTION — JUDGMENT — BOND BY NEXT FRIEND.

A judgment for minors should not authorize the money to be paid their next friend without requiring him to give bond, as provided by Rev. St. 1895, art. 3498w.

[Ed. Note.—For other cases, see Infants, Dec. Dig. § 105.*]

6. FRAUDS, STATUTE OF (§ 73*) — SALE OF LAND.

A contract to deliver to one a certain amount of the proceeds of the sale of land is not one for sale of land within the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 119; Dec. Dig. § 73.*]

Appeal from District Court, Travis County; Geo. Calhoun, Judge.

Action by H. A. Jewell and wife against A. Parriss and others. Judgment for plaintiffs. Defendants appeal. Reformed and affirmed.

Dowell & Dowell, for appellants. Allen & Hart, for appellees.

KEY, J. H. A. Jewell and his wife brought this suit against A. Parriss and his wife, Emily Parriss, and the Austin National Bank, seeking to recover \$1,500, part of a designated fund alleged to be in possession of the bank and claimed by Parriss and his wife.

Among other things, the plaintiffs alleged in their petition that the plaintiff Mrs. Grace Jewell was the daughter of A. Parriss and his former wife, Caroline Parriss; that Caroline Parriss was dead; that she left property, consisting mainly of 100 acres of land, which was community estate between herself and A. Parriss; that prior to her death A. Parriss, by the exercise of undue influence, amounting to duress, induced Caroline Parriss to make a will, by the terms of which the property referred to was devised to A. Parriss; that, when the will was tendered for probate, H. A. Jewell and his wife filed a protest, contesting the validity of the will on the grounds above stated; that thereafter a contract was entered into between the plaintiffs and the defendant A. Parriss to the effect that they, for a consideration of \$1,500, would withdraw or abandon their contest and permit the will to be probated, thereby enabling A. Parriss to consummate a sale of the land which he had then negotiated; that the \$1,500 was to be paid out of the proceeds of the contemplated sale of the land. The plaintiffs alleged performance of the contract on their part, sale of the land by A. Parriss, and refusal on his part to pay to the plaintiffs the \$1,500 agreed upon. The plaintiffs

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

obtained a preliminary writ of injunction restraining the defendants from disposing of \$2,438.03, the cash proceeds of the sale of the land deposited in the Austin National Bank, and also restraining them from collecting or disposing of certain notes given for the remainder of the purchase money of the land. The record contains no answer for the bank. Parriss and his wife, the other two defendants, filed answers containing a general and numerous special exceptions, a general denial, and a special answer, alleging that since the death of Caroline Parriss A. Parriss and his codefendant, Emily Parriss, were legally married, and that the land, the proceeds of the sale of which are here involved, was their homestead, and for that reason the plaintiffs ought not to recover. Before the case was tried, the plaintiff Mrs. Grace Jewell died, and her husband and coplaintiff filed and presented to the court a written suggestion of her death, in which it was stated that she died intestate, leaving as her heirs Pet Jewell, Annie Jewell, Noble Jewell, Willie Jewell, Rosa Jewell, Ida Jewell, and Robert Jewell, all being her minor children, and inherited the cause of action set up in plaintiff's petition. The document referred to alleged that H. A. Jewell was the father and next of kin of said minors, and prayed the court to allow him to prosecute the suit for and on their behalf. The court granted the prayer referred to, and the case proceeded to trial without any other pleading being filed on behalf of said heirs. The trial court submitted the case to the jury upon special issues, the answers to which were in favor of the plaintiffs and upon which answers the court rendered judgment for H. A. Jewell as next friend of the minors referred to for \$1,500, to constitute the joint property of said minors. The decree also perpetuated the injunction which had been previously granted, and made no provision for its dissolution upon a satisfaction of the plaintiffs' judgment. The defendants A. Parriss and Emily Parriss have appealed, but the bank has not.

The case is submitted in this court on an elaborate brief and numerous assignments of error in behalf of appellants. It would extend this opinion beyond proper limits, and is not necessary, to discuss all the assignments of error. We hold that the petition stated a cause of action, founded upon a breach of the contract between Mrs. Jewell and defendant A. Parriss, by which contract she was entitled to \$1,500 of the proceeds of the sale of the land. The abandonment of her contest of the proceeding to probate her mother's will, as she agreed to do, was a sufficient consideration for the contract by which A. Parriss bound himself to deliver to her \$1,500 of the proceeds of the sale.

We overrule the contention that Mrs. Jewell's children, or their father acting as next friend for them, should have been required

to file another petition, and set up their rights as if they were original plaintiffs. It is provided by article 1246 of the Revised Statutes of 1895, that, when a plaintiff shall die before verdict, if the cause of action be one which survives, the suit shall not abate by reason of such death, but the executor or administrator or the heirs of such deceased plaintiff may appear, and, upon suggestion of such death being entered of record, may be made plaintiffs in such suit. That course was pursued in this case, and we are of the opinion that, by force of the statute and the order of the court allowing the suit to be prosecuted by H. A. Jewell as next friend for the minor children, the latter, in legal effect, became the plaintiffs in the petition which had been filed, and upon which the case was tried. We are also of the opinion that the written suggestion of death should be regarded as part of the pleadings to the extent of substituting the heirs for their deceased mother. Furthermore, as the minor plaintiffs derived all their rights from the original plaintiffs, acquiring all the interest of their mother by inheritance and all the interest of their father by his disclaimer and release made in open court and carried forward into the decree, it would seem that the minor plaintiffs had the right to prosecute the suit in the names of the original plaintiffs.

The contract by which Mrs. Jewell was to have part of the proceeds of the sale of the land was made before Mrs. Emily Parriss acquired any homestead right, and therefore the latter right was subordinate to the former and the plea of homestead was unavailing; and the assignments presenting that question are overruled.

We also overrule the assignments relating to the admission of testimony, and those which complain of the giving and refusal of instructions. We also find that the verdict is supported by sufficient testimony, and overrule the assignments which charge otherwise.

We agree with counsel for appellants that Mrs. Parriss was not a party to the contract, and was not personally liable to the plaintiffs.

We also sustain the contention that error was committed in rendering judgment perpetuating the injunction. It tied up and prevented the use of money and notes far in excess of \$1,500, the sum awarded to the plaintiffs; and therefore the decree should have stipulated that when that sum, with interest thereon, and costs of the suit, were paid, the injunction should stand dissolved, and for that error the judgment must be reformed.

We note that the judgment does not properly protect the interest of the minors, in that it authorizes the money to be paid to H. A. Jewell, their next friend, without requiring him to give bond, as required by article 3498w of the Revised Statutes of 1895, and it will be corrected in that respect. L. & G. N.

R. R. Co. v. Ormond, 64 Tex. 485; G., C. & S. F. Ry. Co. v. Styron, 66 Tex. 421, 1 S. W. 161; T. & P. Ry. Co. v. Walker, 93 Tex. 611, 57 S. W. 568.

It is ordered that the judgment be so reformed as to allow no personal judgment against Mrs. Parriss, and dissolving the injunction when the \$1,500 and interest and costs of the court below adjudged to the plaintiffs have been paid. It is further ordered that the \$1,500 and interest awarded to the plaintiffs shall be paid to the sheriff of Travis county, and shall be held by him until the district court of Travis county, in which this case was tried, makes an order directing him to whom to pay the same, as required by the article of the statute last referred to. It is ordered that the costs of this appeal be taxed against appellees, the minor plaintiffs represented herein by their next friend, and that such costs constitute a charge prior to all other claims against the \$1,500 awarded to said minors, and that the sheriff, when he collects said \$1,500, pay the costs so charged against said minors without any further order from this or any other court.

Reformed and affirmed.

On Motions.

Appellants' motion for rehearing has received due consideration, but we find no reason for changing the judgment heretofore rendered by this court. It is true that in our former opinion we omitted to state that appellants alleged that the contract sued on was one for the sale of land, and, not being in writing, was within the statute of frauds; but, as the contract was for the payment of money, and not for the sale of land, we did not deem it necessary to discuss that feature of the case.

There were some other immaterial matters omitted in the former opinion; and it is also true, as contended by appellants, that the answers of the jury to some of the questions were in favor of appellants' contention, but upon the material issues—those upon which the rights of the parties were to be determined—the answers given by the jury were in favor of the appellees.

Appellants have also submitted a motion to correct the former judgment of this court by eliminating therefrom any reference to interest. That motion is founded upon the contention that the plaintiffs were not entitled to interest, and that the judgment of the trial court is silent upon that subject, and interest is not collectible thereon. It was not our intention to, and the judgment of this court does not, award interest. Unless interest was collectible upon the judgment rendered by the trial court, appellees are not entitled to interest by reason of anything stated in the opinion of this court or incorporated in its judgment.

Both motions are overruled.

SUDERMAN-DOLSON CO. v. CARSON et al. (Court of Civil Appeals of Texas. Nov. 12, 1909. Rehearing Denied Nov. 24, 1909.)

1. APPEAL AND ERROR (§ 1126*)—AFFIRMANCE OF JUDGMENT—FAILURE TO PREPARE CASE. To entitle appellee to an affirmance of the judgment because of the failure of appellant to prepare the case for submission, he must prepare the case for submission in accordance with Court Rule 42 (67 S. W. xvii).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4428, 4430; Dec. Dig. § 1126.*]

2. APPEAL AND ERROR (§ 787*)—FAILURE TO PROSECUTE APPEAL—EFFECT.

Where neither appellant nor any of the appellees filed a brief, the appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3129; Dec. Dig. § 787.*]

Appeal from Liberty County Court; I. B. Simmons, Judge.

Action by M. B. Carson and others against the Suderman-Dolson Company and another. From a judgment for plaintiffs, defendant the Suderman-Dolson Company appeals. Dismissed.

NEILL, J. The judgment in this case was recovered on April 10, 1908. It is in favor of the plaintiffs, M. B. Carson, J. H. Carson, Kathleen O'Connor, and F. M. Blair, against the defendants, Suderman-Dolson Company and Kenefick-Hammond-Quigley Construction Company, for \$125. It also adjudged that neither of defendants take anything on its cross-action against the other. From the judgment the Suderman-Dolson Company perfected this appeal as against all the other parties on August 5, 1909.

The appellant has filed no brief in this court, nor has any of the appellees. The appellees plaintiffs ask for an affirmance. To entitle them to an affirmance of the judgment, they should have prepared the case for submission in accordance with rule 42 of this court (67 S. W. xvii), which they have failed to do. Therefore the proper disposition of the appeal is to dismiss it (Hunt v. Glasscock, 27 Tex. Civ. App. 322, 65 S. W. 209; Harris v. Bryson, 31 Tex. Civ. App. 514, 73 S. W. 548; S. A. & A. P. Ry. Co. v. Brock, 77 S. W. 953; Nigro v. Hodges, 85 S. W. 1169; Bowden v. Patterson, 108 S. W. 177), which is accordingly done.

Dismissed.

DORMAN v. GRACE et al.†

(Court of Civil Appeals of Texas. Nov. 4, 1909. Rehearing Denied Nov. 18, 1909.)

1. HOMESTEAD (§ 153*)—INSOLVENCY OF ESTATE—RIGHTS OF SURVIVING WIFE—DEBTS OF ESTATE.

Under Sayles' Ann. Civ. St. 1897, art. 2046, providing that all exempt property shall be

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 122 S. W.—28

†Writ of error denied by Supreme Court.

set apart to the widow and children remaining with the family, and article 2056, providing that, should the estate of the husband be insolvent, the title of the widow and children to property set apart to them shall not be taken for debts except as provided, and article 2060, providing that the homestead shall not be liable for debts of the estate except for purchase money, taxes, etc., a homestead which, on the death of a husband, was set apart to the widow and was occupied by her as the only remaining constituent of the family, cannot, on her death, be taken as assets by the administrator, though the estate proves insolvent.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 306; Dec. Dig. § 153.*]

2. HOMESTEAD (§ 153*)—INSOLVENCY OF ESTATE—RIGHTS OF SURVIVING WIFE—EFFECT OF HER DEATH.

A contention that, inasmuch as the collateral heirs of the husband were claiming the property on the death of the wife, it would be inequitable to allow them to defeat creditors of the estate, was of no avail, since if the property would be exempt in the hands of lineal descendants of the husband, collateral heirs would also be protected.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 306; Dec. Dig. § 153.*]

3. HOMESTEAD (§ 135*)—RIGHTS OF SURVIVING WIFE—STATUTES—CONSTITUTIONALITY.

Sayles' Ann. Civ. St. 1897, art. 2056, in so far as it attempts to give the widow and remaining constituents of the family the absolute title to property set apart to them as exempt under article 2046, thus cutting off other heirs entitled to their share by the law of descent and distribution, is unconstitutional, but as to the remainder is valid.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 246-248; Dec. Dig. § 135.*]

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Action by E. B. Grace and others against G. I. Dorman, administrator, to recover possession of land. From a judgment for plaintiffs, defendant appeals. Affirmed.

M. L. Morris and McGrady & McMahon, for appellant. Richard B. Semple, for appellees.

HODGES, J. Charles D. Grace during his lifetime was a resident of Fannin county. On the ——— day of February, 1906, he died intestate, leaving surviving him a wife, but no children. At the time of his death he and his wife resided upon the land involved in this suit, as a part of his homestead, and which his wife continued to occupy as her homestead until her death, which occurred on the ——— day of February, 1908. The homestead consisted partly of community property of Charles D. Grace and his wife and partly of his separate property, aggregating about 30 acres of land. Grace left neither father nor mother, and his only heirs were his wife and the appellees herein, E. B. Grace, a brother, Virginia Freeman, a sister, and E. H. Grace, a nephew. At the time of his death the estate of Charles D. Grace was insolvent, and there are now over \$1,000 in

valid claims against his estate which have been duly probated and remain unpaid. On the ——— day of April, 1908, the appellant, Dorman, was appointed administrator of the estate of Charles D. Grace by the county court of Fannin county, and thereafter qualified as such by making the bond and taking the oath required by law, and was and is now the duly qualified and acting administrator. No letters of administration had previously been taken out on the estate of Grace. In September, 1908, a suit was instituted in the district court of Fannin county by the administrator of L. M. Grace, the deceased wife of Charles D. Grace, against the appellant and the appellees in this suit, seeking a partition of the estate. A judgment was accordingly rendered dividing the land, decreeing six acres in controversy to the defendants in that suit, who are the plaintiffs and defendant in the present suit. In that suit no issue was made or adjudicated as to the respective rights of Dorman, the administrator, and the appellees; the only issue being as to the right of the administrator of the estate of L. M. Grace as against the other parties to a portion of the estate left by Grace and wife. This suit was instituted by the appellees, the brother, sister, and nephew of Charles D. Grace, against Dorman, as the administrator, to recover the six acres apportioned to them in the partition suit mentioned above. Dorman in his answer pleaded a general demurrer, general denial, and not guilty. A judgment was rendered in favor of the plaintiffs in the court below, from which the administrator prosecutes this appeal.

The only issue presented is whether the homestead, after the death of Mrs. Grace, became subject to the payment of the debts of Charles D. Grace. If it did, then the appellant, as the duly appointed administrator, was entitled to the possession of the property for the purposes of administration. If it did not so become liable, then he had no such right, and the judgment of the court below should be affirmed. It will be observed that the question is not whether the homestead remains exempt upon the death of the head of the family leaving no constituents of the family authorized under the law to have it set apart to them, but whether, after the death of the only remaining constituent to whom it had been set apart, or might have been set apart, it becomes assets in the hands of the administrator and subject to the debts of the deceased husband. Article 2046 of Sayles' Annotated Civil Statutes of 1897, provides that at the first term of the court, after an inventory, appraisement, and list of claims have been returned, it shall be the duty of the court to set apart to the use and benefit of the widow and minor children and unmarried daughters remaining with the family of the deceased, all such property of the estate

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

as may be exempt from execution or forced sale by the Constitution and laws of the state. Article 2055 provides that, should the estate upon final settlement prove to be insolvent, the title to the widow and children to all the property and allowances set apart or paid to them under the provisions of this and the preceding chapter shall be absolute and shall not be taken for any of the debts of the estate except as thereafter provided. The last provisions referred to make the exempt property, other than the homestead, subject to the payment of funeral expenses and expenses of last sickness, when presented within the time prescribed by law. Article 2060 provides that the homestead shall not be liable for the payment of any of the debts of the estate except for the purchase money, taxes, or for work and material used in constructing improvements thereon, etc. From the foregoing provisions, it is made clear, we think, that, upon the death of the husband leaving a wife or any constituents of the family mentioned in the statute who are authorized to claim the homestead exemption, the latter is not subject to the payment of the deceased husband's debts, and is therefore no part of the assets to be administered. This view is supported by the following authorities: *Zwernemann v. Von Rosenberg*, 76 Tex. 522, 13 S. W. 485; *Childers v. Henderson*, 76 Tex. 664, 13 S. W. 481; *Cameron v. Morris*, 83 Tex. 14, 18 S. W. 422; *Roots v. Robertson*, 93 Tex. 365, 55 S. W. 308; *Ford v. Sims*, 93 Tex. 586, 57 S. W. 20; *McAllister v. Godbold* (Tex. Civ. App.) 29 S. W. 417. The effect of the statute is to completely withdraw the homestead under the condition described from administration, and to exclude it from the assets of the estate available for the payment of the debts of the deceased. This being done, there is no other provision of the statute that attempts to restore it at any future time or upon the happening of any future contingency. If the exemption was intended to last only so long as the statutory constituents of the family lived or used it in the manner required by law, there could be no good reason why it should not be applied during that time to the debts of the husband, subject to the possessory and other rights of those surviving constituents. Counsel for appellant suggest that it is inequitable to permit collateral heirs in cases like the present to defeat the claim of creditors holding valid claims of indebtedness against the estate of the deceased. If the property would be exempt in the hands of the lineal descendants of Grace, we know of no rule that would prevent collateral heirs from invoking the same protection. It seems that the property derives its exempt character from the fact that upon the death of the husband it passes to certain designated constituents of the family, and in conferring those statutory rights the homestead is absolutely

exempted. Article 2055 attempted, in case where the estate proves insolvent, to make the title of the surviving wife and other constituents of the family to whom a homestead had been set apart absolute; but our Supreme Court has held in several cases that so much of that article as interfered with the rights of other heirs, who would take according to the laws of descent and distribution, was unconstitutional and void (see *Roots v. Robertson*, supra); but the remainder is valid.

The principle involved is so fully discussed in the cases we have cited that we deem it unnecessary to say more.

The judgment of the court is affirmed.

MERRIMAN et al. v. BLALACK et al.†

(Court of Civil Appeals of Texas. Oct. 27, 1909.

Rehearing Denied Nov. 18, 1909.)

1. TRIAL (§ 394*)—FINDINGS—CONCLUSIONS OF FACT AND LAW—SEPARATION.

A finding that a deed conveyed to the grantee all the grantor's right, title, and interest in a league of land, including the land in controversy, did not offend against the statute requiring conclusions of fact and of law to be separate.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 924, 926; Dec. Dig. § 394.*]

2. ADVERSE POSSESSION (§ 71*)—COLOR OF TITLE—SUFFICIENCY OF DEEDS.

A deed executed in March, 1878, conveyed to T. one-fourth of a certain league of land, and provided that if the tract therein conveyed should be discovered to constitute one-fourth of an entire league owned by the grantor, T. should have preference as purchaser of it for a certain sum for the whole league. Thereafter such grantor's interest in the whole league was sold for taxes, and the purchaser quitclaimed his interest under the tax deed to T. thereafter conveyed all his right, title, and interest in the whole league, describing it by metes and bounds. The deed further conveyed all of T.'s interest acquired by the deed from the tax sale purchaser, and provided that, in the event that the grantor in the deed of March, 1878, "should own the remaining three-fourths of the league of land herein conveyed according to the stipulation and agreement set forth" in the deed of 1878, T.'s grantee should have preference as purchaser of the same for a certain sum; such grantee "to have and to hold the above-described premises" forever, and T. bound himself, his heirs, etc., to warrant "all and singularly the said premises" to the grantee, his heirs, etc. Held, that T.'s deed was not a mere quitclaim or option to purchase as to the three-fourths of the league referred to in the deed of 1878, but was a deed to the whole league, sufficient to support a claim under the 5-year statute of limitations, or sufficient, as a memorandum of title, to support a claim under the 10-year limitations; the reference to the agreement in the deed of 1878 being merely to give the grantee the benefit of that agreement in the event of T.'s title through the tax deed failing.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 415; Dec. Dig. § 71.*]

3. TRIAL (§ 392*)—FINDING—SUFFICIENCY—NECESSITY OF REQUEST.

If the trial court's findings in trespass to try title as to the improvements made upon the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Application for writ of error pending in Supreme Court.

land by defendant's grantor, upon which defendant relied to establish title by adverse possession, were not sufficiently full or definite, plaintiff should have requested a fuller finding.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 916-919; Dec. Dig. § 392.*]

4. ADVERSE POSSESSION (§ 20*)—HOSTILE ACTS—IMPROVEMENTS.

If improvements, such as building houses, opening fields, etc., made by defendant's grantor on land claimed by defendant by the adverse possession of such grantor, were located on the land claimed, it was immaterial upon what particular part of the land they were located.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 106-108; Dec. Dig. § 20.*]

5. ADVERSE POSSESSION (§ 82*)—COLOR OF TITLE—DEEDS—RECORDING—"DULY RECORDED."

Where the record of a married woman's deed conveying her separate property showed that an essential part of the certificate of acknowledgment was omitted, the deed was not "duly recorded" so as to support a plea of title by limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 469; Dec. Dig. § 82.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2263-2264.]

6. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—FINDINGS.

Where title by limitations was complete in defendant's remote grantor, at the latter's death, it was immaterial, upon defendant's title by limitations, that a deed by a subsequent grantor was so defectively acknowledged on its face that it would not support title by limitations, and hence a finding that it was properly acknowledged was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4238; Dec. Dig. § 1071.*]

7. ADVERSE POSSESSION (§ 100*)—EXTENT OF POSSESSION—COLOR OF TITLE—IMPROVEMENTS.

Where defendant's grantor entered upon a tract under a deed thereto, and erected a number of houses, built corrals, opened up fields and grazed cattle thereon, claiming the whole tract as his own under the deed, such acts were sufficient to support a claim of title by limitations to the entire tract, whether the deed is considered as a duly registered deed under the 5-year limitations, or as a written memorandum of title under the 10-year limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 547; Dec. Dig. § 100.*]

8. ADVERSE POSSESSION (§ 81*)—NOTORIOUS POSSESSION—NOTICE TO FORMER OWNER—NECESSITY.

One who entered upon land under a duly recorded deed thereto, and held it adversely to the world, need not otherwise repudiate the title of others claiming the land, or notify them of his claim of title, in order to set limitations running.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 128-131; Dec. Dig. § 31.*]

9. ADVERSE POSSESSION (§ 82*)—COLOR OF TITLE.

Where title was complete in defendant's remote grantor at the latter's death, it was immaterial to defendant's right to claim title by adverse possession that deeds of subsequent grantors were not recorded a sufficient length of time before the commencement of the action to base a claim by limitations thereon.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 468; Dec. Dig. § 82.*]

10. EVIDENCE (§ 471*)—OPINIONS—CONCLUSIONS.

In trespass to try title, wherein defendants claimed by adverse possession, answers to a question whether defendant's grantor paid taxes for certain people that he paid them for the land, and to a question whether he paid them for himself or another that he paid them for himself, were not objectionable as witness' conclusions.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2157; Dec. Dig. § 471.*]

11. ADVERSE POSSESSION (§ 95*)—PRESUMPTION—PAYMENT OF TAXES.

It is presumed, in trespass to try title to land claimed by adverse possession, that one residing on land under a deed thereto, and who is admitted to have paid the taxes, paid them for himself and not for another.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 531; Dec. Dig. § 95.*]

12. EVIDENCE (§ 471*)—OPINIONS—CONCLUSIONS.

In trespass to try title, in which defendant claimed by adverse possession, testimony by defendant's co-occupant that he or his brothers did not recognize any other than defendant as having any rights in the land was not objectionable as the conclusion of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2150, 2151; Dec. Dig. § 471.*]

13. APPEAL AND ERROR (§ 1054*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—TRIAL BY COURT.

In trespass to try title, wherein defendant claimed by the adverse possession of his grantor, whose exclusive possession was established by evidence not objected to, any error in admitting evidence upon the character of defendant's adverse claim and possession would not justify a reversal of a judgment for defendant, especially where the trial was by the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187, 4192; Dec. Dig. § 1054.*]

14. ADVERSE POSSESSION (§ 85*)—EVIDENCE—SUFFICIENCY.

In trespass to try title, wherein defendant claimed by the adverse possession of his grantor under a duly recorded deed, that the latter took possession upon the execution of the deed, built houses and corrals, fenced a large tract and used it for pasture, and paid taxes on the whole tract each year showed prima facie that such possession and use were based upon the deed and a claim of title to the entire tract thereunder.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 503, 685, 689; Dec. Dig. § 85.*]

15. EVIDENCE (§ 471*)—OPINION EVIDENCE—OPINION AS TO TITLE.

In trespass to try title, testimony by an attorney that he investigated plaintiff's title, and declined to institute suit for recovery of the land, was immaterial and irrelevant, being a mere expression of opinion as to the validity of plaintiff's claim.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2150; Dec. Dig. § 471.*]

16. EVIDENCE (§ 168*)—BEST EVIDENCE—SECONDARY EVIDENCE—CONTENTS OF LETTER.

The contents of a letter not produced are inadmissible as a rule.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 558; Dec. Dig. § 168.*]

17. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—TRIAL BY COURT.

In trespass to try title, testimony of an attorney, claimed to be prominent at the local

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

bar, that he declined to institute the action upon investigating plaintiff's alleged title, and that he knew the land claimed by plaintiff belonged to defendant's grantor, and that he lived on it, though immaterial and irrelevant, could not have prejudiced plaintiff, where the facts on which the witness' knowledge must have been based were amply shown by practically undisputed evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

18. WITNESSES (§ 248*)—EXAMINATION—QUESTIONS—RESPONSIVENESS.

The latter part of the answer to a question whether defendant's grantor claimed the ownership and possession of land that every one knew that he owned it; that it was his ranch and land there—was not responsive, and should have been stricken.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861, 862; Dec. Dig. § 248.*]

19. ADVERSE POSSESSION (§ 30*)—NOTORIOUS POSSESSION—KNOWLEDGE BY OTHERS.

If one entered upon land under a duly recorded deed, and held open and notorious possession thereof, it was immaterial to his right to claim by adverse possession whether any one actually knew of his claim and possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 126, 127; Dec. Dig. § 30.*]

20. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—JUDGMENT CORRECT ON MERITS.

Where facts sufficient to support a judgment for defendant were conclusively shown in a trial by the court by proper evidence, so that no other judgment could have been rendered, any error in the admission of evidence was not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

Appeal from District Court, Hidalgo County; W. B. Hopkins, Judge.

Action by Titus E. Merriman and others against P. E. Blalack and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

D. B. Chapin, R. J. Swearingen, and Don A. Bliss, for appellants. Beasley & Beasley and Dougherty & Dougherty, for appellees.

REESE, J. This is a suit in trespass to try title by Titus E. Merriman and others against R. E. Blalack and G. L. Hawkins, to recover an undivided eight-ninths interest in a tract of land described as the eastern or lower three-fourths of the eastern or lower league of a certain two-league grant to Benigno Leal, known as the "Santa Ana" on the Rio Grande river in Hidalgo county. Defendants pleaded general demurrer, general denial, and "not guilty," and, under appropriate allegations, the statutes of limitation of 5 and 10 years as to the whole tract, and also the statute of limitation of 2 years as to a portion of the land by them under actual inclosure. They deny specially the title of plaintiffs, assert title in themselves, and pray for removal of cloud, and that they be quieted in their title. To this answer plaintiffs filed a supplemental petition by way of reply,

denying defendants' title and denying the defendants' possession was adverse, or that they had any notice thereof. The various deeds under which defendants are alleged to claim title are set out, and it is alleged that they do not afford a basis for their claim of title by limitation of 5 or 10 years, but that defendants' possession, in so far as it extended to the interest claimed by plaintiffs, was in subordination to, and not adverse to, their title. A trial by the court, without a jury, resulted in a judgment for defendants, from which plaintiffs prosecute this appeal.

The following are the material facts, as gathered from the court's conclusion of fact and from the evidence:

(1) The land in controversy is the lower three-fourths of the lower or easternmost of the two leagues granted by the Mexican government to Benigno Leal in 1834, known as Santa Ana. The grant was confirmed and patent issued to said Leal.

(2) The easternmost or lower league was conveyed by Leal and wife to Eli T. Merriman in 1852, and that portion of the league herein involved conveyed by Eli T. Merriman to Henry E. Merriman October 12, 1860. Deeds duly recorded.

(3) Henry E. Merriman died intestate in 1861, leaving surviving as his sole heirs his sister, Caroline, and two brothers, the said Eli T. and Titus E., and the plaintiffs are the descendants and sole heirs of said sister and brothers.

(4) By deed dated October 15, 1860, Eli T. Merriman conveyed by metes and bounds the upper or western one-fourth of the easternmost of lower league of Santa Ana, to John Fusselman, and by deed dated May 3, 1861, Fusselman conveyed the same land to Elizabeth Merriman, both deeds duly acknowledged and recorded.

(5) Said Elizabeth Merriman by deed dated March 29, 1878, duly acknowledged and recorded, conveyed said one-fourth league by metes and bounds to Josiah W. Turner. This deed contained this further contract or agreement: "And for a good and valid consideration from the said Turner received, I hereby agree that in the event the tract now herein conveyed shall be discovered to constitute $\frac{1}{4}$ of an entire league owned by me, then the said Josiah W. Turner shall have the preference as purchaser of same at the rate of six hundred dollars for the whole league, or a balance of \$350.00 to be paid to me, or my heirs or assigns."

(6) On May 7, 1878, the tax collector of Hidalgo county executed to W. T. J. G. Brewster a deed duly recorded on the same day, which said deed conveys to Brewster, purchaser at tax sale for taxes due by Elizabeth Merriman for the year 1877, "all the right, title, interest and estate which the said Elizabeth Merriman had at the time when the

assessment before mentioned was made" to the league of land described in tax deed as follows: "4,428 acres of land lying in the county of Hidalgo and being one of two leagues originally granted to Benigno Leal by the King of Spain and confirmed by the Legislature of the state of Texas and known as 'Santa Ana.' Bounded as follows: On the east by a tract of land owned by Christobal Leal, on the west by land owned by C. B. Combe, on the north by land to me unknown, on the south by the Rio Grande river, having a front of 900 varas and a depth from north to south of five Spanish leagues, being about thirteen miles below the town of Hidalgo."

(7) By quitclaim deed dated July 21, 1879, said Brewster conveyed to said Josiah W. Turner the land conveyed to him. This deed was duly recorded July 1, 1879.

(8) Said Josiah W. Turner, by deed dated April 24, 1882, conveyed to Julio Guzman "his right, title and interest in the easternmost league of the Santa Ana grant," describing the same by metes and bounds, embracing the whole league and including the land in controversy. The deed was duly acknowledged and recorded in deed records of Hidalgo county on the day of its date.

As the decision of the questions raised on this appeal turns largely upon the terms of this deed, so much of it as is material to an understanding of those questions is here given in full:

"Know all men by these presents that I, Josiah W. Turner, a resident of the county of Cameron in said state of Texas, for and in consideration of the sum of six hundred dollars (\$600.00) in lawful money of the United States of America, to me actually in hand paid by Julio Guzman, a resident of said county of Hidalgo, in said state of Texas, the receipt of which sum I hereby acknowledge, and confess, have granted, sold and conveyed and by these presents do grant, sell and convey unto the said Julio Guzman, his heirs and assigns, all my right, title and interest in and to a certain piece or parcel of land situated in said county of Hidalgo, in a certain tract of land called and known as 'Santa Ana,' originally granted to Benigno Leal by the Mexican government, which said piece or parcel of land being one league of land out of the two leagues composing said tract of land aforesaid, being described and bounded as follows."

Then follows a full and correct description of the lower or easternmost league of the Santa Ana grant, after which is the following:

"I also herein convey all of my rights and interest acquired in a certain deed bearing date July 1, A. D. 1879, from W. J. T. G. Brewster to me, the said Josiah W. Turner, which said deed is duly recorded in Book 'C' of Real Estate of said county of Hidalgo on pages 186 and 187, and which is duly made part hereof. And also for a good and valuable consideration received from the said

Julio Guzman, I hereby agree, that in the event that Mrs. Elizabeth Merriman should own the remaining three-fourths of said league of land herein conveyed according to the stipulation and agreement set forth in a certain deed bearing date March 29, 1878, from the said Elizabeth Merriman to the said Josiah W. Turner and being duly recorded in Book 'C' of Real Estate of said county of Hidalgo on pages 184, 185, as by reference thereto will more fully appear, and which is made part hereof for greater certainty, then the said Julio Guzman shall have the preference as purchaser of the same at the rate of three hundred and fifty dollars to be paid either to me, the grantor herein, or to the said Elizabeth Merriman according to the tenor of said agreement aforesaid.

"To have and to hold the above described premises together with all and singular the rights and appurtenances thereto in any wise belonging unto the said Julio Guzman, his heirs and assigns forever. And I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Julio Guzman, his heirs and assigns, against every person whomsoever, lawfully claiming or to claim the same or any part thereof."

(9) Julio Guzman was married long prior to 1882, his wife being Estefana. They had eight children. Immediately after said purchase from Josiah Turner, in the spring of 1882, said Guzman had the western line of the one-fourth league of land described in said deed from said Turner to him, which is also the western line of the lower league, surveyed by the county surveyor of Hidalgo county. Said Guzman accompanied the surveyor and knew where the line was. Immediately after having had the land surveyed, said Guzman moved on the land with his said wife and children. They located on the eastern three-fourths of the eastern one-half of the Santa Ana grant, being the land in controversy. Guzman erected some six or eight houses on the land in suit, some six miles from the river, near a lake of water called Perchuga. He also built corrals, and opened up fields on the land. Within a year or so after he went on the land he inclosed that portion thereof fronting on the river in a pasture. The western line of this inclosure extended from the river northward along the western boundary line of the eastern league of the Santa Ana; thence eastward to a point 466 varas east of the western boundary line of the one-half league of the Gato grant which said Guzman claimed; thence to the river. The inclosure embraced some 500 acres of the land in suit. Guzman and his family lived continuously on the land in suit from the spring of 1882 until his death in December, 1901. Guzman moved on the land claiming same as his own under the deed made to him by Turner. He claimed all of the eastern league of the grant as his own, and continuously, from the time he

moved on the land up to the time of his death, asserted and exercised ownership of the land, and paid all taxes thereon, and used and enjoyed same by cultivating fields each year and grazing horses, sheep and cattle thereon, and having exclusive use and enjoyment of the land inclosed in the pasture. Julio Guzman had actual, peaceable, adverse, exclusive, and continuous possession of the land in suit, and claiming same under a duly registered deed from the spring of 1882 until his death in December, 1901. Guzman's possession and claim of ownership was open, visible, notorious, and hostile to plaintiffs and to the world.

(10) Julio Guzman died intestate in December, 1901; his wife having previously died. They had eight children, and these children and their descendants were their sole heirs, and inherited the land in suit.

(11) P. E. Blalack, by deeds duly executed by said heirs and the legal guardians of such of them as were minors, succeeded to the title of all of said heirs. These deeds were executed and recorded at various times from February to August, 1902. By each deed the grantor therein conveyed to Blalack the undivided interest owned by him or her, in the land in controversy, as one of the heirs of Julio Guzman, specifying the amount of such interest; the several deeds taken together conveying the entire league. The deeds for about one-half of the entire league were recorded more than 5 years before this suit was filed.

(12) After the death of Julio Guzman his children and grandchildren remained in possession of the land, claiming the whole of it as their own, and cultivated, used, and enjoyed the same, and had exclusive and adverse possession thereof, until they conveyed the same to the defendant, P. E. Blalack. When Blalack purchased the land from the Guzman heirs, he went into the actual possession of the land so purchased, and the heirs who had not conveyed to him admitted him into possession with them, and recognized his right to the extent of the interests conveyed to him, and said Blalack recognized the rights of the heirs who had not conveyed to him to the extent of the interests owned by them, and Blalack and the heirs who had not conveyed to him so recognized each other's rights and interest in the land and remained in the actual possession thereof, using, cultivating, and enjoying the same, and claiming the same as their own adverse to the world, and continuously up to the filing of this suit.

(13) All taxes on the land in suit from 1882 have been paid for each year as they accrued in full, first Julio Guzman during his life, then by his children and grandchildren, until they sold to Blalack, and then by Blalack until he sold to Hawkins, and then by Hawkins and Blalack up to this time. The suit was instituted May 1, 1907.

By the first assignment of error, and the

several propositions thereunder appellants assail the ninth conclusion of fact of the trial court, wherein the court finds that by deed dated April 24, 1882, Josiah W. Turner conveyed to Julio Guzman all his right, title, and interest in the easternmost league of the Santa Ana grant including the land in suit. One objection to this finding is that it offends against that provision of the statute which requires conclusions of fact and law to be separate. There is no merit in the objection.

Another objection is that the deed referred to in the findings does not purport to convey anything to the said Guzman except one-fourth of a league that Turner had acquired from Elizabeth Merriman, together with whatever right might have been given by Mrs. Merriman to Turner, by way of option, to purchase the other three-fourths, which is the land in controversy. The merits of appellants' case rest very largely upon the construction of this deed from Turner to Guzman as a basis for the claim of title by limitation of 5 and 10 years by appellees, without which appellants are entitled to recover. This deed has been fully set out in our eighth finding of fact, which differs from the ninth conclusion of fact of the trial court here objected to only in having a fuller statement of the contents of the deed. If this instrument is, properly construed, a deed to the land in controversy, as found by the trial court, within the meaning of the 5-year statute of limitation, or a memorandum of title thereto within the meaning of the 10-year statute, it must be held that Guzman's title was complete under both recorded at the time of his death, as there is no dispute that it was recorded on the day of its date, and the evidence is sufficient to sustain the finding of the trial court, which we have adopted in our findings of fact, as to payment of taxes, which was in fact admitted by appellants, and peaceable, adverse possession by Guzman from 1882 to 1901, and those holding his title since his death.

But appellants contend that it is neither such a deed to the land as would support the 5-year statute, nor such a memorandum of title as would support the 10-year statute, but that it merely conveys to Guzman the option to purchase the three-fourths league, given to Turner by the deed to him by Mrs. Merriman as a part of her deed for the upper one-fourth of the league. Appellants arrive at this conclusion by disregarding that part of the deed in terms conveying the land to Guzman, or absolutely subordinating the same to the additional stipulation in the deed with regard to the agreement of Mrs. Merriman in her deed to Turner of the one-fourth league, referring to the option to purchase the other three-fourths in case it be discovered that she owns it. Turner had a deed to the league from Brewster, who in turn had the deed

from the tax collector. Turner then had this title to the lower league, and in addition had the deed from Elizabeth Merriman for the upper one-fourth of the league, containing the option to purchase the other three-fourths, if it should be discovered that it belonged to her. It seems to us that, in these circumstances, there is no sound basis for appellants' contention that the intention, as shown by Turner's deed to Guzman, so far as the land in suit is concerned, was to pass only the option to purchase the three-fourths of the league. Certainly no such construction can be given the terms of the deed. The deed first, in express and appropriate terms, conveys by metes and bounds the grantor's right, title, and interest in the entire league, and then proceeds: "I also convey all of my right, title and interest" in the land conveyed by the Brewster deed. "And also for a good and valuable consideration" makes the agreement shown with regard to the option contained in the Merriman deed to Turner, referring to the three-fourths as three-fourths of "said league of land herein conveyed." The use of the language "in the event Mrs. Merriman should own the remaining three-fourths of said league herein conveyed" must be taken to refer only to the terms of the option agreement which embraced only the lower three-fourths of the league, and cannot, in the face of the positive terms of the conveyance of the entire league preceding, be taken as limiting such conveyance to the one-fourth of the league conveyed by Mrs. Merriman to Turner. The deed also concludes with a general warranty of title of the "said premises." No reference is made to the one-fourth of the league, and the warranty clearly refers to the title to the entire league embraced in the conveyance. It seems clear to us that the primary purpose of the deed was to convey the entire league, but to provide against the contingency of the title under the tax deed proving invalid, by giving Guzman the benefit, for whatever it was worth, of the conditional option of purchase from Mrs. Merriman of the lower three-fourths of the league. Guzman so understood it, for he paid taxes on the entire league, and settled and placed his improvements on the lower three-fourths, which is the land in suit. We have discussed thus fully the terms of this deed for the reason that the appellants' whole case seems to rest upon the construction thereof claimed by them. The first assignment of error must be overruled.

By the second assignment of error appellants complain of the tenth conclusion of fact of the trial court, wherein it is found that Julio Guzman built corrals and opened up fields, without stating where said corrals were, or where said fields were on the land, or identifying in any manner the

portion of the land inclosed, or the quantity thereof. It is a sufficient answer to this assignment to say that if the findings in question were not full or definite enough, appellant should have requested fuller or more definite findings. The findings in question, however, which are copied in full as the findings of this court as paragraph 9 thereof, are not subject to the objection made. They are in fact based upon an agreement as to these facts on the part of appellants. It is not material on what particular portion of the land in suit the fields, corrals, and house were located. The court clearly finds the extent and character of the improvements, and that they were located on the land in dispute, which was admitted. There is no merit in the assignment.

The third assignment of error cannot be sustained. The deed from Amado Guzman to Blalack describes the land conveyed as an undivided 780½ acres out of a part of the Gato grant, describing it and the lower or easternmost league of the Santa Ana grant, which is clearly identified, and also described the interest conveyed as his one-eighth interest as one of the eight children of Julio Guzman and wife.

The finding of the court, referred to in the fourth assignment of error, that the deed from Mrs. Longoria and husband to Blalack was duly recorded was error. The deed showed on its face that the property conveyed was the separate property of Mrs. Longoria, and the record of the deed exhibited showed that in recording an essential part of the certificate of her acknowledgment was omitted. Under these facts it could not be said that the deed was duly recorded. *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304. The original deed was introduced in evidence, showing the execution of the conveyance, and it was not material to appellees' rights, as we view the case upon the limitation title, that this deed should have been recorded. The limitation title was complete in Julio Guzman at his death. The error is entirely immaterial.

There is no error in the fifth assignment of error, which complains of the twentieth and twenty-first conclusions of fact of the trial court. The facts as found with regard to the extent and character of the improvements on the land, and the acts of cultivation, use, and enjoyment, evidencing the actual possession, are entirely sufficient to support the limitation title to the entire tract held under the deed to Guzman, whether it be held as a duly registered deed under the 5-year statute, or a written memorandum of title under the 10-year statute. We have held that the instrument was, in fact, a deed, conveying the entire league.

What has been said with regard to the effect of the deed from Turner to Guzman sufficiently answers the first and second

propositions under the sixth assignment of error. With regard to the second proposition, the several deeds from the heirs of Julio Guzman to Blalack clearly show that the undivided interest owned by each grantor as one of the heirs of Julio Guzman and wife was intended to be, and was, conveyed. It clearly appears that separate interests were conveyed by each deed, the sum of the deeds embracing the whole. The case of *Noble v. Hill*, 8 Tex. Civ. App. 171, 27 S. W. 756, and other cases to the same effect cited by appellants, are not in point.

We overrule the seventh assignment of error. There is no merit in either of the three propositions advanced by appellants thereunder. The deed of Josiah Turner was a duly registered deed to the land in dispute, and the actual possession thereunder was shown to be adverse to all the world. It was not necessary, under the facts established, that Guzman should have ever otherwise repudiated the title of appellants, or otherwise notified appellants of his claim of title, to set the statute of limitation in motion. It is not necessary to repeat here what we have said elsewhere as to the effect of the deed to Guzman by Turner. It was not a quitclaim deed, although it contained the terms "all my right, title and interest." The habendum clause is "to have and to hold the above described premises," etc., and there is a general warranty of "all and singular the said premises." In that portion of the deed containing the transfer to Guzman of Turner's rights under the option agreement with Elizabeth Merriman the reference is to the three-fourths "of the said league herein conveyed," evidently referring to the former portion of the instrument as a conveyance of the entire league, and showing that the grantor so understood it. It seems to be settled by the authorities in this state that such a deed is not a mere quitclaim, but conveys the land, and not a mere chance of title. *Garrett v. Christopher*, 74 Tex. 453, 12 S. W. 67, 15 Am. St. Rep. 850; *Abanathy v. Stone*, 81 Tex. 433, 16 S. W. 1102; *Evans v. Ashe* (Tex. Civ. App.) 108 S. W. 408; *Wynne v. Ward*, 41 Tex. Civ. App. 235, 91 S. W. 237; *Laughlin v. Tips*, 8 Tex. Civ. App. 649, 28 S. W. 551; *Bedford v. Rayner Cattle Co.*, 13 Tex. Civ. App. 623, 35 S. W. 931; *Moore v. Swift*, 29 Tex. Civ. App. 53, 67 S. W. 1065; *Pool v. Foster* (Tex. Civ. App.) 49 S. W. 924. It would seem that if the deed were a mere quitclaim deed, it would support the plea of limitation of both 5 and 10 years. *McDonough v. Jefferson Co.*, 79 Tex. 535, 15 S. W. 490; *Parker v. Newberry*, 83 Tex. 430, 18 S. W. 815; *Harris v. Bryson*, 84 Tex. Civ. App. 532, 80 S. W. 106. The court found that appellants showed title, and were entitled to recover, unless appellees were entitled to the land under their claim of title by limitation. Appellees had no other title, and if the deed to Guzman was sufficient to

support such claim, it was all appellees needed. But we entertain no doubt that the deed in fact conveyed the entire league. What we have said disposes of the eighth, ninth, tenth, and eleventh assignments of error, and the propositions thereunder, which are overruled.

By their twelfth assignment of error appellants assail the conclusion of the trial court that appellees were entitled to recover the land under their plea of 5-year limitation. We have held that the deed to Guzman was sufficient as a registered deed to the land to support this defense. As we have found in our conclusions of fact, the evidence was amply sufficient to establish, on the part of Guzman, actual, peaceable, and adverse possession, together with cultivation, use, and enjoyment thereof, from the date of his deed in 1882 up to the date of his death in 1901, a period of 19 years, with payment of taxes for each year of such possession. The evidence leaves no doubt of such possession, and as little doubt that it was adverse to appellants and everybody else, and exclusive as to them, and that it was held under a claim of title to the land in controversy, and not any less interest. Not only is the evidence sufficient to sustain the trial court's findings on this point, but it really excludes any other conclusion, based as it is upon admissions of appellants by agreement shown in the record. The title by limitation, being complete in Julio Guzman at his death, descended to his heirs, and passed by their deeds to appellees. But the evidence further fully supports the conclusion of the trial court that this adverse possession, with all the elements necessary to support a limitation title, was continued by the heirs up to the date of their respective deeds to Blalack, and by him at least as to half of the land under the 5-year statute, and the whole under the statute of 10 years, up to the filing of this suit in 1907. It is true that not all of these deeds were recorded 5 years prior to the filing of the suit, and one of them, that of Mrs. Longoria, was not duly recorded at all, but this did not affect the limitation title complete at date of Guzman's death, nor the 10-year limitation title at all. The twelfth assignment of error raises the question here discussed, and is overruled.

No objection was made to the admission of the Longoria deed, except as a recorded deed to support the statute of limitation of 5 years. We have seen that the error of the court in holding that the deed was duly recorded was immaterial and harmless. The thirteenth, fourteenth, and fifteenth assignments of error cannot be sustained.

Appellees were permitted, over the objections of appellants that the questions called for the conclusions of the witness, to ask a witness whether Julio Guzman paid taxes for the Merriman people or any one else, to which the witness answered, "For the land,"

and to a further question whom he paid taxes for, whether for himself or for any other person, the witness answered, "For himself." We think there is no merit in the objection, and it was properly overruled. By written agreement filed in the suit it was admitted that Julio Guzman paid all taxes on the land in suit as they accrued for each year, up to the time of his death, and after his death, all taxes were paid by his children until they conveyed to Blalack, and that Blalack and Hawkins had paid all taxes since their respective purchases. The presumption would be that the taxes were paid by Guzman himself. The objection that the answers aforesaid were the conclusion of the witness is not sound.

The same may be said with regard to the testimony referred to in the seventeenth assignment of error, as to whether or not Blalack took possession of the land after he bought. This fact was also proven by Blalack and was practically undisputed.

Objection was also made to the testimony of the witness Julio Guzman, Jr., that neither he nor any of his brothers and sisters recognized any other as having any rights in the land. The objection was that such testimony was the conclusion of the witness, and was properly overruled.

The evidence of Julio Guzman, referred to in the nineteenth assignment, and objected thereto, was of the same general character. The assignment presents no ground for reversal.

All of this testimony referred to above was addressed to the character of Guzman's possession and claim. It may be said that the fact of this possession, and that it was exclusive as to the entire tract in controversy, was practically undisputed, and established beyond question by evidence not objected to. If we are correct in the construction we have given the deed from Turner to Guzman, his entry into possession immediately upon the execution of the deed, establishing his residence, and building houses and corrals, and fencing an extensive tract and using the same for a pasture, and the payment of taxes on the entire tract every year, all of which is established by undisputed evidence, would of itself establish prima facie that such entry and possession, use and enjoyment, were based upon the deed, and a claim of title thereunder to the entire tract conveyed by the deed. During all of the time since such entry in 1882 no evidence which we have been able to find in the record, or which has been referred to in the brief, except the evidently unintentional statement of Julio Guzman, afterwards corrected by him, that his father only claimed the land fenced, has the slightest tendency to show that Guzman recognized any other title or claim of title, or claimed less than the deed conveyed to him. Appellees seem to have undertaken affirmatively to show that Guzman, and those claiming under him

after his death, asserted exclusive ownership and recognized no other title, and much of the testimony objected to was to this general effect. If the rules of evidence were violated in the admission of any of it, such error would not require or authorize a reversal of the judgment, particularly in a trial by the court without a jury. With this statement, and without further discussion, the twentieth, twenty-third, twenty-fourth, twenty-fifth, and twenty-seventh assignments of error, none of which present any grounds for reversal of the judgment, are overruled.

The testimony of the witness James B. Wells, referred to in the twenty-sixth assignment, that when approached by a man by the name of Merriman to institute suit for recovery, he made investigation of the title, and declined the employment, was in substance and effect nothing more than the opinion of the witness that he did not think said Merriman's claim valid. It was error to admit the testimony, whether it be as to the contents of a letter not produced, on which ground it was also objected to, or that generally it was immaterial and irrelevant. Notwithstanding, however, appellants' statement in the brief that this witness was the most effective witness against them, and that he is a lawyer of great reputation and standing in that section, we cannot bring ourselves to think that this evidence influenced the court in its judgment, especially when the practically undisputed and unobjectionable evidence in the record fully supports the judgment. The testimony of the witness that he knew it was Guzman's land, and that he lived on it, could not amount to more, or be understood to mean more, than that witness knew that Guzman had a deed to the land and was claiming it, which was undisputed, except by appellants' contention that the deed to him did not convey the land in dispute.

The testimony referred to in the twenty-first, twenty-second, twenty-ninth, and thirtieth assignments of error is of such a character that, if objectionable at all, its admission does not require or authorize a reversal of the judgment. The testimony was of the most trivial character, and could not reasonably be supposed to have influenced the court, in view of the sufficiency of the other evidence generally to establish the facts upon which the judgment is based.

The witness L. C. Hill, being asked whether Julio Guzman claimed ownership and possession of this land at that time (1900), answered: "Yes, sir; everybody in this country knew that Julio Guzman owned it; that it was his ranch and land there." The latter part of the answer was objectionable as not being responsive to the question, and for that reason should have been stricken out, but it was utterly immaterial. It did not at all matter whether any one actually knew of Guzman's claim and possession. The re-

corded deed furnished evidence of the claim, and his possession was open and notorious. Such error as there was in admitting the testimony and refusing to strike it out was harmless in view of the whole testimony.

The thirty-second, thirty-third, and thirty-fourth assignments of error are addressed to the error of the court in refusing to render judgment for appellants, and in rendering judgment for appellees. In view of our findings of fact, and what we have said of the evidence, further extension of this opinion in a discussion of these assignments seems to us unnecessary. The trial court found that appellants had title, and were entitled to recover the land, unless their claim was defeated by the claim of title in appellees under the statute of limitation, but further found in favor of appellees the claim under 5-year limitation. The court may as well have sustained also that title under 10-year statute. If we are correct in our interpretation of the deed from Turner to Guzman, the practically undisputed evidence establishes, in our mind, beyond question, appellees' claim, under both the 5 and 10 years statute, with such conclusiveness as to render such errors as may have been committed in the admission of testimony harmless, even if the trial had been with a jury. It may be said that, if appellees had no other claim of title except that under the statute of limitation of five years, resting upon their duly recorded deeds from the heirs of Julio Guzman and wife, such title was established only to about one-half of the land, but the actual, peaceable, and adverse possession of Julio Guzman from 1882 to his death in 1901, and of his heirs from that date up to their conveyances to Blalack in 1902 under duly recorded deed, with payment of taxes, was so conclusively established that no other judgment than one for appellees could have properly been rendered. In such case the judgment should not be reversed on account of immaterial errors which may have been committed in a trial by the court, in the admission of evidence.

We have carefully examined all of the assignments of error and the several propositions advanced under each, which are severally overruled, and we have concluded that none of them present any ground for reversal, and the judgment is therefore affirmed.

Affirmed.

CITY OF PARIS v. JENKINS.

(Court of Civil Appeals of Texas. Nov. 4, 1900.)

1. MUNICIPAL CORPORATIONS (§ 736*)—TORTS—NUISANCE—LIABILITY.

A city acts in its individual, and not in its governmental, capacity in disposing of garbage, and is liable as an individual for creating and maintaining a nuisance in doing so, so that it

would be liable to an adjoining owner, irrespective of negligence, where it established a garbage dump on its own land, the noxious odors from which made it uncomfortable and dangerous to reside on adjacent land.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1552; Dec. Dig. § 736.*]

2. NUISANCE (§ 3*)—PRIVATE NUISANCE—GARBAGE DUMP.

One dumping garbage on his land, the noxious odors from which make it uncomfortable and dangerous to reside on adjacent land, would be liable to the adjoining owner for creating and maintaining a nuisance.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 24, 25; Dec. Dig. § 3.*]

3. NUISANCE (§ 50*) — PRIVATE NUISANCE — DAMAGES — SHARE — TEMPORARY INJURY — DEPRECIATION IN RENTAL VALUE.

In an action against a city for damages for creating a nuisance by dumping garbage on a lot adjoining plaintiff's property, the damage alleged and proved was that resulting from the noxious odors, and not to plaintiff's land, and the evidence showed that the garbage could be removed from the city's lot, and that the amount of garbage dumped was decreasing, and the city was preparing to construct an abattoir, when it would quit dumping garbage. Held, that the injury resulting from the nuisance was only temporary, and hence plaintiff's measure of damages was the depreciation in rental value of his property because of the nuisance, and not its depreciation in market value.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 118-127; Dec. Dig. § 50;* *Damages*, Cent. Dig. §§ 198, 397.]

Appeal from District Court, Lamar County; T. D. Montrose, Judge.

Action by T. W. Jenkins against the City of Paris. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Appellee owned a tract of about 31 acres of land, situated about two miles north of the city of Paris. The city owned a tract of about 10 acres of land adjacent to appellee's tract, and used same as a dumping ground for dead animals, garbage, and refuse of all kinds. The suit was by appellee against appellant. In his petition appellee alleged as follows: "That since the 1st day of January, 1902, and up to and including the present time, the defendant, the city of Paris, dumped and caused to be dumped, and is dumping and causing to be dumped, all manner of offensive garbage, dead animals, waste matter, and refuse of all kinds from the streets and residences of said city of Paris, on and near to plaintiff's said land and near his place of residence thereon, by reason of which dumping a very offensive, unhealthy scent was cast onto and over plaintiff's land, into and around his residence, and that noxious vapors and smell therefrom constantly invaded his premises and were wafted over his land, and are still being carried over, onto, around, and into his said house, and that same is so noxious and the effluvia so strong and poisonous that it is unsafe, uncomfortable, and dangerous to reside on said land, or to use and cultivate it, and renders it un-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fit for any purpose and almost entirely worthless. Plaintiff further states that his said residence is situated about 150 yards in a southwesterly direction from where said dumpage, garbage, and filth is dumped, and he says that the air is constantly filled with said vapors arising from said dumpage as above described, and said vapors are wafted into his house to such an extent and so strong and disagreeable as to render his house on said land and his land uninhabitable, and his said land almost valueless and permanently injured, thereby destroying said land and depriving plaintiff of its value. That defendant has permanently established it as it now is for its dumping ground for the purpose of dumping all manner of filth, garbage, and dead animals, etc., from the streets and residences of said city of Paris, to remain there forever. Plaintiff's said land is situated and described as follows: (Then follows description of land.) That said land is worth \$4,000 without the nuisance above complained of, but is not worth over \$500 now by reason of said nuisance as it now is, if that much, and that by reason of said nuisance plaintiff's land has been damaged permanently in the sum of \$3,500." The appeal is from a judgment for the sum of \$175, interest, and costs, in favor of appellee.

Edgar Wright, for appellant. D. K. Fooshe, for appellee.

WILLSON, C. J. (after stating the facts as above). Appellant contends that it was not liable to appellee for damages suffered by him in consequence of the use it made of its land, unless in making such use of same it was guilty of negligence, and insists that the charge of the court was erroneous, in that it authorized the jury to find for appellee in the absence of proof of negligence on its part. That, in disposing of its garbage and refuse, a city acts in its corporate, and not in its governmental, capacity, and is liable as an individual would be for its act in thereby creating and maintaining a nuisance, seems to be well settled in this state. *City of Coleman v. Price* (Civ. App.) 117 S. W. 905; *Ostrom v. City of San Antonio*, 94 Tex. 523, 62 S. W. 909; *City of Galveston v. Posnalsky*, 62 Tex. 127, 50 Am. Rep. 517; *City of Ft. Worth v. Crawford*, 74 Tex. 404, 12 S. W. 52, 15 Am. St. Rep. 840; *City of Sherman v. Langham* (Sup.) 13 S. W. 1042. That an individual, creating and maintaining on his own land such a nuisance as the one complained of, without respect to whether in so doing he had been negligent or not, would be liable to an adjacent owner thereby injured, is clear. *Joyce on Nuisances*, § 167; *Frost v. Phosphate Co.*, 42 S. C. 402, 20 S. E. 280, 26 L. R. A. 693, 40 Am. St. Rep. 736. Therefore we are of the opinion that the court did not err in the portion of his charge referred to.

The court instructed the jury, in the event they found in appellee's favor, that the measure of his damages would be "the difference

in the market value of his premises without the dumping ground and the market value of the premises with the dumping ground established where it is." Appellant insists that the instruction was erroneous, because "the undisputed evidence showed that, if there was any injury to appellee's premises, same was not a permanent injury, but was a temporary injury, which in its very nature would and could be abated at any time." In his pleading the appellee did not charge, and the testimony did not show, injury to the land as such. The injury alleged, and the injury which the evidence tended to establish, was such alone as was caused by noisome smells and poisonous gases emanating from the refuse on the dumping ground, and corrupting the air on appellee's premises. The evidence was that the refuse was dumped on the surface of the ground. That it could be removed, and the nuisance thereby be abated, was established by uncontradicted testimony. There was evidence tending to show that the use made of appellant's land as a place to dump its refuse had decreased as it had extended its sewer system, and would continue to decrease as said system was further extended; and there was also evidence tending to show preparation by appellant to construct an abattoir which would enable it to altogether dispense with the use of the land as a place on which to dump dead animals. From the testimony referred to, which is undisputed by anything in the record, it is clear, we think, that the nuisance and the injury occasioned by it to appellee's property must be regarded as a temporary, and not as a permanent, nuisance or injury. In such a case, it seems to be well settled that the depreciation in rental value, and not a depreciation in the market value, of property injured, must be looked to as the measure of its owner's damages. *City of San Antonio v. Mackey*, 22 Tex. Civ. App. 145, 54 S. W. 34; *Baugh v. Railway Co.*, 80 Tex. 59, 15 S. W. 587; *Railway Co. v. Ridgeway*, 38 Tex. Civ. App. 108, 85 S. W. 497; *McGill v. Pintsch Compressing Co. (Iowa)* 118 N. W. 789, 20 L. R. A. (N. S.) 466; *Joyce on Nuisances*, § 170. In *City of San Antonio v. Mackey*, cited above, a case in many respects similar to this one, the court said: "The recovery of damages is sought in this case on the ground that the stenches and odors arising from the deposits of garbage and filth made by the city had rendered the dwelling of the plaintiff untenable, thereby destroying its rental value, and causing permanent depreciation in the value of the property by reason of the odors and that reputation as to unhealthfulness acquired therefrom. It is not alleged that there was any permanent injury to the soil by reason of the deposits; but the claim for damages is made to rest upon the existence of the stench arising from the garbage. It follows that, unless the cause of the odors is of such a nature that it cannot be removed, there could be no permanent damage. There

is no evidence that tends to prove that the odors are permanent in their injury. * * * There was no testimony to the effect that the nuisance could not be abated. * * * The testimony clearly established the temporary character of the nuisance, and, independent of the testimony, experience and reason would seem to teach that, in the very nature of things, deposits made on or near the surface can be removed. * * * Such being the case presented by the evidence, the depreciation in the market value of the land was not the measure of damages, and the charge presenting that issue to the jury can have no other tendency than that of misleading them. As to a nuisance capable of abatement, the depreciation in the value of the property can have no applicability. The settled rule of damages in such cases is the difference in the rental value with and without the nuisance." And see *City of San Antonio v. Mackey*, 14 Tex. Civ. App. 210, 86 S. W. 760.

For the error in the trial court's instructions to the jury as to the measure of appellee's damages, the judgment will be reversed. As the cause will be remanded for a new trial, the assignment questioning the sufficiency of the evidence will not be noticed further than to say that if, on another trial, the pleadings on the part of appellee remain as they are, and there is again an absence of evidence tending to show a permanent injury to his land, the jury should be instructed to return a verdict in favor of appellant.

Reversed and remanded.

HOBART NAT. BANK v. FORDTRAN.

(Court of Civil Appeals of Texas. Oct. 27, 1909.
Rehearing Denied Nov. 24, 1909.)

1. EVIDENCE (§ 594*)—WEIGHT—UNCONTRADICTED TESTIMONY.

The jury need not believe the evidence of a party, though it is not directly contradicted.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2431; Dec. Dig. § 594.*]

2. BANKS AND BANKING (§ 165*)—COLLECTIONS—TITLE TO PROCEEDS OF DRAFT.

A bank receiving from the drawer a draft for collection is not the owner of the proceeds of its collection, but the proceeds belong to the drawer, and they are subject to garnishment.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 547, 571; Dec. Dig. § 165.*]

Appeal from Galveston County Court;
George E. Mann, Judge.

Action by J. S. Fordtran against E. H. Linzee, defendant, and the Texas Bank & Trust Company, as garnishee, in which the Hobart National Bank of Hobart, Okl., intervenes. From a judgment for plaintiff against the garnishee, the intervener appeals. Affirmed.

Geo. T. Burgess, for appellant. Wm. B. Lockhart, for appellee.

NEILL, J. Fordtran sued E. H. Linzee, doing business under the name of E. H. Linzee Grain Company, for \$100.20, and caused a writ of garnishment to be issued and served upon the Texas Bank & Trust Company. The company answered that it held \$540, the proceeds of a draft drawn by E. H. Linzee Grain Company, on Texas Star Flour Mills, at Galveston, which it had collected. Appellant, the Hobart National Bank of Hobart, Okl., then intervened in the garnishment suit, averring the ownership of the draft, and, when it was collected, of the proceeds of the collection. The trial in the justice court, as well as in the county court on appeal, resulted in a judgment against the garnishee for \$112.15. This appeal is by the intervener from the judgment of the county court.

If the evidence of the intervener as to the ownership of the draft were true, then it owned the proceeds of the collection; and the verdict and judgment should have been in its favor. Though such evidence was not directly contradicted, the jury were not bound to believe it (*Cheatham v. Riddle*, 12 Tex. 112; *McCormick v. Kampmann*, 109 S. W. 492); and it is evident from the verdict that they did not. The facts and circumstances were such as tended to show that the intervener never purchased or held the draft as its own property, but that it was simply placed in its hands by the drawer for collection. In this view of the matter the proceeds of its collection held by the garnishee were the property of the defendant, E. H. Linzee, and subject to his debt. Therefore the judgment is affirmed.

GULF, C. & S. F. RY. CO. v. CITY OF BELTON et al.

(Court of Civil Appeals of Texas. Nov. 10, 1909.)

1. MUNICIPAL CORPORATIONS (§ 605*)—ABATEMENT OF NUISANCES—POWERS.

Rev. St. 1893, arts. 419, 453, 460, giving to the council of cities the exclusive power over its streets, authorizing the abatement of nuisances and to define what shall be nuisances, and to control the construction of railroad crossings, authorize a city council to abate a nuisance at common law or under the statute, irrespective of any ordinance on the subject, but, where the thing complained of is not a nuisance per se, the question whether it is a nuisance is one for judicial determination.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1338; Dec. Dig. § 605.*]

2. NUISANCE (§ 84*)—QUESTION FOR JURY.

Whether a bridge maintained by a railroad over its tracks for a public road is a nuisance is a question for the jury under proper instructions.

[Ed. Note.—For other cases, see *Nuisance*, Dec. Dig. § 84.*]

3. EVIDENCE (§ 513*)—OPINION EVIDENCE—SUBJECTS FOR EXPERT TESTIMONY.

Whether it is feasible for a railroad to establish a grade crossing over its tracks at a particular place is a subject for expert testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318; Dec. Dig. § 513.*]

4. EVIDENCE (§ 539½*)—OPINION EVIDENCE—COMPETENCY OF EXPERT.

A civil engineer of 18 years' experience in the construction of railroads, including the grading of tracks at crossings, who is familiar with a particular crossing and who testifies to the physical conditions surrounding it, is competent to give his opinion as to whether it is feasible to establish a grade crossing.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2350; Dec. Dig. § 539½.*]

5. RAILROADS (§ 98*)—ESTABLISHMENT OF GRADE CROSSINGS—EVIDENCE—ADMISSIBILITY.

In mandamus by a city to compel a railroad to establish a grade crossing, the railroad may show that it is impracticable or impossible to maintain a grade crossing under the circumstances, or that it is unreasonable to so require it on account of the danger to the public at the crossing.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 291, 292; Dec. Dig. § 98.*]

Appeal from District Court, Bell County; John D. Robinson, Judge.

Action by the Gulf, Colorado & Santa Fe Railway Company against the City of Belton and others, in which defendants by cross-action sought by mandamus to compel plaintiff to establish a grade crossing. From a judgment awarding the writ of mandamus as prayed for by defendants, plaintiff appeals. Reversed and remanded.

Terry, Cavin & Mills and A. H. Culwell, for appellant. John B. Durrett, A. L. Curtis, and James F. Hair, for appellees.

RICE, J. It was shown that in 1877 the county commissioners' court of Bell county laid out and established a third-class public road, known as the "Belton and Tennessee Valley public road," leading from the end of Main street on the north line of the corporation of Belton, as it then existed, in a northerly direction to the Leon river, and in 1882 the appellant constructed its roadbed across said public road a short distance north of the end of Main street in said city. In 1885 said road was changed by the commissioners' court to a second-class road, and made 60 feet wide, the same width as Main street in said city, making the same an extension of said street north across the roadbed of appellant. In 1888 appellant built an overhead crossing over its track and over said public road. In 1894 the corporate limits of the city of Belton were extended some half mile to the north. Said strip of new territory included the Belton and Tennessee Valley public road for a half mile from the north line of the original city limits, embracing said public road where the same was crossed by appellant's track. It appeared

that the appellant's line of railroad had been constructed and in operation for more than 25 years over said public road, and that this bridge was constructed before that part of the territory was annexed to the city of Belton, and that the same had been maintained during said time by appellant, and had been continuously in use by the public since its construction as a crossing. On the 3d of February, 1909, the city of Belton, acting through its officers and agents, removed the bridge, and were in the act of removing the earthen approaches thereto, when the temporary writ of injunction applied for was issued, restraining said city from further interfering therewith. Said city of Belton is a municipal corporation, incorporated under the general laws of the state of Texas, and at the time of the removal of said bridge D. E. Patterson was its acting mayor, W. T. Hale was its acting marshal, and E. W. Ferguson was its acting secretary. It further appeared that the acts of Patterson and Hale in the removal of the bridge and the attempted removal of the approaches to it had been done in their official capacity, and that the same were ordered, directed, and ratified by the city of Belton. On the 10th day of February, 1909, appellant brought this suit against said city and its officers above named for the recovery of actual and exemplary damages occasioned by the removal of said bridge, and for an injunction restraining the city of Belton and its officials from further destroying the approaches thereto, as well as any attempt on their part to construct a grade crossing at said point, alleging the facts hereinbefore stated, and, further, that its tracks on either side of Main street ran through a deep cut, and the view of one approaching its tracks from either direction along said street was obstructed to such an extent that it would be extremely dangerous to have or maintain a grade crossing over its tracks at said place. A temporary writ of Injunction was issued. Appellees answered by general and special exceptions and by special answer, to the effect that the bridge in question was within the city limits of the city of Belton and across one of its public streets, and that the city had power and control over its streets, and that the same was an obstruction thereto, and that the wooden portion of said bridge had been removed by the city after the same had been declared a nuisance by the city council, and after the city marshal had been directed by the city council to remove the same. Appellees by cross-action sought by mandamus to compel the railway company to put in a grade crossing at the place in question. Appellant specially excepted to this answer, pleading the invalidity of the act of the city council declaring the bridge in question a nuisance, and denying the right of said city to summarily remove the same. There was a jury

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

trial, upon the conclusion of which the court directed a verdict in favor of the defendants upon all the issues raised by the pleadings, and judgment was rendered in accordance therewith, that appellant take nothing by its action for damages, and that the temporary injunction formerly issued should be dissolved, and that the writ of mandamus as prayed for by the city be awarded. A new trial having been refused, appellant prosecutes this appeal.

The chief questions for our consideration, as raised by the several assignments of error, are, first, whether the bridge in question within itself was such a nuisance, either at common law or by statute, as would authorize said city to summarily abate it, or whether the question of nuisance *vel non* was one of fact, to be determined by the jury under proper instructions from the court. Appellees justify their action on the ground that the bridge was an obstruction to the street, and therefore a nuisance *per se*, and that, by virtue of the resolutions or ordinances passed by its city council, it was authorized to summarily abate the same by a removal thereof. Appellant, on the contrary, contends that whether such structure constituted a nuisance was a question of fact, to be determined by the jury, and that the ordinances or resolutions passed by the city council authorizing its destruction were absolute nullities, and could not be pleaded in justification of this action. The resolutions or ordinances under which the city undertook to justify its acts in the removal of said bridge and the attempted removal of the approaches thereto, and which were offered in evidence on the trial over appellant's objection, are as follows:

"Extract from minutes of city council, under date of September 11, 1907:

"(1) Resolved that the street committee be instructed to co-operate with the Santa Fé agent in regard to establishing a proper crossing across Main street. Motion carried.

"(2) November 13, 1907. Moved and seconded that the Main street bridge over the Santa Fé railway be declared a public nuisance. Motion carried.

"(3) August 18, 1908. Moved and seconded that the marshal be instructed to remove the bridge over the Santa Fé track on Main street that has been declared a public nuisance at a previous meeting of the council. Motion carried."

The evidence discloses that this bridge had been constructed and maintained by the appellant at its own expense and had been in continuous use by the public in traveling said public road for a period of over 25 years, during which time no complaint previous to the present one appears to have been made. It is true that it is shown that some time in 1907 there had been a conference between the representatives of the city and of the railroad company relative to this structure in pursuance of the resolutions passed

by the city council, but no demands to remove the same appear to have been then or thereafter made, and no definite action was taken by the city in reference thereto at said time. It appears that at times travel over said bridge was inconvenienced by reason of the narrow passageway across the same (the bridge being only about 18 feet wide and not covering the entire space of the street), and the steep ascent thereto, which rendered it difficult in a wet time to haul heavy loads thereover.

It was shown on the part of appellant that its tracks for some distance on either side of said street approached the same through a deep cut, and that it was impossible for persons traveling said highway or for persons operating its trains in approaching the same to see each other for a distance of something like 200 feet from said crossing, and that there was great danger and would necessarily continue to be great danger in operating its road over said street with safety to the public unless said overhead bridge was maintained; and appellant offered to show that it would be impracticable to construct and maintain a grade crossing at said point, but such evidence was excluded upon appellees' objection, which is also assigned as error, and will be hereafter discussed. While it is true, as contended by the city, that under our law it is provided that the city council shall have exclusive control and power over its streets, alleys, public grounds, and highways, and to abate or remove encroachments or obstructions thereon, to open, alter, widen, extend, establish, regulate, grade, and otherwise improve its streets (Rev. St. 1895, art. 419), and that the city council shall have the power to abate and remove nuisances and to punish the author thereof by penalties, fines, and imprisonment, and to define and declare what shall be nuisances, and authorize and direct summary abatement thereof (Rev. St. 1895, art. 453), and that the city council shall likewise have the power to direct and control the laying and construction of railroad tracks, etc., to require railroad corporations to construct and keep in repair suitable crossings at the intersection of streets, etc., when the city council shall deem it necessary (Rev. St. 1895, art. 460), still we are not inclined to believe that, by reason of these provisions of our statute, a city council is authorized to declare that to be a nuisance which is in fact not such, and by reason of its mere declaration so denominating it a nuisance to summarily destroy or abate the same; but that in all such cases whether the particular thing complained of is a nuisance is a question of fact. And this, as we understand it, is appellant's contention.

In the case of *Yates v. Milwaukee*, 77 U. S. 497, 19 L. Ed. 984, where the Legislature of Wisconsin authorized the city of Milwaukee by ordinance to establish dock and wharf lines and prevent encroachments upon the rivers, the city passed an ordinance declar-

ing a wharf erected in the river by Yates to be an obstruction to navigation, and a nuisance, and ordered its abatement, and upon said city attempting to do so Yates sought to restrain it by injunction. Justice Miller, in delivering the opinion of the court, among other things, said: "The act of the Wisconsin Legislature approved March 21, 1854, confers upon the city of Milwaukee the authority to establish dock and wharf lines on the banks of the Milwaukee and Memomee rivers, and to restrain and prevent encroachments upon said rivers and obstructions thereto, and it is by this statute that the summary proceedings for the removal of appellant's wharf are supposed to be authorized. But the mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance, unless it in fact had that character. It is a doctrine not to be tolerated in this country that a municipal corporation, without any general laws, either of the city or of the state within which a given structure can be shown to be a nuisance, can be, by its mere declaration that it is one, subject to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities." In the case of *Teass v. the City of St. Albans*, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802, a similar question came before the Supreme Court of West Virginia, in which, quoting from the syllabus, it is said: "A municipal corporation cannot by its mere declaration that a dwelling house is a nuisance subject it to removal. It must first resort to some proper judicial proceeding, giving the owner or occupant an opportunity to be heard before his house is condemned and removed as a nuisance." In that case the house projected into one of the public streets of the town. The city council was empowered to declare what a nuisance is and to remove the same, a similar authority as granted by our statute.

In the case of *Western & Atlantic Ry. Co. v. City of Atlanta*, 113 Ga. 537, 38 S. E. 996, 54 L. R. A. 294, where the right of the city by summary proceeding to declare a depot and the floor thereof to be a public nuisance and remove the same was up for consideration, the court in discussing a similar question says: "No detailed statement of the evidence contained in the record is deemed to be necessary, but reference to such parts of it as becomes material will be considered in the discussion of the legal propositions by which the case is controlled. We shall undertake to establish two propositions as being sound in law and controlling in this case. The first is that neither the municipal authorities of any city in this state nor any department of a city government has the legal right summarily to abate

a nuisance without first having given reasonable notice to the person maintaining the thing or doing the acts alleged to be a nuisance of the time and place of hearing the question whether such thing or the doing of such acts constitute a nuisance, and the determination by such body that the thing so maintained or the acts done in law constitute a nuisance, and this rule of law applies to all acts and things alleged to be nuisances except those which are by the law expressly declared to be nuisances, or which are indisputably so per se, and that this is true, notwithstanding the municipal authorities, or any department thereof, have, by the charter of the town or city, been given the power to abate nuisances in such city." A similar doctrine seems to have been maintained in *Furniture Company v. Batesville*, 139 Ind. 77, 38 N. E. 408. In the case of *Town of Lakeview v. Letz*, 44 Ill. 81, it is said: "There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or not be so, their character in this respect depending upon circumstances; and in the latter instance it is manifestly beyond the power of the village to declare in advance that those things are nuisances, and so it was held in that case. The question when the thing may or may not be a nuisance must be settled as one of fact, and not of law."

It is said in 2 Wood on Nuisances (3d Ed.) § 744, that "where the Legislature confers upon a city or village the power to regulate and remove nuisances and to provide penalties therefor, or to remove such as are detrimental to the health of the inhabitants, this power confers authority upon the city government to impose penalties upon persons maintaining nuisances within its jurisdiction, and to remove the same, provided the thing be a nuisance at common law or by statute, and produces such an injury that an individual injured thereby might remove it, but not otherwise, and, if the authorities abate a nuisance under authority of an ordinance of the city, they are subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance. But where the corporation is clothed with power by its charter, or special or general law, to abate or remove nuisances, that does not confer authority to prevent them, nor to impose penalties for their erection. Neither does authority to prevent nuisances confer authority to abate them. Neither does the power to abate nuisances warrant the destruction of valuable property which was lawfully erected, or anything which was erected by lawful authority. It would, indeed, be a dangerous power to repose in municipal corporations to permit them to declare by ordinance or otherwise anything a nuisance which the caprice or interests of those having control of its government might see fit to outlaw without being responsible for all the consequences, and even, if such power is express-

ly given by the Legislature, it is utterly inoperative and void, unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it. The fact that a particular use of property is declared a nuisance by an ordinance of the city does not make that use of property a nuisance, unless it is in fact so, and comes within the common-law or statutory idea of a nuisance. Hence authority conferred by an ordinance of the city is no protection against liability for damages resulting from the destruction of property upon the ground that it is a nuisance, unless its lawful character is clearly established. Therefore, except in cases of great public emergency, when the emergency may safely be regarded as so strong as to justify extraordinary measures upon the ground of paramount necessity, or when the use of property complained of is so clearly a nuisance as to leave no room for doubt upon the subject, it is the better course to secure an adjudication from the courts before proceeding to abate it. A municipal corporation which is empowered to declare what shall be nuisances is not thereby authorized to declare that to be a nuisance which is not so in fact. Things which may or may not be nuisances where their character in this respect depends upon circumstances cannot be so declared in advance. The question when the thing may or may not be a nuisance must be settled as one of fact, and not of law."

Judge Dillon, in his work on *Municipal Corporations* (volume 1, § 374 [4th Ed]), on this subject says: "It is to secure and promote the public health, safety, and convenience that municipal corporations are so generally and so liberally endowed with power to prevent and abate nuisances. This authority and its summary exercise may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the legal notion of a nuisance, but such power conferred in general terms cannot be taken to authorize the extrajudicial condemnation and destruction of that as a nuisance which, in its nature, situation or use, is not such"—quoting with approval the doctrine announced in *Yates v. Milwaukee*, supra. In *Joyce on the Law of Nuisances*, § 332, treating of the power of municipalities to declare things nuisances, it is said: "In the absence of power conferred by the Legislature upon a municipality to define or declare what is a nuisance, no power is held to be vested in it to declare a certain act or omission a public nuisance; and, though the power may be conferred upon a municipal corporation to declare, prevent, and abate nuisances, yet this will not justify a wanton declaration that a particular act, thing, or avocation is a nuisance which unquestionably is not one. The power must be exercised in a reasonable manner, having

in view the personal and property rights of the individual, and the mere fact that a certain thing has been declared by the municipal authorities to be a nuisance does not render it one where it is not in its nature within the common law or statutory idea of a nuisance." See, also, *Des Plaines v. Poyer*, 123 Ill. 348, 14 N. E. 677, 5 Am. St. Rep. 524; *City of Denver v. Mullen*, 7 Colo. 345, 8 Pac. 693. The same doctrine is also approved in *Pye et al. v. Peterson*, 45 Tex. 812, 23 Am. Rep. 608. In the case of the *City of Dallas v. Allen*, 40 S. W. 324, where the city was sued for the value of certain wearing apparel destroyed under the authority of an ordinance authorizing the city to do all acts and make all regulations proper for the promotion of health or the suppression of disease, and where there was evidence that the articles could have been safely disinfected, it was held that whether it was necessary to burn the same was a question of fact for the jury, and that it was error to direct a verdict against the city.

Counsel for appellant likewise insists and cites authority in support of the doctrine that in no case can a city summarily abate a nuisance, and that to do so would be, if allowed, the taking of property without due process of law, and a violation of the constitutional provisions upon this subject. We are not inclined to adopt this view under the provisions and regulations of our statutes upon the subject hereinbefore quoted. The contrary of the doctrine so asserted by appellant has been announced by Justice Williams in the case of *H. & T. C. Ry. Co. v. Dallas*, 98 Tex. 396, 84 S. W. 648, 70 L. R. A. 850.

Counsel for appellant likewise objected to the introduction of the resolutions holding that the same were void because not shown to be in writing nor published in the official paper of the city and deposited with the secretary; and, further, because they were not styled, "Be it ordained by the city council of the city of Belton," as required by law, and because they authorized and provided for the condemnation and taking of property, imposed a penalty and forfeiture, and that under our statutes this could only be done by a general ordinance, and that the same must be published, etc., 10 days before becoming effective as provided in article 557. See articles 404, 464, 557, 559, Rev. St. 1895.

From a review of the foregoing authorities, we are inclined to believe that where the thing complained of is clearly a nuisance per se, coming within the definition of a nuisance either under our statute or by the common law, then the authority for its abatement clearly exists in the city, and that a city could so abate it irrespective of whether there was any ordinance upon the subject or not, and might possibly proceed to do it under an order of its city council.

But we hold that in all cases where the thing complained of is not a nuisance *per se* that no such authority exists. So in the present case, without intending to intimate or hold that the structure complained of is or is not a nuisance under the facts, we sustain the assignment complaining of the action of the court in peremptorily instructing the jury to find on this issue in behalf of appellees, because the questions raised by the pleadings and by the evidence were questions of fact for the consideration of the jury under proper instructions from the court.

During the progress of the trial, appellant offered to show by its engineer Rutledge that in his opinion it was not feasible to put in a grade crossing over plaintiff's tracks at the place in question, but upon objection of appellees he was not permitted to give his opinion upon this subject. It was shown from the bill of exceptions taken to this ruling that the witness was a civil engineer, had had some eighteen years' experience in the construction of railroads, including the grading of tracks at crossings, the building of bridges, viaducts, etc.; and, as a further predicate for the introduction of such evidence, he testified that he was familiar with the crossing in question, had taken measurements concerning the same, and had testified to the physical conditions surrounding the crossing, including the depth, length, and breadth of the cut through which the railroad tracks ran at the point, and gave various elevations and other data pertaining to the crossing. We think this evidence was competent. It came clearly within the rule of law permitting expert testimony. See *Lawson on Expert & Opinion Evid.* pp. 5-7; 2 *Elliott on Evid.* § 1059; 1 *Wigmore on Evid.* § 555 et seq. This evidence was offered for the purpose of showing the impracticability of constructing a grade crossing at the place in question. The pleadings raised the issue as to whether it was practicable to construct a grade crossing over the tracks of appellant at the point in question on account of the danger to the public in operating its trains. In this character of suit, where the city is seeking by mandamus to compel appellant to put in a grade crossing, it is competent for the company to show that it is impracticable or impossible to maintain a grade crossing under the circumstances, or that it is unreasonable to so require it on account of the existence of danger to the public at said crossing. Hence the evidence showing that it was not feasible or tending to meet the issue was relevant, and therefore admissible. See *H. & T. C. Ry. Co. v. City of Dallas*, supra. In the view we have taken of this case, we regard it unnecessary to consider the remaining assignments of error.

For the reasons indicated, we think the

judgment of the court below should be reversed and the cause remanded; and it is so ordered.

Reversed and remanded.

FULLER v. PRYOR et al.

(Court of Civil Appeals of Texas. Nov. 6, 1909.)

1. CONTRACTS (§ 164*)—CONSTRUCTION—SEPARATE INSTRUMENTS.

A note and an instrument creating a lien to secure payment constitute one contract, and must be construed together.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 746; Dec. Dig. § 164.*]

2. SALES (§ 82*)—RECOVERY OF PRICE—EARNINGS.

Where notes were given for the price of articles, and the seller retained a lien until payment of notes, "the same to be paid as the net earnings of the gin may be able to pay them as per face of the note," such notes became a demand at maturity, and liability thereon did not depend on the earnings.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. § 229; Dec. Dig. § 82.*]

Appeal from Collin County Court; John Church, Judge.

Action by W. W. Fuller against J. A. Pryor and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

R. C. Merritt and L. J. Truett, for appellant. Abernathy, Abernathy & Abernathy, for appellees.

RAINEY, C. J. Appellant brought suit against appellees to recover on certain obligations, and to foreclose a lien on certain platform scales.

The obligations sued on are made exhibits, and are as follows:

Exhibit A: "\$248.00. Aug. 15, 1906. On or before Dec. 1st, 1907, after date for value received we promise to pay to W. W. Fuller or order two hundred & forty-eight dollars at Callis, Texas, without interest. This note is to remain in full force until paid according to the contract under which it was given. J. A. Pryor, J. W. Brock, C. J. Frazier."

Exhibit B: "To Whom It May Concern. This is to certify that we, the undersigned party of the first part, for and in consideration of certain promissory notes of even date herewith have this day bargained, sold and turned over all our rights, interests and claims in the Union Mill and Gin Co. to John Pryor, Jet Frazier, and J. W. Brock, parties of the second part, on the following terms, to wit: The party of the second part shall be allowed to put in the following improvements, to wit: one 20 horse power gasoline engine, one 80 saw ginstand, two 80 saw condensers, friction tramper double box revolving press, corn mill for grinding meal

and all belts, pulleys, shafting and all necessary fixtures to successfully operate a two 80 saw gin and mill and it is further agreed and understood by the parties of the first part that after the above, together with the operating expenses, have been paid and not until then, shall they have any claim on the net earnings of the plant. It is understood and a lien is hereby given by the party of the second part in favor of the party of the first part on all the entire gin and mill plant until all the promissory notes above referred to have been fully paid. The same to be paid as the net earnings of the gin may be able to pay them as per face of the note, said instrument signed by the same parties as the note."

The petition also alleged the burning of the property, except the platform scales; that the obligation was due, demand, nonpayment, etc. The defendants filed a general demurrer to said amended petition, and also special demurrers as follows: (a) Because plaintiff declares upon a note of \$248 based upon a contract, and alleged that the same was to be paid out of the net earnings of the gin for which said note was given, and plaintiff nowhere alleged or claimed that there were any net earnings of said gin. (b) Because plaintiff has not set out the terms of said contract, and nowhere alleges that the condition on which said note is based has been performed by him, or that such condition or contingencies have arisen which make said note due and payable. (c) Defendants further except to said amended petition because plaintiff does not set up any right to the money derived from the insurance, and does not set up that there were any funds or assets in these defendants' hands after payment of the costs of such new improvements and operating expenses. (d) Because the petition on its face shows that the proper parties are not before the court. The general demurrer and all of said special demurrers were sustained by the court, and plaintiff excepted, and the court dismissed said cause and plaintiff excepted, and brings the cause here for review.

The contention of appellees, and the one upon which the court acted, is, in effect, that the provision relating to the payment of the obligation out of the net earnings of the gin is a contract to pay only out of said earnings, and, said petition showing no such earnings, it is subject to demurrer. We cannot agree to this contention. It is true said instruments constitute one contract and must be construed together, but, so construing them, we are of the opinion that the right to pay out of the net earnings was a privilege granted to the defendants to pay such earnings on the contract at any time before the date said amount was to become due and payable specified in the contract, to wit, December 1, 1907. Said amount not having been paid on

or before said date, it became a certain demand for money, and the parties are liable therefor. *Bummel v. City of Houston*, 68 Tex. 10-12, 2 S. W. 740; *Atterbury v. Biggerstaff*, 36 Tex. 177.

The petition stated a good cause of action, and the court erred in sustaining the demurrer.

The judgment is reversed, and cause remanded.

BECK v. HANCOCK.

(Court of Civil Appeals of Texas. Nov. 12, 1906.)

APPEAL AND ERROR (§ 773*)—BRIEFS—FAILURE TO FILE—AFFIRMANCE.

Where appellant fails to file briefs on appeal, and there is no fundamental error, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3109; Dec. Dig. § 773.*]

Appeal from Galveston County Court; George E. Mann, Judge.

Action by G. G. Hancock against S. Beck. Judgment for plaintiff, and defendant appeals. Affirmed.

Marsene Johnson, for appellee.

FLY, J. Appellee sued appellant in a justice's court to recover the sum of \$113.60, being double the amount of usurious interest which appellant compelled appellee to pay, and obtained judgment for the full amount sued for. The case was appealed to the county court, where appellee obtained judgment for the sum of \$92.

Appellant has not filed briefs in this court, and, there being no fundamental error, the judgment will be affirmed.

PARKER v. COOK et ux.

(Court of Civil Appeals of Texas. Oct. 21, 1909. Rehearing Denied Nov. 18, 1909.)

1. APPEAL AND ERROR (§ 987*)—FINDINGS OF FACT—REVIEW.

The court on appeal must examine the evidence and ascertain whether it is sufficient to justify the findings made and the conclusions of law based thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893-3896; Dec. Dig. § 987.*]

2. HOMESTEAD (§ 31*)—UNOCCUPIED LANDS—INTENTION.

The intention necessary to impress on unoccupied premises a homestead character must not only be bona fide, but must be accompanied by some conduct on the part of the homesteader showing reasonable diligence in carrying into execution the intent to actually use the premises for some of the purposes of a home.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 39; Dec. Dig. § 31.*]

3. HOMESTEAD (§ 31*)—UNOCCUPIED LAND—INTENTION—DILIGENCE.

Under the constitutional provision relating to homesteads on premises not in a city, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

providing that the homestead shall be used for the purpose of a home or place to exercise the calling of the head of the family, a carpenter, who avows his intention of working at his trade, refusing to reside on the farm because he cannot make a living on it, and who does not intend to occupy it until he can pursue his calling in the vicinity of the homestead so as to enable him to support his family, and whose only excuse for not occupying the premises is its unfitness to make a living on, and who delays settling on the premises for almost a year before an action to enjoin the levy of an execution against the property to satisfy a judgment against him, cannot claim a homestead in such action.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 39; Dec. Case, § 31.*]

Appeal from District Court, Red River County; Ben H. Denton, Judge.

Suit by J. R. Cook and wife against James A. Parker to enjoin an execution sale. From a decree for plaintiffs, defendant appeals. Reversed, and judgment rendered dissolving injunction.

George Morrison and Chambers & Black, for appellant. Kennedy & Robbins, for appellees.

HODGES, J. The appellant was the owner of two judgments against the appellee J. R. Cook, upon which executions were issued in April, 1908, and levied upon 61 acres of land situated in Red River county, Tex., as the property of the appellee Cook. After the levy the officer making it advertised the property for sale, according to law. Before the sale day arrived, this suit was instituted by J. R. Cook and his wife for the purpose of having the sale enjoined, alleging that the land was their homestead, and not subject to the executions. The petition was presented to the district judge, and a temporary order granted restraining the officer from proceeding with the sale, which order was, upon final hearing before the court in term time, made perpetual. The case was tried before the court without a jury, and the findings of fact made and filed are, substantially, as follows: (1) That the appellant was the owner of the judgments mentioned, and executions were issued and levied upon the property in controversy. (2) That the appellee J. R. Cook was the head of a family, and had been since 1892. (3) That since the marriage of Cook and his present wife they had lived upon and occupied as their home a house and lots in the city of Clarksville till November, 1907. That this property so used as their home was the community property of Cook and a former wife; the present wife having no interest in it beyond homestead claim. (4) That after their marriage Cook and his present wife purchased and improved the land in controversy, placing thereon a house, and putting some of the land in cultivation; but that they had never lived on it or occupied it as a home. (5) That three or four years prior to the time of the trial the appellee J. R. Cook procured a loan of \$500, to

secure which he executed a deed of trust upon the 61 acres involved in this suit. That this loan was still unpaid. That at the time the loan was procured Cook and wife designated the house and lots in Clarksville upon which they lived as their homestead. (6) That the appellee was a carpenter, following his trade when he could find employment. That some time in November, 1907, on account of dull business in his line, and for the purpose of obtaining money to meet his obligations and to support his family, Cook placed the 61 acres of land on the market, but that before the levy of the writs issued as hereinbefore stated he succeeded in selling his home in Clarksville. (7) That Mrs. Cook was induced to sign the deed to the Clarksville property by the promise of Cook that they would move onto and occupy the 61 acres as a home, and that she could have that as a home for herself and her children. That Cook immediately thereafter took the 61 acres off the market and had openly claimed it as his homestead. (8) That at the time it was so designated by Cook as his home the land was occupied by tenants and possession could not be obtained till January 1, 1908. (9) That Cook, failing to get employment at home, first decided to leave his family at their home, having for that reason refused to rent the place until after January 1, 1908, but subsequently concluded to move with his family to Arlington to reside temporarily while engaged in his employment. He thereupon rented the place for the year 1908, but no longer. (10) That Cook sought employment at Ft. Worth for the purpose of supporting his family and obtaining means wherewith to pay off the mortgage debt on his place. That the 61 acres were ready for occupancy, needing no improvements for that purpose, but that the debt was still unsatisfied. (11) That after the sale of their home in the city of Clarksville appellees openly and notoriously claimed the premises in controversy as their home, no other having been acquired, and openly expressed their intention to occupy it as soon as the indebtedness against it could be paid off. That the evidence failed to show that the appellant did not have full knowledge of these facts at the time his judgments were rendered and executions issued. The twelfth finding is substantially a repetition of what is embodied in one or more of the preceding. From the foregoing the court concluded as a matter of law that the homestead character was impressed upon the premises at the time the writs were levied, and for that reason the land was not subject to execution.

The court having found as a fact that the homestead right existed at the time the writs were levied upon the property, and that the appellant, Parker, had failed to show that he had no notice of the intention of Cook and wife to use and occupy the prem-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ises as a homestead, it becomes our duty to examine the evidence and ascertain whether or not it is sufficient to justify the findings made and the conclusion of law based thereon. *West End Town Co. v. Grigg et al.*, 98 Tex. 451, 56 S. W. 49. An examination of the testimony embodied in the statement of facts shows that the court in making his findings placed upon the testimony of the appellees, Cook and wife, the most favorable construction that was possible, and indulged every inference from the language used that was capable of supporting the conclusion reached. There are other facts, however, not included in the court's findings, which we think should be considered in disposing of the case. The petition alleges, and there seems to be no controversy upon that issue, that the tract of land in question was a farm situated two miles south of the city of Clarksville in Red River county. It is shown by the evidence that it was sufficiently improved to permit the use and occupancy by the family, without anything else being added. There was a dwelling upon it, and some of the land was fitted for cultivation. About November 1, 1907, according to Cook's testimony, he sold his homestead in the city of Clarksville, and then for the first time conceived the intention of making this farm his homestead in the future. Up to that date it had by an express designation been excluded from the premises composing the homestead proper. He did not move upon the premises at that time because they were rented for the year 1907, and he could not get possession. About the first of the following year he decided to go to Arlington, in Tarrant county, in search of employment, and to leave his family in Red River county; but subsequently he decided to take his family with him to Tarrant county. He says: "I never did anything towards moving out to that place in the country, except to intend to move out there. I did no overt act; only decided to move out there; and then I moved out to Tarrant county, where I now live, and went to work at the carpenter's trade in Ft. Worth. I am still engaged in this business. I intend to move out to this farm some time. I have had chances to rent it out this fall several times, and I would not do it. At the time I moved to Tarrant county, I did not know when I was going back, further than when I got my job done. When I went out there I had no fixed intention in my mind as to the time I would come back and occupy this land, for I had rented it. When I moved out to Arlington, I said I was going out there to get work, that I could not get work here, that my business was a carpenter's, and not that of a farmer, and that I was going out there not only to get money to pay debts, but to make a living for my family, and that I could not make a living for my family here. * * * I told everybody I was going out there to live until I could get work here, to make a living at my trade. I was in debt

here and could not get out. I knew that I could not make a living out there at that little place, and that is the reason I left here. If I had known I could make a living out there, I would have went right to the farm. I did not know that I could make it, and therefore went to Ft. Worth."

The foregoing testimony of Cook presents this situation: A carpenter, who disclaims being a farmer, and who avows his intention of continuing to work at his trade as a means of providing a living for his family, refusing to reside upon a farm because of the fact that he cannot make a living upon it, and in effect saying that he does not intend to occupy it as a home until such time as he can pursue his calling in that vicinity under conditions sufficiently remunerative to enable him to make money enough to support his family and pay his debts. The excuse which he gives for not occupying the premises is the absence of one of the very conditions which makes the acquisition of the homestead and its use and occupancy desirable—its fitness as a place to live upon and support his family. The only evidence with which we are furnished of any bona fide intent upon the part of Cook to use and occupy the premises as a homestead consists of the statements made by himself and wife of what they intended to do at some indefinite time. The question then is: Are these sufficient to support a finding that the property was in fact a homestead at the time the writs were levied?

After stating that the homestead not in a town or city shall consist of not more than 200 acres, and in a town or city of lot or lots not exceeding in value \$5,000 exclusive of improvements, the Constitution contains this provision: "Provided that the same shall be used for the purpose of a home or place to exercise the calling or business of the head of the family; provided also that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired."¹ A literal application of the language here used would restrict the homestead right to premises actually used for some of the purposes of a home, except in cases of temporary renting after the right has once been acquired, and when no other homestead has been provided. It frequently happens that, in the acquisition of property intended for use as a homestead, an unavoidable interval occurs between the acquisition and the actual use or occupancy for those purposes. In order to give full effect to this beneficent provision of the Constitution and prevent the defeat of bona fide efforts to acquire a home, our courts have adopted the policy of treating this interval, under certain conditions, as a kind of constructive occupancy, and in this way have extended the homestead exemption to times anterior to the period of actual use and occupancy. In doing so, however, they have undertaken to safeguard this right against being used as a

¹ Const. art. 18, § 51.

means of perpetrating a fraud upon creditors, and have exacted that in each particular case, where it is sought to impress the homestead character upon property in the advance of occupancy and use, there be satisfactory evidence of the utmost good faith in the homestead intention, accompanied by some efforts to carry such intention into execution. In the case now under consideration the evidence is undisputed that the claimant of the homestead did nothing toward perfecting his homestead right, further than to conceive and entertain the intention to, at some time in the future, not definitely fixed, occupy the premises as a home for his family.

It has been repeatedly held by the courts of this state that intention alone is not sufficient to impress upon unoccupied premises the homestead character. *Franklin v. Coffee*, 18 Tex. 416, 70 Am. Dec. 292; *Wolf v. Butler*, 8 Tex. Civ. App. 468, 28 S. W. 51; *Barnes v. White*, 53 Tex. 629; *Autry v. Reesor* (Tex.) 113 S. W. 748; *Dinwiddie v. Tims* (Tex. Civ. App.) 114 S. W. 400; *Johnson v. Burton*, 39 Tex. Civ. App. 249, 87 S. W. 181; *Blum v. Rogers*, 78 Tex. 530, 15 S. W. 115; *Cameron v. Gebhard*, 85 Tex. 616, 22 S. W. 1033, 34 Am. St. Rep. 832; *Fort v. Powell*, 59 Tex. 322; *Anderson v. McKay*, 30 Tex. 188; *Gardner v. Douglass*, 64 Tex. 78; *Bente v. Lange*, 9 Tex. Civ. App. 328, 29 S. W. 813; *Collier v. Betterton*, 8 Tex. Civ. App. 479, 29 S. W. 490; *Batts v. Scott*, 37 Tex. 65. We think the true rule deducible from the adjudicated cases is not that intention alone, under all circumstances, is insufficient to constitute a homestead dedication, but that in each instance the intention must not only be bona fide, but must be accompanied by some conduct or some overt act on the part of the claimant that may justly be considered reasonable diligence in carrying into execution the intention to actually use and occupy the premises for some of the purposes of a home. The legal functions of the overt act, or conduct, which it is said should accompany the intention in order to impress the homestead character upon unoccupied premises, are not solely to show the bona fides of the intention, but to manifest the exercise of reasonable diligence to put that intention into effect by actually using the premises as a home in the manner contemplated by the Constitution. It must be borne in mind that the real object of this provision is to extend the exemption only to premises used for some of the purposes of a home, and not to exempt a designated amount of realty. *Autry v. Reesor* (Tex.) 113 S. W. 748; *Blum v. Rogers*, 78 Tex. 530, 15 S. W. 115; *Franklin v. Coffee*, 18 Tex. 417, 70 Am. Dec. 292. Viewed in that light, all of the seeming inconsistencies appearing in the different cases where these questions have been passed upon disappear. We can also appreciate the full force of the language of the court in *Cameron v. Gebhard*, supra, wherein it is said: "Cases arising under the homestead law differ so widely

in their facts that it is impossible to lay down any definite rules to govern in all cases that may arise. Each case must be determined upon its own peculiar state of facts."

In *Gardner v. Douglass*, above referred to, Gardner purchased an improved place, intending it for a home; a part of the purchase price being derived from the sale of a former homestead. The premises were under a lease at the time, and he could not get possession till the lease expired. Before that time an execution was levied upon the premises, at the instance of a creditor, to satisfy a pre-existing debt. As soon as the lease terminated, Gardner manifested his good faith and diligence by moving onto the place and beginning to use it as a home. The court held that his homestead right dated from the time of the purchase, by virtue of the intent then existing to so use the property. It uses, in that connection, this significant language: "As the appellants acted in the best of good faith in purchasing this improved property for a homestead, and upon the expiration of the lease took prompt possession, and have ever since occupied it as such, under the facts and circumstances it must be considered that the occupancy followed the purchase in such reasonable time as would vest the property with the homestead quality from the time of its purchase," etc. Here the only element required to constitute the homestead character which existed anterior to the levy of the writ was the bona fide intention of the plaintiffs in the suit; but particular stress seems to be placed upon the fact that actual occupancy followed as soon as practicable.

In the *Cameron-Gebhard* Case, which seems to be relied upon by the appellees as being decisive of the question here involved, Gebhard purchased an unimproved lot for the express purpose of erecting thereon a home for himself and family. He made a contract with Turntine to furnish the material and build the house at an agreed price. Subsequently Turntine, being unable to supply the material, agreed to another contract by which Cameron was to supply the material for a stipulated price, and that sum to be deducted from what Turntine was originally to get for constructing the building. The suit was by Cameron after the completion of the house to subject it to a lien for the material so furnished. The evidence showed that there was no written contract executed by Gebhard and wife in the manner required to operate as a lien upon the homestead. The court held that the homestead rights of Gebhard arose and dated from the time he made the contract with Turntine to build the house and that the subsequent agreement with Cameron to furnish the material, not being in conformity with the requirements prescribed for binding the homestead, did not create a lien such as could be enforced against the homestead. Here we have not only an intention to use and occupy the premises claimed as the homestead, but a contract with a build-

er for the erection of a house thereon, followed by actual occupancy.

The case of *Scott v. Dyer*, 60 Tex. 185, cited by appellees, is, we think, clearly distinguishable from the case at bar. There the effort of the creditor was to subject to the payment of his debt a lot which had once formed a part of a plat of land which had been used and occupied as a homestead, and the issue was as to whether the homestead right had been abandoned by selling that portion upon which the residence was situated. The claimants testified that they still intended to resume occupancy, and there was no evidence to overcome their testimony. There is a distinction between the abandonment of a homestead once dedicated by actual occupancy, and the cessation of the inchoate homestead right resting only upon intention. *Kempner v. Comer*, 73 Tex. 202, 11 S. W. 194. The perpetuation of the homestead right against the charge of abandonment on account of temporary absence, after having been once perfected by actual use and occupancy of the premises, is protected by another clause of the Constitution, which provides that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired.

Where the homestead right is made to rest upon intention, as distinguished from actual use and occupancy, there is strong reason for requiring the accompaniment of some overt acts on the part of the claimant, evidencing a purpose or effort to carry his intentions into effect. Use and occupancy are open to observation, and consist of facts which are easily proved or combatted; but, where the homestead right is made to rest on mere intention, the situation is otherwise. No one would be willing to swear that another did not in fact have a certain intention regarding the occupancy of premises, and in the majority of instances the difficulty of disproving intention by circumstances is so great as to render the undertaking practically fruitless. Hence, unless some rule should be adopted by the courts requiring a secret intention to be accompanied by some physical conduct open to observation, the liberality of the construction placed by them upon this section of the Constitution would furnish a cloak easily available for concealing fraudulent transactions.

In the case before us, whatever may be said of the intentions of Cook as to occupying the premises in question as his homestead, it cannot be claimed that he did anything or made any effort toward carrying those intentions into effect. Certainly it cannot be said that he had to "race with the sheriff for possession." Applying to the facts of this case the rule which seems to have been adopted in this state regarding the homestead rights in premises in advance of occupancy, and considering the rationale upon

which it is predicated, we do not think the evidence was sufficient to support the judgment of the court. It is admitted that the place was improved and ready for occupancy. The lease upon it, which at one time operated as a barrier to possession, had expired, and there was nothing which hindered the actual occupation of the land had the appellees desired to do so. This condition existed from the 1st day of January, 1907, till the day of the trial, about December following. The excuse given is that it was too small, and that the owner could not make a living upon it for his family. Is it reasonable to permit the claimant of an improved rural homestead to excuse his failure to occupy the premises in the first instance, and thereby complete the inchoate homestead right originating with the intention, by saying that the premises were insufficient to supply the essential elements of a home in the country? Such an excuse would not only justify temporary absence, but the permanent abandonment of the intention, if any ever existed. There is, we think, a radical difference between the reasons for a failure to take actual possession of premises and use them as a home, based upon their unimproved condition, or inability at the time to get possession, or the existence of some fact or condition intervening consistent only with temporary absence, and that given in this case, founded upon the unfitness of the premises, after being improved, to meet the requirements of a home. The tract of land was a farm; but Cook was a carpenter, not a farmer. He intended to occupy the farm whenever conditions changed so that he could go there and make a living for his family and money to pay his debts. Such a time might never come. There was no evidence to show that there was any good reason for expecting it in the near future. To sustain the homestead claim in this case would be carrying the effect of intention alone beyond the limits fixed by any adjudicated case we have examined. Even in those decisions rendered in the early history of the state, when the commercial value of the homestead was comparatively small, and when the sparsely inhabited country furnished the best reasons for encouraging the acquisition of homes by the adoption of a liberal policy in protecting homestead rights, the courts have not gone so far as to furnish a precedent for sustaining the judgment in this case. We do not feel that under the conditions existing at the present time, when the commercial value of the usual homestead allowance has been vastly enhanced by the growth of population and industrial development, and the temptation to use it as a cloak for fraud has been increased in the same ratio, we should go beyond the bounds already established by precedents.

Inasmuch as the case seems to have been well developed, and no good purpose could

be subversed by remanding, the judgment of the district court will be reversed, and judgment here rendered dissolving the writ of injunction granted by the court below; and all costs, both of this court and of the court below, will be adjudged against the appellees, Cook and wife.

TEXAS CO. v. LACOUR.

(Court of Civil Appeals of Texas. Nov. 12, 1909.)

1. DAMAGES (§ 112*)—INJURY TO CROPS—EVIDENCE.

In an action for injuries to a crop, the measure of damages is the difference between the value of what the crop would have been, and the value of what was produced after deducting the expense of cultivating, harvesting, and marketing.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

2. DAMAGES (§ 188*)—INJURY TO CROPS—EVIDENCE.

In an action for injuries to a crop, evidence showing what the crop would have afterwards brought in the market was insufficient to enable the jury to ascertain the loss sustained.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 511; Dec. Dig. § 188.*]

3. DAMAGES (§ 163*)—INJURY TO CROPS—BURDEN OF PROOF.

In an action for injuries to a crop, the burden of proof of loss did not shift, after plaintiff had shown what the crop would have afterward brought in the market, and what the crop he succeeded in getting sold for, to defendant, to show what the expense of making and marketing the crop would amount to.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 454; Dec. Dig. § 163.*]

Appeal from Liberty County Court; L. B. Simmons, Judge.

Action by J. G. Lacour against the Texas Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Robertson & Whitaker, for appellant. Marshall & Marshall, for appellee.

JAMES, C. J. This appeal is from a judgment against appellant for damages for injury done to a growing rice crop, alleged to have been caused by the appellant laying its pipe over the land occupied by appellee's crop.

The jury were instructed on the measure of damages that it was the value of the damaged rice immediately before and after the injury. Plaintiff, Lacour, testified: "I cannot say what the value of the rice was at the time it was damaged; could only figure what it would have made." It is evident from this testimony that a jury would be as unable to determine the value of the injured crop at the time of the injury as plaintiff was, and that the only way to arrive at plaintiff's loss was, as plaintiff himself says, on the basis of what the crop would have made. This is the approved standard of

damages in this character of case. Stated in a general way, it is the difference between the value of what it would have produced, and the value of what was produced, after deducting the expense of cultivating, harvesting, and marketing. *I. & G. N. R. R. Co. v. Pape*, 73 Tex. 503, 11 S. W. 526; *Railway v. McGowan*, 73 Tex. 362, 11 S. W. 336; *Railway Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. 1012; *City of Paris v. Tucker* (Civ. App.) 93 S. W. 233.

Appellee contends that, because he showed what the crop would have afterwards brought in the market, this was enough to enable the jury to ascertain his loss. Clearly not. He also contends that when he showed this, and what the few sacks which he succeeded in getting off this particular land sold for, the burden of proof shifted, and, this being a tort case, as distinguished from contract, it devolved on defendant to show, if he desired, what the expense of making and marketing the crop would amount to. The burden of proof did not shift. It rested upon plaintiff to make out a case, and to adduce what was proof of his loss; and proof of what the yield would have been, and what it would have sold for in gross, and what the yield actually was, and what it sold for in gross, was not proof of what represented his loss. He failed to furnish the jury with sufficient evidence to determine what would legally compensate him.

For this reason, and for the reason that we are unable to say that the verdict would not have been less than it is, the judgment will be reversed, and the cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. KONE, County Judge, et al.

(Court of Civil Appeals of Texas. Nov. 10, 1909.)

1. TAXATION (§ 45*)—EQUALITY—UNIFORMITY.

Where the property of the individuals in a county was assessed at 50 per cent. of its real value in accordance with a deliberately adopted plan, an assessment of intangible property of a railroad situated in the county at full value violated Const. art. 8, § 1, requiring equality and uniformity of taxation.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 100-103; Dec. Dig. § 45.*]

2. CONSTITUTIONAL LAW (§ 229*)—EQUAL PROTECTION.

Such assessment was violative of Const. U. S. Amend. 14, guaranteeing equal protection of the laws.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 685; Dec. Dig. § 229.*]

Appeal from District Court, Hays County; L. W. Moore, Judge.

Action by the Missouri, Kansas & Texas Railway Company of Texas against Ed. R. Kone, County Judge, and others. From a judgment for defendants, plaintiff appeals. Reversed and rendered.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Coke, Miller & Coke, A. H. McKnight, and Fiset & McClendon, for appellant. L. H. Brown, R. V. Davidson, Atty. Gen., and Claude Pollard, Asst. Atty. Gen., for appellees.

KEY, J. Appellant brought this suit for the purpose of preventing the county officers of Hays county from collecting from appellant taxes for the year 1907 upon its intangible property situated in Hays county, in excess of 50 per cent. of the valuation placed upon it by the tax assessor and board of equalization of the county. The plaintiff alleged and proved that the property of taxpayers generally throughout the county for the year 1907, and for several years prior thereto, had been assessed, equalized, and placed on the tax rolls for taxing purposes at not exceeding 50 per cent. of its value, and that for the year 1907 the plaintiff's intangible property had for like purposes been assessed and placed on the tax rolls by the defendants at its full value, which was 50 per cent. in excess of the valuations placed on the property of other taxpayers. The trial court rendered judgment in favor of the defendants and refused to grant the plaintiff any relief.

In all material respects the case is similar to *Lively v. Missouri, Kansas & Texas Railway Company of Texas*, 120 S. W. 852, in which it was held by the Supreme Court that, where the property of individuals in a county was assessed at 66% per cent. of its real value, in accordance with a deliberately adopted policy, an assessment of the intangible assets of a railroad company apportioned to that county at full value constituted a violation of article 8, § 1, of the Constitution of the state, which requires equality and uniformity of taxation; and was also a violation of the fourteenth amendment of the federal Constitution, which guarantees equal protection, etc.

In view of that decision the judgment in this case will be reversed, and judgment here rendered for appellant.

Reversed and rendered.

NEWMAN v. TAYLOR.

(Court of Civil Appeals of Texas. Nov. 11, 1909. Rehearing Denied Nov. 23, 1909.)

1. INSANE PERSONS (§§ 73, 79*)—CONTRACTS—VALIDITY.

The contract of an insane person is voidable only, and he may, on recovering his reason, ratify the contract.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 125, 141; Dec. Dig. §§ 73, 79.*]

2. INSANE PERSONS (§ 79*)—CONTRACTS—VALIDITY.

An insane person who makes a contract must on recovering his reason elect within a rea-

sonable time, depending on circumstances, whether he will affirm or disaffirm the contract.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 141; Dec. Dig. § 79.*]

3. INSANE PERSONS (§ 79*)—CONTRACTS—VALIDITY.

One while insane bought machinery. After regaining his reason, he inspected it with the aid of an expert and an attorney. He subsequently called on the seller to set up the machinery, and neglected, for at least 12 months, while retaining control of it, to say anything indicating to the seller an election to disaffirm. Held, as a matter of law, that he elected to affirm the contract, and his remedy for any wrong suffered in the transaction was by action for damages.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 141; Dec. Dig. § 79.*]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Action by J. P. Taylor against Joseph Newman. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

P. M. Young, for appellant. Y. D. Harrison, for appellee.

WILLSON, C. J. April 28, 1906, in consideration of \$650 paid to him by appellee, appellant sold to appellee a machine for bottling soda water, and certain other property, together constituting an outfit intended for use in manufacturing soda pop. June 23, 1908, appellee commenced the suit resulting in the judgment, from which this appeal is prosecuted. The suit was for a rescission of the contract of sale, on the ground (1) that at the time he made the contract he was insane; and (2) that he was induced to make it by false and fraudulent representations as to the condition and value of the property at the time he purchased it, made to him by appellant. The appeal is from a judgment in accordance with the verdict of a jury in favor of appellee for the sum of \$400, interest, and costs, and directing the return of the property to appellant.

It was shown on the trial that within a few days after he purchased the bottling outfit appellee was adjudged to be insane, and, as a lunatic, was confined in jail until about July 7th, following, when, the authorities believing he had sufficiently recovered his reasoning powers to justify it, he was discharged "on probation," as witnesses termed it. Thirty or 60 days thereafter, it seems, he was formally discharged as sane by orders made by the court. From appellee's testimony it appears that in August, after he was released from jail, he consulted an attorney in regard to the purchase he had made of appellant, and, at the suggestion of the attorney, secured an expert to inspect the bottling outfit, presumably to advise him as to its condition, value, etc. The inspection was accordingly made by the expert; appellee and his attorney being present when it was made. Appellee testi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fied he was then "at himself," and there is nothing in the record contradicting his statement. By the terms of the contract of sale appellant had bound himself to set up and put in good running order the machinery forming the plant he had sold to appellee. Appellee testified that, after the inspection referred to above had been made, appellant, with his assistance and at his request, set up the machinery in a house to which he had removed it a few days after he purchased it. Afterwards appellee endeavored to procure from appellant and from other sources bottles to be used in operating the bottling outfit, and retained possession and control of the property until 12 or 14 months later, when it was levied upon as his property by virtue of process issued in a suit against him by a bank on a note made by him to procure money with which to pay for it at the time he purchased it from appellant. Notwithstanding the fact, as seems to have been the case, that during all the time thereafter intervening appellant resided in the city of Marshall, where or near where appellee resided, so that he must have had ample opportunity to do so, appellee never said anything to appellant about being dissatisfied with his purchase until some time in October of the following year, or some 12 or 14 months after he had recovered his reason and after he had inspected the property. Such being the state of the case as shown by appellee's own testimony and other testimony, uncontradicted, appellant asked the court to instruct the jury if they believed appellee was insane at the time he purchased the bottling outfit nevertheless to find for him (appellant) if they believed he did not practice actual fraud in misrepresenting the condition, etc., of the machinery, "because," the charge requested recited, "it was the duty of plaintiff to promptly disaffirm the contract and tender back the machinery upon recovering his reason, which the evidence conclusively shows he failed to do." The refusal of the court to so instruct the jury is complained of in appellant's seventh assignment of error. While not in terms so, we think the instruction refused should be treated as a request to peremptorily instruct the jury to find for appellant, because it conclusively appeared from the evidence that appellee, after he had regained his reason, with a full knowledge of the condition, etc., of the property he had purchased, had elected to and had ratified and affirmed the contract of sale. So construing the effect of the instruction, we think the court erred in refusing to give it as requested.

The contract of an insane person is not void, but, like the contract of an infant,

is merely voidable. 2 Page on Contracts, § 900; Williams v. Sapleha, 94 Tex. 430, 61 S. W. 115; Elston v. Jasper, 45 Tex. 409. If the insane person recovers his reason, he may ratify the contract and so make it valid. Railway Co. v. Brazzil, 72 Tex. 233, 10 S. W. 407. And it is his duty, after recovering his reason, promptly—that is, within a reasonable time, the circumstances of his case being considered—to elect whether he will affirm or disaffirm the contract. Morris v. Railway Co., 67 Minn. 74, 69 N. W. 628. With reference to the rules stated, the question is: Did the evidence so conclusively show an affirmation by appellee of the contract as to render unreasonable a contrary conclusion? Having an opportunity after he regained his reason to inspect the machinery, and, with the assistance of his attorney and an expert in knowledge of such machinery, having inspected same, in the absence, as appears from the record to be true, of evidence to the contrary, we think it should be assumed as conclusively established that appellee acquired the full information necessary to enable him to determine whether he wished to disaffirm the contract, or, instead, to affirm it. Having such information, calling upon appellant to set up the machinery in compliance with his undertaking under the contract to do so, endeavoring to procure bottles to be used in operating it as his own property, and neglecting during 12 or 14 months thereafter, while retaining the possession and control of the property, to do or say anything indicating to appellant that he had elected to disaffirm the contract, we think should be treated as conclusively showing that he had elected to affirm and had affirmed the contract. His conduct reasonably can be accounted for only upon the hypothesis that, whether satisfied or not with his purchase, he had chosen to recognize the contract as binding upon him and to retain as his own the property he had acquired under it. Bingham v. Barley, 55 Tex. 288, 40 Am. Rep. 801; Barry v. St. Joseph's Hospital (Cal.) 48 Pac. 68; Hastings v. Dollarhide, 24 Cal. 216; 2 Page on Contracts, § 900. Having elected to affirm the contract, it became valid, and he could not thereafter maintain a suit to rescind it. His remedy then for the wrong, if one was suffered by him in the transaction, was not a rescission of the contract, but a recovery of damages.

The judgment will be reversed, and a judgment in appellant's favor will be here rendered, but without prejudice to appellee's right, if he sees proper to do so, to prosecute a suit for damages for the deceit alleged to have been practiced upon him by appellant.

CAPPS et al. v. CITY OF LONGVIEW.†
(Court of Civil Appeals of Texas. Oct. 28, 1909.
Rehearing Denied Nov. 23, 1909.)

1. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—STATEMENT FROM RECORD.

Assignments of error copied in the brief, but not followed by either a proposition or a statement from the record, as required by Rules 29-36 for Courts of Civil Appeals (67 S. W. xv, xvi), will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

2. APPEAL AND ERROR (§ 219*)—REVIEW—REQUEST FOR FINDINGS.

Appellants cannot complain that findings do not cover all the issues of fact when no other findings were requested.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1321, 1322; Dec. Dig. § 219.*]

Appeal from District Court, Gregg County; W. C. Buford, Judge.

Action by Margie F. Capps and another against the city of Longview. From a judgment for defendant, plaintiffs appeal. Affirmed.

J. N. Campbell and F. B. Martin, for appellants. W. L. Cunningham and E. M. Bramlette, for appellee.

WILLSON, C. J. Claiming that a public road forming the north boundary line of a tract of land owned by Mrs. Capps and situated in the city of Longview had been so abandoned as to relieve it of the servitude which had existed in favor of the public, appellants (said Mrs. Capps and her husband) by a fence inclosed a part of the road. On the ground that the servitude still existed, and that the fence was an obstruction of a public road which had become one of its streets, appellee by its proper officers removed the fence from the road to the south boundary line thereof, and in repairing and improving the road diverted, appellants alleged, surface water from same onto their land, thereby injuring it. The suit was by appellants to recover the value of the land alleged to have been unlawfully reappropriated to public use, and to recover damages alleged to have been inflicted upon other land in the tract by reason of the diversion of surface water as alleged. The appeal is from a judgment in favor of the city.

The assignments of error on the trial in the court below relied upon as reasons for a reversal of the judgment are copied in the brief, but, as pointed out by appellee, no one of the assignments (thirteen in number) is followed by either a proposition or a statement from the record as required by the rules prescribed for briefing causes on appeal to this court. Rules 29 to 36 for Courts of Civil Appeals (67 S. W. xv, xvi). Such an utter disregard of the rules referred to should not be ignored. Therefore we have not considered, and will not consider, any of

the assignments. We have, however, inspected the record far enough to satisfy us that the judgment should be affirmed. The trial was before the court without a jury. The judge's findings of fact, made a part of the record, in every particular are amply supported by the evidence. His conclusion as to the law applicable to those facts is correct. If the findings do not cover all the issues of fact made by the pleadings, appellants are not in a position to complain of the omission, as it is not made to appear that other findings were requested. *Caplen v. Cox*, 42 Tex. Civ. App. 297, 92 S. W. 1052; *Veatch v. Gray*, 41 Tex. Civ. App. 145, 91 S. W. 324; *Reed v. Brewer*, 90 Tex. 144, 37 S. W. 418.

The judgment is affirmed.

WICHITA MILL & ELEVATOR CO. et al. v. STATE et al.†

(Court of Civil Appeals of Texas. Oct. 20, 1909.)

1. CLERKS OF COURTS (§ 24*)—FEES—ESTOPPEL AS TO CHARGES.

Act March 12, 1901 (Laws 1901, p. 24, c. 21) § 1, provides that for certified copies of petitions the clerk of the district court shall receive 20 cents per folio. Section 2 provides that for comparing and certifying copies prepared by plaintiff the clerk of the district court shall receive 50 cents for each certificate and 10 cents per page of 300 words. *Held*, that where a clerk received and used printed matter prepared by plaintiff to obtain the benefit of such section, from which, by pasting sheets together and filling blanks, he made copies of a petition, he is estopped to claim the larger fee, under section 1, for making copies of such petition.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 55; Dec. Dig. § 24.*]

2. PLEADING (§ 336*)—COPY OF PETITION—INDORSEMENTS.

The indorsement on the back of a petition is no part of the petition and need not be included in the copy served on defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1020, 1021; Dec. Dig. § 336.*]

3. COSTS (§ 146*)—AMOUNT OF COSTS.

Each party to an action, being primarily liable for the costs incurred by him (Rev. St. 1895, art. 1421), and if costs cannot be collected by the party against whom they have been adjudged the other is liable only for the costs incurred by him (article 2491), defendant against whom costs have been adjudged is liable only for such amount of plaintiff's costs as plaintiff is primarily liable for.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 567; Dec. Dig. § 146.*]

4. CLERKS OF COURTS (§ 11*)—FEES—DISCRIMINATION.

The clerk of court cannot discriminate between litigants and charge fees against one at a higher rate than he would be entitled to charge the other if the latter had been cast in the suit.

[Ed. Note.—For other cases, see Clerks of Courts, Cent. Dig. § 33; Dec. Dig. § 11.*]

Error from District Court, Travis County; Geo. Calhoun, Judge.

Action by the State and others against the Wichita Mill & Elevator Company and oth-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

ers. Plaintiffs had judgment, and defendants bring error. Reversed in part, and affirmed in part.

J. W. Terry, W. D. Williams, H. M. Garwood, and M. M. Crane, for plaintiffs in error. R. L. Penn and Warren W. Moore, for defendants in error.

KEY, J. The state brought this suit against a large number of defendants for alleged violations of the anti-trust statute of the state. At the trial judgment was rendered in favor of the state for \$35,000, and the defendants have brought the case to this court by writ of error.

The only question presented for decision relates to the action of the district court in overruling a motion to retax the bill of costs made out and claimed by D. J. Pickle, the clerk of that court. His bill of costs includes an item of \$3,000 for issuing and certifying to 103 copies of the plaintiffs' petition. The motion to retax challenged the correctness of that item and asserted that he was only entitled to \$566.50 for the services referred to. The trial court overruled the motion to retax, and that ruling is assigned as error.

Fees which district clerks are allowed to charge are fixed by the act of the Twenty-Seventh Legislature, approved March 12, 1901 (Laws 1901, p. 24, c. 21), and so much of it as has application to this case reads as follows:

"Section 1. Be it enacted by the Legislature of the state of Texas: That the clerks of the district courts shall receive for the following services in civil cases the following fees, to wit: For copy of petition, including certificate and seal, each one hundred words, \$.20.

"Sec. 2. Whenever in any suit a certified copy of any petition or any other instrument is necessary in the district court, it shall be lawful for the plaintiff or defendant to prepare such true and correct copy thereof, and submit the same to the clerk of the district court, whose duty it shall be to compare the same with the original instrument, and if found to be correct he shall attach his certificate of true copy. For such services he shall receive 50 cents for each certificate and seal, and in addition thereto the sum of 10 cents per page, three hundred words to the page, for each page of each copy."

It is conceded by counsel that if the clerk was entitled to charge under the first section his bill is correct, and the motion was properly overruled; but if he was not entitled to charge under that section, and should have made his charge under the second section, the motion should have been granted and the item of costs referred to reduced to \$566.50. The undisputed testimony shows that the Attorney General's department originally decided to sue each defendant separately, and, in view of that fact, decided to prepare a form of petition

and have it printed. It was also shown that an agreement was entered into between the Attorney General's department and Mr. J. P. Hart, then the clerk of the district court of Travis county, with a view to having enough copies printed for Mr. Hart's use in sending out copies of the petition with the citations, to be served on the several defendants residing out of the county; Mr. Hart agreeing to pay his proportion of the expense of printing the petitions. The Attorney General's department had 800 copies of the petition printed and delivered to that department. Mr. Hart testified that he offered to pay that department his portion of the printing expense, which the representative of the department to whom the offer was made declined to accept, and Mr. Hart paid nothing under the agreement referred to, and went out of office before the suit was filed. Mr. Hart was succeeded by Mr. Pickle, the present clerk, who advised the Attorney General's department that he was willing to carry out the agreement made with Mr. Hart, and was told by the department that that was all right, but that they were not then ready to bring the suit. Finally the Attorney General's department decided to bring only one action against all of the defendants, and, in view of that decision, it became necessary to make some changes in the petition which had been prepared and printed but not filed. The petition as originally prepared consisted of 30 pages of printed matter, blank lines being left on the first and second pages for the insertion of the names and residences of the defendants, and on the last page blanks were left for the signature of the Attorney General and the other attorneys associated with him in the case. Having reached the conclusion to file but one suit, the Attorney General's department had a leaflet prepared and printed, changing the first three pages of the petition so as to show the names and residences of the several defendants, which three pages were pasted in the front of one copy of the original petition, and had another leaflet printed and pasted in so as to constitute the last page of the petition, which leaflet made a change in the prayer. On November 9, 1907, the suit was instituted, and the copy of the petition referred to, with the leaflets pasted in, the attorneys' names signed, and a few other formal blanks filled in writing, was used for that purpose.

Before the suit was brought, there was an understanding between Mr. Lightfoot, an Assistant Attorney General, acting for the state, and Mr. Pickle, in person, to the effect that if the state was cast in the suit, and the costs taxed against it, Mr. Pickle was not to claim or receive any more than the costs allowed under the second section of the statute above quoted, and at the same time Mr. Lightfoot informed Mr. Pickle that he had the printed copies of the petition

which he desired to furnish him to be used in serving the parties outside of the county, and Mr. Pickle sent to the Attorney General's office and obtained the necessary copies, including the leaflets necessary to correct the petition as originally printed. The leaflets had not been pasted in, but Mr. Pickle and his deputies pasted them in, and, with typewriter, pen, and ink, filled in the blanks, so as to make correct copies of the petition as filed, and these copies were used by Mr. Pickle in making the 103 certified copies referred to in the item of costs under consideration. Mr. Pickle stated in his testimony that at the time the suit was filed he had a conversation with Mr. Lightfoot in regard to what the state was to pay in the event it was defeated in the suit and cast in the costs. He states that he said he was going to charge "right straight through for the petitions, but that if the state lost its case, on account of the large amount of costs in it, he was willing to charge under the statute for comparing and certifying." He also testified that at the time the service was rendered he entered the charges in his fee book under the first section of the statute and for the amount now claimed. It was also shown that the company that did the printing had attempted to collect \$23 as part payment therefor from both Mr. Hart and Travis county, and that three days after this motion was filed Mr. Pickle paid that bill. It was not shown that Mr. Pickle had ever acquired Mr. Hart's interest or been subrogated to his rights under the agreement between him and the Attorney General's department.

We have reached the conclusion that the motion to retax was well taken, and that the trial court erred in overruling it. It is not deemed necessary to determine whether or not section 2 of the statute should be liberally construed in favor of the litigant or strictly construed in favor of the officer, because we are of opinion that upon the undisputed testimony Mr. Pickle, the clerk, is estopped from claiming costs in the particulars under consideration otherwise than as provided by that section of the statute. Even if his predecessor, Mr. Hart, was part owner of the 800 copies of the petition which were delivered to the Attorney General's department, which point we do not decide, such ownership resulted from a private and unofficial contract on Mr. Hart's part, and Mr. Pickle was not subrogated thereto by reason of the fact that he succeeded Mr. Hart as district clerk. This being the case, it must be held that the printed copies of the petition, together with the printed leaflets intended to be pasted in and used as part of the same, were furnished by the plaintiff, and they were furnished for the purpose of obtaining for the plaintiff the benefit of section 2 of the statute under consideration. Such being the case, and the clerk having used them knowing that they were furnished for that

purpose, he must be held to have waived any objection which he might otherwise have made. If he had declined to use them and had notified the plaintiff's counsel of that fact, then it would be necessary to decide whether or not what was furnished constituted a true and correct copy of the plaintiff's petition; but, not having pursued that course, and having accepted and used what was furnished to him upon the theory that it was meeting the requirements of section 2 of the statute, it would be unjust and inequitable to permit him to deny the correctness of the copies furnished. He was furnished with printed matter which, when placed together, constituted correct copies of the petition, with a few exceptions consisting of blanks in which to insert names, dates, and a few other formal matters. The indorsements on the back of the petition did not constitute part of the petition, and it was not necessary that they should be included in the copies served on the defendants. *Pruitt v. State*, 92 Tex. 434, 49 S. W. 366. At any rate, the actual services rendered by the clerk, using the material furnished by the plaintiff, was so small in comparison to what would have been required to make copies of the petition, as required by the first section of the statute, as to demonstrate that it would be inequitable to allow the clerk to accept and use that material upon the understanding that, as between him and the plaintiff, he was to look to section 2 of the statute for his compensation, and thereafter assert his right to claim more, as prescribed by the first section.

But it is contended and urged on behalf of the clerk that, as the costs were adjudged against the defendants, it is immaterial what amount of costs he would have been entitled to claim if they had been adjudged against the plaintiff. In other words, the argument is that there is no privity between the plaintiff and defendants, and that the latter are not subrogated to the rights of the former. It is prescribed by statute that "each party to any suit shall be responsible to the officers of the court for the costs incurred by himself." Rev. St. 1895, art. 1421. And it is also declared that "each party to a suit shall be liable for all costs incurred by him, and in case the costs cannot be collected of the party against whom the same have been adjudged, execution may issue against any party in such suit for the amount of costs incurred by such party, but no more." Rev. St. 1895, art. 2491. From these provisions of the statute we conclude that, when the costs are incurred, the party at whose instance and on whose behalf they are incurred becomes primarily liable therefor, and, while such primary liability may be changed by the judgment to secondary liability, the liability itself never ceases until the costs are paid. So, in this case, the item of costs under consideration having been incurred by and on behalf of the state, who was the plaintiff, that lia-

bility did not cease when the costs were adjudged against the defendants. In other words, when a party is cast in a suit, unless it is otherwise ordered by the court, he becomes liable, not only for the costs incurred on his behalf, but for those incurred on behalf of his adversary; but as to the latter costs they are such, and such only, as were incurred by and properly chargeable to the adverse party. Hence we conclude that a proper construction of the statute, as well as sound public policy, requires a holding that an officer of the court should not be permitted to discriminate between litigants and charge fees against one at a higher rate than he could have charged against the other, if the latter had been cast in the suit.

We do not concur in the contention that, in determining the liability of the defendants, it is immaterial what may have been the liability of the plaintiff. On the contrary, and by force of article 2491 of the statute, on the item of costs here involved, and all others incurred by the plaintiff, the defendants' liability is measured by and limited to the liability of the plaintiff. As to such costs the clerk has no right to claim any more from the defendants than he could have claimed from the plaintiff.

The judgment of the district court on the motion will be reversed, and judgment here rendered sustaining the motion to retax the costs, and reducing the item referred to from \$3,090 to \$566.50. The main judgment will be affirmed. Costs of this court taxed against defendant in error Pickle.

Reversed and rendered in part, and in part affirmed.

JOHN M. BONNER MEMORIAL HOME v. COLLIN COUNTY NAT. BANK et al.
(Court of Civil Appeals of Texas. Oct. 30, 1909.
Rehearing Denied Nov. 20, 1909.)

1. APPEAL AND ERROR (§ 719*)—ASSIGNMENTS OF ERROR—NECESSITY.

The overruling of demurrers will not be considered on appeal in absence of assignments of error predicated thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2973; Dec. Dig. § 719.*]

2. VENDOR AND PURCHASER (§ 267*)—LIEN—RECONVEYANCE—RIGHT AS AGAINST THIRD PERSONS ACQUIRING EQUITABLE INTEREST.

A vendor retaining a lien for the purchase money cannot take a reconveyance of a part of the land from the purchaser in part payment, and subsequently convey it to a third person, to the prejudice of one who has acquired an equitable interest in the land at the time of such reconveyance, known to the parties at the time.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 756; Dec. Dig. § 267.*]

3. VENDOR AND PURCHASER (§ 103*)—PARTIAL RESCISSION BY VENDOR—EFFECT OF ACQUISITION OF RIGHTS BY THIRD PERSON.

A vendor having permitted a part of the land to be sold without attempting to enforce her lien, neither she nor a purchaser from her administrator could elect to rescind the contract

as to a part of the land remaining by accepting a reconveyance thereof after the rights of a third person were fixed by the recording of a trust deed thereof, of which rights vendor had both actual and constructive notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 157; Dec. Dig. § 103.*]

4. SUBROGATION (§ 23*)—RIGHTS OF BANK LOANING MONEY TO PAY VENDOR'S LIEN NOTES.

A bank loaned money to a purchaser of land on notes secured by a trust deed thereof, with the understanding that the money was to be applied in part payment of vendor's lien notes, and vendor and her agent were so instructed to apply the money which was paid her agent, but which he applied on an unsecured debt. Held, that the bank became subrogated pro tanto to the rights of vendor.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 62, 64; Dec. Dig. § 23.*]

5. PRINCIPAL AND AGENT (§ 105*)—AUTHORITY TO RECEIVE AND APPLY PAYMENT ON NOTES IN AGENT'S POSSESSION.

An agent and attorney in fact of a vendor of land is authorized to receive and apply as a credit on purchase-money notes in the agent's possession money borrowed by the purchaser, and sent to the agent for that purpose.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 299, 307; Dec. Dig. § 105.*]

6. PAYMENT (§ 38*)—APPLICATION TO SECURED DEBT.

A debtor is entitled to have a payment applied to a secured debt.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 99; Dec. Dig. § 38.*]

7. VENDOR AND PURCHASER (§ 265*)—SUBJECTING LAND CONVEYED BY PURCHASER TO PAYMENT OF LIEN NOTES.

Land conveyed by the purchaser should be subjected to the payment of vendor's lien notes in the reverse order of its alienation.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 711; Dec. Dig. § 265.*]

Appeal from District Court, Collin County; B. L. Jones, Judge.

Suit by the Collin County National Bank against John R. Smith and others. From a judgment for plaintiff, the John M. Bonner Memorial Home, one of the defendants, appeals. Affirmed.

Doggett & Clifton and N. A. Rector, for appellant. J. R. Gough and Abernathy & Abernathy, for appellee.

BOOKHOUT, J. This suit was instituted in the district court of Collin county by appellee, the Collin County National Bank of McKinney, against Jno. R. Smith and E. L. Gladney, administrator with the will annexed of the estate of Lelia B. Dwyer, deceased, and later by an amended petition filed August 19, 1907, the John M. Bonner Memorial Home was made defendant. The amended petition alleged that John R. Smith on December 31, 1901, executed to the plaintiff's bank his promissory note for the sum of \$2,382.41, payable to defendant's order 60 days after date, with 10 per cent. interest per annum from maturity, and providing for the usual 10 per cent. attorney's fees. It was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

also alleged that on December 26, 1901, the said Smith, for the purpose of securing the payment of said note, executed in favor of said bank a deed of trust, creating a lien upon a certain described portion of the Abner Lee survey, situated in Collin county, Tex. The petition further alleged that on or about December 23, 1886, said John R. Smith purchased from Lella E. Bonner and William B. Bonner 200 acres of land in the Abner Lee survey, in Collin county, Tex., and for the purchase money thereof executed his four notes each for \$625, due on the 1st day of January, 1888, 1889, 1890, and 1891, respectively, and that the land described in the deed of trust was a portion of said 200-acre tract; that at the date of the execution of said deed of trust a portion of said original purchase-money notes had been paid, the amount so paid, and the amount remaining due thereon at the time, plaintiff was unable to state. Said petition further alleged that said note sued on and said deed of trust mentioned were executed for the purpose of raising money to pay upon said original indebtedness, and with the understanding that the same should be so paid, and that said money was paid upon said indebtedness; that, the money received from the bank having been used to pay on said indebtedness, the plaintiff's bank thereby became subrogated to all of the rights, privileges, and benefits of the vendors in said deed, and the holders of said notes. Plaintiff further pleaded that, by virtue of the facts stated, it had a vendor's lien upon the land mentioned in the deed of trust, which it prayed might be established against the land mentioned and for order of sale, etc. The marriage of Lella E. Bonner, one of the grantors in the deed to one Dwyer was alleged, and it was further stated that on June 22, 1905, she departed this life testate, and that defendant E. L. Gladney had qualified as her administrator with the will annexed, and that as such administrator he has sold the land described in plaintiff's petition to the defendant, the John M. Bonner Memorial Home.

The petition further sued for rents in the sum of \$1,600, and prayed that this amount be offset against any amount defendants might recover on the purchase-money notes. The John M. Bonner Memorial Home answered by general demurrer and special exceptions, and general denial and special answers. The demurrers were overruled, and, as no assignments of error are predicated on the court's action in this respect, they need not be further mentioned. The special answers alleged the sale of 200 acres of land by Lella E. Bonner and William B. Bonner by their said attorney, John M. Bonner, on the 23d day of December, 1886, to John R. Smith, and the execution of the four purchase-money notes, each for the sum of \$625, of said date, and each payable to Lella E. Bonner or order with 12 per cent. interest per annum, due on the dates mentioned in

plaintiff's petition, and each providing for 10 per cent. attorney's fees, and further alleged that the vendor's lien was specially retained in said deed on the land therein conveyed until said notes were fully paid off and discharged, according to tenor and effect; that first note, due January 1, 1888, was paid off by said Smith, and that on or about the 26th day of October, 1901, said Smith had, by indorsement on the back of the remaining notes, acknowledged his indebtedness and liability thereon, and promised to pay the same on or about January 1, 1902, each note being indorsed interest paid to January 1, 1902; that there was on the back of each of said notes a further indorsement, as follows: "Farmersville, Texas, August 30th.—This note is canceled by reconveyance of 94.85 acres out of the 200 acres of land in the Abner Lee survey in Collin county, Texas, on which this note is a lien for the original purchase money. Lella Bonner Dwyer." The answer further alleged that on August 20, 1904, said John R. Smith, being unable to pay the above described three notes, on that date amounting to the sum of \$5,691.50, executed and delivered to Mrs. Lella Dwyer, the owner and holder of said three notes, a deed, conveying to her 94.85 acres of land, a part of the 200 acres originally conveyed by her and another to said Smith, which reconveyance was made in full satisfaction of the said sum of \$5,691.50, then due upon the three remaining purchase-money notes given for said original tract of 200 acres of land, the field notes of which 94.85-acre tract are set out in said answer. Said answer further alleged that at the date of the reconveyance from said Smith to said Dwyer of 94.85 acres of land that said tract of land so conveyed was of no greater value than the sum of \$5,691.50, the amount due on said note, and was, in fact, of less value, and that the said Mrs. Dwyer received from said Smith said reconveyance in good faith, without actual knowledge of any claim or lien claimed by plaintiff upon said land, and that said conveyance was received by her solely in satisfaction of her purchase-money notes. There were other pleadings by both parties; but it is unnecessary to set them out at this time. The defendant John R. Smith failed to answer, and a default judgment was rendered against him. The cause was submitted to the court without a jury, and a judgment was entered in favor of the plaintiff against John R. Smith for \$3,413.80, and foreclosure of its lien was decreed on the land mentioned in plaintiff's petition as against both defendants, John R. Smith and the John M. Bonner Memorial Home. Judgment was also entered in favor of the John M. Bonner Memorial Home against said Smith for \$5,489.25. The court adjudged a prior lien in favor of the John M. Bonner Memorial Home against said premises for only \$1,875.45, and gave the plaintiff bank a second lien for the full amount of its entire debt,

and gave the Bonner Memorial Home a second lien for the balance of its debt. E. L. Gladney, administrator, having filed a disclaimer, was dismissed from the suit. The John M. Bonner Memorial Home filed a motion for new trial, in which all of the errors assigned in this record were presented to the court, and which motion was overruled, and defendant excepted and gave notice of appeal to this court, and, having perfected its appeal, has assigned error.

The first assignment of error reads as follows: "Mrs. Dwyer, the original vendor, to whom the purchase-money notes were executed by Smith, and in which deed and notes the vendor's lien was retained, had the right to rescind in whole or in part, and to accept in payment of the remaining purchase money due, a reconveyance by Smith of all or any part of the land originally conveyed, and the court erred in not so holding." Under this assignment, the proposition is urged that Mrs. Dwyer, the original vendor, owner, and holder of all the vendor's lien notes executed by John R. Smith for the purchase money for the said 200 acres of land, had a legal right to accept in payment of said notes a reconveyance by said Smith to her of the 94.85 acres of land a part of the original 200-acre tract, said notes being secured by the vendor's lien on all of said land, and which were at the date of said reconveyance canceled and delivered to him. On December 23, 1886, Lelia Bonner and William B. Bonner, by their agent and attorney in fact, John M. Bonner, conveyed by their deed of that date to John R. Smith 200 acres of land in the Abner Lee survey in Collin county, Tex. The consideration for said conveyance was \$2,500, for which the said John R. Smith executed his four certain promissory notes of even date with said conveyance for \$625.00 each, due, respectively, January 1, 1888, January 1, 1889, January 1, 1890, and January 1, 1891. To secure the payment of said notes, a vendor's lien was retained in the deed of conveyance and acknowledged in each of said notes. On or about the 26th day of October, 1901, the defendant John R. Smith and Lelia B. Dwyer (née Bonner), who was the holder of said three unpaid purchase-money notes, had a settlement. By the terms of said settlement John R. Smith acknowledged that he was due upon each of said notes the sum of \$1,500, aggregating the sum of \$4,500. At the time of settlement John R. Smith renewed each of said notes by an indorsement on the back thereof, and it was also stipulated that from said date the notes were to draw interest at the rate of 6 per cent. per annum. The renewal of the said notes was not recorded, and plaintiff had no notice thereof, either actual or constructive. On December 26, 1901, defendant John R. Smith executed to plaintiff the note and deed of trust declared upon herein. Said deed of trust, though calling for 100 acres of land, actually

included in the description therein about 106 acres taken off of the south side of the 200 acres conveyed to John R. Smith by Lelia B. and William B. Bonner. It included about 84.25 acres of the land in controversy herein. This deed of trust was duly filed for record on the 7th day of January, 1902, and recorded on the 28th day of January, 1902.

After the execution of the deed of trust to plaintiff the said John R. Smith sold out of said 200-acre tract land as follows: To W. G. Lee, January 15, 1902, 84.35 acres for \$1,500; to J. H. Hutchins on December 19, 1902, 21.95 acres for \$768.25; to W. R. Hamilton on September 9, 1902, 3 acres for \$180; to W. R. Hamilton on April 29, 1904, about 1½ acres for \$90; to C. C. Tatum on December 22, 1904, about 14.48 acres, which was included in the field notes of a much larger tract of land, and the consideration cannot be determined. At the time of the execution of the deed of trust to plaintiff, defendant John R. Smith owned of the 200-acre tract and on which was a vendor's lien to secure the payment of the three purchase-money notes, exclusive of the land contained in said deed of trust and conveyed by it to plaintiff, land which on the 20th day of October, 1904, was of the value of \$3,831.80, and also a tract of 10.60 acres of the said 200-acre tract which the said Smith had on hand, and on said date reconveyed to the said Mrs. L. B. Dwyer in cancellation of the purchase-money notes, but not included in plaintiff's deed of trust. On October 26, 1901, John R. Smith conveyed to Mrs. L. B. Dwyer 94.85 acres of land out of the said 200-acre tract in cancellation and settlement of the three original purchase-money notes. This conveyance included 84.25 acres of the land covered by plaintiff's said deed of trust and the 10.60-acre tract of land mentioned above. Prior to this conveyance the said Mrs. Dwyer had both actual and constructive notice of plaintiff's rights under its said deed of trust. The money borrowed from the bank was borrowed to pay on the purchase-money notes given by Smith in payment of the 200 acres of land and on which they were a lien. The said Smith at the time he borrowed the money declared such to be his purpose to those from whom he obtained the loan, and to whom he gave the deed of trust. The said Smith sent the money thus obtained to the authorized agent of Mrs. Lelia B. Dwyer at New Orleans, with instructions to said agent for the money to be so applied, but, contrary to said instructions, the said agent applied the money to an unsecured debt due by him to the Bonners and Mrs. Dwyer. The land in controversy was at the time of the execution of plaintiff's deed of trust the homestead of the said John R. Smith.

The particular question raised by the first assignment and the proposition presented thereunder is: Can a vendor who has conveyed land by a deed, retaining a lien to secure the purchase money, take a reconveyance

of a part of the land from the vendee in part payment of the purchase money, and subsequently convey the part reconveyed to him to a third person, to the prejudice of one who had acquired an equitable interest in the land at the time of such reconveyance, which was known to the parties at the time? This question is answered in the negative in the opinion of *Burson v. Blackley*, 67 Tex. 5, 2 S. W. 688, where it is held that there can be no partial rescission of an entire contract to the prejudice of innocent third parties. There must be a total rescission or none at all. The reconveyance of the 94.85 acres to Mrs. Dwyer by John R. Smith and wife was an attempt at a partial rescission of an entire contract after plaintiff's right had intervened. Mrs. Dwyer, having permitted 90.23 acres of the 200 acres to be sold off without attempting to enforce her lien against the same, cannot now elect to rescind the contract as to the 94.85 acres after plaintiff's rights had been fixed by the recording of its deed of trust, nor can the John M. Bonner Memorial Home so elect to rescind a part only of the entire contract. Under the facts of this case, the result would be the same had there been an entire rescission of the contract by Mrs. Dwyer and Smith. The testimony showed that the plaintiff bank lent the defendant Smith the money mentioned in the notes sued on with the agreement and understanding between them that it should be applied on the vendor's lien notes held by Mrs. Dwyer; she and her agent having been instructed by John R. Smith to so apply the money borrowed from the plaintiff bank. Under these facts, the bank became subrogated pro tanto to the rights of Mrs. Dwyer, the owner of the prior vendor's lien for which the money loaned by the bank was to go in part payment. Smith testified that: "I borrowed this money from the bank, and so stated at the time that it was for the purpose of paying on these debts to Mrs. Dwyer, and I sent it to Judge Bonner to be applied on the purchase-money notes for this 200 acres of land, but he applied it to another purpose." Again, he says: "The money that I borrowed from the Collin County National Bank for which I executed this deed of trust I paid to John M. Bonner, agent and attorney in fact for Lelia E. and W. B. Bonner, and instructed him to credit same on the four \$625 purchase-money notes, but, contrary to said instructions, he placed it as a credit on some rent notes he had." *Bank v. Ackerman*, 70 Tex. 315, 8 S. W. 45; *Warhund et al. v. Merritt & Metcalf*, 60 Tex. 24; *Dillon v. Kauffman & Runge*, 58 Tex. 705; *Hicks v. Morris*, 57 Tex. 660. But it is contended that it is not shown that John M. Bonner, to whom John R. Smith sent the money borrowed from the bank, was authorized to receive the same and apply it as a credit on the purchase-money notes held by Mrs. Dwyer. He was at the time the agent

and attorney in fact of Mrs. Dwyer, and it seems had these notes in his possession. He was at the time of payment instructed by Smith to apply the money on these notes, but, instead of doing so, he applied it to other indebtedness which he held against Smith, for which it is not shown he had security. It is clear that the payor, Smith, had the right to have the payment applied to the original vendor's lien notes.

The court found that the land that should have been first subjected by Mrs. Dwyer to the payment of the said three purchase-money notes at the time she took a reconveyance from the said John R. Smith in payment of said notes was of the value of \$3,631.80. The debt of Mrs. Dwyer, in so far as the bank is concerned, amounted to \$5,489.25, which was a lien on 190.23 acres of the land. The difference between these amounts, being \$1,857.45, represents the amount that the said Mrs. Dwyer had the right to enforce as a first lien against the land in controversy. The plaintiff bank was given judgment against defendant John R. Smith for \$3,413.80, with interest at the rate of 10 per cent. per annum, together with a foreclosure of the lien given by its deed of trust on the land described in its petition, but said foreclosure is given on that portion of the land described in its deed of trust represented by the 84.23 acres of land mentioned in the pleadings, subject to a prior lien in favor of defendant, the John M. Bonner Memorial Home, for \$1,857.45. This was correct.

The court properly rendered judgment that the land conveyed by John R. Smith after the execution of the deed of trust and prior to the attempted rescission should be subjected to the payment of said purchase-money notes in the reverse order of its alienation. *Miller v. Rogers*, 49 Tex. 398.

Finding no error in the record, the judgment is affirmed.

SMITH v. FEARS.

(Court of Civil Appeals of Texas. Oct. 21, 1909. Rehearing Denied Nov. 25, 1909.)

1. BROKERS (§ 14*) — COMMISSIONS — CONTRACTS—CONSTRUCTION—"AMOUNT."

Plaintiff, a broker, wrote defendant, asking what he would take for his land, including the stock and a 5 per cent. commission, and defendant replied that: "\$22,250 your commission \$1,112.50 this amount will buy the place." Held, that the word "amount" referred to the total of the two sums mentioned by defendant; the word being defined by Webster as "the sum total of two or more particular sums or quantities, as the amount of 7 and 9 is 16."

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 18; Dec. Dig. § 14.*

For other definitions, see *Words and Phrases*, vol. 1, pp. 375-376.]

2. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR.

Where, under a contract as properly construed, plaintiff was not entitled to recover,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

error in the admission of testimony affecting such construction was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

3. BROKERS (§ 85*)—COMMISSIONS—ACTIONS—EVIDENCE.

In a broker's action for commissions, evidence that, to enable the purchasers to make the cash payment required, plaintiff agreed to lend them the amount of the commission claimed by him, was admissible on the issue whether plaintiff was a joint purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 106, 115; Dec. Dig. § 85.*]

4. BROKERS (§ 88*)—COMMISSIONS—ACTIONS—SUBMISSION TO JURY.

In an action by a land broker for commissions, evidence held to warrant submitting to the jury the question whether plaintiff was a joint purchaser.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 118, 128; Dec. Dig. § 88.*]

5. TRIAL (§ 187*)—PROVINCE OF COURT AND JURY—CREDIBILITY OF WITNESSES—WEIGHT OF TESTIMONY.

The credibility of witnesses and the weight to be given testimony are for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 414; Dec. Dig. § 187.*]

Appeal from District Court, Dallam County; J. N. Browning, Judge.

Action by W. W. Smith against J. W. Fears. Judgment for defendant, and plaintiff appeals. Affirmed.

Fears owned six sections of land in Dallam county, and certain cattle, horses, and farming implements. In 1906, through appellant, Smith, then a partner with Stalcup and Hyde under the firm name of the Panhandle Land & Investment Company, Fears "listed" the land and other property mentioned with said company to be sold by it on his account for \$20,000. Said company did not effect a sale of the property, and the authority given to it to sell same seems to have been revoked. Afterwards, in December, 1906, Fears authorized appellant Smith, who in the meantime, had withdrawn from said firm and was doing business as a real estate agent on his own account, to sell the land alone for \$19,000, agreeing to allow Smith to retain as compensation for his services in effecting a sale any sum he might obtain in excess of said sum of \$19,000. An exclusive right to sell the land was not conferred upon Smith. On the contrary, authority was conferred by Fears on other agents to effect a sale thereof, and he reserved as against such other agents and as against Smith a right to sell same himself. By virtue of the authority so conferred upon him, Smith did not make a sale of the land. For the purpose, he testified, of ascertaining from Fears the price at which he would sell the land, including the stock, etc., and a commission of 5 per cent. to himself, on January 19, 1907, Smith wrote a letter, shown by the record to have been lost at the time of the trial, to Fears, who on the day following replied as follows: "Wilkins, Okla., Jan. 20, 1907. Mr. W. W. Smith,

Dalhart, Texas—Dear Sir: Yours of 19th to hand, contents noted, will say nearly all of land stiff land, a small amount sandy, rather dark, tight land dark nearly all short grass about 165 head of cattle, twenty horses and mules, mules young 3 head. I spent \$150 since I saw you on the place, counting all \$22,250.00 your commission \$1112.50 this amount will buy the place; this is net the state \$1.00 on school land \$6.00 on patented land yet behind, horses, cattle and implements all go in the trade. R. R. 30 miles, post office and store 2 miles, no shop near. will give time so as to make the trade. There is another party on trade for one section; do not bar this party, first come first served. Resp. J. W. Fears." A few days after the letter copied above was written by Fears and received by Smith, Hyde called upon Fears for the purpose of buying the property, and (Hyde testified) was informed by Fears that, if he (Hyde) bought it, it would have to be through Smith. On the next day Hyde again called upon Fears, presenting to him the following letter from Smith: "W. W. Smith, Manager. Hyde & Stalcup, Attorneys. Panhandle Land & Investment Co. Large and Small Tracts, Farms and Ranches in the Panhandle of Texas. Dalhart, Texas, 1/26/07. J. W. Fears, Presented by Ed. C. Hyde—Dear Sir: Mr. Hyde has been connected with me on deal for your place. Go ahead and close up deal with Mr. Hyde, and I will approve deal. W. W. Smith." Negotiations following between Fears and Hyde resulted in a contract concluded January 26, 1907, whereby Fears, in consideration of \$22,500 to be paid to him, bound himself to sell and convey the land, stock, etc., to Stalcup. Fears having refused to pay Smith a commission he claimed to be entitled to, on the ground that in the person of Stalcup he had procured a purchaser of the property, Smith brought his suit, alleging "that it was through his efforts and agency alone" that the sale was made to Stalcup, and setting up as a contract entitling him to demand and receive the commission of \$1,112.50 claimed Fears' letter to him of January 20th, copied above. There was evidence showing that, while the contract as concluded on its face was for the purchase of the property by Stalcup alone, as a matter of fact he and Hyde and one Rouse jointly were the purchasers thereof; and in the trial court Fears contended, and on this appeal contends, that there was evidence sufficient to support a finding that Smith was a partner with Stalcup, Hyde, and Rouse in the purchase of the property. The court instructed the jury to find for Smith if they believed he was employed as a real estate broker by Fears to sell the property, and that in pursuance of such employment he procured in the person of Stalcup a purchaser thereof at the price and on the terms authorized by Fears; but to find for Fears, notwithstanding

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing they believed he had agreed to pay Smith a commission, if they also believed that, unknown to him (Fears), Smith was a purchaser jointly with Stalcup and others of the property. The trial was before a jury and resulted in a verdict in favor of Fears. From a judgment in accordance with the verdict, Smith prosecutes this appeal.

Del W. Harrington and Wallace & Lumpkins, for appellant. J. S. Bailey and John W. Veale, for appellee.

WILLSON, C. J. (after stating the facts as above). Appellant insists that the language of appellee's letter of January 20th to him was unambiguous, and authorized him to sell the property for \$22,250, and entitled him to demand and receive of appellee out of that sum a commission of \$1,112.50. We agree that appellee's meaning as evidenced by the language used by him in the letter is plain enough; but we do not agree with appellant in the interpretation he places on that language. At the time and before the letter was written, appellant was authorized to sell the land alone for \$19,000, exclusive of a commission to himself. He was to get compensation for his services in effecting a sale out of any sum in excess of \$19,000 for which he might sell the land. Ignoring appellee's testimony as to the contents of appellant's letter to him (to the effect that it was a request to state the price at which he would sell the land, cattle, etc., and also to state the amount appellant was to be entitled to as a commission if he effected a sale, to be shown to prospective purchasers to convince them that he, appellant, was "not taxing up two or three dollars on the acre and selling the land to them at a big profit"), and looking alone to appellant's testimony as to the contents of that letter, we learn that it was a request to appellee to "tell him (appellant) what he would take for his place, including the stock and a 5 per cent. commission." In reply appellee wrote that "\$22,250 your commission \$1,112.50 this amount will buy the place." What amount? Twenty-two thousand, two hundred and fifty dollars, or \$1,112.50, or the sum of both? The word "amount" is defined by Webster as "the sum total of two or more particular sums or quantities; as the amount of 7 and 9 is 16." Why should the word as used by Fears be held to refer to \$22,250 as the total of particular sums not mentioned, instead of to the total of the particular sums—\$22,250 and \$1,112.50—mentioned by him? If there is anything in the remainder of the language used in the letter, or in the circumstances surrounding the parties, suggesting a reason for such an interpretation of the meaning of the word as used by him, it has not been pointed out to us, and we have not found it in the record. It is clear to us that in construing appellee's meaning by the language he used the word "amount" should be held to refer to the total of the two sums mentioned by him. If it

should be, then it is clear that the authority given appellant was to sell the property for the amount of said two sums, to wit, for the sum of \$23,362.50.

So construing the letter, it is clear that appellant's first assignment of error, complaining of the action of the court in overruling his motion for a new trial on the ground that the verdict of the jury was contrary to the law and the evidence, in that the uncontroverted evidence showed that as a real estate broker he had been authorized by appellee to sell the property for \$22,250, including a commission to him of \$1,112.50, and had procured a purchaser thereof for that sum, is without merit.

Construing the language of the letter as we have suggested it should be construed, it is equally clear that, if the court erred in admitting as evidence the testimony complained of in the second, third, fourth, fifth, and sixth assignments, the error was harmless, because that testimony could have affected only the question as to the construction to be given the language of the letter.

The assignments mentioned therefore are overruled, as is also the seventh, complaining of the action of the court in permitting appellee, over appellant's objection thereto on the ground that it was immaterial and irrelevant, on cross-examination of appellant to prove that, to enable Stalcup and Hyde to make the cash payment on the property, he had agreed to loan Stalcup and Hyde the commission of \$1,112.50 he claimed to be entitled to as his compensation for selling the same. If we regarded the testimony as immaterial and irrelevant, we would be disinclined therefor to reverse the judgment, but we do not so regard it. We think it was material and relevant on the issue submitted to the jury as to whether appellant while acting as appellee's agent jointly with Stalcup and Hyde and Rouse was a purchaser of the property. Whether such an issue should have been submitted to the jury or not presents, we think, the only debatable question made by the assignments of error, and because we think that question must be determined against appellant we overrule not only said seventh, but also the eighth, assignment. January 26th appellant wrote appellee as follows: "Mr. Hyde has been connected with me on deal for your place. Go ahead and close up deal with Mr. Hyde, and I will approve deal." Appellant testified: "I really do not know who was interested in the purchase of that land besides Mr. Stalcup. * * * I was not interested in it at any time. I think Mr. Hyde spoke about being in it. * * * I did not make any trade with him. Hyde was to go up there, and represent Mr. Stalcup in drawing up the contract. It is a fact that Mr. Hyde went to Mr. Fears out there at my suggestion to carry out this contract and not to draw it up, but to carry it out. We spoke about drawing up the contract, and I told him I would

write Mr. Fears a letter that I had sold the land to Stalcup. * * * I explain that letter by saying Mr. Hyde was to close it up. He was just connected in the deal to write the contract. I suppose that's all the connection he had with it, just writing the contract. That's the connection he had with it, and he might have been in the buying of it. I mean to say that Mr. Hyde was only connected with me on the deal for that place in writing the contract. Well, as to buying with me, he had no connection in the world. I don't know whether he was part owner of the land or not. Q. Was he part owner of the commission with you? A. I don't know whether he was or not. It is not a fact that there was an agreement made between myself and Mr. Stalcup and Mr. Hyde that all three of us were to buy the land and my commission was to be a part of the purchase price. It is not a fact that when this man refused to let me have my commission that they let me out of any deal. * * * I was to loan the boys that \$1,112.50. I was going to loan it to them for 30 or 60 days. We had never agreed on any specific time. I don't remember whether they gave me any security at all. * * * I don't remember anything about the interest they were to pay. I said loan them some money. They gave me their note and secured it. * * * I had a connection with the deal to the extent that, after the deal was complete, I had a mortgage on the stock. I had that for money I had loaned them for this transaction. It was on January 26th. I think it was after the deal was closed up. I think it was one or two days after the deal was closed up. I think it was one or two days after the deal—a few days after the deal was closed—that I took the mortgage on the stock. I don't remember just exactly the date. I loaned them some money. They paid that money that I loaned them on this land. I think it was \$2,000 that I loaned them. It seems to me like it was that." Stalcup testified that one Rouse jointly with himself and Hyde were the purchasers of the land. On his cross-examination by appellant appellee testified that Rouse told him that appellant also was one of the purchasers, and on his re-examination without objection testified: "Rouse told me that Smith was a partner with these people in this deal. He told me that after the contract was signed and I went home. I do not remember just the time that he told me—the date. It was just after the contract was completed. It was after the money had been delivered down here—in April some time. Myself and my wife and Mr. Rouse was talking, and Mr. Rouse told me that Smith was in on the purchase of this land." We think the testimony we have referred to tended to show that appellant jointly with Stalcup, Hyde, and Rouse was a purchaser of the property, and that the court did not err in submitting

to the jury a question as to whether he was or not. The fact that the testimony referred to and the inferences to be drawn from it were rebutted by the testimony of appellant, Stalcup and Hyde denying that appellant was such a purchaser, furnished no reason for refusing to submit such an issue to the jury. The credibility of the witnesses and the weight to be given to the testimony presented questions for the jury, and not for the court, to determine.

The judgment is affirmed.

SLEDGE v. DENTON.

(Court of Civil Appeals of Texas. Nov. 6, 1909.)

JUDGMENT (§ 443*)—FRAUD—VACATION—EQUITY—PLEA.

Plaintiff sued defendant for a firm accounting, shortly after which defendant became a bankrupt, and plaintiff was restrained from continuing the suit, and the remaining assets of the firm were delivered to the receiver. An account was thereafter had, in which it was found that defendant was not indebted to plaintiff, but the reverse. Plaintiff procured an order requiring the receiver to turn over the balance of the partnership assets to him for administration, and entered into a stipulation settling all claims arising out of the partnership so far as defendant was concerned. Defendant was thereupon advised by his attorneys that the action for accounting would be dismissed, but plaintiff secured a dissolution of the injunction without notice, and, also without notice, secured a judgment in that action by false testimony that defendant was indebted to him for \$5,694.65, of which defendant acquired no knowledge until after the term at which the judgment was recovered. Held, that a petition by defendant alleging such facts stated a cause of action in equity for vacation of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 838; Dec. Dig. § 443.*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Action by W. W. Sledge against T. H. Denton. From an order sustaining a demurrer to the petition and dismissing the action, plaintiff appeals. Reversed and remanded.

Smith & Lattimore and S. C. Padelford, for appellant. Phillips & Bledsoe and J. W. Still, for appellee.

RAINEY, C. J. This is an original action by Sledge against Denton to set aside and annul a judgment of the district court of Johnson county, wherein Denton recovered against Sledge. A general demurrer to plaintiff's petition was sustained and the action dismissed, and Sledge appeals.

The substance of plaintiff's petition, taken from appellant's brief, with slight changes, is as follows: That in the year 1896, plaintiff and defendant, under the firm name of Denton & Sledge, entered into a copartnership for the purpose of conducting a mercantile business in the town of Cresson, Tex.;

that plaintiff owned a one-fourth interest, and the defendant a three-fourths interest in said copartnership concern, and that the exclusive management of the business of said concern was turned over to plaintiff, and, in addition to his one-fourth of the profits, he was to receive \$50 per month out of said concern, and that the defendant was to receive three-fourths of the profits of the said concern; that this copartnership continued until the 2d day of October, 1902, when the stock of goods and merchandise and business building owned and occupied by the firm were consumed by fire, and that on said last-mentioned day and date the said firm was dissolved; that after the firm was dissolved, the plaintiff engaged in another business in his individual capacity, which he conducted in his individual capacity, the said firm having no interest in said business, and that the plaintiff proceeded, as best he could after the dissolution of said firm, to wind up the same, and to satisfy all of the indebtedness of said concern; that the said firm owed indebtedness to the amount of about \$12,996.45, and that the plaintiff paid off and satisfied of said amount the sum of \$11,593.28, and that there was remaining in his hands on or about the — day of May, 1903, the sum of \$2,300 of assets still belonging to the firm, consisting of choses in action, etc., as is shown fully in plaintiff's pleadings; that on or about the 13th day of June, 1903, the defendant, T. H. Denton, instituted suit in the district court of Johnson county, Tex., against appellant, W. W. Sledge, for a settlement of said copartnership affairs. The original petition filed in this case being fully shown by copy of same, marked "Exhibit A," and made a part of said amended original petition, and shown in said petition of dissolution, the defendant in this case, and plaintiff in that, prayed for the appointment of a receiver to take possession of, and administer all of, the copartnership effects of said firm of Denton & Sledge, which receiver was appointed and qualified, and that the plaintiff in this case, W. W. Sledge, turned over to said Fred T. Vickers all of the remaining assets of the said firm, which he had in his possession, amounting to the sum of \$2,300; that the plaintiff in this case had paid out of his separate funds about \$2,368.34 of the indebtedness of said concern, and that he used only \$9,224.44 of the assets of the said firm in paying off and satisfying said firm's indebtedness of \$11,593.28—he having paid out of his own separate funds \$2,368.34 of said indebtedness—that is, the plaintiff's petition showed that he had in his possession only \$11,224.44 at the time of the dissolution of said firm, and that he accounted for every cent of these assets, in that he paid \$9,224.44 on the indebtedness of the firm, and turned the remainder of \$2,300 over to the receiver appointed by the district court in the suit brought by the defendant against plaintiff in this case for a

settlement of the said business of said concern, and that in addition plaintiff had paid out \$2,368.34 of his individual money in settlement of the debts of the firm—thus showing that the firm was owing the plaintiff in this case said sum, and that the plaintiff did not owe the said concern one cent.

On the 21st day of December, 1903, the plaintiff, conducting his own private business as stated above, filed a petition for voluntary bankruptcy in the United States District Court of the Northern District of Texas, which court made an order on said day and date adjudging plaintiff a bankrupt, and in said bankruptcy proceedings granted and entered an order enjoining and restraining the defendant herein, and his agents and attorneys, and the said receiver mentioned above, from proceeding further with said suit filed by the defendant and against the plaintiff in the district court of Johnson county, Tex., notice of which injunction was on the 23d day of December, 1903, duly and legally served upon the defendant, which said injunction restrained the defendant, his agents and attorneys, and the receiver from further proceeding with said suit, which the defendant, Sledge, had instituted against the plaintiff, Denton, in the district court of Johnson county, Tex., and the federal court further appointed one Marshall Spoonst as receiver in bankruptcy in the bankruptcy proceedings, with power to take charge of all the property, in which the plaintiff, Sledge, had an interest; that on the 7th day of January, 1904, the receiver Fred Vickers, with full knowledge of the defendant and his attorneys, made a report to the district court of Johnson county, Tex., in said suit therein pending, showing that he had paid debts of said firm to the amount of \$1,400; that he had collected \$2,300 in money, and that he turned over to the federal receiver all the balance of the copartnership assets, notes, accounts, etc., including \$625 in money, all the assets aggregating about \$8,000, and that the said bankruptcy court appointed J. W. Stitt, one of the defendant's attorneys in this case, trustee in bankruptcy of said bankrupt estate of the plaintiff, and that all of the bankrupt estate, including the said copartnership effects, were turned over to, and placed in the hands of said J. W. Stitt, together with all of the property of every kind whatsoever, including notes, accounts, papers, books, real estate, moneys, copy of inventory, and all of the evidence of debt belonging to said copartnership, which had come into the possession of the receiver Vickers, all of which was fully known to the defendant and his attorneys, and concurred in without objection and agreed to; that after all of the effects, books, and accounts and inventories, and property had thus been turned over to J. W. Stitt, who was trustee in bankruptcy, and also one of the attorneys for the defendant, T. H. Denton, in this case, the plaintiff's attorney, and the defendant, T. H. Denton, and his two attorneys, R. F. Phil-

lips and J. W. Stitt, and the receiver Vickers, met by appointment in Ft. Worth, Tex., in January or February, 1904, and went over all of the copartnership accounts, statements, etc., and that it was discovered, and all of said parties arrived at the conclusion that the plaintiff, W. W. Sledge, was not indebted to the defendant, T. H. Denton, in any amount whatsoever, either on a copartnership settlement, or otherwise, but that the defendant, Denton, was indebted to the plaintiff, Sledge, and that this conclusion was arrived at after a full investigation of all the accounts and evidence of indebtedness between the plaintiff and the defendant, and after all of the books and inventories of the firm had been examined by said parties, and that thereafter on another occasion the said Phillips again made another examination of said books, etc., and again stated to the said Browning, the attorney of the plaintiff, that the plaintiff was not indebted to the defendant in any amount, and that in a proceeding in bankruptcy the said Phillips fully and exhaustively examined the plaintiff, W. W. Sledge, as to said account, and after said examination, and after said accounting it was discovered by said parties that plaintiff was not indebted to the defendant in any amount; that the said R. S. Phillips was fully authorized by the defendant, T. H. Denton, to make said investigation, and settlement referred to above, and that the said attorneys of the plaintiff were authorized to adjust said account and to make said settlement; that the said Phillips in said settlement stated to the attorney of the plaintiff that the plaintiff did not owe the defendant anything on an accounting, and that a proper appropriation of all the funds and effects, which had come into the plaintiff's hands had been made by him, and that nothing wrong was discovered in, or shown by, said investigation, and that he found no evidence of fact supporting or maintaining the said suit, which he as the attorney of Denton had instituted in the district court of Johnson county, Tex., against the plaintiff, Sledge, and that he had brought said suit in Johnson county without an opportunity to investigate, and for the purpose only of ascertaining the status of the said copartnership; that the defendant, about April 25, 1904, made an application in said bankruptcy court and proceeding for authority to take into his own possession and administer all of the copartnership notes, accounts, effects, and other property of the firm of Denton & Sledge, which application was on May 12, 1904, granted by said court, and the said J. W. Stitt, trustee in bankruptcy, was ordered to turn over and deliver, and did turn over and deliver to the defendant, Denton, all of the property, effects, etc., of said firm, aggregating the sum of \$7,874.85, as shown by report of said trustee; that in order to settle all controversy between plaintiff and the defendant in regard to a copartnership settlement between them, and in regard to the

matters and claims set up in Denton's petition in the case brought by him against the plaintiff in this case in the district court of Johnson county, Tex., and in order that the plaintiff might not be put to any other and further trouble or expense in regard to said copartnership controversy in said suit, they on the 2d day of September, 1904, made and entered into a contract of settlement, by the terms of which the plaintiff transferred and released unto the defendant all of his property, both individual and copartnership, except his exemptions, upon the consideration that the defendant account merely to the plaintiff's creditors for whatever amount they might be entitled to receive out of the copartnership property, and release unto the defendant any residue of said property of every kind and character which might be left in the defendant's hands after paying all of the debts of the firm of Denton & Sledge, including any due the defendant, T. H. Denton; that said agreement was executed for the purpose of fully settling the copartnership affairs between the plaintiff and the defendant, and that the same did settle said copartnership affairs; that said agreement was made between the attorney of the plaintiff and the attorney of the defendant, who were authorized to make the same, the plaintiff at said time being in Ada, Okl., and that plaintiff's attorney wrote him that the said matters involved in said suit had been fully settled, and that by reason of said agreement of controversy between plaintiff and defendant all claims between plaintiff and defendant were fully settled; that subsequent to the making of the above the defendant, Denton, had sworn to and presented a claim in the bankruptcy court against the plaintiff, W. W. Sledge, in the bankruptcy proceedings for the amount of \$635, which was by the referee in bankruptcy disallowed, and that after this, the above investigation and agreements of settlement were made, and that after said agreement of settlement had been made, the defendant, T. H. Denton, collected \$1,072.99 of copartnership money, and in accordance with said agreement paid to J. W. Stitt, one-fourth thereof, to wit, \$268.24, this being done on the 18th day of May, 1905, and swore that the said \$268.24 was the property of the estate of W. W. Sledge, bankrupt, and filed said affidavit in the bankruptcy court, and that thereafter the defendant further recognized and admitted that under said agreement of settlement the plaintiff was not indebted to him in any amount arising out of said copartnership transaction, and that he did not intend and would not procure any further claim arising out of said firm business against the plaintiff, and that said suit in the district court of Johnson county, Tex., had been, or would be, abandoned, and that the defendant, Denton, on or about the 20th day of May, purchased from J. W. Stitt, trustee in bankruptcy, plaintiff's one-fourth interest in certain notes

and accounts for \$125, and paid same into said bankruptcy court, and also purchased plaintiff's one-fourth interest in real estate of said firm at and for \$132.50 at a bankrupt sale, and paid same to the trustee in bankruptcy; that all of the above acts of the plaintiff were matters of record in said bankruptcy court, and were known to the plaintiff and his attorneys, and that the defendant in all of the ways mentioned above caused the plaintiff to believe he would not insist on any amount as due him, and that the suit pending in the district court of Johnson county, Tex., would be dismissed and abandoned, and was abandoned, and that the plaintiff's attorneys, by the said agreements and statements and actions of the defendant, Denton, were led to believe, and did believe, that the said suit had been abandoned and would not be further prosecuted; that shortly after the plaintiff was declared a bankrupt, he removed from Texas to Ada, Okl., and has since resided there, all of which was known to the defendant, Denton, and his attorneys; that by reason of the said letter written to the plaintiff by his attorney J. G. Browning he firmly believed that the said suit in the district court of Johnson county, Tex., of Denton v. Sledge was abandoned and dismissed, and that from all of the agreements and settlements and the actions of the defendant, Denton, and his attorneys the attorneys of the plaintiff, Sledge, were led to believe, and did believe and relied upon, the fact that the said suit in Johnson county, Tex., No. 5,253, had been abandoned and dismissed; that the defendant, Denton, through his attorney J. W. Stitt, without any notice whatsoever to the plaintiff and his attorneys, in May, 1905, made an application to Judge Meek in the state of Colorado for a dissolution of said injunction, and had the order restraining the defendant and his attorney from prosecuting the suit in Johnson county, Tex., dissolved; that the said application was made by the attorneys of the defendant in a foreign state, without notice to or knowledge of the plaintiff, and that the said order was not entered of record, but was made on a separate piece of paper, and filed away with disposed-of papers, and that neither the plaintiff nor his attorneys had any knowledge or notice that the said application to dissolve said injunction would be or was made, and that the said injunction was dissolved; that the plaintiff had no attorney in Johnson county, Tex., and that the attorneys for the plaintiff, and J. W. Stitt, the attorney for the defendant, resided in Ft. Worth, Tex., and had direct telephonic communication the one with the other, and that the said injunction was fraudulently and surreptitiously dissolved by the said Denton and his attorneys, and that they amended the petition in the case No. 5,253 in the district court of Johnson county, Tex., and, without any knowledge or notice whatsoever to the plaintiff and his attor-

neys, the plaintiff and his attorneys having been led to believe by the defendant and his attorneys that all of the matters involved in the suit in the district court of Johnson county, Tex., had been settled, that the said suit was, or would be, dismissed and would be no further prosecuted, the defendant, Denton, and his attorneys had said suit called up in the district court of Johnson county, Tex., and upon perjured testimony procured the district court of Johnson county, Tex., on the 13th day of May, 1907, to render a judgment against the plaintiff for the sum of \$5,694.67; that said suit was rendered upon perjured testimony, and that the said Denton in the trial of said suit swore that the plaintiff was indebted to him in said sum of \$5,694.65, which was false, the plaintiff at that time not being indebted to the said Denton in any amount whatsoever; that the said suit was procured by fraud, and upon false and perjured testimony, the petition setting forth therein all of the testimony upon which said judgment was obtained was false and perjured—that is, plaintiff's petition showed that the defendant and his attorneys knew that the plaintiff was not indebted to him in any amount for which the suit in Johnson county was brought, and in which the said judgment was recovered, and he presented a claim against the plaintiff in the court of bankruptcy, which was disallowed, which order of disallowance was still in full force and effect—and that the injunction was wrongfully and fraudulently caused to dissolve, and, without any knowledge or notice whatsoever to the plaintiff and his attorneys that the said suit, after having been settled, would be further prosecuted, the defendant and his attorneys fraudulently procured said judgment for said amount in said suit in the district court of Johnson county, Tex., upon false and perjured testimony, and that if plaintiff and his attorneys had known or suspected that said suit would be further prosecuted, they would and could have defeated the same by full and legal testimony.

All of the above is fully set forth, and all of the facts specifically alleged showing that the matters involved in the suit brought by Sledge against Denton in the district court of Johnson county, Tex., had been settled, and satisfied by an agreement between plaintiff and the defendant long prior to the recovery of the said judgment, and that the defendant admitted that he had no cause of action against the plaintiff by affidavit and record made in the bankruptcy court, and that by the agreements and settlements and actions of the defendant and his attorneys, the plaintiff and his attorneys believed, and were authorized in believing, that the said suit in Johnson county, Tex., would not be prosecuted and was abandoned, and that the defendant and his attorneys, for the purpose of obtaining a fraudulent judgment against the plaintiff, without any notice to

the plaintiff and his attorneys, had said injunction dissolved, and amended the said petition in said cause, and procured said judgment upon false and perjured testimony. The plaintiff further pleaded that neither he nor his attorneys knew anything at all about the rendition of said judgment until long after the adjournment of the term of court at which said judgment was rendered, and that plaintiff was deprived of making a motion for a new trial during the term of court, and, there being no statement of facts, and the plaintiff not having had any opportunity to controvert the perjured testimony, the only relief that plaintiff has is and was by this proceeding in equity. The defendant prayed that the judgment be set aside and annulled, and that the defendant, Sledge, and his agents and attorneys be enjoined from enforcing said judgment.

The allegations of plaintiff's petition stated facts sufficient to show a cause of action, and show sufficient grounds to justify the plaintiff in believing that the suit of Denton v. Sledge would not be prosecuted, but be abandoned, and he was thereby excused from not appearing on the trial and making his defense which the petition alleges to exist. The court therefore erred in sustaining the general demurrer, and the judgment is reversed, and cause remanded for trial on its merits.

Reversed and remanded.

McKAY et al. v. McKINNON et al.†

(Court of Civil Appeals of Texas. Nov. 3, 1909.
On Motion for Rehearing, Nov. 24, 1909.)

1. PRINCIPAL AND AGENT (§ 155*)—SALE OF LAND—CONTRACT ENFORCEABLE BY PURCHASER.

Where the agent of the vendor had authority to sell only for cash, a contract of sale for part cash with deferred payments which was repudiated by the vendor is not enforceable by the vendee.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 577; Dec. Dig. § 155.*]

On Motion for Rehearing.

2. PRINCIPAL AND AGENT (§ 123*)—POWERS OF AGENT—EVIDENCE.

Evidence held to show that defendant's agent had no authority to contract for the sale of land for part cash with deferred payments.

[Ed. Note.—For other cases, see Principal and Agent, Dec. Dig. § 123.*]

3. PRINCIPAL AND AGENT (§ 103*)—POWERS OF AGENT—SALE OF LAND.

An agent for the sale of land has no authority to sell on credit unless specially authorized to do so.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 280; Dec. Dig. § 103.*]

4. APPEAL AND ERROR (§ 843*) — REVIEW — MATTERS NOT NECESSARY TO BE DETERMINED.

Where the contract in suit cannot be enforced because defendant's agent had no au-

thority to make it, whether it should be deemed an option or not need not be determined.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8331-8341; Dec. Dig. § 843.*]

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by A. N. McKay and others against A. McKinnon and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

S. Talliaferro, G. L. Teat, and Brockman, Kahn & Newman, for appellants. Stewart, Stewart & Lockett, Campbell & Wren, John Archer Read, Bryan & McRae, and Vasmer & Briant, for appellees.

NEILL, J. This suit was brought by appellants against appellees to enforce specific performance of the alleged contract, copied below in our conclusions of fact, claimed by appellants to have been made by McKinnon to McKay for the sale of certain lands therein mentioned.

After a general denial, the defendant McKinnon pleaded specially: That he did not enter into the alleged contract, nor authorize any one else to make it for him, and that it is not his contract, nor the contract of any authorized agent acting for him. That plaintiff McKay claims to have bought the land from W. T. O'Connor, who pretended to act as the agent of defendant, and claims that O'Connor executed the contract sued on as defendant's agent. That O'Connor was not authorized to act as his agent at the time he pretended to act, nor was he authorized at any time to sell the land at the time and on the terms he is averred to have sold it to said plaintiff. That O'Connor never had any power to act as attorney in fact for him, nor power to sell the land in question at the time and at the price it is claimed he did sell. That the only dealings defendant ever had with O'Connor was merely as a real estate agent and broker with authority to sell the land at a certain price, which was not the price he sold for. That he never at any time conferred any authority upon O'Connor to execute a contract of sale; but that what dealings defendant had with him (which had terminated long before the time he is alleged to have sold to plaintiff) were to produce a purchaser for said land at a price different from the price (it being more) O'Connor is claimed to have sold to plaintiff. That the contract claimed by plaintiff was for the sale of land, and was not in writing signed by the defendant, nor by any authorized agent of defendant, and is contrary to the statute of frauds, which statute is specially pleaded by defendant.

The other defendants, John S. Stewart, P. H. Bryant, G. A. Brandt, F. E. Rue, and W. E. Humphreville, appellees herein, who

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

acquired interests in the land after specially pleading certain matters, which we deem unnecessary to mention, adopted the answer of their codefendant, McKinnon, and by a cross-bill against plaintiffs and McKay claimed the land as their own, and asked judgment therefor.

The case was tried before a jury, who rendered a verdict in favor of the defendants in obedience to the peremptory instruction of the court.

Conclusions of Fact.

This is the writing sued on: "Houston, Texas, September 7, 1907. Received of A. N. McKay \$200, being in part payment of purchase money on 245 acres of land belonging to A. McKinnon, near La Porte, in Harris county, Texas, located in the Scott survey. The consideration agreed upon is \$2,200, half cash on the delivery of deed and satisfactory abstract, the remaining half to be paid in one and two years, equal annual payments at the rate of 7% per annum. If the title proves to be good and satisfactory, then the said McKay is to take his deed and make his payment within 30 days from the date hereof, and the said McKinnon is to furnish an abstract of title showing good title and deliver the deed within that time. If for any reason the said McKinnon does not comply with the contract within 30 days, then the said McKay is not bound hereby to make the payments as specified. If the said McKay refuses to accept deed when tendered with an abstract showing satisfactory title, then the \$200 deposited as earnest money in this case shall be forfeited by him. W. T. O'Connor, Agent, A. McKinnon. Witness: Effie Keith."

Viewing the evidence in the light most favorable to appellants, we conclude that it was sufficient to raise the issue as to whether O'Connor, who was a real estate broker, was authorized, as the agent of the defendant McKinnon, who was the owner of the land, to effect a sale thereof, for the latter for the sum of \$1,700. But there is no evidence tending to show that O'Connor had any authority whatever to effect a sale of the premises upon any other terms than cash, or to confer upon any one an option to purchase the land upon any terms whatsoever.

Conclusions of Law.

We conclude, in view of the facts found, that the writing copied in the foregoing conclusions will not support plaintiff's action for a specific performance of a contract to convey land (*J. B. Walkins Land Co. v. Campbell*, 100 Tex. 542, 101 S. W. 1079; *Colvin v. Blanchard* [Sup.] 106 S. W. 323; *Donnan v. Adams*, 30 Tex. Civ. App. 615, 71 S. W. 581), and that, therefore, the court did not err in peremptorily instructing a verdict for the defendants.

Affirmed.

On Motion for Rehearing.

It is insisted in this motion that we erred in holding in the original opinion that there was no evidence tending to show that O'Connor had any authority whatever to effect the sale upon any other terms than cash. Here is the evidence upon which appellants rely to show that we erred in such finding, and that O'Connor was empowered to sell upon other terms, and to prove that, as McKinnon's agent, he was authorized to make the contract upon which this action is based: "Mrs. W. F. Cheek testified on behalf of the plaintiffs that she worked in the office of W. T. O'Connor during the few months prior to the making of the sale to the appellants in this case, as well as for several years previous, and was working for him at the time the sale was made; that O'Connor had had this land listed with him for something like three years, and that for a month or two before the sale of the land to appellants O'Connor had a deal on with one of the customers of an associate real estate firm, under the style of Clark & Gore, the customer being one W. S. Holmes; that the proposed sale to Holmes fell through; that McKinnon came into O'Connor's office shortly afterwards very much disappointed at the failure of the sale to Holmes, and said to O'Connor: 'I must sell that land. I want to sell it.' I don't know exactly what the judge said, but he said: 'I want to sell it. I need the money.' And he said: 'I will be willing to take \$1,700; and, if not that, \$1,600,' in a careless way, 'to get rid of it.' He said he had to sell it; he needed the money. Before that time he told Judge O'Connor, if he got a buyer, make out a contract, sign it, and send it to him, and he would send him the deed. This happened in the month of August (1907). With reference to the Clark & Gore matter, that sale was not on at that time. That was declared off. It was at the failure of that deal that McKinnon came into the office. He came in several times during that sale. It had not gone through, and, when it had not, he appeared anxious to sell. He said something to Judge O'Connor with reference to closing up and signing contracts if he should get a purchaser. In a conversation with the judge, he told him, he said: 'If you sell that land,' he said, 'I must get rid of it, because I need the money.' But I cannot state exactly when it was, but he gave the judge authority to sell it, and told him to sign up the contract and send it to him, and anything he did would be all right with him. That conversation and authorization was not after the Clark & Gore matter had fallen through. It was before. I heard McKinnon tell the judge. He was standing in the middle of the floor, and there was some gentleman with him, Mr. ———, and he said, 'Judge, I want you to sell that land,' and the gentleman said some-

thing about the price being too high, and he said: 'Well, if you can't get that, sell it for less, get \$1,700, \$1,600, if you can't get more. I have to have the money. I need it.' That conversation was right after the Clark & Gore failure to sell the land; that was in the month of August, or close to September. I do not remember the specific date it was. I know Mr. J. W. Oman. He did office at the same place. I know whether he was about there when the conversation was had. He was in the room waiting for the judge. I was in the office on the 7th of September."

This evidence is copied from the statement subjoined to the proposition under the fourth assignment of error in appellants' brief; and we think presents the evidence upon the question in the most favorable light that can be reflected from the record. After pondering over it and considering it as best we can, we are unable to reach the conclusion that it is sufficient to warrant a jury to find that McKinnon authorized O'Connor to make a contract of sale such as is set out in our conclusions of fact, or one upon any other terms than for a cash consideration. It is elementary that an agent to sell has no authority to sell on a credit unless specially authorized to do so by his principal. Authority not having been conferred by McKinnon upon O'Connor to sell upon other terms than cash, and the former having repudiated the written contract sued upon, we thought it sufficient to say in our original opinion that McKay could not enforce its specific performance.

Appellants insist that we further decide whether or not the contract was simply an option. Since a contract upon a sufficient consideration conferring upon one the right to purchase property upon specific terms within a definite period of time can, upon the purchaser's exercising his right to buy in accordance with the terms of such contract, be specifically enforced, we deem the question as to whether the writing sued on was an option or not purely academic; for, whether it is deemed an option or not, the contract cannot be enforced because O'Connor was not authorized by his principal to sell the land upon any other terms than for a cash consideration.

The motion is overruled.

MEDLIN MILLING CO. v. BOUTWELL.
(Court of Civil Appeals of Texas. Oct. 30, 1909.
Rehearing Denied Nov. 20, 1909.)

1. MASTER AND SERVANT (§ 302*)—ASSAULT BY SERVANT—INITIATION OF NEW EMPLOYÉ—LIABILITY OF MASTER.

A master, though a corporation, authorizes an assault on a new employé by old employés, and so is liable for the injury, where it is in the course of an "initiation" of the new employé against his resistance by the old employés, by

laying him across a barrel and applying a paddle, in accordance with a custom which had long existed in the establishment with the knowledge and acquiescence of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1221; Dec. Dig. § 302.*]

2. CORPORATIONS (§ 493*)—LIABILITY FOR TORT.

A corporation is liable for an assault authorized by it.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1904; Dec. Dig. § 493.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by E. Boutwell against the Medlin Milling Company. Judgment for plaintiff. Defendant appeals. Affirmed.

See, also, 108 S. W. 1025.

J. T. Jones, for appellant. J. P. Copeland, J. P. Yates, and H. L. Carpenter, for appellee.

RAINEY, C. J. This is an appeal from a judgment recovered by appellee against appellant in a suit brought for damages for the illegal whipping and injury to appellee, committed by appellant's servants under its authority and permission. A general demurrer to plaintiff's petition was overruled, exception duly reserved, and this is assigned as error.

This is the second appeal of this case. On a former trial the lower court sustained the demurrer to the action, and dismissed the case. On appeal the judgment was reversed and the cause remanded for a trial on the merits; this court holding that the petition showed grounds for a recovery. The overruling of the demurrer is assigned as error, and presented for our consideration. We are still of the opinion that our former holding is correct, and this assignment is overruled. See *Boutwell v. Medlin Milling Co.*, 108 S. W. 1025. The evidence shows that appellee was employed as a laborer in appellant's milling plant, and, while he was engaged in the performance of his duties as such laborer, he was set upon by a number of others of appellant's employes for the purpose of "initiating" him, as they termed it. The "initiation" was performed by the administration of a paddle to the person by such employes. Appellee, being unwilling to receive the "initiation," resisted, and in the attempt of the other employes to enforce it over his resistance he was severely injured, to the extent of the amount of damages assessed by the jury. This manner of "initiation" of new employes had existed among the mill employes for quite a period and none escaped, except those who by superior force were able to successfully resist; the custom being to always send a force sufficient to overpower those who made resistance. This custom of "initiation" was known to all parties connected with the mill; some 15 or 16 persons having received it as they entered the service of the mill, and it is evident this custom was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

known and acquiesced in by the management of the mill, as it was shown that the president and manager had been so initiated.

We think the decision of this case depends upon the proposition of appellant that the verdict and judgment are contrary to the law and evidence, for, if the evidence shows liability on the part of appellant, no error is shown by the charge of the court; nor is error shown by the refusal to give requested charges as complained of. No corporation is invested by law with authority to commit a tort, and to make it liable for a wrong it must have authorized the commission of same, or the wrong must have been committed by an agent while in the performance of some duty within the scope of the authority vested in him. The act of whipping the appellee contrary to his will by the servants of appellant was an assault and battery, which was unlawful, although it may have been done to afford amusement for the participants. It is the duty of the master to use reasonable care for the safety of a servant while engaged in the performance of the master's business. Here the appellant, it seems, was doing nothing to protect appellee from harm, but, on the other hand, had for a long time permitted the old employees to "initiate" new employees by laying them across a barrel and applying a paddle. This custom had continued so long with the knowledge and acquiescence of the management that it had become a rule of the establishment, and the assault on appellee must be considered as having been authorized by the appellant, and the act being authorized by the corporation, it is liable for the damages sustained in its performance, though the damage be greater than anticipated in undertaking the wrongful act. The following authorities sustain the principle that a corporation is liable for an assault authorized by it: 1 Cooley on Torts (8d Ed.) § 136; 1 Cook, Corp. § 150; 7 Am. & Eng. Ency. Law (2d Ed.) 824, 825.

Believing the evidence shows liability, and no error being shown in the trial, the judgment is affirmed.

PLOTNER & STODDARD v. MARKHAM WAREHOUSE & ELEVATOR CO.

(Court of Civil Appeals of Texas. Oct. 27, 1900.
Rehearing Denied Nov. 24, 1909.)

1. SALES (§ 181*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

Plaintiffs contracted to buy for defendants a quantity of "Deering" binding twine, and delivered twine manufactured by the Deering Manufacturing Company branded "Superior." It appeared that the company also manufactured another brand of twine known as "Deering," and, in an action for the price, the petition did not allege that the twine bought for defendants was to be an article branded by the manufacturers, "Deering," but the answer alleged that, shortly after the twine was in defendants'

warehouse, a person acting for them examined it, and found that it was not "Deering" twine, but was branded "Superior," a different brand than that ordered by defendants, that they took immediate steps to determine whether "Superior" twine was in fact "Deering" twine, and learned that such was not the fact, but that "Superior" twine was a cheaper grade, which allegation was sustained by evidence. Held, to show that the mere brand was not deemed by defendants as the essence of the contract, but that the grade or quality was, and evidence was admissible to show that the twine delivered and branded "Superior" was as good as that branded "Deering," and was sold to the trade as such.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 181.*]

2. SALES (§ 364*)—ACTIONS—INSTRUCTIONS.

Defendants having by their pleading and evidence shown that their own construction of the contract was that the twine ordered was satisfied by a grade equal to that ordinarily marked "Deering," and that the brand was not the test of their obligation under the contract, they could not complain of charges that if plaintiff delivered a brand of twine different than the brand contracted for, but of an equally good quality, and if quality and not the brand was the essence of the contract, and if defendants did not within a reasonable time after discovering the difference in brand return the twine to plaintiff, plaintiff should recover, but if the brand, and not the quality, was the essence of the contract, and plaintiff did not comply with the contract, defendant should recover, and that the twine sold to defendants was a different brand from the ordinary "Deering" twine, which was the subject of the contract, but if it was as good in quality as the ordinary "Deering," and defendants received it and used a portion of it, and failed to return any of it to plaintiff, defendants would be liable for the price thereof; the charges being favorable to defendants.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.*]

3. SALES (§ 364*)—ACTIONS—REFUSAL OF REQUESTS.

For the same reason a requested charge that, if plaintiff delivered twine of a different brand than that ordered and failed to notify defendants that such brand was delivered, the delivery was at the risk of plaintiff, and defendants were under no obligation to return the twine to plaintiff, but that the loss of the twine in defendants' hands would be the loss of plaintiff, was properly refused.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.*]

4. SALES (§ 364*)—ACTIONS FOR PRICE—QUESTIONS FOR JURY.

It being undisputed that defendants purchased 5,000 pounds of twine from plaintiff at the price and terms alleged in the petition, and that defendants received the twine at the place of delivery, carried it away to their farm, and never returned it, a charge that if defendants purchased the 5,000 pounds of twine from plaintiff at the price and on the terms alleged in the petition, and received it at the place of delivery, carried it to their farm, and never returned it, plaintiff should recover, was properly refused, since the jury could not under it have considered any of the rights of defendants based on the delivery of a different twine than that contracted for.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1065-1076; Dec. Dig. § 364.*]

5. SALES (§ 94*)—DESTRUCTION OF GOODS IN BUYER'S HANDS AFTER AGREEMENT TO RETURN.

If the binding twine bought remained a week or 10 days after the delivery in the buyers'

warehouse before examination by their manager, who then claimed that the twine was not as ordered, and immediately notified the broker through whom it was bought, declining to accept the twine, and the broker agreed that it might be returned to it at a specified place, and it was subsequently destroyed by fire in the buyers' warehouse, the broker was not liable on the agreement for return, as their willingness to have the twine returned contemplated its actual return to the place specified.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 280; Dec. Dig. § 94.*]

6. SALES (§ 168*)—RIGHT OF EXAMINATION BY BUYER.

If goods bought do not conform to the contract, the buyer will have the right to reject them after fair opportunity to examine them as to their character.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 403-408; Dec. Dig. § 168.*]

7. SALES (§ 182*)—ACTIONS—QUESTION OF FACT.

Whether the buyer discovered an alleged variance between the goods delivered and the contract of sale and repudiated the transaction in a reasonable time, under the circumstances, is a question for the jury.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 182.*]

8. SALES (§ 131*)—REJECTION WITHIN REASONABLE TIME—SUBSEQUENT LOSS IN BUYER'S HANDS.

If buyers, discovering that goods delivered did not conform to their contract, repudiated the transaction within a reasonable time, they would from that time hold the goods as warehousemen, and be liable for the loss as such, and would not be bound to do more than notify the person through whom they were bought that they would not take the goods, and would not have to tender the goods back at the place stated in the contract for delivery.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 131.*]

9. SALES (§ 178*)—"ACCEPTANCE."

Fact that a part of goods alleged by buyers not to conform to the contract of sale was after delivery to the buyers delivered to their tenants, after discovery of the alleged difference, does not amount to an acceptance; it appearing that such issuance was against the positive orders of the buyers, and a mere mistake.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 451-455; Dec. Dig. § 178.*]

For other definitions, see Words and Phrases, vol. 1, pp. 53-57.]

10. SALES (§ 179*)—DELIVERY OF GOODS NOT ORDERED—USE OF PORTION BY BUYER.

Buyers having used a portion of goods delivered, not conforming to the contract of sale, after discovery of that fact, are liable for the portion used.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 456-468; Dec. Dig. § 179.*]

11. INTEREST (§ 39*)—COMPUTATION.

It being the duty of a broker through whom goods are bought to notify the buyer of the arrival of goods at place of delivery, the broker, upon recovering the price therefor, will be entitled to interest only from the time of such notification.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 83; Dec. Dig. § 39.*]

12. BROKERS (§ 19*)—RIGHT OF BUYER TO REBATE FROM OTHER PARTY.

Where persons buy goods through brokers, paying them a specified brokerage, any rebate

to the broker received from the other party should inure to the buyers.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 16; Dec. Dig. § 19.*]

Appeal from District Court, Matagorda County; Wells Thompson, Judge.

Action by the Markham Warehouse & Elevator Company against Plotner & Stoddard. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Gaines & Corbett, for appellants. Linn, Conger & Austin, for appellee.

JAMES, C. J. Plaintiff (the appellee) alleged: That on, to wit, June 24, 1907, plaintiff contracted with defendants, in consideration of 10¼ cents per pound and a reasonable brokerage in addition, to purchase for defendants and on their account, and to have same shipped and delivered to defendants at Markham, Tex., 5,000 pounds of Deering binding twine, said twine to be received by and delivered to defendants at Markham, Tex., on its arrival, and that defendants through their general manager, Chillson, agreed and promised to receive same at Markham, Tex., on its delivery at said point by the transportation company, and to pay plaintiff cash on delivery the sum of 10¼ cents per pound, together with a reasonable brokerage, which was ¾ of a cent per pound. That said twine was received by plaintiff ready to deliver to defendants on July 16, 1907. That, although defendants were duly notified thereof, they failed to call for and receive the same, and thereby plaintiff had to store same until September 16, 1907, on which date defendants received same at Markham and took same to their farm under their contract, and have from that time held same and have never returned or offered to return same or any part thereof, but, as plaintiff is informed and believes and so charges, not only took same, but thereafter used a large part thereof in the harvesting of their crops, and hold the balance thereof and refuse to pay for it, and praying for judgment for \$550, with interest from July 16, 1907.

The amended original answer pleaded the general denial, and specially denied the purchase of the twine in the manner and form alleged by them or any one authorized to act for them, and alleged the purchase by defendants, through Chillson, of 5,000 pounds of Deering binder twine for which defendants were to pay actual cost delivered at Markham with a reasonable brokerage; that it was expressly agreed that the twine was to be the Deering, and none other; that on September 14, 1907, one Furber, for plaintiff, delivered to the drivers of defendants' teams at Markham 5,000 pounds of Superior binding twine, which was carried to and placed in defendants' warehouse; that shortly thereafter Chillson, acting for defendants, had oc-

casion to examine same, and found it was not Deering twine, but was branded "Superior," another brand than that ordered by defendants, and they immediately took steps to determine whether or not Superior twine was in fact Deering twine, and learned that it was not, and was a cheaper and inferior article, and that immediately, on September 23d, they notified plaintiff that it was not Deering twine and asked for disposition of same as defendants could not use it; that Furber, plaintiff's president, then acknowledged it was not the twine ordered, but insisted that it was as good, if not better, and offered to guarantee the quality of it; that then defendants stated they could not, and would not, use the twine delivered as a substitute for what they had ordered, and again asked for disposition, and thereupon plaintiff, acting through its said president, admitted that it was not the twine ordered, and accepted the cancellation of the order, and admitted to defendants that they were not bound by reason of such fact, and that at all times the twine has been subject to plaintiff's order and well understood to be its property. It is not deemed necessary to state the substance of the plaintiff's supplemental pleading. The verdict was for plaintiff for the sum claimed.

Under the first seven assignments of error complaint is made of the admission of testimony by various witnesses to the effect that the twine which was delivered, and which was branded "Superior," was equally good as that branded "Deering," and was sold to the trade as such, for the objection that the petition contained no allegation to sustain such evidence, and because this suit was based upon an alleged specific contract for the purchase of "Deering" twine, which term was used by manufacturers to designate the quality and kind of twine, and such evidence was irrelevant to the issues made by the pleadings. There was evidence that the twine delivered was in one sense Deering twine, being manufactured by the Deering Manufacturing Company, though branded or stenciled "Superior." Plaintiff had not alleged that the twine sold or bought for defendants was to be an article that was branded by the manufacturers "Deering." Defendant raised this issue by its answer, but the answer, it seems to us, shows upon its face that the "brand" was not the determining fact. This is evident from defendant's allegation that "shortly after (after the twine was in defendants' warehouse) Chillson, acting for defendants, had occasion to examine the twine, and found that the same was not 'Deering' twine, but was branded 'Superior,' and was another and different brand than that ordered by defendants; that these defendants immediately took such steps as were necessary to determine whether or not 'Superior' twine was in truth and in fact Deering twine and learned that such was not the fact, but that 'Superior' twine was a

cheaper and inferior grade of twine." This clearly indicates that the mere brand was not deemed by defendants as the essence of the contract, but that the grade or character and quality was, and this allegation was sustained by the testimony of Chillson. This narrowed the issue to that point. It is therefore idle to contend for these assignments.

The ninth, tenth, eleventh, and twelfth assignments are as follows:

"(9) The court erred in giving in charge to the jury the second paragraph of the general charge as follows: 'If you believe that the plaintiff delivered to the defendants a brand of twine different from the "brand" contracted for, and you further believe that the twine delivered was of a quality equally as good as that contracted for, and you further believe that this "quality" and not the "brand" was the essence of the contract; and you further believe that defendants did not, within a reasonable time after discovering the difference in the brand of twine, return the same to the plaintiff—then you should find for plaintiff. But, on the other hand, if you believe that the "brand," and not the "quality," was the essence of the contract, and that the plaintiff did not comply with the contract, then you will find for defendants.'

"(10) The court erred in giving in charge to the jury plaintiffs' requested charge No. 2, reading as follows: 'At the request of the plaintiffs, you are instructed that the twine sold and delivered to the defendants by the plaintiffs was a different brand from the ordinary "Deering" twine, the subject-matter of the contract, but, if you believe from the evidence that the twine so delivered to the defendants was as good in quality as the ordinary "Deering," and that the defendants received the said twine and used a portion of it, and failed to return any part of said twine to plaintiffs at the delivery point, viz., Markham, Tex., then you are instructed that the defendants are liable for the purchase price thereof, and, if you so find, your verdict should be for the plaintiffs.'

"(11) The court erred in refusing to give in charge to the jury the defendants' requested charge No. 1, reading as follows: 'At the request of the defendants, you are charged that if you believe from the evidence that the plaintiff delivered twine to the teams of the defendants of another and different brand from that ordered, and failed to notify the defendants that it was delivering such brand, then that such delivery was at the risk of the plaintiff, and that the defendants were under no obligation to return said twine to the plaintiff, and the loss of said twine would be the loss of the plaintiff, and you are charged that, if you so believe, you must find for the defendants.'

"(12) The court erred in giving in charge to the jury the plaintiffs' special charge No. 1, reading as follows: 'At the request of the plaintiff, you are instructed that if you be-

lieve from the evidence that the defendants purchased the 5,000 pounds of twine from the plaintiff at the price and on the terms alleged in the petition, and you further believe that the defendants received the twine so purchased at the place of delivery agreed upon and carried the same away to their farm, and that said twine has never been returned to the plaintiff by the defendants, then you are instructed to find for the plaintiff."

As to the first of the above charges, inasmuch as the defendant, by its pleading and evidence, showed that its own construction of the contract was that the twine ordered was satisfied by a grade or quality of twine equal to that ordinarily marked or branded "Deering," and that the brand was not the test of their obligation under the contract, the charge was favorable to defendants, rather than otherwise; and the same is the case as to the second. The third, a requested charge, was for the same reason properly refused. The fourth was practically a peremptory charge for the plaintiff, because there was not a single fact stated therein which was not undisputed. It was undisputed that defendants purchased 5,000 pounds of twine from plaintiff, and at the price and terms alleged in the petition, and also that defendants received the twine at the place of delivery, and carried same away to their farm, and that it was never returned. The jury could not, if they regarded this particular instruction, have considered any of the rights of defendant based on the delivery of a different twine than that contracted for. This requires that the judgment be reversed.

In remanding the cause, it is proper that we state our views of the issues as made by the pleadings and evidence. It was shown by defendants that for a week or 10 days after delivery of the twine and the deposit of it in defendants' warehouse on their farm it was not examined by Chillson, defendants' manager, and, as soon as he did this and discovered, as he states, that it was not the twine ordered, he immediately notified plaintiffs of the fact, and declined to accept the goods, and asked what disposition to make of it, and this led, by correspondence, to an understanding between Chillson and Furber, plaintiff's president (though reluctantly by the latter), that the twine might be returned to plaintiff at Markham, but, before it was returned, the warehouse of defendant burned, and with it the twine. Upon this state of facts, we are of opinion that the latter arrangement amounted to nothing, inasmuch as the willingness of plaintiff to submit to the twine being returned contemplated its actual return at Markham, and this never took place. The right of plaintiff to recover, and the right of defendant to deny recovery, existed as if that arrangement had not been made. Therefore we say, if plaintiff performed its obligation by delivering twine substan-

tially as contemplated by the contract, defendants have no reason to deny their liability. But, if the twine did not conform to what the contract meant, defendants had the right to reject it after a fair opportunity to examine it to find out its character. Whether or not defendants made the discovery of the defect and repudiated the transaction in a reasonable time under the circumstances would be a question for the jury, and, if they did not, they would be bound. Meacham on Agency, §§ 1380, 1381. But, if they did, it would be otherwise, and they would from that time hold the goods as warehousemen, and be liable for the loss only as such, and there was no evidence of negligence in this respect. We are of opinion that, if the twine was not what was bought, its delivery under the circumstances shown in the record was wrongful on the part of plaintiff, and defendants were not required to do more than notify plaintiff that they would not take the twine and would hold it subject to plaintiff's order. It was not necessary for them to have tendered it at Markham. There was, therefore, an issue of fact in the case whether or not defendants would be liable on the contract, even if the twine was not what the contract called for.

It seems to be thought that there was another theory on which defendants might be held, and this arose from certain testimony showing that about 700 or 800 pounds of the twine had, after discovery of its character, been issued to defendants' tenants. But the uncontroverted evidence was that this happened against the positive orders of the defendants, and was evidently a mere mistake, which should not be held an act of acceptance. *Dauphiny v. Creamery Co.*, 123 Cal. 548, 56 Pac. 451. They would, however, be liable for the 700 or 800 pounds.

These views of the law relative to the pleadings and evidence in the case render it, we think, unnecessary for us to discuss the other assignments of error. But we should add that it was the duty of plaintiff on the arrival of the twine at Markham to notify defendants, and interest should be allowed plaintiff only from the time of such notification; and we also think that, inasmuch as plaintiff was acting as broker in behalf of defendants, any rebate plaintiff received from the factory on this transaction should inure to the benefit of defendants.

Reversed and remanded.

MORSE v. STATE BOARD OF MEDICAL EXAMINERS.

(Court of Civil Appeals of Texas. Oct. 13, 1909.)

1. PHYSICIANS AND SURGEONS (§ 5*)—LICENSE—NATURE OF RIGHT—FRANCHISE—PENALTY.
A license to practice medicine is a privilege or franchise by the government, and a re-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fusal to grant it, for whatever reason, did not constitute a penalty.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 5; Dec. Dig. § 5.*]

2. PHYSICIANS AND SURGEONS (§ 2*)—REGULATION—LICENSE—STATUTES—CONSTRUCTION—"OTHER."

Act April 17, 1907 (Laws 1907, p. 227, c. 123) § 11, authorizes the refusal of a license to practice medicine for a conviction of a crime of the grade of a felony, or one which involves moral turpitude, or procuring or aiding or abetting the procuring of a criminal abortion, or for "other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public." *Held*, that by the use of the word "other," in the clause quoted, it was intended that the conduct referred to therein should be similar in its nature to that designated in the preceding subdivision and defined as a crime of the grade of a felony, etc.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. § 2.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5070-5102; vol. 8, pp. 7741-7743.]

3. PHYSICIANS AND SURGEONS (§ 2*)—LICENSE—STATUTES—INSTRUCTION.

Act April 17, 1907 (Laws 1907, p. 227, c. 123), § 11, subd. 3, authorizing the denial of a physician's license for other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public, was not void for uncertainty.

[Ed. Note.—For other cases, see Physicians and Surgeons, Cent. Dig. § 2; Dec. Dig. § 2.*]

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Application for mandamus by Stephen Alfred Morse against the State Board of Medical Examiners. From a judgment dismissing the writ, petitioner appeals. Affirmed.

Baker & Thomas, for appellant. Scott, Sanford & Ross, for appellee.

KEY, J. Appellant, as relator, brought this suit against appellees, as respondents, whereby he sought a writ of mandamus to compel respondents to issue to him verification license to practice medicine. He alleged in his petition that he was legally licensed to practice medicine throughout the state of Texas on the 25th day of March, 1895, that he had presented such license to respondents, the State Board of Medical Examiners created under the act of April 17, 1907 (Laws 1907, p. 224, c. 123), regulating the practice of medicine, and had in all other respects complied with the law, and that respondents had unlawfully refused to issue to him the verification license provided for in the act referred to. The answer of respondents, among other things, averred that relator had been guilty of grossly unprofessional or dishonorable conduct, of a character likely to deceive and defraud the public, setting forth in detail the conduct referred to, and assigned such conduct as their reason for refusing to issue to relator a verification license, and relied upon section 11 of the act referred to to support such refusal. By supplemental petition re-

lator excepted to respondents' answer upon the ground that so much of the act referred to as attempted to authorize respondents to refuse to allow a license to practice medicine on account of "other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public" is void for the want of certainty and is retroactive in its effect. The trial court overruled relator's exceptions to respondents' answer and rendered judgment in favor of respondents, and relator has appealed and presents the case in this court upon three assignments of error, all of which present substantially the same question, which is the validity of that portion of the statute which authorizes respondents to refuse a license on account of grossly unprofessional or dishonorable conduct, etc.

The Thirtieth Legislature enacted a law intended to cover the whole subject of the practice of medicine in this state. Section 1 provides for the creation of a board of medical examiners for the state, the number and qualifications of its members, that the several schools of medicine shall be represented thereon, the manner of the appointment of the members, their term of office, etc. Section 2 provides for the organization and officers and meetings and internal government of the board. Section 3 provides for the keeping of the records of the board. Section 4 makes it unlawful for any person to practice medicine in the state except he first comply with the requirements of this act. Section 5 prescribes the manner and form of registration by the practitioner of his authority with the district clerk. Under section 6 it is made necessary for all lawful practitioners of medicine in the state to apply to said board and obtain from it a license, and also provides for reciprocity with other states. Sections 7-9 provide for the examination of applicants for licenses, who were not theretofore lawful practitioners. Section 10 names certain classes that are exempt from the operation of this act. Section 11 makes provision for the denial by the board of licenses, naming the causes for which such denial may be made. Section 12 provides for the revocation of licenses by the courts. Section 13 designates those who are subject to the provisions of this act. Section 14 prescribes the penalty for violation of the act. Section 15 specifies the time which will be allowed those who were theretofore lawful practitioners in which to obtain license. Section 16 defines the meaning of certain terms used in the act, and section 17 is the repealing clause. The section involved in this case reads as follows: "Sec. 11. The State Board of Medical Examiners may refuse to admit persons to its examinations or to issue the certificate provided for in this act for any of the following causes: First. The

presentation to the board of any license, certificate or diploma which was illegally or fraudulently obtained, or when fraud or deception has been practiced in passing the examination. Second. Conviction of a crime of the grade of a felony or one which involves moral turpitude, or procuring or aiding or abetting the procuring of a criminal abortion. Third. Other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public; or for habits of intemperance or drug addiction calculated to endanger the lives of patients, provided that any applicant who may be refused admittance to examination before said board shall have his right of action to have such issue tried in the district court of the county in which some member of the board shall reside."

Appellant assails the first clause of the third subdivision of this section, the contention being that it is too general and uncertain, and therefore should be disregarded and the statute administered as though that clause was eliminated therefrom, and several cases have been cited in support of that contention, and especially *Czarra v. Board of Medical Supervisors*, 33 Wash. Law Rep. 470; *Matthews v. Murphy* (Ky.) 63 S. W. 785, 54 L. R. A. 415; *Hewett v. Board of Medical Examiners*, 148 Cal. 590, 84 Pac. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315; *School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90; *Ex parte McNulty*, 77 Cal. 164, 19 Pac. 237, 11 Am. St. Rep. 257; *Augustine v. State*, 41 Tex. Cr. R. 59, 76, 52 S. W. 77, 96 Am. St. Rep. 765; *State v. Gaster*, 45 La. Ann. 636, 12 South. 789. In all these cases the proceedings complained of were for the purpose of canceling or revoking license to practice medicine, or were criminal prosecutions for alleged violation of penal statutes, while in this case appellant is not charged with violating any penal law, and it is not contended that appellees have attempted to cancel or revoke appellant's pre-existing license to practice medicine. An important distinction exists between granting a license and revoking a license, which distinction may justify the application of different rules of law. Many courts hold that the cancellation or revocation of a license to practice medicine constitutes a penalty; but such result does not follow from a refusal to grant such license. A license to practice medicine is a privilege or franchise granted by the government, and a refusal to grant such franchise, whatever the reason may be for such refusal, does not constitute a penalty. Furthermore, none of the statutes under consideration in the cases relied on by appellant are entirely analogous to the statute here involved. In the *Czarra Case* the statute authorized the board to refuse to grant and to revoke a license where the party was guilty "of unprofessional or dishonorable conduct," and that was an appeal from the

action of the medical board revoking a license. The particular clause of the statute assailed in this case not only requires proof of unprofessional or dishonorable conduct, but it must be other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public. It is not unreasonable to conclude that, by the use of the word "other," the Legislature intended that the conduct referred to should be similar in its nature to that designated in the preceding subdivision of that section and defined as "a crime of the grade of a felony, or one which involves moral turpitude, or procuring or aiding or abetting the procuring of a criminal abortion." Not only that, but such conduct is further qualified by the use of the word "grossly." Furthermore, such conduct must not only be grossly unprofessional or dishonorable, but it must be of a character likely to deceive or defraud the public.

In none of the cases referred to have we found a statute as specific as ours, which restricts the condemned conduct to a certain specified class or kind, about which there can be much less room for disagreement among fair and just minds. It has been held, in construing a similar statute, that the language "unprofessional or dishonorable" was not intended to describe two classes of conduct, and that the word "unprofessional" was used in the same sense as "dishonorable," and not as signifying "unethical." *State v. State Medical Examining Board*, 32 Minn. 324, 20 N. W. 238, 50 Am. Rep. 575. We have reached the conclusion that the statute is not subject to the objection urged against it. Nearly if not all the states have statutes requiring applicants for license to practice either medicine or law to present satisfactory evidence of good moral character, and no case has been cited, and we know of none, in which it has ever been held that such a statute was invalid because of uncertainty. It would seem that statutes of the latter class afford as much room for difference of opinion as does the statute under consideration in this case.

While we have pointed out the fact that this case does not involve the revocation of a license or the imposition of any other penalty, we are not to be understood as holding that it would be invalid if the case was of the latter class and involved the question of penalty. Our federal anti-trust statute prescribes a penalty against every person entering into a contract or conspiracy "in restraint of trade or commerce among the several states or with foreign nations." Our state anti-trust statute makes it an offense, punishable by heavy penalty, to enter into a contract or conspiracy "to create or which may tend to create or carry out restrictions in trade or commerce or aids to commerce"; and both of these statutes have been unsuccessfully assailed upon the ground that they were too uncertain and indefinite. *Waters-*

Pierce Oil Co. v. State (Civ. App.) 106 S. W. 925, and cases there cited. In fact, unless it be permissible to use language as general as that involved in the statute under consideration, legislation in many instances could not be so framed as to accomplish all that was desired and afford full protection to the public, because of the impossibility of enumerating in detail every separate and distinct act intended to be prohibited.

In conclusion, the writer, speaking for himself only, deems it proper to add that he is strongly inclined to believe that, if appellant's contention be correct as to the construction to be placed upon the statute, nevertheless he has mistaken his remedy and should not prevail in this action. He has brought an action for a writ of mandamus, alleging that under one section of the statute referred to he is entitled to have the board grant to him a verification license. In reply the board answers that, by force of another section of the same statute invoked by appellant, the board had the power to refuse to grant such license for reasons specified in that section. Has appellant the right to invoke one section of the statute by which to compel appellees to do something which another section authorized them to refuse to do? In other words, can he, by affirmative action, and in a suit brought by him split the statute in two, and assert that part of it is valid and the other part invalid, and obtain affirmative relief founded upon such contention? On the contrary, it seems to me that his remedy would be to stand upon the defensive, and, when his right to practice medicine under his pre-existing license is challenged by any legal proceeding instituted for that purpose, to assert that his former license is not affected by the statute under consideration because of the objections urged against it in this case.

No error has been shown, and the judgment is affirmed.

Affirmed.

MAYO v. GOLDMAN.

(Court of Civil Appeals of Texas. Nov. 11, 1909.)

1. LIBEL AND SLANDER (§§ 9, 10*)—WORDS ACTIONABLE PER SE.

The rule that oral words, however opprobrious, are not actionable without proof of special damage, unless they impute the commission of a crime, is subject to the exception that such words affecting one injuriously in his office, profession, or occupation are actionable per se, regardless of the fact that they do not impute the commission of a crime.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 80-90, 41, 91-96; Dec. Dig. §§ 9, 10.*]

2. LIBEL AND SLANDER (§ 114*)—DAMAGES.

When words spoken are slanderous per se because imputing a crime or tending to injuriously affect complainant in his business, trade, or calling, he is entitled to at least nominal dam-

ages, if the speaking is not privileged, and the imputation conveyed is false.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 352; Dec. Dig. § 114.*]

3. LIBEL AND SLANDER (§ 5*)—MALICE—PRESUMPTIONS.

In such case it is presumed that the words were spoken maliciously, in the absence of evidence tending to show the contrary.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 278; Dec. Dig. § 5.*]

4. LIBEL AND SLANDER (§ 10*)—WORDS SLANDEROUS PER SE.

To falsely impute to a clerk that he has been bribed to betray the confidence of his employer is per se slanderous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 41, 91-96; Dec. Dig. § 10.*]

5. LIBEL AND SLANDER (§ 124*)—MALICE—INSTRUCTIONS.

In an action for slander, where there was no evidence tending to show that the words as charged were used innocently, and were not intended to convey the imputation claimed for them, the court should in charging the jury have assumed that the words, if spoken at all, were spoken maliciously.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 363-373; Dec. Dig. § 124.*]

6. LIBEL AND SLANDER (§ 118*)—DAMAGES.

In an action for slander, where it appeared that plaintiff was not discharged by the company employing him as a result of the slanderous words used by defendant, but because defendant as president and manager of the company was dissatisfied with what he believed to be plaintiff's conduct while in the company's service, plaintiff was not entitled to recover anything because of his discharge.

[Ed. Note.—For other cases, see Libel and Slander, Dec. Dig. § 118.*]

Appeal from District Court, Lamar County; T. D. Montrose, Judge.

Action by Homer P. Mayo against Abe Goldman. Judgment for defendant, and plaintiff appeals. Reversed and cause remanded for a new trial.

See, also, 44 Tex. Civ. App. 80, 97 S. W. 1061.

Dudley & Dudley and B. B. Sturgeon, for appellant. Moore & Park, for appellee.

WILLSON, C. J. Appellee was the president and manager of the Goldman Grocer Company, a concern engaged in a wholesale grocery business in the city of Paris. Appellant was an employé of said company—a "utility man," he testified. His duty, it seems, was to keep his employer advised as to its stock and the market price of goods it handled. One Webber was a traveling salesman for dealers in grocers' specialties, including pickles, preserves, etc. In June, 1904, while in Paris, Webber endeavored to sell to appellant as the manager of the Goldman Grocer Company a car load of pickles, and during the negotiations, as claimed by appellee, presented to Mayo certain jellies, preserves, etc. The acceptance by Mayo of the gift, as claimed by appellee, was a violation, it seems, of the rules controlling in the

conduct of the grocer company's business, and appellee protested against it. In doing so, according to the testimony on the part of appellant, appellee in the presence of Webber and other parties charged him (appellant) with having been bribed by Webber, and thereupon as president and manager of said grocer company discharged him from his employment for said company. On the ground that the charge was slanderous and had resulted in injury to him, appellant commenced and prosecuted the action for damages, resulting in the judgment in appellee's favor, from which this appeal is prosecuted.

The first assignment complains of the action of the court in instructing the jury, in effect, to find for appellee, notwithstanding they believed he had charged appellant with having been bribed, as alleged, unless they also believed that the charge was made maliciously. Appellant's contention is that the words alleged to have been spoken of and concerning him by appellee were slanderous per se, and therefore that it was immaterial, so far as his right to recover actual damages was concerned, whether they were spoken maliciously or not. We think the contention must be sustained. According to the testimony admitted on appellant's behalf, appellee, in an angry manner and in the presence of several parties, charged Webber with having bribed appellant, and charged appellant with having been bribed by Webber, and thereupon discharged him. The general rule is that "oral words, however opprobrious, are not actionable without proof of special damage, unless they impute to another the commission of a crime." 18 A. & E. Ency. Law (2d Ed.) pp. 908, 944, 965. To impute to a clerk that he has been bribed in connection with the discharge of duties he owes his employer does not charge him with a crime known to our laws, and therefore we are of the opinion that the imputation charged to appellee did not bring his case within the general rule. An exception, however, to the rule as well established, perhaps, as the rule itself, is that "words which affect a person injuriously in his office, profession, or occupation are actionable per se, though they are oral, regardless of the fact that they do not impute the commission of any crime." Id. p. 965. To impute to a clerk that he has been bribed to betray the confidence of his employer unquestionably tends to injure him in his vocation, and, if the imputation is false, it is per se slanderous. *Fowles v. Bowen*, 30 N. Y. 20; *Railway Co. v. Richmond*, 73 Tex. 573, 11 S. W. 555, 4 L. R. A. 280, 15 Am. St. Rep. 794. We understand the rule to be that when words spoken are per se slanderous, because they impute a crime or because they tend to injuriously affect the complainant in his business, or trade or calling, he is entitled to recover at least nominal damages, if the speaking thereof is not privileged, and if the imputation they convey is false. In such a case, in the ab-

sence of evidence tending to show the contrary, it will be presumed that the words were spoken maliciously. In the case we are considering there was no testimony tending to show that the words as charged, if used at all by appellee, were used jocularly or otherwise innocently, and were not intended to convey the imputation claimed for them. Hence an issue as to whether they were spoken maliciously or not was not raised by the evidence. Under such circumstances, in charging the jury, we think the court should have given effect to the presumption to be indulged in such cases by assuming that the words, if spoken at all, were spoken maliciously. *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616, 31 Am. St. Rep. 75; *Ledgerwood v. Elliott*, 51 S. W. 872; *Brown v. Durham*, 42 S. W. 331.

Another portion of the court's charge to the jury instructed them to find for appellee, notwithstanding they might believe he uttered the words as alleged, if they further believed that such words at the time and under the circumstances of their use "did not charge plaintiff with being bribed, or accepting a bribe," and were "not intended by defendant to injure plaintiff and charge him with acting dishonestly, and," the charge continued, "you believe from the evidence plaintiff suffered no injury therefrom, or if you believe from the evidence none of those present understood it as charging plaintiff with accepting a bribe, or being bribed, or of acting dishonestly, as alleged by plaintiff." The specific objection urged to such instructions is that, the words being per se actionable, appellant was entitled to recover "without proof of injury or special damages and without proof that defendant thereby intended to injure him." For reasons suggested in disposing of the first assignment, this contention on the part of the appellant also must be sustained. If, as we think is true, the words charged to have been spoken were per se slanderous and if they were spoken as charged, and the imputation they conveyed was a false one, appellant was entitled to recover at least nominal damages, without regard to appellee's intent in speaking them. 18 A. & E. Ency. Law (2d Ed.) p. 1088; *Irwin v. Cook*, 24 Tex. 244.

At appellee's request, the court instructed the jury, if they found for appellant, not to "allow him anything by reason of the fact that he lost employment with the Goldman Grocer Company." Appellant insists that the instruction was erroneous, "because Abe Goldman individually and as president of the Goldman Grocer Company are distinct legal entities, and loss of employment resulting from the slanderous words are recoverable." The assignment presenting this contention is overruled. Appellant, it appeared, was not discharged by the Goldman Grocer Company as a result and because of the use, as charged, by Goldman of the slanderous words,

but because Goldman as the president and manager of the company was dissatisfied with what he believed to be his conduct while in the service of the company.

For the error referred to in the trial court's charge, the judgment is reversed, and the cause is remanded for a new trial.

WELLS v. HOBBS.

(Court of Civil Appeals of Texas. Nov. 4, 1909.)

1. WITNESSES (§ 140*)—COMPETENCY—TRANSACTIONS WITH DECEDENT — PERSONS EXCLUDED — PERSONS INTERESTED — HUSBAND AND WIFE.

In an action in the husband's name against an executor to recover on behalf of the community estate for services rendered testator, the wife is a real party in interest, and cannot testify to transactions by herself or her husband with decedent, unless called by the opposite party.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 606; Dec. Dig. § 140.*]

2. WITNESSES (§ 159*)—COMPETENCY—TESTIMONY OF PARTIES AGAINST EXECUTORS—PERSONS EXCLUDED — PERSONS INTERESTED — HUSBAND AND WIFE—"TRANSACTIONS" WITH DECEDENT.

In an action in the husband's name against an executor to recover for services rendered testator, in which plaintiff's wife was in effect a party, the recovery being for the community estate, the wife testified that she rendered services for testator by milking, cooking, and performing other housework, and that her husband would take testator every place he wanted to go, and waited on him all over the place in tending to the stock, etc., and plaintiff testified that he cut wood, fed the cattle, put up the hay, etc., harnessed the buggy, and carried testator almost every place there was anything to see to, and that when he moved to testator's farm he took with him corn and pork and other provisions, and the corn was fed to his and testator's horses, and the other supplies, as well as groceries bought by plaintiff, were eaten by him and testator. 1 Sayles' Ann. Civ. St. 1897, art. 2302, provides that in actions against executors as such neither party can testify to transactions with testator unless called by the opposite party. *Held*, that the witness' testimony that her husband took testator every place he wanted to go, and waited on him all over the place in feeding, etc., and carried him almost every place there was anything to see to, as well as plaintiff's testimony that groceries purchased by him were used by testator, was as to "transactions" with testator, and not admissible, but the other testimony was admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 604, 606-609; Dec. Dig. § 159.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7060-7062; vol. 8, pp. 7818, 7819.]

3. TRIAL (§ 85*)—OBJECTIONS—ADMISSION OF EVIDENCE—EVIDENCE ADMISSIBLE IN PART.

An objection to all of the testimony of a witness will be disregarded where a part of it is admissible.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 223-225; Dec. Dig. § 85.*]

4. WITNESSES (§ 176*)—COMPETENCY—TESTIMONY AGAINST PERSONS REPRESENTED — CONVERSATION WITH DECEDENT.

In an action against an executor for services to testator, in which defendant's witness testified to a conversation with plaintiff, in which plaintiff stated the terms of his contract

with testator and the latter's compliance therewith, testimony by plaintiff which merely gave a different version of such conversation with the witness, but did not refer to a different conversation with him, was admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 717, 718; Dec. Dig. § 176.*]

5. WITNESSES (§ 183*)—DISCRETION OF TRIAL COURT—ADMISSION OF EVIDENCE—CONVERSATION AS TO TRANSACTION WITH DECEDENT — DIFFERENT CONVERSATION.

In an action against an executor for services to testator, in which defendant's witness testified to a conversation with plaintiff, in which plaintiff stated the terms of his contract with testator and the latter's performance thereof, whether plaintiff's testimony that he had no such conversation with witness, but made other and different statements in a conversation with him, referred to a different conversation than that testified to by the witness so as to be inadmissible, was for the trial court's determination in ruling on its admissibility, where both plaintiff and such witness testified that they had only one conversation with each other on the subject, which occurred at the latter's house.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 781; Dec. Dig. § 183.*]

6. DAMAGES (§ 68*) — MEASURE — BREACH OF CONTRACT—VERBAL CONTRACT.

Interest is recoverable in an action for breach of a verbal contract, though not stipulated for in the contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 141; Dec. Dig. § 68.*]

7. EXECUTORS AND ADMINISTRATORS (§ 431*)—ACTIONS AGAINST—PRESENTATION AND REJECTION OF CLAIM—NECESSITY—CLAIM FOR UNLIQUIDATED AMOUNT.

1 Sayles' Ann. Civ. St. 1897, art. 2082, providing that, when a claim for money against an estate is rejected by the executor, claimant may sue thereon and the executor's indorsements on the claim may be given in evidence to prove the facts stated therein without proof of his handwriting, unless denied under oath, does not require a claim for an unliquidated amount for services to testator, to be presented and rejected before suing the executor thereon.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1679, 1681, 1682; Dec. Dig. § 431.*]

8. APPEAL AND ERROR (§ 843*) — REVIEW — QUESTIONS CONSIDERED—QUESTIONS UNNECESSARY TO DECISION.

Upon deciding, in an action against an executor for services rendered testator, that plaintiff's claim need not, under the statute, be presented to the executor and rejected before suing thereon, the appellate court need not decide whether the claim presented and rejected should have been excluded as evidence on the ground of variance between it and the account declared on in the petition.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3331-3342; Dec. Dig. § 843.*]

Appeal from District Court, Lamar County; T. D. Montrose, Judge.

Action by John P. Hobbs against G. W. Wells, executor of James M. Braden, deceased. From a judgment for plaintiff, defendant appeals. Affirmed.

Appellee was the plaintiff below. In his petition he alleged that appellant's testator, James M. Braden, deceased, in his lifetime, being old, infirm, almost helpless, and alone, undertook and agreed if he, appellee, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

his wife, would move to his, Braden's, home, and care for him and for his property during the remainder of his life, to pay them well for so doing; that, relying upon such undertaking, he moved with his wife to Braden's home, and for 36 months thereafter remained there, caring for said Braden and managing his property; that during said 36 months he looked after Braden's farms and stock, collected rents due him, and generally superintended his entire business, and that during the same period his wife "attended to all the household duties, cooked, washed, and kept house for said Braden"; that at the expiration of said 36 months, to wit, on December 28, 1905, said Braden "discharged plaintiff and his wife from aforesaid employment," and they did not thereafter live with him; that the services specified performed by him and his wife for Braden reasonably were worth \$50 per month, or, for the 36 months, \$1,800; that said Braden died about November 15, 1906; and that after his death and after appellant had qualified as executor of his will he presented to appellant as such executor "his account for the sum of \$1,800, duly verified, * * * which account was by said executor examined, rejected; he indorsing his rejection thereof on same." Appellee further alleged in his said petition that a time was not agreed upon as to when Braden was to pay for the services specified, but that "it was understood that, if it was not paid before, they would be fully compensated by said Braden in his will, but that in said will no provision whatever was made for same"; and he further alleged that "the amount due him under said contract became due and payable upon the breach thereof by the decedent, James M. Braden, to wit, on the 28th day of December, 1905." Appellant answered the petition by a general denial, and specially set up certain matters which need not be here stated.

The trial was before a jury. Over appellant's objection thereto, on the ground that same was a statement of transactions by and between appellee and his wife on one side and Braden on the other, about which he had not called her to testify, the court permitted Mrs. Hobbs to testify as follows: "I rendered services to Mr. Braden during the time we lived with him by milking, cooking, washing, and keeping house in general. I would help shuck corn sometimes and carry in wood. I washed Uncle Jimmie Braden's clothes, and washed for my family. His clothes were in very bad condition, as he was feeble and very nervous, and could not control himself very well. I washed his underclothes when he could not control his bowels. I performed the services above enumerated for three years. My husband would go with Uncle Jimmie, take him every place he wanted to go, and waited on him all over the place—that is, in feeding and tending to

all of the stock and all outside work, everything. He did all the outside work that was done about the place." Over appellant's objection thereto on like ground, the court permitted appellee to testify as follows: "I done a good deal while I lived there. I could tell a heap of it. I hauled wood, cut wood. I fed cattle. I fed mules, collected rents, harnessed the old man's buggy, and carried him almost every place that there was anything to see to. I went with him. I attended to putting up hay. There was about 500 or 600 acres of meadow. I superintended the putting up of that hay while I was there. I have never received one cent in compensation for what I done while living on the Braden place." And further to testify as follows: "When I moved to Mr. Braden's place, I took there with me 300 bushels of corn, 1000 pounds of pork, some sugar and coffee. The corn was put into Mr. Braden's crib and fed out to my horses and his. The other supplies I carried there was cooked and eaten there. Supplies were furnished by me while I lived there. I bought them uptown at the grocer's. I could not state what proportion of the supplies used on the place was furnished by me." Appellant duly excepted to the action of the court in admitting as evidence the testimony quoted above. The trial was before a jury, and the appeal is from a judgment in favor of appellee for the sum of \$471.40, interest and costs.

G. W. Wells and Allen & Dohoney, for appellant. J. S. Patrick and W. F. Moore, for appellee.

WILLSON, C. J. (after stating the facts as above). Appellant's first, second, and sixth assignments of error are predicated upon the action of the court in admitting as evidence the testimony of appellee and his wife quoted in the foregoing statement. If the testimony of Mrs. Hobbs referred to should have been excluded had she by name been a party to the suit, the fact that she was not such a party would not be a reason for overruling the objection to it. The recovery sought was on behalf of the community estate between herself and her husband, and therefore she was a real party to the suit. That the wife in such a suit cannot, unless called to do so by the opposite party, testify to transactions had by her or by her husband with the decedent, is not an open question in this state. It is settled that she cannot testify as to such transactions. *Simpson v. Brotherton*, 62 Tex. 170; *Anglin v. Barlow* (Tex. Civ. App.) 45 S. W. 827; *Padlock v. Lewis*, 13 Tex. Civ. App. 265, 35 S. W. 320; *Hedges v. Williams*, 26 Tex. Civ. App. 551, 64 S. W. 77. Her testimony therefore is to be treated as that of a party to the suit, and its admissibility must be determined with reference to the rules applicable to the testimony of appellee, her husband.

The statute declares that "in actions by or against executors * * * in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the other as to any transaction with, or statement by the testator * * * unless called to testify thereto by the opposite party." 1 Sayles' Ann. Civ. St. 1897, art. 2302. Was the testimony of appellee or that of his wife as quoted as to a transaction or transactions by either of them with Braden? We think it must be answered that portions of the testimony of each clearly were as to such transactions. "My husband," Mrs. Hobbs testified, "would go with Uncle Jimmie (Braden), take him every place he wanted to go, and waited on him all over the place—that is, in feeding and tending to all of the stock and all outside work, everything." Going with Braden, taking him from place to place and waiting on him, when sought to be made the basis of a recovery of compensation therefor, certainly were "transactions with" Braden. So, as clearly, was carrying him "most every place that there was anything to see to," as testified to by appellee, a transaction by him with Braden. *Garwood v. Schlicheumaier*, 25 Tex. Civ. App. 176, 60 S. W. 574; *Williams v. Walden*, 82 Ark. 136, 100 S. W. 900; *Abbott v. Stiff* (Tex. Civ. App.) 81 S. W. 563; *Johnson v. Lockhart*, 16 Tex. Civ. App. 32, 40 S. W. 640. And, while not so well satisfied about it, we think appellee's testimony that groceries purchased by him were used by Braden also was within the inhibition of the statute. The remainder of the testimony of appellee and his wife admitted as evidence over appellant's objection we think was not inadmissible on the ground stated. It was as to what the witnesses, respectively, did, and not as to "transactions with" the decedent. *Potter v. Wheat*, 53 Tex. 408. The testimony of Mrs. Hobbs as quoted having been objected to in its entirety, and portions of same being admissible and other portions inadmissible, did the court err in overruling the objection thereto and in admitting the testimony as evidence? We think not. The rule seems to be that "if the exception goes to the whole of the testimony complained of, and a part is admissible, the objection to the evidence will not be considered." *Dolan v. Meehan* (Tex. Civ. App.) 80 S. W. 101; *Railway Co. v. Frazier* (Tex. Civ. App.) 87 S. W. 400; *Railway Co. v. Cuneo* (Tex. Civ. App.) 108 S. W. 718; *Wandelohr v. Bank* (Tex. Civ. App.) 106 S. W. 416; *Tuttle v. Moody*, 100 Tex. 240, 97 S. W. 1067; *Rhodes-Haverty Furniture Co. v. Henry* (Tex. Civ. App.) 67 S. W. 341; *Railway Co. v. Hall*, 31 Tex. Civ. App. 464, 72 S. W. 1053; *Moore v. Bank*, 38 U. S. 302, 10 L. Ed. 173. For a like reason—that is, because a portion of it was admissible—the court did not err in overruling appellant's objection to the testimony of appellee quoted

in said statement. The assignments specified therefore must be overruled.

One Crow and his son having testified to a conversation they asserted they had had with appellee, in the course of which appellee made certain statements tending to show the terms of the contract between himself and Braden and a compliance by the latter with his obligations thereunder, appellee, after testifying that he had had no such conversations with the Crows as the one recounted by them, over appellant's objection, was permitted to further testify as to other and different statements which he asserted he had made to the Crows in a conversation between himself and them. The grounds of appellant's objection were that the conversation testified to by appellee was another and different one from that testified to by the Crows, was self-serving, and within the inhibition of the statute above referred to, because it detailed transactions by appellee with the decedent, Braden, and as well statements by him in regard to such transactions. If the conversation testified to by appellee was not the conversation testified to by the Crows, the objection interposed by appellant to appellee's testimony should have been sustained. But the elder Crow and appellee both testified that they had never had more than one conversation with each other involving matters they respectively were testifying about, and each denied that the conversation as detailed by the other ever occurred. If the testimony objected to, instead of referring to another and different conversation, was appellee's version of the conversation testified to by the Crows, we think it was admissible. 1 Elliott on Ev. § 241, p. 351; 1 Ency. of Ev. p. 608, note; *Railway Co. v. Frazier* (Tex. Civ. App.) 87 S. W. 400; *Fidelity & Casualty Co. v. Dorrough*, 107 Fed. 398, 48 C. C. A. 364. It was competent for appellee, not only to deny the statements in the conversation attributed to him by the Crows, but also to support such denial by giving his version of the conversation. Whether the testimony objected to referred to the conversation detailed by the Crows or to another conversation presented a question for determination by the trial court in ruling on the admissibility of said testimony. The sufficiency of the predicate laid to justify the admission of the testimony is attacked in no other way than by an assumption in the assignment that it was shown that the conversation recounted by appellee occurred at a time and place different from the time and place when and where the conversation recounted by the Crows occurred. We do not think it so indisputably appears from the record. Both the Crows and appellee testified that the conversation they respectively recounted occurred at the elder Crow's home. The time it occurred was fixed by the Crows as in April, 1905, while appellee

by his testimony did not fix a time. In the condition stated of the record we think the assignment should be overruled.

The trial court did not err in instructing the jury, if they found for appellee, to find in his favor as interest 6 per cent. on the sum they believed to be due to him by Braden on December 28, 1905. Appellant's contention, based on the ruling in *Close v. Fields*, 2 Tex. 238, that, unless stipulated for, interest is not recoverable in a suit for a breach of a verbal contract, cannot be sustained in view of the holding in *Watkins v. Junker*, 90 Tex. 586, 40 S. W. 11, and other cases. See *Weaver v. Goodman* (Tex. Civ. App.) 51 S. W. 862; *Railway Co. v. Timon*, (Tex. Civ. App.) 110 S. W. 83; *Railway Co. v. Graves*, 45 Tex. Civ. App. 375, 101 S. W. 488. In support of the allegation in his petition that he had presented to appellant as Braden's executor an account for \$1,800 covering the services on which he sought a recovery, and that appellant as such executor had rejected same, appellee offered as evidence an account, and the indorsement thereon, as follows:

"Estate of James M. Braden to J. P. Hobbs, Dr. To services rendered from December 28th, 1902, to December 28th, 1905, 36 months, at \$50 per month, said time being employed in superintending his farms, stock, and managing his business for him, under an agreement made by the said James M. Braden, to pay said Hobbs and his wife, and pay them well if they would move to his home and care for him, \$1,800.

"The State of Texas, County of Lamar. Before the undersigned authority this day personally appeared J. P. Hobbs, who, on oath, says that the attached claim of Eighteen Hundred Dollars, against the estate of James M. Braden, deceased, is just, and that all legal offsets, payments and credits, known to affiant, have been allowed. J. P. Hobbs.

"Sworn to and subscribed before me, this 17th day of April, A. D. 1907. Wm. Hodges, Notary Public, Lamar Co., Tex.

"The within claim of J. P. Hobbs against the J. M. Braden estate having been presented to me for allowance, I hereby reject the same. G. W. Wells, Executor of the J. M. Braden Estate."

The court admitted the account as evidence, over appellant's objection thereto on the ground that there was a variance between it and the account declared upon in the petition, in that the account offered as evidence was only for services rendered to Braden in superintending his farms and managing his business, while the account declared upon was also for certain personal services, manual labor, etc., alleged to have been performed for Braden by appellee and his wife. After the court had admitted as evidence the account offered by appellee, appellant asked the court "to strike from the

record, exclude, and withdraw from the jury all testimony of said plaintiff (appellee) and his wife Mrs. Hobbs as to personal services rendered said Braden by Mrs. Hobbs and work and labor performed by her for him, and all testimony as to manual labor and work performed by plaintiff for said Braden and all services rendered by plaintiff in the way of waiting upon him and personal care and attention rendered by plaintiff to said Braden," upon the ground that the account proven to have been presented to and rejected by him as executor "did not contain any charge for such labor, personal care, and attention and services, but was only for services rendered by plaintiff in superintending said Braden's farms and stock and managing his business for him." The court overruled the motion, and also refused to instruct the jury, as appellant requested him to do, not to find for appellee anything on account of his wife's services "in keeping house for and waiting upon Braden, nor for manual labor and services rendered said Braden by plaintiff."

In passing upon the assignments presenting for revision the action of the court in the particulars just stated, it is proper first to determine whether the claim made the basis of appellee's suit was such a claim as must have been rejected by the executor before a suit could be maintained on it. 1 Sayles' Ann. Civ. St. 1895, art. 2082; *Thompson, Adm'r, v. Branch's Adm'r*, 35 Tex. 25; *Ballard v. Murphy* (Tex. App.) 15 S. W. 42. The claim was "for money against an estate"; and the amount, if any, justly due appellee on it, though unliquidated, was capable of ascertainment by proof made in the ordinary way. If we regarded the question presented as an open one, keeping in mind the purposes of the statute (*Graham v. Vining*, 1 Tex. 644; *Garrett v. Gaines*, 6 Tex. 441), we would be strongly inclined to hold the claim to be one which must have been presented to and rejected by the executor before the suit could be maintained. But it seems to be settled that claims for unliquidated amounts need not be so presented and rejected as a prerequisite to the holder's right to sue thereon. *Evans v. Hardeman*, 15 Tex. 483; *Ferrill's Adm'r v. Mooney's Ex'r*, 33 Tex. 224; *Sutton v. Page*, 4 Tex. 142; *King's Adm'r v. Cassidy's Adm'r*, 36 Tex. 538; *Blum v. Welborne*, 58 Tex. 159. In the *Evans-Hardeman* Case, cited above, Evans had located a land certificate for Hardeman, and for his services was to have one-half of the land. The location as made was not satisfactory to Hardeman, but he accepted it as a performance on the part of Evans of his obligation under the contract between them covering the location of the certificate on Evans' guaranty to him of \$1 per acre for his part of the land located. Evans expected to negotiate a sale of the land in New York, but died before he had done so. The suit was by Hardeman

against Evans' administrator on Evans' guaranty for the difference between the market value of the land and its value at \$1 per acre. Hardeman having recovered a judgment, on appeal it was objected that his claim had not been presented to Evans' administrator before the suit thereon was commenced. In disposing of this objection the court said: "It is a sufficient answer that the petition was framed with a double aspect in respect to the relief sought. In the aspect in which it was maintainable, and was maintained, it was a demand for uncertain or unliquidated damages, being the amount which the land fell short in value of the sum of \$1 per acre, and being a sum which was uncertain, and could only be rendered certain by proof, it was not necessary that it should have been presented to the administrator for allowance." In *Ferrill's Adm'r v. Mooney's Ex'r*, supra, the action was to recover the value of certain hogs belonging to the Ferrill estate alleged to have been killed by Mooney in his lifetime. The claim had been presented to and rejected by Mooney's executor, but suit thereon had not been commenced within 90 days after it was so rejected, as was required by the statute. In passing upon a question made as to whether it was necessary that the claim should have been presented to and rejected by the executor before a suit thereon could be maintained, the court said: "The words 'claim for money' have received the construction of this court to mean liquidated claims. *Hall v. McCormick*, 7 Tex. 275. It certainly could not be in the minds of the Legislature to cause a party to make oath as to the amount due on a claim upon which there had been no agreement between the parties, and thus open a door to perjury, and to favor a person in an inverse ratio to his conscience." If, as seems to be the case, the effect of the decisions cited is to hold the statute operative only when the claim for money is a liquidated one, it is clear that appellee's claim was not within the statute, and, as a prerequisite to a suit thereon, need not have been rejected by appellant as Braden's executor. As, out of respect to what we believe to be the construction placed upon the statute by the Supreme Court in the cases cited above, we feel constrained to hold that the claim sued upon was one which need not have been presented to the executor, it is unnecessary to determine whether on the grounds urged the claim rejected by the executor should have been excluded as evidence or not.

We do not think the charge of the court was erroneous in the particular pointed out in the eighth assignment, nor do we think the court erred in refusing to give to the jury the special charge requested by appellant, referred to in his tenth assignment. Both of said assignments therefore are over-

ruled, as is also the twelfth, which questions the sufficiency of the evidence to support the verdict of the jury. The evidence as it appears in the record we think is sufficient to support the amount found in appellee's favor.

The judgment is affirmed.

HODGES, J., disqualified, and not sitting.

BLEDSOE v. HANEY.

(Court of Civil Appeals of Texas. Oct. 27, 1909.
Rehearing Denied Nov. 24, 1909.)

1. ACKNOWLEDGMENT (§ 54*)—ADMISSIBILITY OF INSTRUMENT IN EVIDENCE—"ACKNOWLEDGED IN THE MANNER PROVIDED BY THE LAWS," ETC.

Sayles' Ann. Civ. St. 1897, art. 2312, provides for the introduction of every instrument which is permitted or required to be recorded, and which has been recorded after being "acknowledged in the manner provided by the laws in force at the time of its registration." *Held*, that the quoted words mean not only that the certificate of acknowledgment itself must be formal, but also that the officer taking the same must have had authority to do so.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 278, 279; Dec. Dig. § 54.*]

2. ACKNOWLEDGMENT (§ 6*)—EVIDENCE.

Under Act April 23, 1907 (Laws 1907, p. 308, c. 165), amending Sayles' Ann. Civ. St. 1897, art. 2312, providing that after an instrument has been recorded for 10 years it shall be no objection to its admission in evidence, or to that of a certified copy thereof, that the certificate of acknowledgment is not in form and substance such as required by law, a deed, or certified copy thereof, which has been recorded for 10 years, is admissible in evidence whether duly acknowledged or not.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 57; Dec. Dig. § 6.*]

3. TAXATION (§ 805*)—TAX TITLE—LIMITATIONS.

The possession of land under a tax deed is not adverse to the owner during the two years within which the land may be redeemed, and limitations do not run during that time.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 805.*]

Appeal from District Court, Lubbock County; L. S. Kinder, Judge.

Action by Jasper N. Haney against W. E. Bledsoe. From a judgment for plaintiff, defendant appeals. Reversed.

Geo. L. Beatty and John R. McGee, for appellant. Bean & Klett, H. C. Randolph, and Dillard & Dillard, for appellee.

RICE, J. This is an action of trespass to try title, brought in the usual form by appellee against appellant for the title and possession of 80 acres of land in Lubbock county, Tex. The defendant answered by plea of not guilty and the five-year statute of limitations. The case was tried by the court without a jury, resulting in a judgment in favor of appellee, from which this appeal is prosecuted.

The appellee showed title from the sovereignty of the soil to himself by deeds properly recorded, and the judgment rendered in his favor is proper, provided the action of the court was correct in excluding a deed offered in evidence by appellant, showing an outstanding legal title in one Thomas W. Campbell to the land in controversy, or the conclusion of the court to the effect that the statute of limitations did not apply.

Appellant contends by his first assignment that the trial court erred in refusing to admit in evidence the deed from Charles W. Lindley and Marian T. Lindley, his wife, purporting to convey said land to Thomas W. Campbell, dated the 14th day of February, 1881, and recorded in the proper county on the 24th of February next thereafter, contending by his proposition thereunder that, if the same had been so admitted, it would have shown a conveyance of an outstanding legal title to the land in controversy to said Campbell, long prior to the time when plaintiff acquired the deed under which he claims from said Lindley. On the trial the defendant offered in evidence a deed from Lindley and wife of Park county, in the state of Indiana, conveying the land involved to Thomas W. Campbell. This deed was acknowledged by Lindley and wife before John J. Woody, a justice of the peace in and for said county on the 14th day of February, 1881, and duly recorded on the 24th day of February, 1881, in the proper county; but the certificate of acknowledgment was defective and not in accordance with our statute. At the time this acknowledgment was taken, no officer was authorized outside of this state to take acknowledgments to deeds of lands in this state, except a notary public, the clerk of a court of record, or a commissioner of deeds for this state. Appellee therefore contends that the action of the court in excluding said deed so offered in evidence was correct; said acknowledgment having been taken by an Indiana justice of the peace who was not authorized so to do. But appellant insists that, notwithstanding this fact, the same should have been admitted in evidence, because the act of the Thirtieth Legislature approved April 23, 1907 (Laws 1907, p. 308, c. 165), so changed the law as to permit its introduction, by providing for the admission in evidence of any deed which may have been actually recorded for a period of 10 years in the proper county, irrespective of whether the same was proved or acknowledged in the manner provided by the laws of this state or not. The act in question reads as follows, to wit:

"Section 1. That article 2312 of the Revised Civil Statutes of the State of Texas, be and the same is hereby amended so as hereafter to read as follows, to wit: "Art. 2312. Every instrument of writing which is permitted or required by law to be recorded in the office of the clerk of the county court, and which has been or hereafter, may be so record-

ed, after being proved or acknowledged in the manner provided by the laws of this state in force at the time of its registration, or at the time it was proved or acknowledged, or every instrument which has been or hereafter may be actually recorded for a period of ten years in the book used by said clerk for the recording of such instruments, whether proved or acknowledged in such manner or not, shall be admitted as evidence in any suit in this state without the necessity of proving its execution; provided no claim adverse or inconsistent to the one evidenced by such instrument shall have been asserted during that ten years; provided, that the party to give such instrument in evidence shall file the same among the papers of the suit in which he proposes to use it, at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party or his attorney of record; and unless such opposite party, or some other person for him, shall, within three days before the trial of the cause, file an affidavit stating that he believes such instrument of writing to be forged. And whenever any party to a suit shall file among the papers of the cause an affidavit stating that any instrument of writing, recorded as aforesaid, has been lost, or that he cannot procure the original, a certified copy of the record of any such instrument shall be admitted in evidence in like manner as the original could be. And after such instrument shall have been actually recorded as herein provided for a period of ten years, it shall be no objection to the admission of same, or a certified copy thereof, as evidence, that the certificate of the officer who took such proof or acknowledgment, is not in form or substance such as required by the laws of this state, and said instrument shall be given the same effect as if it were not so defective.

"Sec. 2. The fact that there are no adequate laws to relieve persons whose titles to their lands have been clouded by insufficient acknowledgments and proofs taken and made by ignorant and incompetent officers, creates an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days, and an emergency exists that this act take effect and be in force from and after its passage, and it is so enacted."

It will be observed that the first clause of said act is not essentially different from the old law. The second clause, however, provides for a different contingency entirely from the first, and seems to permit the introduction in evidence of every instrument which has been or may hereafter be actually recorded for a period of 10 years in the record of deeds by the clerk, irrespective of whether the same may have been proven or acknowledged in the manner required by law or not, provided no claim adverse or inconsistent with the one evidenced by such instrument shall have been asserted during that 10 years.

The question therefore for consideration is: What is meant by this new clause, and what construction must be given to its words? It is evident that the Legislature intended to make a radical departure from the system prevailing in the introduction of recorded instruments in evidence at the time of its adoption. The old law (article 2312 of the Revised Statutes) permitted the introduction in evidence of every instrument of writing which was permitted or required by law to be recorded in the office of the clerk of the county court, and which has been or may be so recorded after being proven or acknowledged "in the manner provided by the laws in force at the time of its registration," and the expression "in the manner provided by the laws in force at the time of its registration" has been oftentimes construed to mean, not only that the certificate itself must be formal, but that the officer taking the same must have the authority and power so to do, and, if it appeared from the certificate that the officer taking the same was not so authorized, the instrument so offered would be rejected, notwithstanding the fact it may have been duly recorded.

In *Craddock v. Merrill*, 2 Tex. 494, Judge Lipscomb, speaking with reference to the execution of a bond, where the same was attested by two subscribing witnesses and where there had been no effort to prove the execution by either of said witnesses, nor was any evidence offered that said testimony could not be procured, it having been admitted to record on the certificate of the officer who certified that he was the presiding judge of the county court of Searcy county in the state of Arkansas, before whom the same was acknowledged, said: "There seems to be an insuperable objection to the admissibility of the evidence as offered. It was not proven in any way required by the laws of this state, nor in accordance with the known rules of evidence. It was not proven that the subscribing witnesses were dead or beyond the jurisdiction of the court, so that their testimony could not be had. This was an essential requisite to open the way for secondary evidence. The bond acquired no authenticity from having been in point of fact recorded, because it was not proven in the mode required for its admission to record. It was not acknowledged before any officer known to our laws, nor was it proven by one of the subscribing witnesses," etc. So, here, it was held that the execution of the bond was not proven in the manner required by the laws of this state, and therefore it was not admissible in evidence; thus holding that the words "not proven in the manner required by the laws of this state" not only had reference to the manner of the taking of the acknowledgment, but went farther, and embraced the authority of the officer who took the same. Mr. Webster defines the word "manner" as: "Mode of action; way of performing or effecting any-

thing; method; style; form or fashion." In the *Century Dictionary* (volume 5) it is said the word "manner" means, first: "The way in which an action is performed; method of doing anything; mode of proceeding in any case or situation; mode; way; method."

So, it seems to us, the expression "whether proved or acknowledged in such manner or not," used in the new statute, was certainly intended by the lawmakers to have the same force and effect as the same expression in the old statute, and we have seen that in the old this expression was held to apply, not only to the formality of certifying what was done by the officer, but as well to the power of the officer to take acknowledgment of the person to the instrument. Besides, if we give to these words their usual and ordinary signification and the meaning attached to them by the lexicographers, the expression must be held, in our judgment, to mean the way in which acknowledgments had formerly been taken—the mode of proceeding in such cases, which the Legislature seems to have intended to dispense with. The last clause of the first section of this act, which provides that it shall be no objection to the admission of the same or certified copy thereof as evidence that the certificate of the officer who took such proof or acknowledgment is not, in form or substance, such as required by the laws of this state, and such instrument shall be given the same effect as if it were not so defective, does not, we think, militate against this position, but rather tends to strengthen it, as this clause refers alone to the character of the certificate to the instrument, and does not relate to the authority of the officer taking it. We therefore hold that by this act the Legislature clearly intended to provide for the introduction in evidence of deeds which have been recorded in the proper office, under two separate and distinct conditions: First, every instrument which may have been recorded after being properly acknowledged, as required by law, before the proper officer; second, every instrument which had been actually recorded for a period of 10 years, whether the same had been properly acknowledged in accordance with law or not. So believing, we sustain said assignment, and hold that the court erred in excluding said deed.

By his third assignment of error appellant insists that the court erred in holding that appellee's alleged cause of action was not barred by the statute of limitation of five years, pleaded and proven by the defendant on the trial of this case. Appellant introduced in evidence a tax deed from the sheriff of Lubbock county conveying the land in controversy to Geo. L. Beaty, of date May 7, 1901, and duly registered on the 18th day of July, 1901; a deed from Beaty purporting to convey the same land to himself, of date January 3, 1903, filed for record same day and duly recorded January 5, 1903, and

showed that he and his vendor had said land inclosed and actually and continuously used and occupied the same, claiming title thereto during the period covered thereby, and had paid all taxes thereon for the years 1900 to 1907, inclusive. The suit was filed June 19, 1907, thus embracing a period of more than seven years that he had held same before the filing of this suit. Appellee contends, however, that the ruling of the court holding that the statute of limitations did not apply to and therefore bar him of the right of recovery was correct, for the reason that appellant's claim was based on a tax deed from the sheriff to Beaty, and that in such cases the five-year statute of limitations did not begin to run until two years after the execution of said sheriff's deed to Beaty, during which time the owner of said land had the right of redemption, and that such period of two years should be excluded from the computation. If this is true, then it appears that defendant's holding was not for a period of five years, as contemplated by the statute. We are inclined to agree with appellee in this contention, and to hold that the court did not err in this respect. In the case of *Beatty v. O'Harrow*, 109 S. W. 414, in which a writ of error was denied by the Supreme Court, it was held, as shown by the syllabus thereof, that the possession by a purchaser of land sold for taxes is not adverse to the owner during the two years from the execution of the deed within which the land may be redeemed, and limitation does not begin to run against the owner before the expiration of the redemption period, citing in support thereof *Davis v. Hurst*, 14 S. W. 610, which last decision was approved by the Supreme Court. The law provides that the owner, during said two years, shall have the right to redeem, and during such period it is evident that there can be no adverse holding under the statute of limitation. The action of the court holding that the statute was not applicable is correct. We therefore overrule this assignment.

On account, however, of the error heretofore pointed out, the judgment of the court below is reversed, and the cause remanded. Reversed and remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. GRAVES.

(Court of Civil Appeals of Texas. Nov. 6, 1909.)

1. MASTER AND SERVANT (§ 92*)—ACCIDENT TO RAILROAD EMPLOYÉ—NEGLIGENCE IN PROVIDING MEDICAL ATTENTION.

A railroad employé contributed monthly to a fund for the relief of injured employés under a contract with the railroad company. An accident to such employé happened about 6 p. m., and he was not carried to the place where the

company's nearest local surgeon resided till next morning about 6 or 8 a. m., and no effort was made to have him conveyed there, though there was an engine at hand on which he might have been taken within two or three hours after the accident. *Held*, that it was defendant's duty, notwithstanding a rule of its hospital department requiring removal of injured employés on the first train, to have exercised ordinary care to have carried plaintiff to such place within a reasonable time after his injury, or to have provided him with as skillful treatment where he was as he would have received if he had been carried on the first train pursuant to such rule.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 143; Dec. Dig. § 92.*]

2. MASTER AND SERVANT (§ 293*)—ACCIDENT TO RAILROAD EMPLOYÉ—NEGLIGENCE IN PROVIDING MEDICAL ATTENTION—INSTRUCTIONS.

There being evidence warranting the jury in concluding that a rule pursuant to which plaintiff was carried by the first train to the place where defendant's nearest local surgeon resided was reasonable, and that a competent physician and surgeon gave plaintiff prompt and proper medical attention at the place where he was hurt, such as he would have received at the hands of defendant's local surgeon, and that the latter in conjunction with another, within a reasonable time after his arrival on the train, gave him proper attention, it was error to refuse a charge exonerating defendant from liability if the evidence established such a state of facts.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1148; Dec. Dig. § 293.*]

3. DEPOSITIONS (§ 75*)—SUFFICIENCY OF CERTIFICATE.

The caption of a deposition recited that, pursuant to the commission and interrogatories, a notary summoned the witness before him, and that he was "first duly sworn to testify the truth, the whole truth and nothing but the truth." Then followed the answers to the direct interrogatories, signed "W. C. G., Witness," with the following jurat: "Subscribed and sworn to before me," etc. Following answers to cross-interrogatories were likewise signed, followed by a jurat identical with the last quoted. The notary's certificate showed that defendant "was by me duly sworn to testify the truth, the whole truth and nothing but the truth in the case mentioned in the caption"; that the deposition was reduced to writing on a typewriter by the notary in the presence of defendant, who subscribed the same in the notary's presence, etc. *Held*, that the statutory requirement that the certificate, either alone or considered with the caption, must show that answers to the interrogatories and cross-interrogatories were signed and sworn to by the witness before the officer taking the deposition, was not complied with.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 182-189; Dec. Dig. § 75.*]

4. COURTS (§ 91*)—PREVIOUS DECISION OF SUPREME COURT CONTROLLING IN COURT OF CIVIL APPEALS.

It is the duty of the Court of Civil Appeals to follow rulings of the Supreme Court, though it might have reached a different conclusion had the question been presented as an original proposition.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.*]

5. EVIDENCE (§ 512*)—EXPERT OPINION AS TO MEDICAL TREATMENT.

While expert testimony is admissible to prove the character of treatment which should be given a patient, or the probable effect of the lack thereof, the opinion of an expert as to whether another physician should or should not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have gone to a patient under particular circumstances is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2316; Dec. Dig. § 512.*]

6. MASTER AND SERVANT (§ 270*)—INJURY TO RAILROAD EMPLOYE—NEGLIGENCE IN PROVIDING MEDICAL ATTENTION—EVIDENCE.

In a suit against a railroad for negligence in providing an injured employe with medical attention, the testimony of a witness that at plaintiff's request he notified defendant's local agent of the injury was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 913; Dec. Dig. § 270.*]

7. EVIDENCE (§ 317*)—HEARSAY—STATEMENTS BY PERSON OTHER THAN PARTY TESTIFYING.

In a suit against a railroad for negligence in providing an injured employe with medical attention, testimony of plaintiff that in reply to messages sent to defendant's local agent a third person told him, shortly after he was injured, that the agent would have a train up from the place where defendant's nearest local surgeon resided at 9 o'clock that night, and take him there; that after he failed to get out at 9 o'clock he had such person make from three to six trips to the agent; and that, in response to messages sent to the agent by this person on these trips, the latter told him that the agent said, "They would have a train and that it should have gone," and also, "We will have a train stop at a certain street and give four blasts of the whistle and wait until he (plaintiff) can be carried on the cot; that he had gone to his house and got a cot to put him on early in the evening." *Held*, that the testimony was hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1174-1192; Dec. Dig. § 317.*]

8. EVIDENCE (§ 556*)—OPINION EVIDENCE—HEARSAY—STATEMENTS IN MEDICAL BOOKS.

In a suit against a railroad for negligence in providing medical attention for an employe, injured in the knee, a physician testifying for plaintiff was permitted, after stating that a compound comminuted fracture not receiving proper attention for a period of 15 hours would be a great deal more likely, if not practically certain, to become infected, and by reason of the weakened condition of the patient render him more easily a prey to septic germs, and that these germs multiply rapidly in a proper soil like blood and serum, and to further state "so that from a single germ, according to Koch, in 24 hours more than 8,000,000 would develop. They divide themselves by fission once every hour." *Held*, that this testimony was hearsay; the witness' statement not purporting to be an expression of his own opinion or knowledge of the subject on which he was speaking, but that of the person Koch.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2377; Dec. Dig. § 556.*]

9. TRIAL (§ 260*)—REFUSAL OF SPECIAL CHARGES COVERED BY MAIN CHARGE AND OTHER SPECIAL CHARGES GIVEN.

No error can be predicated on the refusal of special charges sufficiently covered by the court's main charge and other special charges given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

10. TRIAL (§ 233*)—MISLEADING INSTRUCTIONS—STATEMENT AS TO ISSUES WITHDRAWN.

To avoid the probability of misleading the jury, they should not be instructed that all other issues raised by the pleadings, other than those submitted, are withdrawn from their consideration.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 527-530; Dec. Dig. § 233.*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by George W. Graves against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed.

Coke, Miller & Coke and Ramsey & Odell, for appellant. C. B. Stuart and Collins & Cummings, for appellee.

TALBOT, J. Appellee sued appellant to recover damages alleged to have been sustained by him on account of the loss of his leg as a result of the negligence of appellant in not using reasonable diligence to provide him with proper medical and surgical attention after he had received an accidental injury resulting in the fracture of the kneecap of said leg. The petition alleged that on the 12th day of May, 1907, plaintiff was, and had been for some time, in the employ of the defendant in the capacity of chief clerk in its offices in the city of Hillsboro, Hill County, Tex., and that among other duties it was his duty, especially in the absence of the defendant's local agent at Hillsboro in case of a wreck along defendant's line of railway where the property of defendant was in danger of being damaged or destroyed, etc., to go to the scene of such wreck and assist in the preservation of its property; that on said 12th day of May, 1907, a serious wreck occurred on defendant's line of railway at Milford, a small station about 15 miles north from Hillsboro, in which much of its property was damaged and destroyed; that the plaintiff, on hearing of said wreck, defendant's local agent at Hillsboro being absent, went at once to Milford for the purpose of caring for the property of defendant, and, while viewing the wreck from the top of a freight car which had been overturned, he received the injury to his knee. It was further alleged that at the time plaintiff entered the service of the defendant he entered into a contract with the defendant, by the terms of which the defendant agreed, in consideration of its retaining 50 cents each and every month out of the plaintiff's salary for hospital fees and medical attention, that it would, in case of injury to or sickness of the plaintiff while in the discharge of his duties from any cause, immediately convey the plaintiff to a hospital or to a place where he could receive proper medical and surgical attention, and that in case the plaintiff, by reason of any such injury or sickness, should be in such condition as that he could not be removed by the means at hand, he should be placed in charge of the local agent and cared for until the arrival of the nearest local surgeon, whose duty it would then become to go immediately equipped with necessary and proper apparatus and medicines to give

plaintiff such medical and surgical attention as the injury or sickness should require; that plaintiff relied upon said contract, and consented for the defendant to retain, and defendant did retain, each month for a period of five years while plaintiff was in its employ, including the month in which he was injured, 50 cents from his salary to defray the expense of medical attention and treatment, etc., in the event he should become sick or injured; that, immediately after receiving the injury mentioned, he caused the defendant's local agent at Milford and its nearest local surgeon, Dr. J. W. Miller of Hillsboro, to be notified of his said injury and the necessity for immediate surgical attention; that notwithstanding it was only 15 miles from Milford to Hillsboro, at which last-named place were situated competent surgeons and suitable surroundings for sanitary treatment, which were not available at Milford, Tex., and notwithstanding that defendant had idle engines and crews at Hillsboro which it could have used either for the purpose of conveying the appellee to Hillsboro or for conveying its local surgeon and proper apparatus for performing the needful operation, it negligently refused to do either and permitted the appellee to remain at Milford for a period of 15 hours after receiving said injury without proper medical and surgical attention; that said delay was unreasonable and negligent, and, as the direct result thereof, sepsis set in and plaintiff's kneecap and kneejoint became infected before any operation was performed upon the same, and because thereof it afterwards became necessary to, and he did, have his leg amputated near his hip joint, and that such operation would not have been necessary if he had received proper surgical attention within a reasonable time. The appellee further alleged that it was impossible for him to reach proper surgical attention by his own efforts, but that the appellant, in the exercise of ordinary care, could have conveyed the plaintiff to a place where he could and would have received proper surgical attention within a reasonable time, and that it could have sent its local surgeon from Hillsboro to Milford, where appellee was, who could and would have given him proper surgical attention within a few hours after his injury.

The defendant pleaded a general denial and specially that, if the contract existed between it and the plaintiff as alleged by him, the plaintiff at the time of his injury was not engaged in the discharge of any duty as an employé of defendant, and therefore not entitled to receive medical treatment; that, if the contract existed, it was expressly provided therein that, when any injured employé was able to be moved, he should be taken or sent to the nearest local surgeon in the direction in which the first train should be going, and the local surgeon notified of his coming and of the character of the injury, and that said contract was

in all things complied with by the appellant; that, after appellee's injury, he was properly attended at Milford by Dr. Rogers, a careful and skillful surgeon, by whom proper medical attention was rendered him at the expense of the appellant, and that he was thereafter removed from Milford to Hillsboro upon the first train going in that direction, and upon his arrival was properly attended by Drs. Miller and Davis, by whom he was given proper attention at the expense of the appellant, and that, by reason thereof, appellant had used reasonable and proper care to provide appellee with proper attention and treatment; that if, under the terms of the alleged contract, it was the duty of appellant's surgeon at Hillsboro to go to Milford to give attention to appellee, he was unable to go, and in the exercise of ordinary care could not have done so by reason of illness in his own family and the bad condition of the roads between Milford and Hillsboro; that, if it became necessary to amputate appellee's leg, as alleged by him, that same did not arise from any alleged delay in his receiving medical attention, but by reason of natural or other causes wholly independent of such delay, and the appellant was in no wise responsible therefor; that same was due to his voluntary act in leaving the care and attention of Drs. Miller and Davis at Hillsboro shortly after said alleged injury and going from Hillsboro, a distance of more than 200 miles, to McAlester, Okl., with his leg in such a dangerous and serious condition as it was by reason of said alleged injury, and that his act in so doing constituted contributory negligence, which was the proximate cause of the loss of his leg; that if plaintiff was caused to suffer great mental and physical pain by reason of lack of attention at Milford, as alleged by him, the same was caused by and due to his own negligence in failing to request such attention which was the proximate cause of any such suffering. It is undisputed that appellee was accidentally injured as alleged; that appellant's local surgeon at Hillsboro, Dr. Miller, was shortly thereafter notified of his injuries, and did not go to Milford and dress and treat the wound; that Dr. Rogers did visit plaintiff at Milford very soon after he was hurt, and gave the wound a temporary dressing; that appellee was carried from Milford to Hillsboro on the morning after his injury upon the first train running from Milford to Hillsboro, and, at his request, was taken to the sanitarium of Dr. C. C. Davis. A jury trial resulted in a verdict and judgment in favor of appellee for the sum of \$12,500, and the appellant has appealed the case to this court.

It is assigned that the trial court erred in refusing to instruct the jury, as requested by appellant, that "under the rules and regulations of the defendant for the government of its hospital department in force at the time of plaintiff's alleged injury, and at the

time of plaintiff's employment by the defendant, it was provided that, in the event an injured employé was able to be moved, he should be taken or sent to the nearest local surgeon in the direction in which the first train should be going, and the local surgeon notified of his coming and the character of his injury, and, it being shown from the uncontradicted evidence in this case that after the receipt of his alleged injury the plaintiff was able to be moved, and that he was taken to Hillsboro, where the nearest local surgeon of the defendant resided, upon the first train moving in the direction of Hillsboro, and defendant's local surgeon notified of his coming and the character of his injury, you are therefore instructed that in so far as the plaintiff seeks to recover for the alleged negligence of the defendant in delaying sending him from Milford, Tex., to Hillsboro, Tex., you will find for defendant." This charge seems to have been requested in view of a rule of the appellant for the government of its hospital department, to the effect that, when an injured employé is able to be moved, "take or send him to the nearest local surgeon in the direction in which the first train is going, notify the surgeon of his coming and the character of his injuries"; and there was testimony tending to show that this rule had been complied with in this case. We are not prepared to hold that the charge under the facts should have been given. The accident alleged happened about 6 o'clock in the afternoon of May 12, 1907, and appellee was not carried to Hillsboro, where appellant's nearest local surgeon resided, until the next morning about 6 or 8 o'clock; nor does it appear that appellant made any effort to have appellee conveyed to Hillsboro until that time, notwithstanding it had an engine at hand south of the wreck upon which he might have been taken to that place within two or three hours after the accident occurred. We are inclined to think that under the circumstances shown it was appellant's duty, notwithstanding the rule governing its hospital department, above referred to, to exercise ordinary care to have appellee carried to Hillsboro within a reasonable time after he received the injury described in his petition, or to have provided him with as skillful surgical treatment at Milford as he would have received at Hillsboro, and that, inasmuch as the requested charge failed to impose such duty upon it, there was no error in refusing it.

The fifth assignment of error complains of the refusal of the court to give the following charge, requested by appellant: "It is shown from uncontradicted evidence that, under the rules and regulations of the defendant for the government and regulation of its hospital department in force at the time of plaintiff's injuries, employés of the defendant who were able to be moved should be taken or sent to the nearest local surgeon in the direction in which the first train should be going, and

the local surgeon notified of his coming and the character of his injury, and that plaintiff, after receiving the injury complained of in this case, was able to be moved and was brought to Hillsboro, where the nearest local surgeon of the defendant resided, on the first train moving in the direction of Hillsboro, and the local surgeon notified of his coming and the character of his injury, and if you believe that said rule and regulation was a reasonable one, and that the plaintiff received from Dr. Will Rogers at Milford proper attention, and such as would have been given him by a careful and competent physician and surgeon in the exercise of ordinary care prior to the time of his removal to Hillsboro, and that, after the arrival of the plaintiff in Hillsboro, the operation performed by Drs. Davis and Miller was performed within a reasonable time, or that they exercised ordinary care to do so, then and in such event you will find for the defendant." We are of the opinion this charge was applicable to the facts, and its refusal error. The charge correctly states the rule of appellant in force at the time appellee entered its service and for a long time prior thereto, and continuously up to the time of his injury, and there was testimony from which the jury would have been warranted in concluding that the rule was a reasonable one, and that appellee received at the instance of appellant prompt and proper medical attention at Milford after he was hurt in the services rendered by Dr. Will Rogers; that Dr. Rogers was a careful and competent physician and surgeon, and that his treatment of appellee before his removal to Hillsboro was such as he would have received at the hands of Dr. Miller, appellant's local surgeon at Hillsboro, had he gone to Milford when notified of appellee's injury and treated him in person. It was also shown without contradiction that appellee was, in fact, carried from Milford to Hillsboro after he received his injury on the first train of appellant going there, and that, within a reasonable time after he arrived at Hillsboro, appellant's local surgeon, Dr. Miller, in conjunction with Dr. Davis, attended appellee, and performed an operation upon him which appellee admits was proper and skillfully done. Dr. C. C. Davis testified that, if the antiseptic preparations of Dr. Rogers were thorough, the temporary treatment given appellee was the proper temporary treatment to give that kind of a wound; that, if appellee had been brought to his sanitarium in the night in the condition in which he found him next day with his wound dressed as he found it dressed, he would have postponed the operation until daylight. It would seem that the special charge grouped facts which appellant was entitled to have specifically submitted to the jury, and, if found to be true, were sufficient to exonerate it from liability. Neither the general charge nor any special charge given by the court, all of which we have care-

fully considered, sufficiently enumerated the particular facts and submitted for the consideration of the jury the phases of the case presented in the special charge under consideration.

On the trial of the case appellee offered in evidence the deposition of Dr. W. C. Graves, taken before a notary public in and for Pittsburg county, Okl. The depositions of this witness were not filed until after the trial began, and, when offered in evidence, counsel for appellant objected to the admission of the same, and by motion in writing moved to quash said depositions on the ground that the officer before whom they were taken did not certify that the answers were sworn to before him by said witness. Both the objection to the admission of the testimony and the motion to suppress the depositions were overruled, and the same admitted in evidence, to which action of the court proper exception was reserved by appellant, and the same is here assigned as error. The testimony of this witness was most material. It covered fully his treatment of the appellee from the time of appellee's arrival at McAlester, and his opinion as an expert to the effect that the amputation of appellee's leg resulted from delay in the performance of the operation performed by Drs. Davis and Miller at Hillsboro, and other material features of the case. The caption of the depositions, omitting the style of the case, is as follows: "Pursuant to the attached commission and interrogatories, I, E. Allen Boyd, a notary public within and for the county of Pittsburg, state of Oklahoma, summoned before me Dr. W. C. Graves, who, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:" The answers to the direct interrogatories then follow in consecutive order, and are signed, "W. C. Graves, Witness," with the following jurat of the officer: "Subscribed and sworn to before me this 5th day of September, 1908. My commission expires March 31st, 1911. E. Allen Boyd." The answers to the cross-interrogatories then follow in consecutive order, and are signed, "W. C. Graves, Witness," followed by a jurat identical with that last quoted, and there is then attached to the depositions the following certificate: "State of Oklahoma, Pittsburg county. I, E. Allen Boyd, a notary public, in and for Pittsburg county, Oklahoma, do hereby certify that the above named Dr. W. C. Graves, the witness whose name is subscribed to the foregoing depositions, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the case mentioned in the caption, and that the deposition by him subscribed was reduced to writing upon a type-writer by me in the presence of said witness, and the same was subscribed by him in my presence, said depositions being taken upon the attached direct and cross-interrogatories, and pursuant to the attached commission, and

the same were taken on the 5th day of September, 1908, between the hours of 10 o'clock in the forenoon and 6 o'clock in the afternoon, at the office of Boyd & Moore, at 108½ East Choctaw avenue, in the city of McAlester, Pittsburg county, Oklahoma; that neither plaintiff nor defendant was present during the examination of the witness in person or by attorney; that I am not related to, nor attorney for either of said parties, nor otherwise interested in the outcome of the action. I so certify. My commission expires March 31, 1911. E. Allen Boyd, Notary Public."

Our statute provides, and it is well settled by the decisions construing the same, that the certificate of the officer taking a deposition either alone or considered in connection with the caption thereto must show that the answers of the witness to the interrogatories and cross-interrogatories were signed and sworn to by the witness before such officer. Does it appear from the certificate or from the caption and certificate in this case that this requirement has been complied with? Under the decisions of the courts in this state, we think the question must be answered in the negative. *Chapman v. Allen*, 15 Tex. 282; *Carroll v. Welch*, 26 Tex. 184; *Slaughter v. Rivenbark*, 35 Tex. 68; *Railway Co. v. Brouard*, 69 Tex. 617, 7 S. W. 374; *Bush v. Barron*, 78 Tex. 8, 14 S. W. 238; *Emerson v. McKenna* (App.) 16 S. W. 419; *McFaddin v. Sims* (Civ. App.) 97 S. W. 335. In the case of *Railway Company v. Brouard*, supra, Judge Stayton, in writing the opinion of the Supreme Court, says: "The only way in which it can be known that what appears to be the answers of a witness taken through interrogatories and a commission, within the meaning of the law, are such answers, is by the certificate of the officer to the fact that the answers of the witness were signed and sworn to by the witness before him. That which is thus verified becomes evidence; but no statement made by the officer that matters appearing as the answers which does not show that they become so by the facts that the witness signed and swore to them before the officer can be received. If we take what is stated in the caption to the deposition of Bradley Johnson and attach it to the certificate of the officer which follows, it will stand thus: 'Answers of Bradley Johnson to direct interrogatories in the above suit, I, G. W. Paine, a justice of the peace in and for precinct No. 8, and ex officio notary public of said county and state, do hereby certify under my hand and official seal that the foregoing answers were made, subscribed, and sworn to before me at Sabine Pass, Jefferson county and state of Texas, on this fourth day of April, A. D. 1887.'" From this it may be suspected that the answers were signed and sworn to by Bradley Johnson; but this is not enough. It must appear through the officer's certificate that this is

true, or the deposition should be rejected. In *Bush v. Barron*, cited above, the certificate of the officer was as follows: "Sworn to and subscribed before me this August 25, A. D. 1887. John H. Smith, Justice of the Peace, Ellis County, Texas." The caption was: "Answers to interrogatories propounded by plaintiff to Joe Barron, a resident of Ellis county, Texas." The Supreme Court in holding the certificate in this case insufficient said: "This [caption] does not when read in connection with the certificate show that the answers were signed by the witness before the officer." In *Emberson v. McKenna*, supra, the caption, after stating the style of the case, is as follows: "Answers of interrogatories of S. E. Hartline in a suit pending in county court of Grayson county, Texas, March term, 1888. Interrogatories to S. E. Hartline. The certificate is as follows: 'The State of Texas, County of Hunt. Before me, A. D. Jackson, a notary public in and for Hunt county, on this day personally appeared before me S: E. Hartline, and, after being duly sworn according to law, answered on oath the within interrogatories and cross-interrogatories, and says they are true and correct to the best of his knowledge and belief. Sworn to and subscribed before me this the 7th day of March, 1888. A. D. Jackson, Notary Public Hunt County, Texas.'" In passing upon the sufficiency of this certificate the court, among other things, said: "The certificate does not state that the answers were signed and sworn to by the witness before him." Again, in the case of *McFaddin v. Sims*, 97 S. W. 335, the certificate to the deposition was in this language: "State of Kansas, County of Montgomery. I, the undersigned, Walter Zeigler, a notary public in and for the county of Montgomery, state of Kansas, do hereby certify that Harry Nolte was by me first duly sworn to make the answers to the above and foregoing direct and cross-interrogatories, and that his answers as given were reduced to writing and that the same were subscribed and sworn to by said witness." The objection urged was that the certificate did not show that the answers of the witness were sworn to and subscribed by him before the officer taking the same. It was held that, notwithstanding the certificate recited that the witness was sworn by the officer taking the deposition before the interrogatories were propounded to him, and his answers thereto were reduced to writing, and were subscribed and sworn to by him, still the same was not equivalent to a statement, as required by the statute, that the answers of the witness were signed and sworn to by him before said officer, and therefore the certificate was fatally defective. We are of opinion that the certificate in the present case is no more definite and certain with respect to the requirement of the statute that it shall show that the answers of the witness to the interrogatories

were sworn to by the witness before the officer taking said answers than the certificates in the cases cited were with respect to the defect pointed out in each of them. That the statement in the caption in this case to the effect that the witness Graves was "first duly sworn to testify the truth, the whole truth and nothing but the truth," was not a sufficient compliance with the statute requiring the certificate to show that the answers of the witness were sworn to by him is affirmed in the cases of *Emberson v. McKenna* and *McFaddin v. Sims*, supra; and that it no more certainly appears that the witness Graves swore to the answers objected to in the case at bar than in the case of *Railway Company v. Brouard* seems very clear. In the latter case the caption shows that the answers sought to be introduced in evidence were the answers of Bradley Johnson, whose deposition the officer was directed by the commission to take, and, notwithstanding the officer certifies "that the foregoing answers (Bradley Johnson's answers) were made, subscribed, and sworn to before him," yet the Supreme Court said it could only be suspected that said answers were signed and sworn to by Bradley Johnson, which was not enough to authorize the admission of the depositions. If it could not be said that it appears by necessary implication from the language of the captions and certificates used in this and other cases cited above that the respective answers of the witnesses to the interrogatories propounded were sworn to by said witnesses, we are unable to perceive how it can be said that it does so appear from the language used in the caption and certificate in question that Dr. W. C. Graves swore to the answers introduced in evidence in this case, and of which complaint is made. Appellee cites the case of *Railway Company v. Hennessy*, 20 Tex. Civ. App. 316, 49 S. W. 917, in support of his contention that the certificate here in question, when read in connection with the caption, shows a substantial compliance with the statute, which is all that is necessary. The case apparently sustains this view, and, if it does, it is, in our opinion, contrary to the decisions made by our Supreme Court in the cases cited in this opinion, wherein very similar certificates were construed and held to be fatally defective. In such case we conceive it to be the duty of this court to follow the ruling of the Supreme Court, even though we might have reached a different conclusion had the question been presented to us as an original proposition.

The twenty-first assignment is to the effect that the court erred in admitting in evidence, over the objection of the defendant, the testimony of the witness Dr. B. H. Vaughan that assuming that a surgeon, whose duty it was to attend to the case, was informed immediately or very soon after the accident that appellee's knee had been

severely injured, and the patella badly broken, in his judgment the proper thing for the surgeon to do would be to go immediately and dress and treat the case. The admission of this testimony, we think, was material error. One of the important issues in the case was whether or not appellant's local surgeon at Hillsboro, Dr. Miller, upon receiving notice of appellee's injury shortly after the accident, should in the exercise of ordinary care have gone to Milford and treated the case in person, and the affirmative of this issue could not be established under the facts of this case by the opinion of an expert witness. As argued by counsel for appellant, while expert testimony is admissible to prove the character of treatment which should be given a patient or the probable effect of the lack of such treatment, the opinion of such expert as to whether another physician should or should not have gone to the patient under particular circumstances was inadmissible. The practical effect of the testimony objected to was to tell the jury that in the opinion of the witness it became the duty of Dr. Miller, when he was notified that appellee had been hurt, to go to Milford and dress and treat his wounds. Whether he should have done so was not the subject of expert testimony, and the opinion of Dr. Vaughan as to what he should have done in this respect should have been rejected by the court.

We are also of the opinion that the court erred in permitting the plaintiff, George W. Graves, to testify, over the objection of appellant that the testimony was hearsay, that in reply to messages sent to appellant's local agent at Milford Charles Beck told him, plaintiff, shortly after he was injured that he, said agent, would have a train out from Hillsboro at 9 o'clock that night and take him to Hillsboro; that, after he failed to get out at 9 o'clock, he had Mr. Beck make anywhere from three to six trips to the agent, and that, in response to messages sent to the agent by Beck on these trips Beck told him that the agent said, "They would have a train and that it should have gone"; that he said, "We will have a train stopped at a certain street and give four blasts of the whistle, and wait until he (plaintiff) can be carried on the cot; that he had gone to his house and got the cot to put him on early in the evening." The testimony of the witness Beck to the effect that at the request of the appellee he had notified the agent at Milford of appellee's injury was admissible but the testimony objected to and quoted above was clearly obnoxious to the objection that it was hearsay, and, being material, its admission must be regarded as hurtful to appellant's rights.

The court also erred, we think, in permitting the witness Dr. W. C. Graves, after stating that a compound comminuted frac-

ture not receiving proper attention for a period of 15 hours would be a great deal more likely, if not practically certain, to become infected, and by reason of the weakened condition of the patient render him more easily a prey to septic germs, and that these germs multiply rapidly in a proper soil like blood and serum, to further state: "So that from a single germ, according to Koch, in 24 hours more than 8,000,000 would develop. They divide themselves by fission once every hour." This testimony was subject to the objection urged that it was hearsay. The statement of the witness does not purport to be an expression of his own opinion or knowledge of the subject upon which he is speaking, but that of the person Koch. The question is practically the same as would have been raised had appellee read the statement made by the witness from some medical treatise or standard work on medical jurisprudence, and that the reading of such an excerpt would not have been admissible seems to be well established. *Railway Co. v. Jones* (Sup.) 14 S. W. 306; *Boehringer v. Richards*, 9 Tex. Civ. App. 284, 29 S. W. 508; *Railway Co. v. Hanway* (Civ. App.) 57 S. W. 695; *Lawson Expert & Opinion* Ev. p. 205; *Burt v. State*, 38 Tex. Cr. R. 397, 40 S. W. 1000, 43 S. W. 344, 39 L. R. A. 305, 330; *Railway Co. v. Farmer* (Civ. App.) 108 S. W. 729. We think the testimony upon the objection of appellant should have been excluded.

There are a number of assignments which have not been discussed, none of which in our opinion pointed out reversible error. Those relating to special charges asked by the appellant and refused were, we think, sufficiently covered by the court's main charge and other special charges given. Those complaining of the court's main charge probably disclose no reversible error, or, if so, they are not likely to occur upon another trial. The paragraph relating to the measure of damages, when the entire language thereof is considered, is not perhaps subject to the criticism urged against it, but we suggest that the portion thereof authorizing the jury, in the event they find for plaintiff, to take into consideration the value of the time lost by him during the period of his disabilities upon another trial, be made to more accurately and with greater certainty apply to the time lost by reason of injury suffered subsequent to the infliction of the original wound, as a result of appellant's negligence, if any. We also think the paragraph instructing the jury that all other issues raised by the pleadings other than those submitted are withdrawn from their consideration should, to avoid any probability of misleading the jury, be omitted.

For the errors indicated, the judgment of the court below is reversed, and the cause remanded.

STATE v. WEAVER.

(Supreme Court of Tennessee. Nov. 20, 1909.)

1. ELECTIONS (§ 95*)—REGISTRATION OF VOTERS—NATURE OF PROVISION.

The registration laws authorized by Const. art. 4, § 1, authorizing the General Assembly to enact laws to secure the freedom of elections and the purity of the ballot box, prescribe no qualifications of electors, but are to regulate the exercise of the elective franchise.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 95, 96; Dec. Dig. § 95.*]

2. ELECTIONS (§ 96*)—REGISTRATION OF VOTERS—CONSTRUCTION OF STATUTE.

Shannon's Code, § 1189, provides that, in all civil districts, wards, and voting precincts in counties having a population of 50,000 or over, every voter shall be registered. Section 1198 provides that registration, as provided for, shall be a prerequisite to voting in all elections in such territory. Section 1199 provides no voter shall be allowed to vote in any election wherein registration is required by law, unless he shall have first registered under the provisions of the article as much as 20 days before the election is held. *Held*, that the sections apply to all elections, including those of municipalities in the counties falling within their provisions, and to all voters, whether property holders or residents voting in the elections, and hence apply to municipal elections in the town of Lonsdale, Knox county, which county has a population of over 50,000, though the town charter (Laws 1907, p. 1048, c. 305) merely defines the qualifications of voters at municipal elections, and does not provide for registration.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 97; Dec. Dig. § 96.*]

3. ELECTIONS (§ 313*)—VIOLATION OF LAWS—VOTING WITHOUT REGISTRATION.

The statute making registration a prerequisite to voting in all elections in the specified counties, a person who voted without registering at a municipal election in the town of Lonsdale, in Knox county, was guilty of a misdemeanor under Code 1838, § 4596, providing that when the performance of any act is prohibited by statute, and no penalty for violation is imposed, the doing of such act is a misdemeanor.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 338; Dec. Dig. § 313.*]

4. ELECTIONS (§ 97*)—REGISTRATION—PLACE.

In view of Shannon's Code, § 1217, requiring the registrars of each district or voting precinct to appear at the place where the election is held with the books in which the voters are numbered, which are made evidence of registration, and occupy places inside the polling precincts, and check off or mark said voters as each voter therein registered shall vote, a voter must register in the civil district, ward, or voting precinct where he proposes to vote, as a prerequisite to his right to vote therein.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 92; Dec. Dig. § 97.*]

Error to Criminal Court, Knox County; T. A. R. Nelson, Judge.

R. W. Weaver was indicted for illegal voting. A motion to quash the indictment was overruled on one ground and sustained on another, and both parties bring error. Motion overruled, and case remanded for trial.

W. W. Faw, Asst. Atty. Gen., for the State, R. A. Brown, for defendant.

SHIELDS, J. The defendant was indicted in the criminal court of Knox county for

knowingly voting, as the owner of real estate situated in the town of Lonsdale, Knox county, in a municipal election held in that town, without first having there registered 20 days or more before the election, as provided by chapter 25, p. 59, Acts Ex. Sess. 1890, chapter 224, p. 438, Acts 1891, and chapter 12, p. 30, Acts Ex. Sess. 1891.

A motion was made to quash the indictment, upon the grounds that it was not a misdemeanor to vote illegally in a municipal election, and that registration was not required of owners of real estate in Lonsdale in municipal elections there held. The trial judge overruled the first ground of the motion, and sustained the latter, and quashed the indictment. The state and the defendant both prosecuted appeals in the nature of writ of error, and have assigned the action of the trial judge adverse to them, respectively, as error.

We think the first ground of the motion was properly overruled, and the second erroneously sustained.

The contention of the defendant is predicated upon the provision of the charter of Lonsdale (chapter 305, p. 1048, Acts 1907) defining the qualifications of voters in elections to be held in the municipality for the election of municipal officers, which is in these words:

"The votes shall be by ballot, all persons owning real estate within said corporation, all persons living therein and who have been residents thereof for six months previous to said election and who are entitled to vote for members of the General Assembly shall be entitled to vote in said election."

The qualification here prescribed applies to all voters, whether they be owners of real estate in the municipality or residents therein.

To be entitled to vote for members of the General Assembly, under the Constitution, the voter must be a male person who is 21 years old, a citizen of the United States, and a resident of the state for 12 months and of the county 6 months; and the only other qualification which can be prescribed is the payment of poll taxes and the production of satisfactory evidence of such payment for such preceding period as the Legislature shall prescribe and at such time as may be prescribed by law. Const. art. 4, § 1.

These are all the qualifications required of those authorized to vote in elections held in the municipality.

The registration laws of the state do not prescribe qualifications of electors, but were enacted for the purpose of regulating the exercise of the elective franchise, and are authorized by the concluding clause of section 1, art. 4, of the Constitution, ordaining that the General Assembly shall have power to enact laws to secure the freedom of elections and the purity of the ballot box.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

In *Madison v. Wade*, 88 Ga. 699, 16 S. E. 21, it is held that registration adds no qualification to voters, but merely serves to identify them as a person qualified to vote. In *People v. Hoffman*, 116 Ill. 611, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793, it is said that a registry law is merely a mode of ascertaining and determining whether or not a man possesses the necessary qualifications of a voter. In *State v. Butts*, 31 Kan. 550, 2 Pac. 618, 619, Judge Brewer, now Mr. Justice Brewer of the Supreme Court of the United States, speaking for the court, said:

"It is evident that a proper enforcement of this statute, in securing 10 days before every election a full registry of all persons entitled to vote, furnishes a very efficient check against fraudulent voting. At any election in which much interest is felt, and where the opposing parties are supposed to be nearly equal in numbers, most careful scrutiny will be made of these registry lists, every voter's name and residence taken, and his right to vote verified by examination. The matter will not be left to the pressure and excitement of election day, but will all be ascertained and determined prior thereto. The value of such a registry for the preservation of the purity of the ballot box cannot be too highly estimated. * * * Obviously, what was contemplated was the ascertaining beforehand, by proper proof, of the persons who should on the day of election be entitled to vote; and any reasonable provision for making such ascertainment must be upheld. Requiring a party to be registered is not in any true sense imposing an additional qualification, any more than requiring a voter to go to a specific place for the purpose of voting, or requiring him to prove by his own oath or the oaths of other parties his right to vote when challenged, or than requiring a naturalized foreigner to present his naturalization papers. Each and all of these are simply matters of proof, steps to be taken in order to ascertain who are and who are not entitled to vote."

Judge Cooley in his work on *Constitutional Limitations* (page 601), said:

"In some of the states it has also been regarded as important that lists of voters should be prepared before the day of election, in which should be registered the names of every person entitled to vote. Under such a registration the officers whose duty it is to administer the election laws are enabled to proceed with more deliberation in the discharge of their duties, and to avoid the haste and confusion that must attend the determination upon election day of the various and sometimes difficult questions concerning the right of individuals to exercise this important franchise. Electors, also, by means of this registry, are notified in advance of the persons claiming the right to vote, and are enabled to make the necessary examination to determine whether the

claim is well founded, and to exercise the right of challenge if satisfied any person registered is unqualified. When the Constitution has established no such rule, and is entirely silent on the subject, it has sometimes been claimed that the statute requiring voters to be registered before the day of election and excluding from the right all whose names do not appear upon the list was unconstitutional and void, as adding another test to the qualifications of electors which the Constitution has prescribed, and as having the effect, where the electors are not registered, to exclude from voting persons who have an absolute right to that franchise by the fundamental law. This position, however, has not been accepted as sound by the courts. The provision for a registry deprives no one of his right, but is only a reasonable regulation under which the right may be exercised. Such regulations must always have been within the power of the Legislature unless forbidden."

This was quoted by this court with approval in the case of *Moore v. Sharp*, 98 Tenn. 498, 41 S. W. 587.

These registration laws apply to all elections, including those of municipalities, in the counties and civil districts falling within their provisions. We quote the sections evidencing this as codified in Shannon's edition of the Code, viz.:

"Sec. 1189. In all civil districts, wards, and voting precincts in counties which have a population of 50,000 or over that number, computed by the federal census of 1890, or which may hereafter have that number or over, computed by any subsequent federal census, and in all cities, towns, and civil districts, having a population of 2,500 inhabitants or over that number computed by the federal census of 1890, or may hereafter have that number or over, computed by any subsequent federal census, each and every voter, in addition to the other regulations required by law, shall be registered as a voter as hereinafter provided before he shall be allowed to exercise the elective franchise in any election held in any civil district, ward, or voting precinct in said counties having a population as herein provided: Provided, that the last published census shall control in every case. (Ex. Sess. 1890, c. 25, § 1; 1891, c. 224, § 1; Ex. Sess. 1891, c. 12.)"

"Sec. 1198. Registration, as provided for in section 1197, and the other provisions thereof, shall be a prerequisite to voting in all elections in such territory; and when such registration has been made under the provisions of this article, no other or further general registration for two and four years shall be made or required as a prerequisite to his voting, except in cases where the voter has changed his residence. (Id. § 3.)"

"Sec. 1199. No voter shall be allowed to vote in any election wherein registration

is required by law, unless he shall have first registered, under the provisions of this article, as much as twenty days before the election wherein he offers to vote is held. But registration of voters shall only be required every four years hereafter in the civil districts having less than five thousand population, according to last census, whenever said civil districts are in the counties not wholly subject by the present laws to registration. (Id. § 4.)

They not only apply to all elections in the territory coming within the provisions of the statute, but to all voters, whether as property holders or residents, voting in the election. No exception of any kind is made. They make registration a prerequisite to voting in all elections and prohibit voters from voting without lawful registration. All who do so are guilty of a misdemeanor. Code 1858, § 4596. Knox county falls within the provisions of these laws, and they therefore apply to all elections and voters in the municipality of Lonsdale.

The voter must register in the civil district, ward, or voting precinct where he offers to vote. This clearly appears from a consideration of all the provisions of the statutes, and such has been their practical construction. Section 1217 requires the registrars of each district, or voting precinct, to appear at the place where the election is held with the books in which the voters are numbered, which are made evidence of registration, and occupy places inside the polling precincts, and check off or mark said voters as each voter therein registered shall vote. The voter's name cannot appear upon these books unless he has there registered. No other registration books are required or authorized to be present or used, and a registration in another precinct would not avail the voter anything. If the registration laws did not apply to the place of the residence of the nonresident voter, and the law was as insisted, he could not register anywhere, although he could not vote at the place where the laws do apply without registration. The registration must be in the district or ward where the vote is proposed to be cast.

When considered from the viewpoint of the objects and purposes of the registration law, the reasons for requiring registration of nonresident real estate owners, and resident real estate owners who may not have lived in the town of Lonsdale for a sufficient length of time to otherwise qualify them to vote, are more weighty than in the case of voters who have lived there for a sufficient length of time to qualify them to vote without regard to the real estate qualifications; for, ordinarily, there is more likelihood that the voters of the latter class, and their qualifications, will be known to the judges of election, and the candidates

and their friends, than those of the former class. As was well said by Mr. Justice Brewer, in *State v. Butts*, supra, viz.: "Obviously what was contemplated was the ascertaining beforehand, by proper proof, of the persons who should on the day of election be entitled to vote," so that "the matter will not be left to the pressure and excitement of election day, but will all be ascertained and determined prior thereto."

The motion to quash is overruled, and the case remanded for trial.

NASHVILLE, C. & ST. L. RY. CO. v. PATTERSON et al.

(Supreme Court of Tennessee. Dec. Term, 1908.)

1. TAXATION (§ 391*)—RAILROADS—STATUTES—CONSTRUCTION—"DISTRIBUTABLE"—"LOCALIZED."

Acts 1897, p. 102, c. 5, requiring railroads to file a schedule setting forth the length in miles of its railroad bed, switches, and side tracks, and the value of the whole, providing that the road of any railroad shall include side tracks, switches, etc., and that the roadbed, rolling stock, franchises, choses in action, and personal property having no actual situs shall be known as "distributable property," and shall be valued separately, and that the depot buildings and other property, real, personal, and mixed, having an actual situs, shall be known as the "localized property," and shall be valued separately, divides the taxation of railroad property into "localized" and "distributable" property; and switches and industrial tracks off the main right of way, but used as a part of the general system, and for the same purposes as switch tracks on the right of way are used, must be assessed as "distributable" property, but all buildings, coal bins, roundhouses, machine shops, depot buildings, and other structures located on the terminal yards must be assessed as "localized" property.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 391.*]

2. TAXATION (§ 391*)—VOID ASSESSMENTS—LIABILITY OF TAXPAYER.

Where switch and industrial tracks off the main right of way of a railroad are separately assessed as localized trackage off the right of way, though the property belongs to the distributable class, within Acts 1897, p. 102, c. 5, authorizing the taxation of railroad property, the separate assessment is void, and no tax can be collected thereon as distributable property.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 391.*]

Appeal from Circuit Court, Davidson County; T. E. Matthews, Judge.

Certiorari by the Nashville, Chattanooga & St. Louis Railway Company against Malcolm R. Patterson, Chairman, and others, constituting the Board of Equalization for Assessment of Railroad Property, to review an assessment. From a judgment quashing an assessment, both parties appeal. Reversed and rendered.

Claude Waller, for plaintiff. Attorney General Cates and James C. Bradford, for defendants.

McALISTER, J. This cause is before the court on the cross-appeals of the Nashville, Chattanooga & St. Louis Railway Company and the board of equalization from a judgment of the circuit court of Davidson county quashing an assessment of certain alleged localized property of the railroad, on account of vagueness and indefiniteness in the description of the property assessed. The main controversy, however, presented on the record, is whether the property involved should have been assessed as localized or distributable property. The genesis of the controversy, as well as its progress and development, may be thus stated: On August 1, 1907, the Railroad Commission made the following order, to wit:

The commission took up the petition of Mayor Frierson and City Attorney Chamlee, of Chattanooga, in regard to the assessment of the yards and terminals of railroad companies as localized property, and, after considering the opinion of the Attorney General of the state in the case, the petition was granted.

The commission proceeded to the consideration of the method to be pursued in assessing the trackage of railroads off the main right of way as localized property, and decided to value and assess it as railroad track on a mileage basis, whereupon the following order was adopted:

"That every railroad company doing business in Tennessee be required to file a statement under oath on or before August 15, 1907, setting forth the number of miles of side track, switch track, and spur track owned by it in the state of Tennessee, exclusive of such track on the main right of way; the statement to show the number of miles of such track in each county and municipality through which the road runs, together with the value of same.

"It is further ordered that each and every railroad company owning terminal yards and switch yards, or switch yards, be required to file with this commission as a part of its returns a blue print, or blue prints, showing the main line, side tracks and switches, and such terminal yards and switch yards."

In pursuance of this order the following letter was addressed to the tax agent or other representative of each railroad company doing business in Tennessee, who has been heretofore designated to make out, swear to, and return the tax schedules to the Comptroller of the State Treasury for the use of the commission making the assessment of railroad property for the years 1907 and 1908:

"Dear Sir: The Attorney General of the state holds that, under the law, this commission must assess [as] localized property, all the side tracks, spur tracks, and switch tracks off the main right of way of all railroads in Tennessee. To secure the information necessary to complete the assessment, the commission has entered an order on its

records, requiring returns to be made to the commission by all railroads in Tennessee, on or before August 15, 1907, under oath, giving the number of miles of such side track, spur track, and switch track belonging to each road in Tennessee that is off the main right of way, and to report the number of miles of such track in each county and municipality in Tennessee through which the road runs, with the value in each instance of such track, the report to be accompanied by a blue print, showing the main line and side tracks in all switch yards as terminal yards."

The schedules and blue prints were accordingly filed by the railroad authorities. The following assessment was then made of

Localized Track off Main Right of Way.

Value of localized track off main right of way	\$331,155 50
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Localized Track Apportioned to Counties.

Localized track in Davidson county, 12.40 miles	\$169,634 00
Localized track in Davidson county, 3.35 miles, being one-half the mileage of the Louisville & Nashville Terminal Company	82,461 50
Total localized track, Davidson county, 15.65 miles.....	\$252,095 50
Total localized track, Rutherford county, 1.33 miles.....	2,660 00
Total localized track, Bedford county, 0.07 miles.....	140 00
Total localized track, Franklin county, 2.23 miles.....	4,460 00
Total localized track, Marion county, 0.18 miles.....	360 00
Total localized track, Hamilton county, 12.37 miles.....	71,440 00

Localized Track Apportioned to Municipalities.

In Nashville, Nashville, Chattanooga & St. Louis proper, 12.30 miles.....	\$169,434 00
In Nashville, one-half interest in Louisville & Nashville terminal, 3.35 miles....	82,461 50
Total localized track in Nashville, 15.55 miles	\$251,895 50
Total localized track in Murfreesboro, 1.33 miles.....	2,660 00
Total localized track in Bell Buckle, 0.07 miles	140 00
Total localized track in Decherd, 0.25 miles	460 00
Total localized track in Chattanooga, 9.19 miles	65,080 00

Conclusions.

Value entire distributable property of this division (151.15 miles).....	\$5,140,100 00
Value entire property in Tennessee	5,474,749 50
Less exemptions.....	\$ 1,000 00
Less localized track off main right of way.....	331,155 50
Less other localized property	869,594 00
Value remaining distributable property in Tennessee	4,233,000 00
Value distributable property per mile (124.50 miles).....	34,000 00

After the work of the Railroad Commission had been completed, the petitioner filed its exception to the action of that body as to the assessment of all its property, and specifically excepted to the assessment of "local-

ized track off main right of way" in the following language:

"The honorable Railroad Commission in making the assessments of the several divisions of the Nashville, Chattanooga & St. Louis Railway within the state of Tennessee has divided the said property in the following classes, to wit: (1) Localized property; (2) localized trackage; (3) distributable property. In the division known and designated as "localized trackage" it has undertaken to assess separately and distinctly from the road itself certain tracks, switches, ties, rails, and the superstructure thereon, together with the property upon which they are located, and has specifically assessed this company as follows on localized trackage:

On the main line—that is, the line running from Nashville to Chattanooga—it has assessed what is designated as localized trackage at the sum of.....	\$351,155 50
On the Western & Atlantic Division it has assessed localized trackage at the sum of	32,980 00
On the Middle Tennessee & Alabama Branch it has assessed localized trackage at the sum of.....	200 00
On the West Nashville Branch it has assessed localized trackage at the sum of	12,850 00
On the Centreville Branch it has assessed localized trackage at the sum of	17,025 00
On the Sequatchie Valley Branch it has assessed localized trackage at the sum of	30,875 00
On the Tracy City Branch it has assessed localized trackage at the sum of	25,575 00
On the Columbia Branch it has assessed localized trackage at the sum of.....	3,940 00
On the McMinnville Branch it has assessed localized trackage at the sum of	6,225 00
On the Lebanon Branch it has assessed localized trackage at the sum of.....	800 00
On the Shelbyville Branch it has assessed localized trackage at the sum of	1,475 00
On the Paducah & Memphis Division it has assessed localized trackage at the sum of.....	7,775 00
On the Northwestern Division it has assessed localized trackage at the sum of	44,333 00

"All of said localized trackage is property that is completely covered by tracks, switches, ties, rails, and the superstructure thereon, and is used, not in the performance of local business, but in the handling of the general business of the company on each of the said branches. Said trackage is used precisely for the same purposes and in the same manner as the trackage on the main right of way of each of the several divisions of the company's property. The honorable Railroad Commission has seen proper to class all trackage—including tracks, switches, ties, rails, and the superstructure thereon—located upon the right of way of each of said divisions as a part of the distributable property of said company, but has assessed all of said trackage off of said right of way as localized trackage.

"It is respectfully submitted that there is nothing in the act under which this honorable Railroad Commission assesses the property in question which justifies it in assessing any of said tracks, switches, ties, rails, and superstructure thereon off of the right of way

as localized property, but that under and by the express terms of the act—being chapter 5 of the Acts of 1897—said property is a part of the distributable property, and must be assessed as a whole in connection with each division. Said act provides that 'the roadbed, rolling stock, franchises, choses in action and personal property of a railroad property having no actual situs, shall be known as distributable property and shall be valued separately from the other property.' And section 6 of said act provides that 'the road of any railroad property shall include all side tracks, switches, bridges, trestles, ties, rails and superstructure of every kind.' All of said localized trackage as above assessed is a part of the distributable property of each of the several divisions that have been assessed, and the assessment of said side tracks, switches, bridges, ties, rails, and superstructure thereon as localized property is unauthorized and void.

"The Nashville, Chattanooga & St. Louis Railway, therefore, excepts to all of the assessments designated as 'localized trackage' because said assessments are wholly void and unauthorized by the act under which the honorable Railroad Commission is proceeding. For proof as to the character of said localized trackage, reference is hereby made to the proof already on file before the honorable Railroad Commission."

This exception was specifically overruled by the Railroad Commission.

When the Railroad Commission had finally completed its work and overruled the exceptions of the petitioner, the record reached the hands of the board of equalization in the manner designated by the statute, and before that body the exception to the assessment of localized trackage off main right of way was renewed, but was overruled by that board, viz.:

"In the matter of the assessment of side tracks, spur tracks, switch tracks, and yards outside the main right of way of the * * * Nashville, Chattanooga & St. Louis * * * (the same having been assessed and denominated as 'localized trackage' by the State Tax Assessors), the board heard the arguments of counsel and upon consideration thereof and the whole record did confirm the assessment, as localized property, of said side tracks, switch tracks, spur tracks, and yards as the same had been made by the Railroad Commission, acting ex officio as State Tax Assessors of railroad property."

The assessments made by the Railroad Commission of localized property and distributable property were also approved by the board of equalization and certified to the Comptroller.

The assessments of "localized track off main right of way" were not certified to the Comptroller, because of the fact that the Nashville, Chattanooga & St. Louis Railway filed in the circuit court of Davidson county a petition for certiorari and supersedeas.

The prayer of the petition is as follows:

"Premises considered, your petitioner prays that proper process issue making the above-named defendants parties hereto, and that a writ of certiorari issue against the defendants to produce into this honorable court the minutes, orders, proceedings, records, and proof, including all maps and other evidence as to the assessments of the property of the petitioner now on file with the board of equalization and in the hands of the defendant Malcolm R. Patterson, and that a writ of supersedeas issue to supersede the assessments by the said board of equalization of the side tracks, switch tracks, spur tracks, industrial tracks, and yards, outside of petitioner's main right of way, as localized property, and to restrain the certification of the same, but not to restrain or stay the certification of the remainder of the assessments made by the board of equalization of the petitioner's property, and that on final hearing the assessment of said side tracks, switch tracks, spur tracks, industrial tracks, and yards of your petitioner, situated outside of the petitioner's main right of way, as localized property, be declared to be illegal, null, and void, and that said assessment itself be declared to be illegal, null, and void, as not authorized by the act, chapter 5 of the Acts of 1897. Petitioner prays for such other and further general relief as the circumstances may require."

It is said on behalf of the state that "localized trackage off the main right of way" does not simply embrace side tracks and spur tracks, but includes the real estate on which said side tracks and spur tracks are located. It is said the land and the said road tracks traversing it are the constituent elements of valuation, and are inappropriately designated "localized trackage." The insistence of the state is that the so-called localized trackage at Chattanooga and Nashville is shown to be several tracts of land, comprising many acres, upon which are built shops, roundhouses, and other buildings, and also railway tracks used for switching and parking cars and other incidental and convenient uses. The Railroad Commission ascertained the number of miles of railroad track on each lot, and in making the assessment considered the individual value of the land and the tracks. This is shown by the following extract from the brief of the Railroad Commission, which is filed as an exhibit to its answer, viz.:

"In assessing localized tracks, the commission has taken into consideration the value of the ground and the value of the superstructure. This makes a wide difference in the valuation placed upon the side tracks in the city and in the country, on account of the high valuation placed on city property as compared with country property."

It is to be noted in this connection that these several tracts, upon which were situated the railway side tracks, were not assessed

under the head of localized property, as other real estate is assessed. In other words, if they were not assessed as localized trackage, they were not assessed at all.

The said properties are thus described in the answer and return of board of equalization:

"Localized Trackage in the City of Chattanooga and Hamilton County.

"As hereinbefore adverted to, it was shown by proof taken by the board of assessors, under the controversy before said board between the municipal authorities of Chattanooga and petitioner, that petitioner was and is the owner of 14 acres of land lying practically in the heart of the city of Chattanooga, and in control, under lease from the state of Georgia, of about 10 acres adjoining the aforesaid 14-acre tract, which was used as the yards of the Nashville, Chattanooga & St. Louis Railway and of the Western & Atlantic Railroad, which yards were largely covered by tracks, some of which were used for switching purposes, but the major portion of which (particularly on the 10-acre tract) were used for storage purposes and for repairing cars, and that on the 14-acre tract was located a machine shop, a turntable, or uncovered roundhouse, bins for the storage of coal, a sandhouse, an office building, and perhaps some other structures."

Again the answer avers, on the subject of localized trackage in Nashville:

"Further, it will be seen by an inspection of Exhibit No. 10 hereto, in connection with Exhibit No. 12 hereto, that the five several tracts of land bounded in red as shown upon said Exhibit No. 10, all owned by petitioner and containing 25.80 acres, were reported by petitioner's engineer, Trabue, as having on them 12.07 miles of track, and that, in addition to this track there were three separate industrial tracks leading, one to the Cumberland Mill, another to the Model Mill, and the third to the National Fertilizer Works, aggregating .33 miles of track, and this, added to the 12.07 miles of track above referred to, aggregated 12.40 miles, which the board of assessors valued and assessed as 'localized trackage' belonging to petitioner in the city of Nashville.

"Further, it will be seen by an inspection of said Exhibit No. 10 hereto that there are six separate tracts of land designated on said map and bounded by yellow lines, which several tracts aggregate 28.66 acres, and are owned by the Louisville & Nashville Terminal Company, but leased to the petitioner and the Louisville & Nashville Railroad. As located upon these six separate tracts of land, petitioner's engineer, Trabue, reported 6.5 miles of track, and one-half this mileage, to wit, 3.25 miles, the board of assessors assessed against petitioner, without any further description of said six several tracts of land, and without showing upon which of said

tracts said 3.25 miles of trackage were located.

"No map showing location of the 'localized trackage' assessed against petitioner on account of its Northwestern Division was furnished by petitioner, but an inspection of Exhibit No. 19 hereto shows that the 'localized track' assessed against petitioner on account of its Northwestern Division in the city of Nashville and in the county of Davidson aggregated 10.85 miles.

"Exhibit C to Trabue deposition, Exhibit No. 12 hereto, p. 5, shows that this 'localized track,' aggregating 10.85 miles, covers some 12 industrial tracks leading from petitioner's property to different manufacturing or other business establishments, and the shops belonging to petitioner's Northwestern Division upon the shop track. Petitioner's engineer reports 8.12 miles of track, but does not give the acreage of this tract."

As to the other properties, the answer further states:

"Respondents deny that the assessment or valuation of petitioner's property, assessed as aforesaid under the name or classification of 'localized trackage' was included either by the board of assessors or by your respondents in the assessment and valuation of petitioner's distributable property, and this is clearly shown in Exhibit No. 15 to this answer and return; and the respondents also deny that said localized property so assessed as 'localized trackage' ought to have been included within the assessment and valuation of petitioner's distributable property, because, as respondents aver, said property is 'localized property,' as defined by section 8 of chapter 5 of the Acts of 1897.

"Respondents also deny that the assessment of petitioner's localized property under the name and classification of 'localized trackage,' as hereinbefore shown, was or is void, and deny that the petitioner is entitled to have said assessment set aside and annulled, or that it is entitled to any of the relief prayed in its petition."

The answer further avers:

"After the board of assessors had called upon petitioner for a supplemental statement, said petitioner filed as Exhibit B to the 'deposition' of its engineer, Trabue (which Exhibit B is said Exhibit No. 11 to this answer and return), a copy of said map, Exhibit No. 2 hereto, and designated thereon in black lines what said Trabue called the right of way (200 feet in width) of the Nashville, Chattanooga & St. Louis Railway, and also a right of way of like width of the Western & Atlantic Railroad. Said Trabue also designated by red lines that part of said yards not included within the alleged rights of way of said petitioner and of the Western & Atlantic Railroad. An inspection of said Exhibit No. 11 hereto will show that petitioner's alleged right of way, as laid down by Trabue—which was done without other evidence of the existence or extent of said right of

way than his simple declaration—was made to include, not only the Union Depot train shed, but a considerable part of petitioner's freight depot; and the right of way of the Western & Atlantic Railroad, as designated by said Trabue, in the same manner was made to include the principal part of the 10 acres leased by petitioner from the state of Georgia, and which the proof shows was and is covered with tracks used principally for storage purposes.

"Localized Trackage in Nashville—Chattanooga Division.

"An examination of Exhibit A to Trabue's deposition (Exhibit No. 10 to this return and answer) will show that petitioner's engineer, Trabue, laid down and designated a right of way for petitioner 200 feet in width bounded by black lines. However, there is no other evidence of the location or width of all this alleged right of way except the mere declaration of Mr. Trabue. But said right of way, as laid down on said map, said Exhibit No. 10 hereto, was made to include the principal part of petitioner's freight depot, its entire general office building, a considerable part of a number of wholesale warehouses, part of the Union Station, the baggage, mail, and express building, and perhaps some other structures, all 'localized property' in character and use."

An examination of the assessment actually made by the Railroad Commission will show that the value of the ground upon which the general office building of the company at Nashville was located, being in the right of way laid off by the engineer, was deducted and included in the class of distributable property assessed, and only the value of the buildings was assessed as localized property.

Another item is 5.58 acres between Cedar and Church streets in Nashville. In regard to this the assessment of the Railroad Commission finds .5 of an acre on the so-called right of way, which it values at \$3,000, and deducts it from the valuation of the whole. And so, also, the land, .97 acre, between Church and Broad streets, upon which is built the freight depot, being within the right of way delimited on the map, is deducted from localized property and thrown into distributable property, and only the value of the superstructure is assessed as localized property.

We have made this elaborate statement of the action of the Railroad Commission, approved by the state board of equalization, in order to intelligently present the questions of law arising on the record. It has already been stated that the complaint of the railroad presented in its petition for certiorari is directed to the "assessment of its side tracks, switch tracks, spur tracks, industrial tracks, and yards outside of its main right of way as localized property." The law governing the assessment of railroad property

for taxation is chapter 5, p. 102, Acts 1897, and is entitled:

"An act to provide just and equitable laws for the assessment and collection of revenue for state, county and municipal purposes whereby revenue is collected from the assessment of railroad, telegraph and telephone properties in the state of Tennessee."

And sections 6, 7, and 8 of that act are as follows:

"Sec. 6: That the road of any railroad property shall include all said (side) tracks, switches, bridges, trestles, ties, rails and superstructure of every kind. * * *

"Sec. 7. That the roadbed, rolling stock, franchises, choses in action and personal property of a railroad property having no actual situs, shall be known as distributable property, and shall be valued separately from the other property; and after ascertaining the total value of such distributable property wherever situated, and after having deducted from this value \$1,000, said assessors shall divide the remainder by the number of miles of the entire length of the road, and the result shall be the value per mile of such distributable property for the purpose of taxation; and the value per mile of such distributable property shall be multiplied by the number of miles in this state, and the product thereof shall be the sum to be assessed against such property for state purposes; and the value per mile so ascertained shall be multiplied by the number of miles in each county or incorporated city, and the product shall be the amount to be assessed upon such property by said counties and incorporated towns respectively.

"Sec. 8. That the depot buildings and other property, real, personal and mixed, having an actual situs, shall be known as the localized property of such railroad, and shall be valued separately accordingly as the same may be located in any of the counties or incorporated towns in this state."

Now, it will be observed that by the terms of this act all railroad property for the purposes of taxation is divided into two classes, localized and distributable. There is no classification of "localized trackage off the main right of way." No such nomenclature appears anywhere in the act, yet the Railroad Commission assessed the property of this company under three heads: (1) Localized property; (2) distributable property; (3) localized trackage off the main right of way. Under this head the commission assessed for taxation, as localized property, every side track, every spur track, every switch track, every industrial track, located off the main right of way of the Nashville, Chattanooga & St. Louis Railway. In other words, the commission adopted the margin of the right of way as the line of cleavage, and all side tracks, spur tracks, and switch tracks inside this delimited line were assessed as distributable property, and all such tracks outside this arbitrary line were assessed as lo-

calized property. Section 7 of the act of 1897 provides: "That the roadbed, rolling stock, franchises, choses in action and personal property of a railroad property having no actual situs shall be known as distributable property and shall be valued separate from the other property," etc. Section 6 of the act of 1897 defines the roadbed of a railroad, viz.: "That the road of any railroad property shall include all side tracks, switches, bridges, trestles, ties, rails and superstructure of every kind." Section 8 of the act of 1897: "That the depot buildings and other property, real, personal and mixed, having an actual situs, shall be known as the localized property of said railroad," etc. It thus appears that by plain statutory definition the roadbed includes "all side tracks and switches," and the direction of the statute is that the roadbed shall be assessed as distributable property. Is there any authority under the statute for making another classification of side tracks and switches, outside of the main right of way, as localized property? The proof in the record is to the effect that these side tracks and switches are auxiliary to the main line and form a constituent and component part of the railway system. The terminal yards of a railroad are frequently a network of side tracks, switches, and turnouts; nor are they exclusively used for local business. They are used to facilitate the transportation of trains engaged in interstate, as well as intrastate, commerce. Yet, the Railroad Commission assessed these side tracks, switches, and spur tracks as localized property, regardless of their connection with the main line and the purposes of their construction. The proof is that these side tracks are used as part of a general system and for all purposes necessary in operating the railroad. According to the proof the side tracks and switch tracks located off the right of way are used for the same purposes as those that are located on the right of way. They are all operated indiscriminately as one system, and to transact the general business of the company. As to the industrial tracks, the proof is that all industries located on such industrial tracks are given the rates of the city, town, or station where they are located. Such industrial tracks are considered a part of the terminals of the company at that point, and no extra charges are made for delivering freight to such industries. It appears, further, that no extra charge is made for shipping from an industry on such a track to a foreign point. The roadbed and trackage of a railroad must be viewed as a unit for all purposes of taxation, except as otherwise directed by statute. The rationale of railroad assessment for taxation is nowhere more lucidly expounded than by the late Justice Cooper in *Franklin Co. v. N. C. & St. L. Railway*, decided in 1881, and reported in 12 Lea, 521. Judge Cooper stated:

"The property of a railroad company for

purposes of taxation consists of its realty, its local personality, its rolling stock, its choses in action, and its franchise. The franchise is the privilege conferred by the charter of incorporation, namely, the right to exercise all the powers granted in the mode prescribed for the purpose of profit. It is a unit not confined to any one county in which it may be exercised. The principal part of the franchise is the right to charge for freight and passengers, the charge being limited with a prescribed or reasonable rate for carriage in the proportion of the distance of transportation. Obviously, after ascertaining the value of the entire franchise in the state as a unit, no more approximate or just division of this value can be made for purposes of taxation than to allot it among the counties through which the track runs in the proportion of the length of track in the county to the entire length of road in the state. And this is what was done by the acts under consideration."

Again the court says:

"The roadway itself of a railroad depends for its value upon the traffic of the company, and not merely upon the narrow strip of land appropriated for the use of the road and the bars and cross-ties thereon. The value of the roadway at any given time is not the original cost, nor a fortiori its ultimate cost after years of expenditure in repairs and improvements. *On the other hand, its value cannot be determined by ascertaining the value of the land included in the roadway assessed at the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes.*"

Again he says:

"The assessable value for taxation of a railroad track can only be determined by looking to the elements on which the financial condition of the company depends, its traffic as evidenced by the rolling stock and gross earnings, in connection with its capital stock. No local estimate of the fraction in one county of a railroad track, running through several counties can be based upon sufficient data to make it at all reliable, unless, indeed, the local assessors are furnished with the means of estimating the whole road."

Again the court says:

"No part of the mere roadway can be said to be more valuable than any other part, when considered as a track, for the exercise of the franchises of the company as a common carrier. It is, like the franchise itself, a unit for the purposes intended; these purposes being not merely the use of the road for the profit of the company, but its use for the benefit of the public."

Again the court says:

"The real estate of a railroad company other than its roadway, and its personal property having a local situs, may stand upon a different footing, for such property may be estimated and assessed like other similar

property of the county, district, or ward where it is situated." (Italics ours.)

This opinion of Judge Cooper was quoted with commendatory language by the United States Supreme Court in two cases, namely: *Columbus Southern Railway v. Wright*, 151 U. S. 470, 14 Sup. Ct. 396, 38 L. Ed. 238, and *Pittsburg Railway Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031.

The leading idea advanced by Judge Cooper is that the franchise of a railroad is a unit, and the roadway itself depends for its value upon the traffic of the company, and not merely upon the land and cross-ties. It is true that "the side tracks and switch tracks off the main right of way" are wholly useless and valueless when dissociated from the main line. They are indissolubly connected with the main line, and one cannot be operated without the other. They are a unit in value and in operation, as is well said by counsel. Side tracks and switch tracks off the main right of way are as essential to the operation of the railroad as the side tracks and switches on the main right of way. The order of the Railroad Commission was that any side track, spur track, and switch, of whatsoever kind, "off the main right of way," regardless of its use, should be assessed as localized property. There is no provision in the act of 1897 which justifies such a classification. If the term "roadbed" includes all "side tracks," it includes a side track "off the main right of way" as well as one on the main right of way. The same may be said of switch tracks, trestles, and bridges. It is said, however, that the act of 1882 (Laws Ex. Sess. 1882, p. 20, c. 16), which first classified railroad property for purposes of taxation into localized and distributable properties, and under which the railroads were assessed, contained this provision:

"Sec. 4. Be it further enacted, that the depot buildings, yards, grounds and other property, real, personal and mixed, having an actual situs, shall be known as the localized property of such railroad, and shall be valued by the county assessors and city assessors of the several districts and wards in which such property is situated, in the same manner and upon the same principles that govern the assessment of similar property owned by individuals, and it shall be valued by said county assessors and city assessors in the respective counties, towns and cities in which it is located. The state shall be entitled to a tax upon all such localized property, the counties, towns and cities shall be entitled to a tax upon the value of all such localized property as is situated within their respective limits."

The words "yards and grounds," found in the section quoted from the act of 1882, are claimed to evince the intention of the Legislature that switching yards with side tracks were intended to be classified as localized property. It will be noticed that in the act

of 1882 the words "yards and grounds" are used in connection with depot buildings, and were probably intended to refer to depot yards. It is significant that no such construction as is now urged was ever placed on the act of 1882, and that for a period of 25 years no tax assessor ever assessed the side tracks or switch tracks "on or off" the right of way as localized property.

It is said in the brief of counsel for the railroad, viz.: "It is a part of the history of the assessment of railroad properties in the state of Tennessee that every board of state assessors from 1882 to 1907 assessed all tracks, including side tracks, spur tracks, and switch tracks, both 'on' and 'off' 'the main right of way,' as a part of the unit known as 'distributable property.' Such assessments were approved by every Governor of the state during that period as a member of the board of examiners or equalization."

We are entirely satisfied with the correctness of this statement. But, whatever potency there may have been in the terms "yards and grounds," found in the assessment act of 1882, they were entirely omitted from the act of 1897, under which the present assessment was made. This is shown by a comparison of the two acts, viz.:

Section 4, Act of 1882.

That the depot buildings, yards, grounds and other property, real, personal and mixed, having an actual situs, shall be known as the localized property of such railroad, etc.

Section 3, Act of 1897.

That the depot buildings and other property, real, personal and mixed, having an actual situs, shall be known as the localized property of such railroad, etc.

This change in the phraseology of the law removes any ground for the contention that "yards and grounds" covered with tracks should be included under the head of localized property. The words "yards and grounds," having been expressly omitted from the act of 1897, cannot now be read into the latter act for the purpose of covering this feature of the assessment. The other features of the two acts are identical, as will appear from the following parallel columns:

Section 2, Act of 1882.

That the roadbed of a railroad shall include all side tracks, switches, trestles, bridges and the ties, rails, fastenings and superstructure of every kind.

Section 6, Act of 1897.

That the road of any railroad property shall include all side tracks, switches, bridges, trestles, ties, rails and superstructure of every kind.

It will be observed that the only difference in these two sections is that the word "roadbed" was used in the act of 1882 where the word "road" was used in the act of 1897. Whether the change was intentional, or a mere inadvertence, is not material. It is conceded by counsel on both sides that this change was immaterial, and that the words "roadbed" and "road," employed in the two acts, mean substantially the same thing.

Section 3 of the act of 1882 and section 7 of the act of 1897 undertake to define what shall be "distributable property." These two sections are substantially identical in language, viz.:

Section 3, Act of 1882.

That the roadbed, rolling stock, franchises, choses in action and personal property of a railroad property having no actual situs, shall be known as its distributable property, and shall be valued by said assessors separate from the other property, etc.

Section 7, Act of 1897.

That the roadbed, rolling stock, franchises, choses in action and personal property of a railroad property having no actual situs, shall be known as distributable property and shall be valued separately from the other property, etc.

The term "roadbed," under both acts, included all side tracks and switch tracks, wherever situated, and, with the rolling stock, franchises, choses in action, and personal property of a railroad having no actual situs, must be assessed separately as distributable property. Again chapter 5, p. 102, of the Acts of 1897 (section 2) requires railroads to file with the State Comptroller a schedule, among other things, "setting forth therein the length in miles of its entire roadbed, switches and side tracks, showing the number of miles lying in this state, in each county of this state, and in each incorporated town in this state," and the "value of the whole." The Legislature would not have required a schedule showing the "value of the whole" of "its entire roadbed, switches and side tracks," if switches and side tracks "off the main right of way" were intended to be assessed separately and distinct from the switches and side tracks "on the main right of way."

The principle of assessing side tracks and switch tracks as distributable property, under chapter 5, Acts 1897, was distinctly recognized and enforced in the case of *Kansas City, Ft. Scott & Memphis Railroad v. King*, Comptroller, decided by the United States Circuit Court of Appeals at Cincinnati, and reported in 120 Fed. 614, 57 C. C. A. 278. That was a Tennessee case, and involved the construction of the act of 1897, with which we are now dealing. This property was shown to cover a considerable acreage, and included about 20 miles of trackage in the city of Memphis. In its schedules the railroad company reported that 2 miles of this trackage was main line, and that the remainder consisted of side tracks and switches. In fact, the whole constituted the terminals of said company in the city of Memphis. The total mileage of the railroad returned for taxation consisted of 959 miles, of which the railroad company claimed that 675 miles were main line and the remainder side tracks and switches, including 18 miles of side tracks and switches in Memphis. The total valuation placed on the distributable property of the entire line of road (959 miles, including main lines, side tracks, etc.) was about \$13,400,000. The commission divided this aggregate amount by the total mileage—

both main and side lines—and in order to arrive at a fair and approximate assessment, the proof showing that the property in Memphis was worth at least \$250,000, the quotient of \$14,000 obtained by this method was, as unit of value, multiplied by the total mileage of all tracks in Memphis, resulting in an assessment of about \$250,000.

It was insisted on behalf of the railroad company that the total valuation should be divided by the 675 miles of main line, and that the quotient thus obtained should be multiplied by the 2 miles of main line, as claimed by it, in Memphis; the result being that the railroad claimed that it could only be assessed upon a valuation of about \$38,000 on property shown to be worth \$250,000. The assessment actually made was as follows:

The Railroad Commission of the state of Tennessee, acting ex officio as state tax assessors of railroad, telegraph, and telephone properties assessable for taxation in said state, after consideration of the distributable property of the above-named railroad, namely, its rolling stock, franchises, roadbed, side tracks, switches, bridges, trestles, ties, rails, and superstructures pertaining to said roadbed, and all other property of said road other than localized property, for the purpose of assessing the same for taxation, state, county, and municipal, for the years 1899 and 1900, find the terminals of said road to be Kansas City, Mo., and Memphis, Tenn., with 959.50 miles of entire main line, of which there is 21.16 miles of terminal line in Tennessee, and the number of miles as hereinafter set out in each county and municipality of said main line, and compute the value for assessment for taxation of the said distributable property of the said road, and do so value the same for taxation, state, county, and municipal, for the years 1899 and 1900, as hereinafter set out, to be apportioned, state, county, and municipal, as hereinafter set out, viz.:

Value of distributable property of entire line of road, 959.50 miles.....	\$13,434,000
Less legal exemptions.....	1,000
Assessable balance in Tennessee.....	296,240
Assessable value per mile.....	14,000

Apportionment for Tennessee.

21.16 miles at \$14,000 per mile.....	\$296,240
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Apportionment for Counties—Shelby.

21.16 miles at \$14,000 per mile.....	\$296,240
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Apportionment for Municipalities—Memphis.

21.16 miles at \$14,000 per mile.....	\$296,240
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An examination of above assessment will show that the Railroad Commission assessed all the terminal tracks, side tracks, and switch tracks of said company in the city of Memphis as distributable property. The real controversy in the case was over the method adopted for valuing the distributable property. The company insisted it had only two or three miles of main line in Memphis, but on account of the side tracks and terminal tracks the commission estimated the main

line as 18.18 miles in length. The court, speaking through Judge Day, said:

"The terminal property of the appellant is composed of a large number of tracks, a network in fact, used to make connections, and to afford storage room for cars, and the means of handling, receiving, and delivering freight and making connections—a situation which may be generally described as embracing the terminal facilities of this railroad at Memphis. It is insisted for the railroad company that only that small portion of some two miles connecting with other roads can be regarded as main line, and included in the 'entire length of the road,' for the purpose of tax distribution under the statute. It is claimed that in this way the statute is consistently carried into effect, and this company taxed by the method which prevails in assessing other railroads in the state. It appears that in assessing a railroad traversing the state, which it is claimed the complainant's does, it has been the practice to find the 'length of the road' without including side tracks, and assess the distributable property by multiplying the value per mile by the number of miles in the state included in the length of the road as thus obtained. The practice of taxing distributable property by this mileage method is quite common, and is prescribed by statute in a number of states. This means of reaching the distributing value of railroad property for the purpose of taxation has met with approval in a number of Supreme Court decisions. They are collected in the opinion of Mr. Justice Brewer in *Railroad Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031."

It will be noticed that the property assessed in that case embraced the terminal facilities of the railroad at Memphis, with a network of tracks used for handling, receiving, and delivering freight, and making connections, and yet it was all assessed as distributable property. There was no insistence that those terminal tracks, side tracks, and switch tracks should be assessed as "localized property." The court then examined section 7, c. 5, Acts 1897, providing for the assessment of distributable property, and further wrote:

"Undoubtedly, wherever applicable, this rule must be followed, and in most cases it will work substantial justice; but, as was said by Mr. Justice Brewer in *Railroad Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114, 38 L. Ed. 1031, the law does not require that the valuation of the property within the state shall be absolutely determined upon the mileage basis. In the case at hand, we cannot perceive any reason for calling the connecting part of these terminal tracks main line and the balance side tracks. We have a situation where the 'length of the road' rule, as construed in practical application to other roads differently situated, will not afford a means of reaching the value of the property of this company in Tennessee.

To treat the two miles as main line, and as furnishing a number by which to multiply the total valuation, divided by the number of miles of main line of the whole road, will value this property at about \$39,000—a sum which the testimony discloses to be so far below its true value as to give an absurd preference to this property in taxing railroads in Tennessee. The situation was apparent to the assessors, as their report discloses. While the mileage rule was inapplicable, they were, nevertheless, authorized by the statute to value this and all other property of the company in Tennessee for taxation. This property was not to be valued as a distinct and separate entity, but was to be treated as a part of the system to which it belonged."

There are many authorities from other states to the effect that the side tracks and switch tracks of a railroad are part and parcel of the system, and must be assessed as such under statutes providing a method of valuing railroad property for taxation. In Illinois a statute provided that a state board should assess "the railroad track," and that the local tax assessors should assess all property not "upon the right of way," or not included in the term "railroad track." Section 42 of the revenue law (Hurd's Rev. St. 1908, c. 120) provided as follows:

"Such right of way, including the superstructure of main, side, or second track and turnouts, and the station and improvements of the railroad company on such right of way, shall be held to be real estate for the purpose of taxation, and denominated 'railroad track,' and shall be so listed and valued; and shall be described in the assessment thereof as a strip of land extending on each side of such railroad track, and embracing the same, together with all the stations and improvements thereon, commencing at a point where such railroad track crosses the boundary line in entering the county, city, town or village, and extending to the point where such track crosses the boundary line leaving such county, city, town or village."

The collector of McLean county, Ill., undertook to collect taxes on certain land in the city of Bloomington, and the objection urged by the railroad company was that the property was held by the railroad company for its right of way, and was embraced in a class of property denominated by the revenue law as "railroad track," and therefore not assessable by the local assessors. The court says, in speaking of section 42 above quoted:

"What was intended by the enactment of this section of the statute by the use of the words here employed, 'such right of way'? Were these words intended to mean merely the strip of land a certain number of feet wide, upon which the railroad company had constructed its main track, or did the framers of the section intend to embrace, not only the main line of the road, but all side tracks,

turnouts, and switches which are connected with the main track, and which are in actual use by the railroad company as a common carrier?

"We can see no reason why the term 'right of way' should be confined to the land over which the main track of a railroad shall be constructed. The land upon which a side track, a switch, or a turnout is built and in actual use by the company in the business for which it was organized, for all practical purposes, is as much held for right of way as is the land upon which the main track is constructed. In the operation of a railroad, it is necessary that trains should pass each other, and hence the necessity of turnouts, switches, and side tracks. In the loading of cars, transfer of cars, the making up of trains, and in innumerable other instances that might be named, in the prosecution of its business as a common carrier, side tracks, switches, and turnouts are as indispensable to a proper transaction of its business as the main track itself. We are, therefore, of the opinion that the land held and in actual use by a railroad company for side tracks, switches, and turnouts must be regarded, within the meaning of the revenue law, as a part of the right of way of the company. It is used in the transportation of freight, and also for the purpose of carrying passengers, alike with the land upon which the main track is constructed, and upon what principle the land upon which the main track is laid can be held to be right of way, and the land over which a side track, switch, or a turnout passes can be termed something else, we are at a loss to understand." *Chicago & Alton Railroad Co. v. People ex rel.*, 98 Ill. 356.

This case was reaffirmed by the Supreme Court of Illinois in the later case of *People ex rel. City of Chicago v. State Board of Equalization*, decided in 1903, and reported in 205 Ill. 296, 68 N. E. 943. The court said:

"The right of way of a railroad company cannot be cut up, for the purposes of assessment, into parts, either by dividing it into sections by the lines of the different taxing bodies which it crosses, or by severing from its main track the portions that lie outside of some arbitrary line drawn through the center of the right of way. A railroad is a unit, and for the purposes of assessment its right of way must be treated as a whole. The switch or side track at which it receives coal, grain, stock, or freight in a country village is as essential to the successful operation of the road as is the switch or side track in the city at which the articles which it handles as a common carrier are discharged, and the land upon which its side or second track and turnouts, and its station, machine shops, roundhouse, etc., stand, is as necessary to the successful operation of the road and as much a part of the right of way as the land upon which the main track is laid, and the value of each piece of its right

of way must be determined by taking into consideration the value of the entire right of way, rather than the value of each piece for commercial purposes wholly disconnected from the use to which it has been applied, as compared with contiguous property used for purposes other than right of way."

In this case it was urged that such a construction would render the act unconstitutional. This was fully discussed, and the court discarded the idea that it was unconstitutional, and says:

"The method provided in said act for assessing 'railroad track' does not remove real estate used for railroad right of way from within the limits of one taxing body and place it within the limits of another taxing body, but merely establishes a method of valuing the proportionate share of each taxing body through which the road runs, in the right of way as a whole, which, as we have seen, is equitable and just, and that method of assessing railroad right of way has frequently been approved by the courts of this and other states, as well as in the Supreme Court of the United States." *Porter v. Rockford Railroad Co.* (76 Ill. 561) *supra*; *Law v. People*, 87 Ill. 385; *State Railroad Tax Cases*, 92 U. S. 575, 23 L. Ed. 663; *City of Dubuque v. C. & M. Railroad Co.*, 47 Iowa, 196.

The state of Indiana also has a statute like that of Illinois. In the case of *Pfaff, Auditor, v. Terre Haute & Indianapolis R. R. Co.*, 108 Ind. 144, 9 N. E. 93, the facts were that the railroad company owned tracts of land and certain parts of lots in the city of Indianapolis, aggregating about 12 acres. Across these lots certain tracks were laid, used for switching purposes and for the purposes of a roundhouse. These lots were attempted to be assessed by the local tax assessors under a statute almost precisely similar to that of the state of Illinois. The Indiana court held that such lots were a part of the "right of way," or "railroad track," in the sense of the statute, and must be assessed as such. See, also, *State ex rel. v. Hannibal R. R. Co.*, 135 Mo. 618, 37 S. W. 532, for the construction of the Missouri statute, and wherein the court, among other things, said:

"The tracks in a yard may properly be termed side tracks, and include the ground necessary for the convenient and safe movement of cars, and for loading and unloading them."

See, also, *State ex rel. v. Chicago, Rock Island Railroad Co.*, 162 Mo. 391, 63 S. W. 495; *St. Louis, Iron Mountain, etc., Railroad Co. v. Miller Co.*, 67 Ark. 498, 55 S. W. 926; *Burlington Railroad Co. v. Lancaster Co.*, 15 Neb. 252, 18 N. W. 71; *Red Willow Co. v. Chicago Railroad Co.*, 26 Neb. 660, 42 N. W. 879. The cases already cited are sufficient to show how, under analogous statutes in other states, side tracks, switches, and

turnouts are regarded in the assessment of the properties of a railroad system. The railroad is everywhere regarded as a unit, and the side tracks and switch tracks as a part of the unit, which are not separately assessed for taxation but are included in the system. In this state this matter is not left to construction; but the statute expressly declares that the roadbed shall include all side tracks, switches, etc., etc. We therefore hold that the circuit court was in error in holding that "side tracks off the main right of way" were properly assessed as localized property. They should have been assessed as distributable property.

It is insisted, however, on behalf of the state, that "even if all the property denominated 'localized property off main right of way' be insufficiently described, and even if it be not 'localized property' under chapter 5 of the Acts of 1897, still it is distributable property, and the state is entitled to its tax on said property."

The above contention of respondent is more particularly set out in their seventh assignment of error as follows:

"The court erred in not sustaining the sixth ground of defendant's motion to quash, to the effect that in any event petitioner is liable for the state tax upon the assessment of petitioner's property in controversy under the name of 'localized trackage,' because the record shows that the amount of said assessment was not included in the assessment of petitioner's 'distributable property,' and, if the same is not assessable as 'localized property,' then the valuation should have been added to the valuation of the distributable property, and so certified. In no event was petitioner entitled to escape the state tax upon the valuation of said property as made and assessed by the state board, and the supersedeas should have been modified, so as to allow said valuation to be certified for state tax."

We are of opinion this contention is unsound. As we have held, this property belonged to the distributable class, which is assessed as a unit. There is no authority in the act of 1897 for the separate assessments of side tracks and switch tracks in any county, and then add that assessment to the valuation of distributable property. The separate assessment of this property as "localized trackage off the main right of way" was absolutely void, and no tax can be collected on such an assessment as distributable property. It should have been included in the general assessment of all distributable property.

While we hold that this trackage and the roadbed on which it is situated must be assessed as distributable property, all buildings, coal bins, roundhouses, machine shops, depot buildings, and other structures located on the terminal yards at Nashville and at Chattanooga, or elsewhere, must be assessed as localized property, and the railroad company should return in its schedule

a description of the real estate so far as it is occupied by such buildings. The circuit court quashed the assessment of localized trackage off the main right of way because of vagueness and indefiniteness of description of the property. In this action the court was correct; but he should have further adjudged said assessment void, for the reason that the property assessed as "localized trackage" should have been assessed as "distributable property."

The proper judgment will be entered here, and the costs will be certified to the Comptroller for payment.

MCCOWN v. WILSON et al.

(Supreme Court of Arkansas. Nov. 1, 1909.)

1. EVIDENCE (§ 130*)—RES INTER ALIOS ACTA.

In an action to replevin property mortgaged to secure a note executed by defendants for a store account, in which the defense was payment of the account, testimony that, when witness went to plaintiff's store to settle an account, the same bookkeeper who kept the books when defendants claimed to have settled said that witness still owed another account, but upon examining other papers admitted that it had been settled, was irrelevant and incompetent; its purpose being to show that, because the bookkeeper had failed to give credit to another customer, he failed to give credit to defendants.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 403; Dec. Dig. § 130.*]

2. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.

The admission of the testimony was prejudicial to plaintiff; the evidence on the issue of payment being sharply conflicting.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.*]

3. WITNESSES (§ 351*) — IMPEACHMENT — FOUNDATION—SUFFICIENCY.

In an action to replevin property mortgaged to secure a note given by defendants for a store account, in which plaintiff's bookkeeper testified that the note had not been paid, and defendants claimed it had, testimony by another customer that the bookkeeper had insisted that witness had not paid an account, but after examining his papers admitted that it had been paid, was inadmissible to impeach the bookkeeper's testimony, in the absence of proper foundation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1150, 1151; Dec. Dig. § 351.*]

Appeal from Circuit Court, Arkansas County; Eugene Lankford, Judge.

Action by A. H. McCown, as administrator, against W. W. Wilson and another. From a judgment for defendants, plaintiff appeals. Reversed, and remanded for new trial.

Thomas, Lee & Smith, for appellant. R. D. Rasco, for appellees.

WOOD, J. This suit was begun in the justice court to replevin certain property mortgaged to secure a note executed by ap-

pellees to J. H. Merritt & Co., September 9, 1905, for the sum of \$253. J. H. Merritt & Co. was a partnership composed of J. H. Merritt and W. A. Merritt. The firm was engaged in the mercantile business. The note and mortgage were executed to cover an account that appellees had contracted with J. H. Merritt & Co. The defense was payment, and this presented a question of fact, upon which there was a sharp conflict in the evidence.

During the progress of the trial a witness, W. P. Ruffin, testified as follows: "Q. Have you had any business transaction with the firm of J. H. Merritt & Co.? A. I guess I have. I have been trading with that house at least about 20 or 22 years. Q. Do you remember about a short time ago, some time within a year, that Mr. Burnett, in looking through the books, told you that you owed them a certain amount, secured by note and mortgage? A. Yes, sir. Q. If you remember the incident, tell the jury how it was? A. In the spring of the year 1907, this spring a year ago, I went to Mr. McCown's store here. I had been dealing with the house there for a long time, and I told Mr. McCown that I would like to make arrangements to get supplies last year; and he says, 'Mr. Burnett will fix up the papers,' and we went into a room, and we hadn't been in there but a while, and he got out some papers, but before he got to writing any he said to me, 'What are you going to do with this old J. H. Merritt account?' that I owed them. I said that I didn't owe them nothing. He said, 'You do,' and I said, 'No; you are mistaken. I didn't owe them a cent. I paid that off quite a while ago,' and he said, 'Mr. Ruffin, you don't dispute the account, do you?' and I said, 'Yes; I do,' and he said, 'Here it is,' and carried me to the books, and showed me where it was on the books charged up—thirty-some-odd dollars, and I said I did not owe it, and finally he contended that I did, and it made me a little vexed, and I just pointed my forefinger at him and said, 'Mr. Burnett, I am a poor man; but, if you will produce that note and mortgage, I will pay it before sundown,' and he went into the desk where he kept a little book of notes, and looked through the papers, and he just turned around and said, 'I guess you have got her.' There have been no words said about it from that day to this." This evidence was objected to by appellant, and he duly excepted to the ruling of the court in admitting it, and makes such ruling one of the grounds of his motion for new trial.

The evidence was wholly irrelevant and incompetent. It was likewise prejudicial. It tended to make the jury believe that Burnett, the bookkeeper who had charge of the settlement of the accounts of J. H. Merritt & Co., had failed to give proper credit to a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

customer who had paid his account, and, after the account had been paid, still carried the account on the books as a subsisting obligation. This was the same bookkeeper, too, who was in charge of the books at the time appellees claimed to have paid the account (or, rather, note evidencing same in suit), and who testified that the note in suit had not been paid. The purpose of the testimony was to show that, if the bookkeeper had failed to give proper credit to one customer, who had paid his account, such fact would show that he had also failed to give appellees proper credit. Moreover, it tended to prejudice the testimony of the bookkeeper, who was an important witness for appellant, and to impeach his evidence, without laying the proper foundation for such impeachment.

This is the only error we find in the record; but for this the judgment is reversed, and the cause is remanded for new trial.

McRAE v. STATE.

(Supreme Court of Arkansas. Oct. 4, 1909.)

CRIMINAL LAW (§ 598*) — CONTINUANCE — RIGHT TO CONTINUANCE—DILIGENCE.

On a motion for continuance to obtain testimony of an absent witness, proper diligence to procure the attendance of the witness must be shown, and a mere showing that the witness resided in the town where the court was held, and that a subpoena had been served on him requiring his attendance at that term of court, without otherwise accounting for his whereabouts or showing that he was then beyond reach by the process of the court, was insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1336; Dec. Dig. § 598.*]

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Lecil McRae was convicted of selling whisky without a license, and appeals. Affirmed.

H. A. Parker for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

McCULLOCH, C. J. Appellant was tried and convicted in the circuit court of Monroe county for selling whisky without license, and appeals to this court.

He was convicted on the testimony of one Smith, who testified that he purchased the whisky from appellant. The only assignment of error insisted on here is as to the refusal of the trial court to grant a continuance on account of the absence of a witness. Appellant alleged in his motion for continuance that he could prove by the absent witness Flemons that Smith had stated to him, Flemons, that he had never purchased any whisky from appellant, and did not know of appellant ever having sold whisky.

It is also alleged in the motion that the witness Flemons lived in Clarendon, and that a subpoena had been issued and served on him requiring his attendance at that term of court. Before a party can complain at the ruling of a court in refusing to postpone a trial, he must affirmatively set forth facts in his motion which show that he is entitled to the postponement. He must show that he has exercised proper diligence to procure the attendance of the witness at that time, and that his efforts in that direction have failed. Now, the motion for continuance in the present case affirmatively shows that the witness resides in Clarendon, where the court was held, but it does not otherwise account for his whereabouts. For aught that appears to the contrary, the witness may then have been in the town or county, and his attendance could have been secured at that time by the compulsory process of the court if that had been sought, without postponing the trial to a distant date. Appellant contented himself with having a subpoena issued and served, without seeking any other process of the court, and without showing that the witness was then beyond reach by the process of the court. We are unable, therefore, to discover in the ruling of the court any abuse of discretion. The appellant had a fair trial, and the evidence was sufficient to sustain the judgment.

Affirmed.

BENEDIOT v. GRIFFITH et al.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. LIMITATION OF ACTIONS (§ 167*)—VENDOR'S LIEN—BAR OF DEBT.

A lien on land for purchase money expires when the debt is barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 653; Dec. Dig. § 167.*]

2. LIMITATION OF ACTIONS (§ 143*)—NEW PROMISE—PARTIES WHO MAY REVIVE.

Where, at the time land is conveyed, there is an existing vendor's lien against the land, the grantor cannot, after the conveyance, by his acts or declarations stop the running of limitations against such lien; the grantee not having assumed such debt and having no knowledge of it.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 578, 583; Dec. Dig. § 143.*]

Appeal from Faulkner Chancery Court; Jeremiah G. Wallace, Chancellor.

Suit by H. H. Benedict against C. A. Griffith and S. G. Smith to foreclose a vendor's lien. From the decree in favor of defendant Smith, complainant appeals. Affirmed.

Will P. Feazel, for appellant. R. W. Robins, for appellees.

BATTLE, J. This suit was instituted by H. H. Benedict against C. A. Griffith and S.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

G. Smith in the Faulkner chancery court, to foreclose a vendor's lien on certain lands. He alleged in his complaint: That on the 26th day of February, 1895, he sold the lands to Griffith for the sum of \$1,000, and that Griffith executed to him for the same his eight promissory notes, as follows: Six, for \$100 each, due and payable, respectively, on the 15th day of November, 1895, 1896, 1897, 1898, 1899, and 1900, and two notes, for \$200 each, due and payable, respectively, on the 15th day of November, 1902 and 1904, all bearing interest at the rate of 10 per cent. from date. That at the time of the sale he conveyed the lands to Griffith, and retained in the deed a lien on the land for the payment of the purchase money. That Griffith in November, 1902, paid \$200 on the notes, and is indebted to him for the lands in the sum of \$1,000, with 10 per cent. per annum interest thereon from the 26th day of February, 1895, less the sum of \$200. That Griffith, in July, 1907, in a letter to him, acknowledged the justice and correctness of the foregoing claim. He asked for judgment against Griffith for the balance due on the notes, and that such judgment be declared a lien on the lands, and that it be foreclosed and the lands sold to satisfy the same.

Griffith did not answer the complaint, but made default.

The defendant Smith answered, and severally denied all the foregoing allegations, and alleged as follows:

"The defendant O. A. Griffith was the owner of the lands described in plaintiff's complaint on February 3, 1902, and that he was and had been the owner thereof for more than seven years prior to that date, and the defendant O. A. Griffith continuously for more than seven years prior to February 3, 1902, and from and up until February 3, 1902, had been in the open, notorious and adverse possession of the lands described in the complaint, and during all that time claimed to own the same as his own, free from any lien of any kind; that the defendant Smith, on the 3d day of February, 1902, did believe and understand that O. A. Griffith was the owner of the land free from any liens or incumbrances of any kind, and, so believing, the defendant Smith did on February 3, 1902, purchase the land from O. A. Griffith, together with other lands owned by Griffith, and on that day did pay Griffith therefor the sum of \$3,500; and that for said sum on that day O. A. Griffith did bargain and sell the lands, together with other lands, to S. G. Smith, and on said day did execute to him a deed therefor, which deed was duly filed for record in the recorder's office of Faulkner county on February 25, 1902. * * *

"The defendant says that the land described in the complaint is a part of and lies adjoining the other lands which this defend-

ant bought from Griffith on said day, and together make and form one farm; and this defendant says that under the purchase and the deed the defendant Griffith did place this defendant in the possession of the land on February 3, 1902, and that this defendant thereunder has been in the quiet, peaceable, open, and notorious possession of the land continuously since said date, claiming to be the owner thereof. This defendant says that at the time he purchased the land as aforesaid from Griffith he did not know or have any information of any debt or claim due plaintiff for the purchase money, or otherwise any right or claim of the plaintiff, and that he did not have such knowledge of such claim, right, or interest of plaintiff at any time prior to the purchase, and has had no knowledge or information of any such claim of plaintiff at any time since the purchase until the summons in this case was served upon him; and, plaintiff further answering, says that, in the event O. A. Griffith did purchase from the plaintiff the land, and did execute to the plaintiff for the purchase money thereof the notes set out in the complaint, or any notes, then in that event this defendant says that more than five years have elapsed after the maturity of each and all of the notes, and after the maturity of the alleged indebtedness, and before the institution of this suit. And this defendant does now specifically plead the statute of limitation of five years against each and all of the alleged notes."

The court, upon final hearing, found that Griffith is indebted to plaintiff, Benedict, in the sum of \$2,300, and that plaintiff had no lien on the lands for the indebtedness of Griffith to plaintiff; "said indebtedness, in so far as the lands involved in this suit and the rights of the defendant S. G. Smith thereto are concerned, and the alleged vendor's lien, having been barred by the statute of limitation and by laches." Plaintiff appealed.

The deed and notes mentioned in the pleadings have been lost or destroyed. Evidence was adduced to prove their contents, which was based upon the memory of witnesses.

Plaintiff alleged that he retained a lien on the lands for the purchase money in the deed executed by him to Griffith, and that the purchase money was unpaid. This lien was an incident to the debt it secured, and expired when the debt was barred by limitation. *Stephens v. Shannon*, 43 Ark. 464; *Chase v. Cartright*, 53 Ark. 358, 14 S. W. 90, 22 Am. St. Rep. 207.

After Griffith conveyed the lands to Smith, it was beyond his power "to affect the running of the statute of limitation as to such lands." Smith not being liable for the debt secured by the lien thereon, his declarations and acts after that time are inadmissible for that purpose. The land had passed be-

yond his power to bind or affect by his liabilities. *Hughes v. Redus*, 90 Ark. 149, 118 S. W. 414, 415; *Mayo v. Cartwright*, 30 Ark. 407; *George v. Butler*, 26 Wash. 456, 67 Pac. 263, 57 L. R. A. 396, 90 Am. St. Rep. 756; *Wood on Limitation* (3d Ed.) § 230.

Payments made or letters written by Griffith after he sold and conveyed the land to Smith could not continue the lien beyond the time it was valid and subsisting when the land was sold to Smith. Griffith sold and conveyed the land to Smith on the 3d day of February, 1902. Witnesses differ as to the time when the notes of Griffith to Benedict were executed. They endeavor to fix the time by the death of the wife of Griffith, which was on the 23d of July, 1894. Benedict, the plaintiff, and Mrs. Dora Adams, testified that the land was sold to Smith about two years before the death of Mrs. Griffith. Griffith testified that the sale was after her death. He had previously stated that it was one or two years before her death; but he says that he had refreshed his memory since he made the latter statement, and discovered that he was in error, and that the sale was after her death. His memory as to this fact was uncertain.

Witnesses also differ as to when the notes were payable. Benedict, the plaintiff, testified: "My recollection is there were eight notes. The first six were due one year apart; one beginning the 1st day of November, 1895, then one each year up to 1900. The two last notes were for \$200 each, due two years apart, one in 1902 and the other in 1904." Griffith testified that the notes matured annually, one every year, until the last one mentioned, so that, if the notes were executed in 1892 or 1893, the first note matured in November, 1892 or 1893, or the 1st day of January, 1893 or 1894, the second one year after the maturity of the first, the third two years, the fourth three years, the fifth four years, the sixth five years, the seventh six years, and the eighth seven years.

The chancellor evidently found that the notes were executed in 1892 or 1893, and that the first of them matured on or before the 1st of January, 1894, and the last matured on or before the 1st of January, 1901, and that this suit was barred; it having been brought on the 10th day of August, 1907, more than five years since their maturity, the time prescribed by the statute of limitation for the bringing of such suits. After a careful review of the evidence in the case, we cannot say the findings of the chancellor were contrary to the preponderance thereof.

Decree affirmed.

FRAUENTHAL, J., being disqualified, did not participate.

POTTS v. STATE.

(Supreme Court of Arkansas. Nov. 1, 1909.)

1. CRIMINAL LAW (§ 1074*)—APPEAL—REQUISITES.

Under Const. art. 7, § 42, providing that appeals may be taken from final judgments of justices of the peace to the circuit court under regulations provided by law, the filing of an affidavit is not a prerequisite to an appeal from a conviction in a justice's court, unless the Legislature has so provided.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1074.*]

2. CRIMINAL LAW (§ 1074*)—APPEAL FROM JUSTICE.

Kirby's Dig. § 4666, providing that appellant must file with the justice of the peace an affidavit as a prerequisite to an appeal to the circuit court, taken from Acts 1873, p. 430, entitled "An act to define the jurisdiction and regulate the proceedings in justice's courts in civil actions," does not apply to convictions in criminal cases.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1074.*]

3. CRIMINAL LAW (§ 1074*)—APPEAL—PRE-REQUISITES.

Neither Acts 1905, p. 375, providing for appeals from convictions in justice's courts to the circuit court, nor the Code of Criminal Procedure (Kirby's Dig. §§ 2576-2582), regulating the taking of appeals from justices of the peace, requires the filing of an affidavit as a prerequisite to an appeal, and the circuit court may not dismiss an appeal for want of such affidavit.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1074.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

W. H. Potts was convicted of a misdemeanor in justice's court, and, from a judgment of the circuit court dismissing his appeal, he appeals. Reversed and remanded.

Geo. W. Dodd, for appellant. Hal. L. Norwood, Atty. Gen., C. A. Cunningham, Asst. Atty. Gen., and A. A. McDonald, Pros. Atty., for the State.

FRAUENTHAL, J. The appellant was convicted in the court of a justice of the peace of Sebastian county of a misdemeanor; and from that judgment he appealed to the circuit court. The judgment of conviction was entered on June 16, 1909, and on June 24, 1909, he filed with the justice of the peace an appeal bond and made an application for appeal, and thereupon the justice of the peace made the following order: "Bond approved and appeal allowed." The appellant did not make or file with the justice of the peace an affidavit for appeal; but the transcript of the orders on his docket and the original papers in the case were filed in the circuit court within the time prescribed by law. Upon motion of the state the circuit court dismissed the appeal because no affidavit for appeal had been made or filed with the justice of the peace. From the judgment of the circuit court thus dis-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

missing his appeal, the appellant now presents this appeal to this court.

It is provided by article 7, § 42, Const. 1874, that "appeals may be taken from the final judgments of the justices of the peace to the circuit court under such regulations as are now or may be provided by law." Unless the Legislature has provided that the filing of an affidavit is a necessary condition or prerequisite to obtaining an appeal from a judgment of conviction in a criminal case in a court of a justice of the peace, such affidavit would not be essential for the circuit court to acquire jurisdiction of such case upon appeal. By the act of the Legislature which became a law April 11, 1905 (Acts 1905, p. 375), it is provided: "Any person convicted before any justice court or police, or city court of any crime, misdemeanor, breach of the penal laws of this state, or of violation of any city or town ordinance, may appeal therefrom to the circuit court of the county in which said conviction occurred at any time within sixty days thereafter." The sections of that act following prescribe the duties of the justice of the peace in regard to sending up transcripts, and also prescribe the time the appeal shall stand for trial in the circuit court and the procedure. But nowhere in the act is it prescribed that an affidavit for appeal shall be made or filed, and in no other provision of the statutes do we find that it is prescribed that an affidavit for appeal must be made or filed in order to obtain an appeal from a judgment of conviction on a trial of a criminal case before a justice of the peace.

It is urged that section 4666 of Kirby's Digest provides that the appellant must make and file with the justice an affidavit as a condition and prerequisite to obtain an appeal to the circuit court from a judgment of a justice of the peace, and that this provision of the statute applies also to judgments of justices of the peace in criminal cases. This provision of the statute and this section of Kirby's Digest is taken from the act of the General Assembly of Arkansas, approved April 29, 1873 (Acts 1873, p. 430). That is an act entitled "An act to define the jurisdiction and regulate the course of proceedings in the courts of justices of the peace in civil actions"; and by section 125 of the act it is specifically stated that the provisions of the act apply to the proceedings in civil actions before justices of the peace. Nowhere does the act prescribe that any of its provisions shall apply to proceedings or trials in criminal actions before the courts of the justices of the peace. It follows that the requirement in section 4666 of Kirby's Digest of an affidavit in order to obtain an appeal only applies to civil actions, and does not apply to judgments of conviction entered upon criminal proceedings. Furthermore in the Code of Criminal Procedure,

there is a subdivision or chapter relating to and regulating the manner of taking appeals from the judgment of justices of the peace in criminal cases (Kirby's Dig. §§ 2576-2582), but it is not provided therein that an affidavit for appeal is necessary to obtain such appeal. The Legislature has not prescribed that it is a requisite or condition in obtaining an appeal from a judgment of conviction of a justice of the peace in a criminal proceeding to make or file an affidavit for appeal. The circuit court therefore erred in dismissing the appeal in this case for the want of an affidavit for appeal.

The judgment of the circuit court is reversed, and this cause is remanded, with directions to overrule the motion to dismiss the appeal, and to proceed with the trial of appellant.

BEEBE STAVE CO. v. AUSTIN et al.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. LIENS (§ 15*)—RIGHTS AND LIABILITIES OF PURCHASERS OF PROPERTY.

One having a lien on property which is purchased and converted by another with notice of the lien may have his lien fixed on the proceeds, where the lien on the property has been destroyed by the wrongdoer.

[Ed. Note.—For other cases, see Liens, Cent. Dig. § 20; Dec. Dig. § 15.*]

2. FRAUDULENT CONVEYANCES (§ 158*)—INADEQUACY OF CONSIDERATION—AS EVIDENCE OF FRAUD.

Mere inadequacy of price of realty is not sufficient to put a purchaser on inquiry or to invalidate the sale, but proof of a grossly inadequate price is evidence affecting the good faith of the purchaser, from which it may be inferred as a fact that he knew of the fraudulent intent of his grantor, and assisted him in the commission of the fraud.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 500, 501; Dec. Dig. § 158.*]

3. LOGS AND LOGGING (§ 3*)—PURCHASE OF TIMBER—BONA FIDE PURCHASER—NOTICE.

A grantee in an unrecorded deed which recited the payment of the price offered to sell the timber on the land to a company engaged in purchasing timber and in logging near the land and presented the deed to the company. The consideration named in the deed was a reasonably fair price. The company bought the timber for a price not unreasonably small, and paid it without notice that the grantor had a vendor's lien. *Held*, that the company was a purchaser of the timber in good faith.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3.*]

4. LOGS AND LOGGING (§ 3*)—SALE OF TIMBER—BONA FIDE PURCHASER—NOTICE.

Where a purchaser of standing timber without notice of a lien on the land executed negotiable notes for the price which the vendor accepted as payment and then transferred them to an innocent person, the purchaser made full payment, and was a bona fide purchaser.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 9; Dec. Dig. § 3.*]

Appeal from Perry Chancery Court; Jeremiah G. Wallace, Chancellor.

Suit by Mrs. John Austin and another against J. D. Richards and another. From a decree for plaintiffs, defendant, the Beebe Stave Company, appeals. Reversed and rendered.

J. A. Comer, for appellant. John L. Hill, for appellees.

FRAUENTHAL, J. The appellees, Mrs. John Austin and the First National Bank of Perry, the plaintiffs below, instituted this suit against the defendants below, J. D. Richards and the Beebe Stave Company, to enforce a vendor's lien upon certain land, and to charge the Beebe Stave Company with the value of the timber cut therefrom. It is alleged in the complaint that Mrs. Austin sold the lands to Richards and conveyed same to him by a deed which recited that the consideration had been paid in full, but that the recital was untrue, and that Richards had not in fact paid said purchase money or any part thereof, but had given notes therefor which were unpaid, and for a recovery of the notes the suit was brought; that Richards sold the timber on said land to the Beebe Stave Company, who purchased with full knowledge that said purchase money of the land had not been paid. The prayer was for judgment against Richards for the amount of the notes and that same be declared a vendor's lien upon the land and for sale thereof in event of nonpayment of the judgment, and also for judgment against the Beebe Stave Company for the value of said timber. The Beebe Stave Company made answer that it purchased the timber from Richards in good faith and for a valuable consideration, and without any notice that any of the purchase money for the land was unpaid.

It appears from the evidence that the plaintiff Mrs. Austin, who was a nonresident of the state, had employed one G. W. Rhea to sell the land for her, and agreed to sell same for \$500, and to pay him \$20 for his services. He thereupon sold the land to defendant J. L. Richards, and sent to her a deed for execution, which recited that the consideration was \$480, and also recited that the purchase money was paid in full. She duly executed the deed on January, 28, 1907, and returned the same to her agent, Rhea, who delivered it to Richards. The Beebe Stave Company was engaged in buying timber with its office at Little Rock, Ark., and at this time was engaged in logging near the land in controversy. One of the men who was logging for the company had gone over the land in controversy, and had estimated the amount of timber on the land. This party had desired to borrow from the Beebe Stave Company money with which to purchase this timber, but the officers of the company told him that the company would purchase the timber if it was for sale. On February 27, 1907, Richards went to the

office of the Beebe Stave Company at Little Rock, and offered to sell the timber on the land for the sum of \$200. He had with him his deed from Mrs. Austin, which was examined by the secretary of the Beebe Stave Company, and, relying upon his statement that he owned the land, and the recital of the deed that the purchase money was paid, it bought the timber from Richards, who executed to it a timber deed therefor. In payment for the timber the Beebe Stave Company executed to Richards two negotiable notes, each for \$100, and due, respectively, 90 and 120 days after date, and Richards accepted these notes in payment for the timber. At this time the deed from Mrs. Austin to Richards had not been recorded. On the following day, February 28, 1907, Richards for value sold and transferred the two notes to the German National Bank of Little Rock, Ark., who then became the true owner thereof.

It appears from the testimony that Rhea, the agent of Mrs. Austin, actually sold the land to Richards for \$625, taking from him two notes, each of which was dated January 28, 1907, and due 12 months thereafter, and recited that it was given as payment for said land. One of these notes was for \$500 and made payable to Mrs. John Austin, and the other was for \$125, and was made payable to G. W. Rhea. This latter note Rhea sold and transferred to the first National Bank of Perry, one of the plaintiffs. It is upon these two notes aggregating \$625 that this suit is instituted. It appears that the Beebe Stave Company began cutting the timber on the land soon after their purchase, and in May, 1907, they had cut a great part thereof, when they were notified that Richards had not paid the purchase money. The amount of timber cut by them from the land was estimated to be of the value of \$400. The chancery court rendered a judgment against Richards by default for \$625, the amount of the notes, and decreed a sale of the land for its payment. The land was sold by a master under this decree pending the further litigation against the Beebe Stave Company, and brought \$259.40, exclusive of the cost of the suit to that date. Thereupon the court found that the plaintiffs had a lien on the timber sold to the Beebe Stave Company for the purchase money of the land, and rendered a judgment against that company in favor of plaintiff for the sum of \$220.60, the difference between the amount named in the deed as the purchase price of the land, to wit, \$480, and the above net amount, after payment of cost, for which the land was sold by the master. From the decree thus rendered against it, the Beebe Stave Company prosecutes this appeal.

The only question involved upon this appeal is the right of the plaintiffs to recover from the Beebe Stave Company the proceeds of the timber which they cut and removed from the land or any part of said proceeds. The plaintiffs contend that they had a ven-

dor's lien for the purchase money upon the land involved in the suit, and therefore upon the standing trees thereon as a part of the land; that the Beebe Stave Company purchased the trees and timber with notice that the purchase money had not been paid, and therefore with notice of their lien therefor, and thereafter removed the trees from the land, and wrongfully converted them to its own use. It is a principle of equity that when one has a lien upon property which is taken, and said property is wrongfully converted by another, with notice of such lien, the owner may have his lien fixed upon the proceeds of the property where the lien on the property has thus been destroyed by the wrongdoer. 3 Pomeroy, Eq. (3d Ed.) § 1233; Reavis v. Barnes, 36 Ark. 575; Judge v. Curtis, 72 Ark. 132, 78 S. W. 746. And it is upon this equitable doctrine that the plaintiffs base their right to equitable relief in this case against the Beebe Stave Company. But from the evidence in this case we are of the opinion that it clearly appears that the Beebe Stave Company at the time it purchased and paid for this timber was a bona fide purchaser thereof for a fair and adequate consideration, and without any notice, either actual or constructive, that the purchase money was not paid, or that plaintiffs had any lien on the timber therefor. The Beebe Stave Company was engaged in purchasing timber at this time, and was then logging near the land in controversy. It had been buying timber on lands in that locality from parties indiscriminately, and it was not unreasonable for them to have told one of their logging men who desired to purchase the timber on the land that the company would rather purchase it. From this party the company learned the amount and character of the timber upon the land, so that, when Richards offered to sell the timber, it was sufficiently advised as to the value of the timber to make a price therefor. Richards came to the office of the company in the ordinary way of doing business, and made the offer to sell the timber in the usual course of business. He presented his deed for inspection, and claimed to own the land. That the deed was not recorded was no suspicious circumstance, as urged by plaintiffs, because numbers of good and honest men do not place their deeds on record. The deed recited the amount of the consideration of the land, and that the entire purchase money was paid. The amount of the consideration named in the deed was a reasonably fair price for the land and the timber thereon, because all that the plaintiff asked therefor was \$500, and the deed named the amount of the consideration to be \$480. The land contained 160 acres, and the sum of \$200, as the price named for the timber thereon, was not an unreasonably small price. The company then paid for the timber with its negotiable notes. There was nothing in the acts or con-

duct of Richards in his transaction with the Beebe Stave Company to arouse any suspicion that he was endeavoring to defraud the plaintiff; and there is not a particle of testimony that indicates that the officers of this company intended to defraud the plaintiff or had any reason or right to believe that Richards was endeavoring to do so. There is no act or word of Richards or circumstance that was sufficient to give them notice that the purchase money was not paid or to cause them to make any further inquiry, so that they could have learned that it was not paid.

It is urged by the plaintiffs that the price paid by the company was so inadequate as to put it on inquiry, and that such inadequacy of price stamps the transaction as fraudulent. But mere inadequacy of price is not sufficient to put the purchaser upon inquiry or to invalidate the sale. Mr. Pomeroy in his work on Equity says: "The doctrine is now well settled that mere inadequacy—that is, inequality in value between the subject-matter and the price—is not sufficient to constitute constructive fraud." "When the inadequacy of price is so gross that it shocks the conscience, and furnishes satisfactory and decisive evidence of fraud, it will be sufficient proof that the purchase is not bona fide." 2 Pomeroy on Equity, §§ 923, 927. Another writer says the inequality must be so great as to shock the sense of justice. 6 Am. & Eng. Ency. Law, 701. The proof of a grossly inadequate price paid for the property is really evidence affecting the good faith of the purchaser, from which it might be inferred as a fact that the purchaser knew of the fraudulent intent of his grantor, and thus assisted him in his commission of fraud. Hogg v. Thurman, 90 Ark. 93, 117 S. W. 1070. In the case at bar the price of the land with the timber thereon was placed by the owner at \$500. The land after the timber had been cut off sold by the master for \$300. It cannot then be said that \$200 was a grossly inadequate price for the timber. It is true that an estimate had been placed on the timber of a value of \$400 by some parties. But, when the vicissitudes of the logging and timber business are considered, it cannot be said that an ordinarily prudent and careful business man who wishes to make some profit upon his trades has given a grossly inadequate price in paying only the price that the Beebe Stave Company paid for this timber. It is not sufficient to definitely prove that the officers of the company had reason to believe that Richards was trying to defraud his vendor; and, when the deed was shown to them reciting that the vendor acknowledged full payment of the purchase money, the price at which Richards agreed to sell the timber was not sufficient to arouse a just suspicion in them which would reasonably call upon them to make further inquiry. Fly v. Screeton, 64 Ark. 185, 41 S. W. 704; Hus-

kins v. Fayetteville Gro. Co., 79 Ark. 390, 96 S. W. 195. And from the evidence we do not find proof of any other fact or circumstance of suspicion which gave the officers of the company notice of any fraudulent intent on the part of Richards or that the purchase money was not paid; nor of any circumstance sufficient to cause them to make further inquiry. It is urged by plaintiffs that in May, 1907, and before all the timber had been cut and removed, actual notice was given to the Beebe Stave Company that the purchase money had not been paid. But at that time said company had fully paid for the timber and the timber was then its property. It had given for the timber negotiable notes which were accepted as payment, and these notes had been long before sold and transferred to an innocent third person who then held and owned the notes, and thereafter the Beebe Stave Company made payment of these notes to this third person, the German National Bank, the true owner thereof. This constituted a full payment, as the notes were sold and transferred long before the notice received by the company. 80 Cyc. 1203.

It follows, therefore, that the chancery court erred in holding that the Beebe Stave Company bought the timber with notice either actual or constructive of the equitable rights or lien of the plaintiff, and that it erred in rendering any judgment against the Beebe Stave Company.

The decree of the chancery court is reversed, and a decree is here rendered dismissing the prayer of the complaint in so far as it seeks any judgment against the Beebe Stave Company.

CHEROKEE CONST. CO. v. HARRIS et al.
(Supreme Court of Arkansas. Nov. 8, 1909.)

1. HOMESTEAD (§ 2*)—CREATION—EXTRATERRITORIAL FORCE OF STATUTE.

The right of homestead is purely the creation of statute, which has no extraterritorial force.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. LIFE ESTATES (§ 11*)—ACTS CONSTITUTING WASTE.

While a tenant for life or years takes the land in the condition in which it is when the estate vests in him, and he is entitled to all the rents and profits that then issue therefrom, and to continue to use and enjoy them to the same extent until the termination of the estate, he may not commit waste by doing anything that essentially injures or impairs the estate in remainder.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 29, 42; Dec. Dig. § 11.*]

3. LIFE ESTATES (§ 12*)—ACTS CONSTITUTING WASTE—MINES.

It is waste for a tenant for life or years to open lands to search for new mines; but, where there are mines opened when he takes the estate, it is not waste to continue to work them.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 31, 42; Dec. Dig. § 12.*]

4. HOMESTEAD (§ 142*) — RIGHTS OF ADULT HEIRS.

Const. art. 9, § 6, vesting the rents and profits of the homestead on the death of the owner in the widow for life and children during minority, etc., secures to the widow and minor children a home during the life of the widow and the minority of the children, but it does not create any estate greater than that of occupancy and the right to the enjoyment of the rents and profits, and, as affecting the rights of the adult heirs, the homestead estate is one for life or for years, and the widow and minor children may not as against the adult heirs or their grantee commit waste by opening on the land new mines, and mine and sell mineral therefrom, or lease the same to others for that purpose.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 271, 272; Dec. Dig. § 142.*]

Appeal from Sebastian Chancery Court; J. V. Bourland, Chancellor.

Action by the Cherokee Construction Company against Charles Harris and others. From a judgment dismissing the complaint, plaintiff appeals. Reversed and remanded.

Ira D. Oglesby, for appellant. T. B. Pryor, for appellees.

FRAUENTHAL, J. The appellant, who was the plaintiff below, instituted this suit in the chancery court against the appellees, the defendants below, seeking to have certain lands partitioned, and to enjoin the defendants from committing waste by mining and removing from the lands the coal underlying the same. It alleged that one Matthew Pew was the owner of the lands in his lifetime, and that plaintiff became the owner of a one-half interest in the lands by purchase from the adult heirs of said Pew. The defendants alleged that the land was the homestead of said Pew, and that it was occupied as such homestead by his widow, who was one of the defendants, and his minor children; that the widow for herself and minor children made a lease to the other defendants of the right to take and mine the coal underlying the land; and that, by virtue of their homestead estate in the land, they had the right to mine said coal.

It is conceded that the facts developed in the case are as follows: The land in controversy was at the death of Matthew Pew his homestead, and was occupied as such. At the time of his death he left surviving him his widow, defendant herein, who after his death married W. B. Thompson, with whom she now resides on said land. The deceased, Matthew Pew, at the time of his death had six adult and four minor children. That plaintiff is owner of a half interest in said land by purchase from the adult children of Matthew Pew, as set out in the complaint. That each of the four minor children own an undivided one-tenth interest in the lands, and they now reside on it with their mother, Mrs. W. B. Thompson, one of the defendants. At the

time of the death of Matthew Pew, it was used and occupied as a farm for farming purposes only, and was so used at the time of the marriage of his widow with Thompson, and was so used thereafter, and is still so used. That at the time of the death of Matthew Pew no coal was mined, or had ever been mined from said land, and no opening of any kind whatsoever made for the purposes. That in the year 1907 defendant Mrs. Thompson, for herself and minor children, made a lease to the defendants herein, Harris, Williams, and Welchel, of the right to take and mine the coal from under said land, for which they were to pay a royalty of 10 cents per ton, which produces \$75 per acre, and they are now, and have been since the execution of said lease, mining coal from said land, and have sunk a slope or shaft on same for this purpose. That all the royalty under said lease is being paid to Mrs. Thompson for herself and children. That the youngest child is about four years of age, and the oldest of the minors nine years old. That the value of said land, including the coal, is \$75 per acre, and its value after the coal is removed \$10 per acre. That rental or income of the land if used only for farming purposes would not exceed \$100 a year. That under the terms of said lease a larger part, if not all, of the coal under said land will be mined out before the youngest child reaches lawful age.

The chancery court denied the plaintiff any relief, holding that the widow and minor children had the right to open new coal mines and to mine and remove the coal underlying the land, and dismissed the complaint. From that decree, the plaintiff presents this appeal.

Upon the fact being developed that the land was the homestead of Matthew Pew at the date of his death, and was at the institution of this suit occupied by his widow and minor children claiming same as a homestead, the plaintiff did not press that portion of his complaint which sought to partition the land, but did seek the relief, and does now seek only the relief, of enjoining the mining and removal of the coal from under said lands. The question involved in this case is whether, during the continuance of the homestead estate of the widow and minor children, they have the right as against the adult children or their grantee to open on the land coal mines where none had been opened during the lifetime of the husband and parent, and to take and mine the coal therefrom solely for the purpose of sale. The defendants assert this right by virtue of the homestead provided for the widow and minor children by the Constitution. Article 9, § 6, of the Constitution provides: "If the owner of a homestead die, leaving a widow and no children, and said widow has no separate homestead in her own right, the same shall be exempt, and

the rent and profits shall vest in her during her natural life; provided, that if the owner leaves children, one or more, said child or children shall share with said widow and be entitled to half the rents and profits until each of them arrives at twenty one years of age, each child's right to cease at twenty one years of age, and then all to go to the widow, and provided, that said widow or child reside on the homestead or not, and, in case of the death of the widow, the homestead shall be vested in the minor children of the testator or intestate." The chief purpose of this constitutional provision was to secure to the widow and minor children a fixed home during the life of the widow or minority of the children. To secure this object, it was made exempt from sale; so that it cannot be sold to pay the decedent's debts, and it cannot be partitioned, either in kind or for sale. *Trotter v. Trotter*, 31 Ark. 145; *Kirksey v. Cole*, 47 Ark. 504, 1 S. W. 778; *McCloy v. Arnett*, 47 Ark. 445, 2 S. W. 71; *Nichols v. Shearon*, 49 Ark. 76, 4 S. W. 167; *Stayton v. Halpern*, 50 Ark. 329, 7 S. W. 304; *Burgett v. Apperson*, 52 Ark. 213, 12 S. W. 559; *Bond v. Montgomery*, 56 Ark. 563, 20 S. W. 525; *Sparkman v. Roberts*, 61 Ark. 26, 31 S. W. 742. It protects the occupant in the possession of the land, and holds it together as a place of residence and a home preserved against sale or partition. It cannot be sold or alienated by the widow. By the act of sale she abandons it as a homestead. *Garabaldi v. Jones*, 48 Ark. 230, 2 S. W. 844; *Sansom v. Harrell*, 55 Ark. 572, 18 S. W. 1047. But the homestead law does not create any estate greater or any right more enlarged than that of the occupancy of the land and the right to the enjoyment of the rents and profits therefrom during the life of the widow or minority of the children.

In the case of *Kessinger v. Wilson*, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220, it is held that, when one dies seised of a homestead, his minor children have two separate and distinct estates in the land—the estate of homestead and of inheritance. These two do not merge; but the right to the enjoyment and possession of the one follows the other, and the right by inheritance cannot be impaired by the right of enjoyment of the homestead during their minority. After the estate of homestead has terminated by the death of the widow and the majority of the minor children, the land is still liable for the debts of the parent. *McAndrew v. Hollingsworth*, 72 Ark. 446, 81 S. W. 610. And the homestead cannot be devised so as to free it from those debts after the termination of the homestead estate. *Winters v. Davis*, 51 Ark. 335, 11 S. W. 420. And subject to the homestead estate the heirs of the decedent have an estate of inheritance in the land. As affecting the rights of the heirs, therefore, the homestead estate is one for life or for years.

"The right of homestead is purely the creation of statutes, which have no extraterritorial force. It is generally spoken of as an estate in land and created as an estate for life." 1 Washburn on Real Prop. § 540. Now, a tenant for life or for years must not commit waste. Anything that is done or permitted to be done that essentially injures or impairs the estate of the remainderman or reversioner is waste. It is the duty of the life tenant or tenant for years to protect the land from injury to the freehold. 1 Tiedeman on Real Property, § 75; 1 Washburn on Real Property, § 270; 1 Lomax, Dig. 504; 1 White & T. Lead. Cases Eq. 1011; 30 Am. & Eng. Ency. Law (2d Ed.) 236. In the case of McLeod v. Dial, 63 Ark. 10, 37 S. W. 306, it is held that "a life tenant has no right to cut trees growing upon land or to allow them to be cut, except so far as it might be necessary to the proper enjoyment of his life estate in conformity with good husbandry, so as not to materially lessen the value of the inheritance." Modlin v. Kennedy, 53 Ind. 267. In the case of Smith v. Smith, 105 Ga. 106, 31 S. E. 135, it was held that a widow who has taken a homestead in her deceased husband's land cannot, as against the rights of those entitled to the property in reversion after the homestead estate shall have expired, make a sale of the standing timber on the land when same will injure the value of the freehold, and is not essential to the legitimate use of the property for homestead purposes. Parker v. Chambliss, 12 Ga. 235. It is uniformly held that it is waste to open lands to search for new mines. If there are mines already opened on the land when the tenant takes the estate, it is not waste to continue to work them. The offense of waste consists in the first penetration and opening of the soil. And so it has been held that a mine which was opened at the vesting of the life estate or estate for years may be worked by the tenant even to exhaustion. 1 Lomax, Dig. 54; 1 Washburn on Real Property, § 280; Crouch v. Puryear, 1 Rand. (Va.) 258, 10 Am. Dec. 528. But tenants for life or for years are guilty of waste in opening and working new mines and which were unopened at the time of the vesting of the estate. 20 Am. & Eng. Ency. Law, 769; 1 Washburn on Real Property, § 280; 16 Cyc. 625. They may use the premises as they may see fit, provided it does not injure the inheritance. They may work old mines already opened when they obtained the estate; but they cannot open new mines. Tiedeman on Real Property, § 75; Hook v. Garfield Coal Co., 112 Iowa, 210, 83 N. W. 963; Gerkins v. Ky. Salt Co., 100 Ky. 734, 39 S. W. 444, 66 Am. St. Rep. 370; Koen v. Bartlett, 41 W. Va. 559, 23 S. E. 664, 31 L. R. A. 128,

56 Am. St. Rep. 884; Williamson v. Jones, 43 W. Va. 562, 27 S. E. 411, 38 L. R. A. 694, 64 Am. St. Rep. 891; People's Gas Co. v. Tyner, 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443, 31 Am. St. Rep. 433.

It follows that the life tenant has the right to use and enjoy the premises as he may see fit, provided he commits no injury to the inheritance. He takes the land in the condition in which it was when the estate vested in him, and he is entitled to all the rents and profits that then issued therefrom, and to continue to use and enjoy them to the same extent until the termination of the estate. But such tenant by an original act of his own is not entitled to obtain from the land any profit that would result in an injury to the inheritance. And the widow and minor children do not obtain by the homestead law any greater right in the use and enjoyment of the homestead than this. They have not the right in their use of the homestead to commit waste, and cannot during their occupancy do or permit any act to be done that will prove an injury to the estate of the reversioner. It is urged by counsel for appellee that they should have the right to open new mines under the authority of the case of Russell v. Berry, 70 Ark. 313, 67 S. W. 864. But it was there only determined that the coal underlying the surface of the earth was land and a part of the homestead; and that, therefore, the exemption of the homestead extended thereto, so that the coal could not be sold to pay the debts of the decedent. But it was there expressly stated that it was not decided that the widow and children have the right to mine and sell the coal. We therefore hold that during the continuance of the homestead estate of the widow and minor children they do not have the right as incident to the homestead estate to open on the land new mines and to mine and sell coal therefrom, or to lease the same to others for that purpose.

We do not, however, pass upon the question as to whether or not the probate court in which the guardianship of these minors may be pending has the power to order for their benefit the sale of the entire interest of the minors, in the underlying coal of the homestead left them by their parent. Merrill v. Harris, 65 Ark. 355, 46 S. W. 538, 41 L. R. A. 714, 67 Am. St. Rep. 929.

It follows, therefore, that the chancery court erred in holding that the widow and minor children had the right to open new coal mines upon the homestead, and to mine and remove the coal underlying the same for the purpose of sale.

The decree is reversed and the cause is remanded, with directions to enter a decree in accordance with this opinion.

WALKER v. NOLL.

(Supreme Court of Arkansas. Nov. 1, 1909.)

1. APPEAL AND ERROR (§ 697*)—BILL OF EXCEPTIONS—CONTENTS—SUFFICIENCY.

A bill of exceptions is sufficient if it appears inferentially that all the evidence is brought up.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2920; Dec. Dig. § 697.*]

2. APPEAL AND ERROR (§ 697*)—BILL OF EXCEPTIONS—CONTENTS.

Where a bill of exceptions recited that certain testimony was all the testimony introduced on the hearing of a motion to dismiss an appeal, it sufficiently showed that it contained all the testimony then heard.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2923; Dec. Dig. § 697.*]

3. WITNESSES (§ 227*)—NECESSITY OF OATH.

On an issue as to the sufficiency of an affidavit for an appeal from the probate to the circuit court, it was error for the court, over objection, to permit the probate clerk to make a statement as to the making and filing of the affidavit without swearing him as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 798; Dec. Dig. § 227.*]

4. COURTS (§ 202*)—PROCEDURE IN PROBATE COURT—APPEAL—AFFIDAVIT.

Claimant's attorney filed in the probate court an instrument reciting that claimant prayed for and was granted an appeal; that it was not taken for delay, etc. The statement contained no jurat, and was presented to the clerk of the probate court in vacation by the attorney with the remark: "I will swear to this." The paper was filed with the clerk, but no jurat was attached. Held, that the paper was not properly sworn to as an affidavit.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 486; Dec. Dig. § 202.*]

5. COURTS (§ 202*)—APPEAL FROM PROBATE—AFFIDAVIT.

Where the necessary affidavit for an appeal from the probate to the circuit court was never presented to nor acted on by the probate court, as required by Kirby's Dig. § 1348, and no order granting an appeal was ever made by the court after the filing of the alleged affidavit, the appeal was not properly taken.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 486; Dec. Dig. § 202.*]

6. COURTS (§ 202*)—ORDER GRANTING APPEAL—DIRECT ATTACK.

A motion to dismiss an appeal from the probate to the circuit court for irregularities in the proceedings was a direct, and not a collateral, attack, and hence it would not be conclusively presumed from the court's order granting the appeal that all the necessary conditions had been complied with.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 486; Dec. Dig. § 202.*]

Appeal from Circuit Court, Lonoke County; Eugene Lankford, Judge.

Claim by Mary E. Noll against J. F. Walker, as administrator of the estate of R. O. Walker, deceased. From a judgment of the circuit court allowing the claim in full on appeal from the probate court allowing it in part only, the administrator appeals. Reversed and remanded, with directions.

Trimble, Robinson & Trimble and Jas. B. Gray, for appellant. George M. Chapline, for appellee.

FRAUENTHAL, J. At the April term, 1907, of the Lonoke probate court, the appellee presented her claim against the estate of R. O. Walker, deceased. In that court the appellant, as administrator of said estate, filed an answer to the pleading, seeking an allowance of the claim. Upon a trial of the matter the probate court allowed a portion of the claim and disallowed the remainder, and rendered judgment accordingly, and in the order it is recited: "Whereupon counsel for plaintiff prayed an appeal to the circuit court, which was granted." In the circuit court the appellant filed a motion to dismiss the appeal from the probate court upon the ground that no affidavit for appeal was made in the time or manner required by law, and at no step in the proceeding was this affidavit waived by the appellant, nor the necessity of making it dispensed with. The circuit court denied the motion to dismiss the appeal over the objection of appellant, and rendered judgment for the full amount of the claim. From that judgment, the appellant prosecutes this appeal.

It would appear that the judgment of the probate court was rendered on April 22, 1907, and that no affidavit for appeal from that judgment was then made or filed. On May 14, 1907, and in vacation, the attorney of appellee presented to the clerk of the probate court an instrument purporting to be an affidavit, as follows: "Comes George M. Chapline, as agent and attorney in fact for the plaintiff herein, and states that the said plaintiff, M. Noll, is a nonresident of the state of Arkansas, and states that this appeal, prayed for and granted, is not taken for delay, but that justice may be done. [Signed] Geo. M. Chapline, Agt. and Atty. for Plaintiff"—with the remark, "I will swear to this," and, without further formality, left the office. The paper was filed by the clerk, but no jurat was attached thereto, nor was the purported affidavit ever presented to or acted upon by the probate court. In the trial upon this motion to dismiss in the circuit court, the clerk of the probate court was allowed to make the above statement relative to the purported affidavit without being sworn as a witness, over the objection of appellant duly made at the time. It appears from the bill of exceptions that this was all the alleged testimony that was introduced upon the hearing of the motion to dismiss the appeal. It is urged by counsel for appellee that, inasmuch as the bill of exceptions does not state specifically that this was all the testimony heard in the matter, the finding and decision of the circuit court should be presumed to be correct. But it does sufficiently appear from the bill of exceptions that it contains all the testimony heard on the trial of the matter by the circuit court, and negatives the idea that any other testimony was heard; and the

bill of exceptions is sufficient if it appears inferentially that all the evidence is brought up. *Thomas v. Hinkle*, 35 Ark. 450; *Leggett v. Grimmer*, 36 Ark. 496; *Overman v. State*, 49 Ark. 364, 5 S. W. 588.

We are of the opinion that it was error for the trial court to hear the statement of the probate clerk without actually first swearing him as a witness when the appellant was at the time objecting to his statement being received as evidence without his first being sworn. There was therefore no legal evidence that the instrument purporting to be an affidavit was actually sworn to. As a matter of fact, under the statement of the clerk, the instrument was not formally sworn to. It was only handed to the clerk with the remark that, "I will swear to this." While there is no particular formality required either in the use of the words or the manner of administering an oath in making an affidavit, nevertheless the actual swearing by the affiant must be done before a proper officer, and the requirements of the law as to the manner of administering the oath must be substantially complied with. It is not necessary to determine whether that was done in this case, for the reason that we do not think that the purported affidavit was made or filed within the time or manner prescribed by law, so that the circuit court could acquire jurisdiction of the matter.

It is provided by article 7, § 35, Const., that "appeals may be taken from judgments and orders of the probate court under such regulations as may be prescribed by law." In order to obtain an appeal from an order or judgment of the probate court, it is prescribed by Kirby's Dig. § 1348, as follows: "Appeals may be taken to the circuit court from all final orders and judgments of the probate court at any time within twelve months after the rendition thereof by the party aggrieved filing an affidavit and prayer for appeal with the clerk of the probate court; and upon the filing of such affidavit the court shall order an appeal at the term at which such judgment or order shall be rendered, or at any term held within twelve months thereafter. The party aggrieved, his agent, or attorney, shall swear in said affidavit that the appeal is taken because he verily believes he is aggrieved and is not taken for the purpose of vexation or delay." It will be seen from this that the probate court must grant the appeal at a term of the court, and that, as a prerequisite to the granting of such appeal, it is necessary that an affidavit for appeal must be filed. It is essential that the affidavit for appeal be made and filed before the probate court can grant the appeal, and that the probate court must itself act on such affidavit and prayer for appeal, and grant same by an order.

In the case of *Johnson, Adm'x, v. Duval*,

Adm'x, 27 Ark. 599, it was held that an affidavit for appeal is a prerequisite to obtain such appeal from a judgment of the probate court, if the same is not waived or dispensed with; and, further, that, if the appeal is not taken substantially in the manner and within the time prescribed by law, it will be dismissed for the want of jurisdiction. In the case of *Matthews v. Lane*, 65 Ark. 419, 46 S. W. 946, it was held that, in order to invest the circuit court with jurisdiction upon appeal from the probate court, it is necessary that it appear that the affidavit and prayer for appeal were presented to the probate court, and that the appeal was granted. In the case of *Neal v. Peay*, 21 Ark. 93, it was held that the affidavit and prayer for appeal from a judgment of the probate court do not invest the circuit court with jurisdiction unless the appeal be granted by an order of the probate court. *Crow v. Hardage*, 24 Ark. 282; *Hanna v. Pitman*, 25 Ark. 275; *Love v. McAlister*, 42 Ark. 183. In the case at bar, the instrument purporting to be an affidavit for appeal was never presented to the probate court, and was never acted upon by that court, and no order granting an appeal was made by that court after the filing of that instrument. It therefore follows that the appeal in this case from the judgment of the probate court was not taken substantially in the manner as prescribed by law.

It is urged by counsel for appellee that inasmuch as the order of the probate court made on April 22, 1907, stated that "counsel for plaintiff prayed an appeal to the circuit court, which was granted," it must be conclusively presumed that all the necessary conditions and prerequisites of the law had been complied with. And this contention is based on the principle that an order or judgment of the probate court cannot be collaterally attacked; but this proceeding was a direct appeal from the order of the probate court. The direct matter involved in the hearing of the appeal from this order was whether the appeal was taken in the manner prescribed by law. It was not therefore a collateral attack of that order.

The judgment of the circuit court is reversed, and this cause is remanded, with directions to dismiss the appeal.

WESTERN UNION TELEGRAPH CO. v. GRIFFIN.

SAME v. GORDON.

(Supreme Court of Arkansas. Oct. 18, 1909.
On Rehearing, Nov. 20, 1909.)

1. TELEGRAPHS AND TELEPHONES (§ 66*)— FAILURE TO DELIVER—NEGLIGENCE.

A finding that a telegraph company, which agreed to send a telegram to W., a town of 3,500 inhabitants, and deliver it to the addressee, who lived 18 or 20 miles therefrom, necessitating send-

ing it by a special messenger, failed to make reasonable efforts to get a conveyance to take the message, is sustained by evidence that, without success, the telegraph operator merely asked several parties to deliver the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 63; Dec. Dig. § 68.*]

2. TELEGRAPHS AND TELEPHONES (§ 68*)—NOTICE TO COMPANY FROM MESSAGE.

A telegram announcing the death of a person, and stating "come at once; answer at my expense"—puts the company on notice that the funeral would be postponed till expiration of a reasonable time.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 70; Dec. Dig. § 68.*]

3. TELEGRAPHS AND TELEPHONES (§ 68*) — FAILURE TO DELIVER—MENTAL ANGUISH.

The relation of son-in-law of the sender of a telegram to the addressee is sufficient to sustain an action for mental anguish occasioned by nondelivery of the telegram announcing the death of the sender's wife, whereby the addressee was prevented from attending the funeral.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 69, 70; Dec. Dig. § 68.*]

4. TELEGRAPHS AND TELEPHONES (§ 27*) — FAILURE TO DELIVER—DAMAGES FOR MENTAL ANGUISH—CONFLICT OF LAWS.

Though the negligence in failing to deliver a telegram, sent from one state to another, was in the state to which the message was sent, yet, as the addressee's right of action primarily grows out of the contract made with the company by the sender in the state from which it was sent, he suing there may have recovery for mental anguish, an element of damage recognized by the statute of that state, though not by the laws of the state where delivery was to be made.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 27.*]

Appeal from Circuit Court, Faulkner County; Eugene Lankford, Judge.

Two actions, one by Ben L. Griffin, the other by A. A. Gordon, against the Western Union Telegraph Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Geo. H. Fearons and Rose, Hemingway, Cantrell & Loughborough, for appellant. R. W. Robins, for appellees.

BATTLE, J. On Sunday, March 24, 1907, Mrs. Genie Griffin, wife of Ben L. Griffin, died, and the following telegram was delivered to the Western Union Telegraph Company at Conway, Ark., on that day, about 1 o'clock p. m., to be sent to A. A. Gordon, at Banner, Miss.:

"A. A. Gordon, Banner, Miss., via Water Valley, Miss.

"Genie died very suddenly at one p. m. today. Come at once; answer my expense.

"Ben L. Griffin."

The funeral of Mrs. Griffin took place at Conway on the 25th of March, 1907, at about 5 o'clock p. m. A. A. Gordon was not present; the telegram not having been de-

livered to him until three or four days thereafter.

Ben L. Griffin and A. A. Gordon brought separate actions against the telegraph company to recover the damages occasioned by the failure to deliver the message in time.

Ben L. Griffin alleged in his complaint, substantially, as follows:

"The defendant is a corporation, engaged in transmitting telegrams, and on March 24th, at 1 o'clock p. m., plaintiff delivered to it the following telegram: 'A. A. Gordon, Banner, Miss., via Water Valley, Miss. Genie died very suddenly at one p. m. today. Come at once; answer my expense. Ben L. Griffin.'

"That at the time the message was delivered to defendant it was notified that A. A. Gordon was the father of 'Genie,' and that plaintiff was very anxious for prompt delivery of the message, so that the addressee could come at once and be present at the funeral, which was to occur at Conway. That the addressee was then at Banner, and plaintiff desired him to be present at the funeral. That the price for transmitting the message was paid and charges for its prompt delivery guaranteed. That defendant agreed to transmit the message and deliver it promptly to the addressee. Alleges that defendant wantonly, willfully, and negligently failed to deliver the message promptly, or within a reasonable time, and that the message was not delivered until March 29th. That, on account of the failure to deliver the message, the addressee did not attend the funeral and was not with the plaintiff before and at the time of the funeral"—which was the occasion to him of great mental anguish, and caused him to suffer damages in the sum of \$1,500.

The defendant answered and denied the material allegations in the complaint.

A. A. Gordon alleged in his complaint, substantially: That the telegram was sent in the manner alleged in Griffin's complaint; "that it was not delivered to plaintiff within a reasonable time, because of the negligence of the defendant; that it was not received by plaintiff until March 29th; that had he received the message promptly, or within a reasonable time, he could and would have gone to Conway and been present at the funeral; that, solely because of the failure to deliver the message promptly, he was not present at the funeral; that his failure to attend the funeral occasioned him mental anguish in the sum of \$1,500."

The defendant denied material allegations.

By consent the two actions were heard as one, and the jury returned a verdict in favor of each of the plaintiffs for \$200, and judgment was rendered accordingly, and the defendant appealed.

In the trial of the issues in the case evidence was adduced tending to prove the following facts:

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

On the 24th of March, about 12 o'clock, Mrs. Genie Griffin died at her home in Conway, Ark. She was the wife of Ben L. Griffin, and the daughter of A. A. Gordon. About 1 o'clock p. m. of the same day, Griffin delivered to the defendant, at Conway, a telegram in words and figures, set out above, to be sent to A. A. Gordon, at Banner, Miss. J. R. Pearcy delivered the telegram for him, and told the defendant's operator, at the time he delivered it, that "Genie" mentioned in the message was the wife of Griffin and the daughter of Gordon, explained to the operator about the funeral, and told him that a reply to the message was desired at once, so that Griffin might know whether or not to expect Gordon to come to the funeral, and told him where Gordon resided, which was about 18 miles from the defendant's telegraph office at Water Valley, Miss., and that it would be necessary to send the telegram to him from Water Valley by special messenger, and offered and agreed to pay all charges for sending the message and extra charges for sending it from Water Valley to Gordon, and defendant agreed to transmit the message and send it to Gordon by special messenger.

The body of Mrs. Griffin was embalmed so as to preserve it for a week or two, and the time of the funeral was postponed, awaiting a reply to the message. The telegram was sent, and reached Water Valley on the 24th of March, 1907, at 4:07 p. m. The operator at that place testified: "After making inquiries from several parties, none of whom knew Mr. Gordon, I asked several parties to deliver said message, without success. I then placed a copy of message in post office at about 5 o'clock, Sunday afternoon, directing it to Banner, Miss.; Banner being 20 miles from this place (Water Valley), there being no telephone communication there, and this being the quickest way to get it to destination." Water Valley is a town of about 3,500 or 4,000 inhabitants, and the distance between it and Gordon's residence could have been traveled by horse in three hours. Gordon was at home on Sunday and Sunday night, which was the 24th of March, 1907, and remained there until 5 o'clock a. m. of the day following. If he had received the telegram on or before 10 o'clock p. m. on Sunday, he could have reached Conway at 6 or 10 o'clock p. m. of the next day. If Gordon had received the telegram on or before 10 o'clock Sunday night, he could and would have sent telegram to Griffin that he would come, and that he could and would have come to Conway at once, and that if such a message had been received by Griffin he could and would have postponed the funeral of his wife until Gordon arrived.

After many ineffectual efforts to hear from his message, Griffin heard on the morning after it had been delivered to the defendant for transmission, at 11 o'clock, that it had been received at Water Valley and had been

placed in the post office at Water Valley addressed to Gordon at Banner, to be sent to him by mail. It was then uncertain when it would reach him, and in fact did not until the 29th of March, 1907. When he heard the message had been sent to Gordon by mail, he caused his wife to be buried on Monday evening, March 25th, at about 5 o'clock, and Gordon was not present. While he was waiting to hear from his telegram, he was anxious and much worried.

The court instructed the jury, in part, at the request of the defendant, as follows: "You are instructed that the defendant was not compelled to attempt to deliver said telegram otherwise than by sending it to Water Valley, and from there attempting to deliver it to the addressee; and if you find from the evidence that the defendant transmitted said message to Water Valley with reasonable dispatch, and made the efforts of a reasonably prudent person under the circumstances to send it by special messenger from Water Valley to Banner, Miss., but was unable to secure such special messenger, your verdict will be for the defendant."

And refused to instruct as follows:

"You are instructed that the telegram in suit was transmitted to Water Valley, Miss., with reasonable dispatch, and that defendant committed no act of negligence in the transmission of said message that would have occasioned plaintiff any damages unless in the delay in delivery of the message from Water Valley to Banner, Miss.; but even if you find that defendant was guilty of negligence in not delivering said message from Water Valley to Banner, in the state of Mississippi, sooner than it did, you are instructed that its tort was committed in the state of Mississippi, and the law of Mississippi will govern as to plaintiff's right of recovery for mental anguish; and you are further instructed that the law of Mississippi does not allow a recovery for mental anguish in such cases, and your verdict will be for the defendant, as to the plaintiff A. A. Gordon."

Many instructions were given and refused.

The evidence adduced in the trial court tended to prove that the telegram delivered to appellant to be sent to Gordon reached Water Valley at seven minutes after 4 o'clock p. m. on the day it was sent. Appellant agreed to deliver it to Gordon, who resided near Banner, in Mississippi, 18 or 20 miles from Water Valley, and Griffin, who sent the message, agreed to pay the expenses of sending it from the latter place to him. To do so it was necessary to send it by a special messenger. The operator at Water Valley testified that she asked several parties to deliver the message without success. Was that sufficient? Water Valley is a town of 3,500 or 4,000 inhabitants, and it was not shown that a horse and rider or conveyance and driver could not have been hired in that place to carry the mes-

sage to Gordon. The question as to whether reasonable efforts were made to secure such a conveyance was submitted to a jury, and they found in the negative, and the evidence sustains them.

If appellant had sent the message to Gordon by special messenger, as it agreed to do, the evidence tends to prove that the funeral would have been postponed, and Gordon would have been present, and in this respect sustains the verdict of the jury.

Appellant says it had no notice that the funeral of Mrs. Griffin was in abeyance. The evidence shows that it did have. The message was sufficient to put it on notice that it would be postponed until the expiration of a reasonable time. The message to Gordon was to: "Come at once; answer my expense." It expressed a desire for him to come and a request for an answer. The answer was, evidently, for the purpose of ascertaining whether he would come, and, if so, when, so that the funeral could be postponed to a time when he could be present. All this indicated that the funeral was in abeyance at the time the message was delivered.

Appellant says that the relation of son-in-law by Griffin to Gordon was not sufficient to sustain an action for mental anguish occasioned by the failure to deliver a telegram; but it was held to the contrary in *Western Union Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112. Two opinions were delivered in that case, and it was held as stated in the first opinion, and this much of the first opinion was not retracted or modified by the second.

It is contended that, if there was any negligence in failing to deliver the message in question, it occurred in the state of Mississippi, where damages on account of mental anguish without personal injury are not recoverable, and appellees cannot recover in their actions. This view is not sustained by *Western Union Telegraph Co. v. Woodward*, 84 Ark. 323, 105 S. W. 579. In that case a message was sent from Fayetteville, Tenn., to Stuttgart, Ark., notifying the addressee of the death of his sister. The message never reached this state. After quoting from Wharton on the Conflict of Laws, the court said:

"Applying this principle here, it is not material in this case which view is generally taken as to the action, whether *ex delicto*, *ex contractu* or statutory; for the actions must be sustained by reason of the Tennessee contract. It is held in Tennessee that the addressee recovers upon the contract of the sender inuring to his benefit, and that mental anguish is a recoverable element in such contracts. * * *

"In this case, although there may be no statutory action arising in Arkansas, for the reason that no negligence has occurred actionable under the statute, yet there is a contract which, under the laws of Tennes-

see, where it was made, between the sender and the telegraph company, inured to the benefit of the addressee; and one element of the contract was the right to recover for mental anguish. That action is, under the principles heretofore quoted from Wharton (which seem fully supported by the authorities), sustainable here, and that is as far as the court is required to go in this case."

According to that case these actions are sustained by the contracts sued on; it having been made, like the Tennessee contract, under a statute which allows the recovery of damages for mental anguish.

Judgment affirmed.

FRAUENTHAL, J., disqualified and not participating.

On Rehearing.

MCCULLOCH, C. J. It is insisted that the conclusion reached in the present case is in conflict with the decision in *Western Union Tel. Co. v. Ford*, 77 Ark. 531, 92 S. W. 528. In that case a telegram was sent from Missouri, where damages on account of mental anguish are not recoverable, into Arkansas, and the negligence occurred here. Suit was brought by the addressee, and we held that damages for mental anguish could be recovered, although not recoverable in the state whence the message came. The opinion in that case contains inaccurate language which is in conflict with other decisions of this court. We said that the right to recover such damages did not depend on any contractual relation existing between the telegraph company and the person injured, and that no contract existed between the addressee of the message and the company. Now the addressee is one for whose benefit the contract is made. Therefore a contractual relation with him is established. We have in other cases recognized the principle that the cause of action to recover damages on account of mental anguish arises out of contract, although the element of damages is created by statute.

In *Ark. & La. Ry. Co. v. Stroude*, 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 130, we said of this statute that: "Manifestly, it was the intention of the lawmakers to change by statute the law as declared by this court in the case referred to above, and to make mental pain and anguish an element of damages resulting from a negligent failure to receive, transmit, or deliver a telegraphic message." In other cases we have held that the contract governs to the extent that a stipulation therein, requiring notice of a claim for damages, is enforceable, and that no recovery can be had unless notice be given in accordance with the terms of the contract. *W. U. Tel. Co. v. Moxley*, 80 Ark. 554, 98 S. W. 112; *W. U. Tel. Co. v. Nelson*, 86 Ark. 336, 111 S. W. 274.

In *W. U. Tel. Co. v. Raines*, 78 Ark. 545, 94 S. W. 700, and in *W. U. Tel. Co. v. Hogue*,

79 Ark. 33, 94 S. W. 924, we recognized the force of the contractual rights of the parties by holding that the rule in *Hadley v. Baxendale*, 9 Exch. 341, would control so as to exclude a recovery of damages when notice was not given that the same might accrue. Judge Riddick, speaking for the court in the *Hogue* Case, said: "Such damages may, under our statute, be recovered in some cases; but the statute does not change the rule that, when a plaintiff seeks to recover of a defendant special damages on account of the breach of a contract, he must show that at the time the defendant entered into the contract he had notice of the special circumstances out of which the special damages arose, so that it may be reasonably said, as a matter of law, that such special damages were in contemplation of the parties at the time they made the contract." He then quoted the following from the *American & English Encyclopedia of Law* (volume 27, p. 1059): "While actions against telegraph companies are not necessarily or usually *ex contractu*, but *ex delicto* for a breach of a public duty, the cause of action is so far dependent upon the original contract of sending as to make the rule just stated controlling, and it has been universally applied in this class of actions without regard to whether the particular action is *ex contractu* or *ex delicto*."

In the *Raines* Case, Judge Battle, speaking for the court, said: "The damages recoverable under the statute are such as the jury may conclude resulted from the negligence of the telegraph company. Such damages are allowed as a compensation for the mental anguish or suffering; and the liability of the company for the same depends upon its having had notice, before or at the time of receiving the telegram, of the special circumstances on account of which mental suffering was caused by negligence in transmitting or delivering the message. This notice may be given by or through the telegram itself, or otherwise."

We think the decisions in all these cases are reconcilable with the decision in the *Ford* Case, though some of the language used in the *Ford* Case is, as already stated, inaccurate. The *Ford* Case is also reconcilable with the conclusion reached in the present case. Mr. Wharton, in his work on *Conflict of Laws*, states the principles upon which a recovery can, without conflict of principles, be had in each of these cases. Wharton on *Conflict of Laws* (3d Ed.) § 471f. He states that "the general rule seems to be that a contract made in one state or country for the transmission of a telegram from a point in that state or country to a point in another is governed by the law of the state or country in which the contract is made and from which the telegram is sent, rather than by that of the state in which it is re-

ceived," but that some cases "assume that the performance of the contract is the delivery of the telegram, and that the transmission is merely a means of enabling the telegraph company to perform; and they therefore refer the contract to the law of the place of delivery as the sole place of performance." He then proceeds: "Assuming, however, that the former rule is the correct one, it does not apply to matters that relate to the remedy, as distinguished from the substantive contract, and therefore does not operate to relieve a contract from the effect of a statute, which is remedial rather than substantive, of the state in which the telegram was to be delivered, if the action is brought in that state."

This fully sustains, without conflict, the decision in the *Ford* Case and in the present case. The statute makes mental anguish an element of recoverable damage for failure to receive, transmit, or deliver a telegram; yet the relation out of which the duty arises is created by contract, and the cause of action primarily grows out of the contract. For this reason a recovery may be had here for negligent failure to deliver a message, even though the negligence occurred in a state where mental anguish is not an element of recoverable damages. On the other hand, as in the *Ford* Case, a recovery may be had for a negligent failure here to deliver a message sent from another state, where such element of damage is not recognized. When the negligence occurs here, the statute of this state applies and makes mental anguish an element of damages, regardless of the law of the state whence the message came, for the statute is intended to give redress for negligent failure to perform the contract to deliver a message.

The petition for rehearing is therefore denied.

GILMORE v. STATE.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. HOMICIDE (§ 63*)—MANSLAUGHTER—HOMICIDE IN COMMISSION OF ASSAULT.

Where blows given decedent, riding in a wagon, by accused, caused decedent to fall from the wagon and under a wheel that passed over his body, inflicting a fatal injury, the blows contributed directly to produce decedent's death, and were the cause of his death, authorizing a conviction of involuntary manslaughter.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 86, 87; Dec. Dig. § 63.*]

2. HOMICIDE (§ 309*)—MANSLAUGHTER—EVIDENCE—INSTRUCTIONS.

Where the evidence showed that accused struck decedent, riding in a wagon, with a six-foot binding pole, and that decedent was either knocked off the wagon or fell from it and was fatally injured by a wheel running over him, the court properly charged on manslaughter in the language of the statute, and that the jury could convict accused if they believed that he

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

struck decedent and knocked him off the wagon, or caused decedent to fall from the wagon, and that a wheel ran over him, and that he died in consequence of such striking and being run over.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 809.*]

3. HOMICIDE (§ 116*)—SELF-DEFENSE.

One may defend himself against an assault by another, and use such force as reasonably appears to him at the time to be necessary to repel such assault, and when accused struck decedent without fault or carelessness on his part, honestly believing that decedent was about to cut him with a knife, and that it was necessary for him to strike decedent to prevent decedent from cutting him, the jury could acquit accused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.*]

Appeal from Circuit Court, Sevier County; James S. Steel, Judge.

George Gilmore was convicted of involuntary manslaughter, and he appeals. Affirmed.

The appellant was indicted for voluntary manslaughter, was convicted of involuntary manslaughter, and sentenced to seven months' imprisonment in the penitentiary. He appeals to this court.

In October, 1907, appellant and several others, including Nick White, were in a wagon going from De Queen to Utama Thule. Appellant and White had a fight. Appellant left the wagon, seized a "binding pole" about six feet long, and struck at White three times. White was on the wagon, and the wagon was in motion. Appellant struck White two blows. White got on his hands and knees and attempted to turn around as if to put his hands on the side of the wagon; but he missed the "wagon bed" and fell. The left hind wheel of the wagon ran over his shoulder and down his body. White went down the road a short distance and lay down. It was shown that the stick with which appellant struck White was crooked, and the witness for the state did not know whether the blows knocked White off the wagon or not. The doctor who was called to see White soon after he was hurt testified that his bowels were badly injured, and it was his opinion that White's death resulted from the injury to his bowels. White complained only of the injury to his bowels where the wheel ran over him, and the body indicated that the bowels had been badly mashed and injured. It was shown that in a dying declaration White said "that the boys had butchered him up so that he could not live, that George (appellant) knocked him out of the wagon, and Jim Polk (the driver) ran the wagon over him." He received his injuries in Sevier county, and died there about six days after. One of the witnesses for the defense, who was on the wagon and saw the fight, testified, substantially, as follows: "I was sitting by Tom Polk, who was driving. The first I knew of the matter was Tom said they

were going to have a dance, and George said he was going. Nick began to curse George. Tom told him to shut up, and told George that he was just drinking and cutting up. George jumped off the wagon and got the stick. He struck at Nick, but hit the side of the wagon and the coal oil tank. He didn't strike Nick at all. Nick tried to get his knife out and attempted to put his hand on the side of the wagon, but missed it and grasped the wheel. It threw him under the wagon, and he was run over. Mr. Dale was sitting on the back end of the wagon. He and George had two pints of whisky. Yes, sir; I saw him drink some of it. Nick had his knife in his hand when he was trying to get off the wagon and fell under."

The court, among others, gave the following prayers of the state:

"(1) 'Manslaughter' is the unlawful killing of a human being without malice, express or implied, and without deliberation. Manslaughter may be voluntary or involuntary."

"(12) If the jury believe from the evidence beyond a reasonable doubt that the defendant struck the deceased with a binding pole, and knocked him off the wagon, or the deceased fell from the wagon as a result of the blow, and the wagon wheel ran over the deceased, and the deceased died in consequence of such striking and being run over by the wagon wheel, then the defendant would be guilty, provided you believe such striking was done without legal excuse or justification."

Appellant objected to the giving of these requests and excepted to the ruling of the court.

The following instruction was asked on behalf of the defendant, and given, after being modified by the court, by inserting the words "without fault or carelessness on his part": "You are told that the defendant had the right to defend himself against an assault made upon him by the deceased, and to use such force as reasonably appeared to him at the time to be necessary to repel such assault, and if he struck the deceased, 'without fault or carelessness on his part,' honestly believing at the time that deceased was about to cut him with a knife, and that it was necessary for him to strike deceased to prevent deceased from cutting him, you may acquit the defendant, although you may believe deceased was knocked from the wagon and run over as a result of such blow." Appellant objected to the modification of his prayer by the court and duly excepted to the ruling.

The grounds of the motion for new trial are that the verdict is contrary to the evidence, and that the court erred in giving instructions numbered respectively 1 and 12 requested by the state, and erred in modifying appellant's prayer No. 4 and giving same as modified.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

WOOD, J. (after stating the facts as above). There was evidence to warrant the jury in finding that the blows given White by appellant caused him to fall from the wagon and under the wheel that passed over his body, and that these blows contributed directly to produce the death of White. They were the cause of his death.

We find no error in the instructions. No. 1 was a copy of section 1777, Kirby's Dig., and proper to be given in such cases. No. 12 announced a correct principle, applicable to the facts here, and likewise No. 4 as modified. These, with other instructions, presented the law of the case to the jury.

There was no error in the trial.

Let the judgment be affirmed.

DAVIS & RHEA v. SPANN.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. APPEAL AND ERROR (§ 580*)—CONFLICTING EVIDENCE—CONCLUSIVENESS.

A finding of the chancellor on conflicting evidence will not be disturbed on appeal, where the testimony on which it is based is not abstracted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2574; Dec. Dig. § 580.*]

2. APPEAL AND ERROR (§ 934*)—RECORD—ABSTRACT—EVIDENCE—EFFECT OF FAILURE TO ABSTRACT.

Where appellant does not abstract the testimony necessary to show that the judgment is erroneous, the Supreme Court will presume that the judgment is correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3777; Dec. Dig. § 934.*]

3. FRAUDS, STATUTE OF (§ 116*)—AUTHORITY—TO SELL LAND—NECESSITY OF WRITING.

While authority to convey land must be given by an instrument of equal dignity with the deed, authority to contract to convey may be given verbally.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 254-256; Dec. Dig. § 116.*]

4. LOGS AND LOGGING (§ 8*)—CONVEYANCE OF TIMBER—EQUITABLE CONVEYANCE.

Where defendant paid the purchase price of timber under a valid contract to purchase, and entered upon the land by permission and cut the timber, he was the equitable owner thereof, so that it was immaterial whether the agent executing the timber deed had authority to do so.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. § 5; Dec. Dig. § 3.*]

Appeal from Mississippi Chancery Court; Edward D. Robertson, Chancellor.

Suit by Davis & Rhea against J. C. Spann to recover timber cut. From a decree for defendant, plaintiffs appeal. Affirmed.

Thomason & Thomason and J. T. Corton, for appellants. W. J. Lamb, for appellee.

McCULLOCH, C. J. Mrs. Elizabeth Ballew, a resident of Tennessee, owned a tract of land in Mississippi county, Ark., and Judge Thomason, an attorney of Osceola, Ark., was her agent; the particular extent of his authority not being shown in this record as abstracted by counsel for appellants. Appellee, Spann, made an offer to Judge Thomason to purchase the timber on the land for \$100, and the latter accepted the offer, subject to the approval of his principal. After submitting the offer to Mrs. Ballew and receiving her approval, Judge Thomason accepted appellee's offer and executed to the latter a deed signing his principal's name thereto as her agent, conveying the timber, and stating a stipulated time within which it should be removed. The deed, as it now appears in the record, specified 3½ years as the period of time within which the timber must be removed; but appellants contend that the deed was originally written specifying only 3 years, and that it has been changed since it was delivered to appellee. Appellee contends that the deed has not been changed since it was delivered to him, and we must accept this as true, since the chancellor so found on conflicting testimony, and appellants have not abstracted the testimony. Afterwards appellants purchased the land from Mrs. Ballew, with notice that the timber had been sold to appellee, and they instituted this suit to recover from him the timber cut during the half-year disputed period. The chancellor denied them any relief, and they appealed to this court.

Judge Thomason testified that the only authority he had from his principal to sell the timber was contained in her letter to him authorizing him to accept appellee's offer of \$100, in which she directed him to allow three years within which to remove the timber. Appellants insist that the testimony on this point is uncontradicted; but counsel for appellee dispute this, and, as the testimony is not abstracted, we cannot, without exploring the record, determine which contention is correct. It is our duty therefore to sustain the findings of the chancellor. It is the duty of an appellant to abstract the record so as to show that the judgment or decree appealed is erroneous; otherwise we indulge the presumption that it is correct. *Files v. Law*, 88 Ark. 449, 115 S. W. 373; *Shorter University v. Franklin*, 75 Ark. 571, 88 S. W. 587, 974. Appellants do not even abstract the letter which they claim constituted the authority of Judge Thomason to sell the timber, nor do they refer to it in the record. We have no information at all that the record contains it.

Learned counsel are also in error when they insist that under the law authority to sell land must be in writing. This court has held to the contrary. They overlook the distinction between authority to sell and au-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

thority to convey land. Authority to convey land must be conferred by an instrument of equal dignity with the instrument of conveyance; but authority to sell and to make a binding contract of sale may be conferred verbally. *Forrester-Duncan Land Co. v. Evatt*, 119 S. W. 282; *McCurry v. Hawkins*, 83 Ark. 202, 103 S. W. 600. This distinction is not important in the present case, for, even if Judge Thomason exceeded his authority in the execution of the timber deed, appellee was the equitable owner under his contract of purchase, and having paid the purchase price, entered upon the land by permission, and cut the timber, he can in equity successfully defend his possession. *Daniel v. Garner*, 71 Ark. 484, 76 S. W. 1063.

We are unable to discover any error in the proceedings, as abstracted, so the decree is affirmed.

YOUNG et al. v. BOLES.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. STATES (§ 30*)—CONTEST—JURISDICTION—STATE SENATE.

The Senate is the only tribunal competent, under the Constitution, to adjudicate the contest of the election of a senator.

[Ed. Note.—For other cases, see *States*, Cent. Dig. § 39; Dec. Dig. § 30.*]

2. ELECTIONS (§ 305*)—APPEAL—DISMISSAL—GROUNDS.

Under Kirby's Dig. § 1227, authorizing appellee to move to dismiss the appeal, stating the grounds of the motion in writing, where appellant's right of further prosecuting the appeal has ceased, and section 1228, permitting appellee to plead any fact which destroys the right of further prosecuting the appeal, where appellee showed, by the statement of facts in his motion to dismiss the appeal in an election contest, that the contest had been finally settled by an adjudication of the Senate, the appeal will be dismissed.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 324; Dec. Dig. § 305.*]

3. COSTS (§ 238*)—ON APPEAL—UNNECESSARY APPEAL.

The costs of an appeal, unnecessarily taken after the subject-matter of the litigation had been finally settled by another tribunal, should be taxed against appellants.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 908; Dec. Dig. § 238.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Mandamus by Thomas Boles against R. A. Young and others. From a judgment awarding the writ as to part of the relief prayed, defendants appeal. Appeal dismissed.

Brizzalara & Fitzhugh, Ben Cravens, and Oscar L. Miles, for appellants. W. A. Falconer, Read & McDonough, and Youmans & Youmans, for appellee.

PER CURIAM. Jno. H. Holland and appellee, Thomas Boles, were rival candidates at the September election, 1908, for the office of state senator for the Twenty-Eighth sena-

torial district, which is composed of Sebastian county. Holland received the certificate of election, and Boles instituted contest. He made demand upon the election commissioners of Sebastian county for a recount of the ballots in certain specified townships, and, upon a refusal, instituted this action in the circuit court for the Ft. Smith district of Sebastian county, asking for a writ of peremptory mandamus compelling the appellants, Young and others, as election commissioners, to recount the ballots. Upon a hearing of the cause the court awarded a writ, directing a recount in certain of the townships named, but denied the writ as to certain other townships. Both parties noted their exceptions, and the election commissioners took an appeal to this court. They forthwith gave bond, with sureties, in accordance with the provisions of the statute, to supersede the judgment. Whether or not the judgment awarding the writ of mandamus in this case was such as could be superseded by a statutory bond, and whether or not the bond was effective for that purpose, we need not now consider.

The contest of Boles against Holland progressed before the state Senate, and in January, 1909, during the early part of the session, Holland was duly declared to be entitled to retain the seat. This, of course, ended the contest, as the Senate was the only tribunal under the Constitution of this state competent to adjudicate that contest. The original appeal in the case was never perfected; but on May 4, 1909, the election commissioners, Young and others, prayed an appeal, and obtained it from the clerk of this court. Appellee, Boles, now moves the court to dismiss the appeal, on the ground that the contest of Boles against Holland was settled before the appeal was taken, and that there is nothing left about which to litigate.

This court concludes that appellee's contention is a sound one, and that the appeal should be dismissed. The statutes of this state which bear upon the subject read as follows:

"Sec. 1227. Where the appeal or writ of error was improperly granted, or the appellant's right of further prosecuting the same has ceased, the appellee, in lieu of pleading, may move the court to dismiss the appeal or writ of error, the grounds of which motion shall be stated in writing, signed by the appellee or his counsel, and, if not appearing on the face of the record, or by a writing purporting to have been signed by the appellant and filed, shall be verified by affidavit. The motion shall not be heard or determined before the day on which the appeal or writ of error is set for trial on the docket, unless the appellant consents thereto.

"Sec. 1228. The appellee may, by answer filed and verified by himself, or agent or attorney, plead any fact or facts which render

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the granting of the appeal or writ of error improper, or destroys the appellant's right of further prosecuting the same; to which answer the appellant shall file a reply, likewise verified by affidavit of himself, agent or attorney, and the questions of law or fact thereon shall be determined by the court."

The fact that the contest case had been settled has been properly brought to our attention by the statement of facts in the motion, and it is conceded to be true. Whether or not we would take judicial knowledge of the judgment of the state Senate we need not decide.

The purpose of the present action was to compel a recount of the ballots in aid of the contest; and, since the contest has ended, no useful purpose would be served by continuing the litigation in this court. There is nothing to litigate over. In *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293, Mr. Justice Gray, speaking for the court, said: "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence." The same rule is announced in *Jones v. Montague*, 194 U. S. 147, 24 Sup. Ct. 611, 48 L. Ed. 913, in *Tennessee v. Condon*, 189 U. S. 64, 23 Sup. Ct. 579, 47 L. Ed. 709, and in *Codlin v. Kohlhansen*, 181 U. S. 151, 21 Sup. Ct. 584, 45 L. Ed. 793.

Appellants are not even burdened with a judgment for costs, as none was rendered in this case. They should properly pay the cost of this appeal, for they prayed the appeal unnecessarily, after the subject-matter of the litigation had been fully settled.

Appeal dismissed, at cost of appellants.

BAILEY v. STATE.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. LARCENY (§ 3*)—INTENT—INTENT TO ACQUIRE PROPERTY.

If accused took a pistol dropped by a policeman, who was attempting to arrest him, only to disarm the policeman or prevent the latter from defending himself, he was not guilty of larceny in taking it, notwithstanding any evil motive in doing so.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 6; Dec. Dig. § 3.*]

2. LARCENY (§ 68*)—PROSECUTIONS—JURY QUESTION—INTENT.

In a prosecution for larceny in taking a pistol which a policeman dropped while attempting to arrest accused, whether accused took the pistol merely to disarm the policeman, without intent to steal it, *held* for the jury.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 180; Dec. Dig. § 68.*]

3. LARCENY (§ 3*)—ELEMENTS—INTENT TO STEAL.

An intent to steal is an essential element of larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 3-10; Dec. Dig. § 3.*]

4. LARCENY (§ 71*)—PROSECUTION—INSTRUCTIONS—INTENT.

Where, in a prosecution for larceny in taking a pistol dropped by a policeman while arresting accused, the evidence made it a jury question whether accused took the pistol merely to disarm the policeman without intending to steal it, the court should have specifically instructed, on request, that, if such was the fact, accused was not guilty; a general instruction that, if the jury believed beyond a reasonable doubt that accused took the pistol with intent to deprive the owner of his property, they should convict, being insufficient.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 191-194; Dec. Dig. § 71.*]

5. LARCENY (§ 44*)—PROSECUTION—ADMISSION OF EVIDENCE—INTENT.

In a prosecution for stealing a pistol dropped by a policeman, where accused claimed that he took it merely to disarm the policeman, and without intent to steal it, evidence that the policeman had repeatedly threatened to kill accused was admissible.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 124; Dec. Dig. § 44.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

Pete Bailey was convicted of grand larceny, and he appeals. Reversed and remanded for new trial.

Jo. Johnson, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. Appellant, Pete Bailey was convicted under an indictment charging him with grand larceny by stealing a pistol, the property of one Adams. The testimony adduced at the trial below by the state tended to establish the following facts: Appellant lived in the city of Ft. Smith, and Adams, who was a policeman, went to the former's house and attempted to arrest him for permitting gambling in his house. Adams had no warrant for appellant's arrest, but claims that he saw a crowd of negroes shooting craps in appellant's house, that he had a warrant for the arrest of Arthur Edwards, who was one of them, and that when he went to the house all of them ran away, and he attempted to arrest appellant for permitting gambling to be carried on in his house. When Adams attempted to make the arrest, appellant and Edwards set upon him, knocked him down, beat him into insensibility, and took his pistol from him and ran away with

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it. Adams testified that he did not know which one of them took the pistol, but said that in the mêlée he felt it move out of the scabbard. Appellant testified that during the fight the pistol fell out on the ground, and that Adams and Edwards both reached for it; the latter getting to it first and securing it. Appellant and Edwards ran away, pursued by officers or persons seeking to apprehend them. They crossed the river into Oklahoma, and the next day were arrested by officers at the town of Sallisaw, in that state. When arrested appellant had the pistol on his person, and he stated to the officer that he came from St. Louis, where he resided, and that the pistol had been given to him by his father. Appellant testified at the trial that Edwards took the pistol and gave it to him to keep during the night, and that they never intended to steal the pistol, but intended to return it at the first opportunity. He testified that, after he and Edwards had escaped from their pursuers, they talked about the pistol, and agreed that he (appellant) should return to Ft. Smith and "turn it over."

Appellant requested the court to give instructions to the effect that if he or Edwards took the pistol without any intention of stealing it, but only for the purpose of disarming Adams, then they would not be guilty of larceny. This is the law, and the court should have so instructed the jury. There was evidence sufficient to warrant a submission of that question to the jury, and appellant was entitled to a specific instruction to that effect.

It is true that the court in all of its instructions told the jury, in general terms, that if they believed, beyond a reasonable doubt, that appellant stole and carried away the pistol with intent to deprive the owner of his property, or aided or abetted Edwards in doing so, they should convict him, thus making his conviction depend upon the finding of these facts beyond a reasonable doubt; but the existence of an intent to steal being an essential element of the crime of larceny, and there being sufficient evidence to justify a finding that the pistol was not taken with any such intent, appellant was entitled to a specific instruction as asked. In *Gooch v. State*, 60 Ark. 5, 28 S. W. 510, Judge Riddick, speaking for the court, said: "To constitute larceny, the taking must be done with a felonious intent. It has been held that a person who takes muskets to prevent their being used against himself and friends does not commit larceny; there being no *lucri causa*." He added a quotation from Bishop, that "a better reason for this just decision would have been that his motive was not to deprive the owner of his ownership in them." In this case the taking and carrying away of the pistol was conceded, and the only question substantially in dispute was as to the intent. The testimony adduced by the state

was sufficient to warrant a finding that Edwards, aided and abetted by appellant, took the pistol from Adams and carried it away with the felonious intent to steal it; and, on the other hand, the jury could have found that there was no intent to steal the pistol, but that they took it away from Adams in order to disarm him, either for the purpose of preventing him from successfully defending himself from their assault or from arresting them. It is unimportant what the real motive was, whether it was good or evil, so long as there was no intent to steal; and whether or not such an intent existed was, under the circumstances of the case, a question for the jury to decide under proper instructions. The minds of the jury should have been directed to this particular point by a specific instruction; at least, when the appellant asked for such an instruction, he was entitled to it. *St. L. & S. F. R. Co. v. Crabtree*, 69 Ark. 134, 62 S. W. 64; *Prescott & N. W. R. Co. v. Weldy*, 80 Ark. 454, 97 S. W. 452; *Western Coal & M. Co. v. Buchanan*, 82 Ark. 499, 102 S. W. 694; *Western Coal & M. Co. v. Burns*, 84 Ark. 74, 104 S. W. 535; *St. L. & S. F. R. Co. v. Dyer*, 87 Ark. 531, 113 S. W. 49; *Jackson v. State*, 122 S. W. 101.

Appellant offered to prove by his own testimony that, previous to this occurrence, Adams had repeatedly threatened to kill him, and that they were on bad terms; but the court refused to permit such proof to be made. We think this testimony was competent for the purpose of showing the intent with which appellant participated in the act of taking the pistol away from Adams and carrying it away. It tended to strengthen appellant's contention that he did not intend to steal the pistol, and it might have induced the jury to find that appellant aided or encouraged Edwards to take the pistol away from Adams because he was afraid of Adams and wanted to disarm him.

Other errors are assigned, not of sufficient importance to discuss; but, for the error indicated, the judgment is reversed, and the cause is remanded, with directions to grant appellant a new trial.

QUALLS v. STATE.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. BASTARDS (§ 19*)—PROCEEDINGS TO AFFILIATE—NATURE.

Proceedings to affiliate a bastard, and compel the reputed father to aid in its support, are of a civil, and not criminal, nature.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 35½; Dec. Dig. § 19.*]

2. BASTARDS (§ 65*)—PROCEEDINGS TO AFFILIATE—SUFFICIENCY OF EVIDENCE—TESTIMONY OF MOTHER ALONE.

Under the statute making the mother of a bastard a competent witness in cases of bastardy, unless legally incompetent, and in the ab-

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sence of any statute requiring the testimony of prosecutrix to be corroborated, the jury, in proceedings to affiliate a bastard, may find that defendant is the father of the child upon the sole testimony of the mother, provided they believe it credible.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 173; Dec. Dig. § 65.*]

3. BASTARDS (§ 70*)—PROCEEDINGS TO AFFILIATE—QUESTION FOR JURY—PERIOD OF GESTATION.

Though 280 days is recognized as the usual period of gestation, yet as the birth of a child is liable to be accelerated or delayed by circumstances, the length of the period is purely a matter of fact to be decided upon all the evidence, physical and moral, in each particular case.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 176, 185; Dec. Dig. § 70.*]

4. BASTARDS (§ 65*)—PROCEEDINGS TO AFFILIATE—SUFFICIENCY OF EVIDENCE.

In proceedings to affiliate a bastard and compel the reputed father to aid in its support, evidence held to support a verdict finding defendant the father of the child.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. § 154; Dec. Dig. § 63.*]

5. APPEAL AND ERROR (§ 1001*)—REVIEW—VERDICTS—CONCLUSIVENESS.

The Supreme Court cannot disturb a verdict which has legal evidence to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3928; Dec. Dig. § 1001.*]

Appeal from Circuit Court, Cleburne County; Brice B. Hudgins, Judge.

Proceeding by the State against William Qualls to affiliate a bastard child, and compel him to aid in its support. Judgment against defendant in the circuit court on appeal from the county court, and he appeals. Affirmed.

Geo. W. Reed and Grant Green, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

HART, J. This was a proceeding begun in the county court for the purpose of affiliating a bastard child, and compelling the father to aid in its support. From a judgment rendered against him there, the defendant, William Qualls, appealed to the circuit court. Judgment was rendered against him in the circuit court, and he has appealed to this court.

The sole issue raised by the appeal is: Was the evidence sufficient to support the verdict? Mary Fortner, the mother of the child, testified that the child was born in Cleburne county, Ark., on the 30th day of May, 1908, and that the defendant was its father. She said that the defendant had intercourse with her several times in White county just before and after Christmas in 1906; that about the last of August, 1907, she went to the defendant's house in Cleburne county to pick cotton, and that while there the defendant had intercourse with her one time; that no one except Qualls had had intercourse with her since the birth of her first child, three years ago. The defendant,

Qualls, testified in his own behalf, and denied that he had ever had sexual intercourse with her. Evidence was adduced in his behalf tending to show that she was pregnant when she came to his house in 1907, and that she came there in October, instead of August. It was also shown that she had made contradictory statements in regard to her intercourse with the defendant, and also stated that he was not the father of the child. A physician testified that he was called to see her in October, 1907, while she was at Qualls' house, and that she told him that her monthly periods had stopped; that he examined her, and found that she was two or three months in pregnancy; that the period of gestation with woman is 280 days.

In this state "proceedings to affiliate a bastard child and compel the reputed father to aid in its support are of a civil, and not criminal, nature." *Chambers v. State*, 45 Ark. 56; *Pearce v. State*, 55 Ark. 387, 18 S. W. 380; *Land v. State*, 84 Ark. 199, 105 S. W. 90, 120 Am. St. Rep. 25; *Wimberly v. State*, 119 S. W. 668. Our statutes expressly provide that the mother shall be a competent witness in all cases of bastardy unless she be legally incompetent in any case. *Kirby's Dig.* § 492. But they do not require that her testimony should be corroborated. "In the absence of any statute requiring the testimony of the prosecutrix to be corroborated, the jury may find that the accused is the father of the child upon the testimony of the mother alone, provided they believe it is credible." *Underhill on Criminal Evidence*, § 529; 5 Cyc. 664, and cases; *State v. Nichols*, 29 Minn. 357, 13 N. W. 153; *Evans v. State*, 165 Ind. 309, 74 N. E. 244, 75 N. E. 651, 2 L. R. A. (N. S.) 619, and cases cited. "In regard to the period of gestation, no precise time is referred to as a rule of law, though the term of 280 days * * * is recognized as the usual period. But, the birth of a child being liable to be accelerated or delayed by circumstances, the gestation is purely a matter of fact to be decided upon all the evidence, both physical and moral, in the particular case." 2 *Greenleaf on Evidence* (16th Ed.) § 152.

Tested by these rules of law, we cannot say that there is no evidence to support the verdict. The prosecutrix testified unequivocally that she went to the defendant's house in August, 1907, and remained there two or three weeks; that he did have sexual intercourse with her while there; and that no other men had had sexual intercourse with her since her first child was born about three years before the birth of the one in question. It is true that her testimony was weakened by contradictory statements said to have been made by her, and by other evidence tending to show that she was pregnant at the time she says conception took place, but this was a matter to be pressed upon the jury as af-

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fecting her credit as a witness. We cannot disturb a verdict which has legal evidence to support it.

The judgment must therefore be affirmed.

SETTLES v. STATE.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. LARCENY (§ 15*)—CONVERSION BY BAILEE—CONDITIONAL SALES—INTEREST OF BUYER.

The buyer of personal property sold on condition that the title shall remain in the seller until the purchase money is paid acquires an interest in such property which he may sell or mortgage, and is not a bailee within Kirby's Dig. § 1839, making it larceny for a bailee to convert to his own use property which has been placed in his custody.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 39; Dec. Dig. § 15.*]

2. WORDS AND PHRASES—"BAILEE."

The term "bailee," in statutes defining larceny by a bailee, is used, not in its large, but in its limited, sense, as including simply those bailees who are authorized to keep, transfer, or deliver, and who receive the goods bona fide and then fraudulently convert, and, where it does not appear that a fiduciary duty is imposed upon the person to return the specific goods of which the alleged bailment is composed, there is no bailment under the statute.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 1, p. 672.]

Appeal from Circuit Court, Pulaski County; Robert J. Lea, Judge.

R. H. Settles was convicted of larceny by embezzlement, and appeals. Reversed and remanded.

Jno. D. Shackleford and Robt. L. Rogers, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

HART, J. R. H. Settles has appealed from a judgment of conviction of larceny by embezzlement. The facts, as developed by the state at the trial, briefly stated, are as follows: In September, 1907, J. C. Womble delivered to the defendant, R. H. Settles, a piano upon the understanding that Settles should repair it and sell it for \$60. The piano remained in the possession of Settles until the 1st of August, 1908, at which time, by a contract in writing, the piano was sold to Settles for \$50 upon condition that the title should remain in Womble until the purchase price was paid. Settles never paid any part of the purchase price, and on the 3d day of August, 1908, sold the piano to Miss Bertha Guebel for \$25. He sold the piano without the knowledge or consent of Womble, and represented to Miss Guebel that it belonged to him, and that he had a right to sell it.

The indictment was found under section 1839 of Kirby's Digest, which is as follows: "If any carrier or any bailee shall embezzle or convert to his own use or make way with or secrete with intent to embezzle or convert

to his own use any money, goods, rights in action, property effects or valuable securities which shall have come to his possession, or have been delivered to him, or placed in his care or custody, such bailee, although he shall not break any trunk, package, box or other thing in which he received them shall be deemed guilty of larceny and on conviction shall be punished as in cases of larceny." The record as amended on certiorari contains a correct copy of the indictment. The indictment contained all the essential allegations necessary to a charge of larceny by embezzlement under the statute quoted, as approved by this court in the following cases: *Fleener v. State*, 58 Ark. 98, 23 S. W. 1; *Dotson v. State*, 51 Ark. 119, 10 S. W. 18; *Ritter v. State*, 70 Ark. 472, 69 S. W. 262. The views we shall hereinafter express render a more extended discussion of the indictment useless. Was the defendant guilty as charged in the indictment?

This court has frequently held that the vendee of personal property, sold on condition that the title shall remain in the vendor until the purchase money is paid, acquires an interest in such property, which he may sell or mortgage. *Phillips v. Hollenberg Music Co.*, 82 Ark. 9, 99 S. W. 1105; *Sunny South Lumber Co. v. Neimeyer Lumber Co.*, 63 Ark. 269, 38 S. W. 902, and cases cited. In discussing the question in the case of *Phillips v. Hollenberg Music Co.*, supra, in regard to the sale of a piano, the court said: "The obligation of the appellant to pay the purchase money became absolute upon the delivery of the piano, and was not conditioned upon the vesting of the title in the purchaser." In the case of *Dedman v. Earle*, 52 Ark. 164, 12 S. W. 330, where the subject of the conditional sale was a mule, the court said: "He [referring to the purchaser] did not become a mere custodian of the mule. He had a right to sell him at such a profit as he could make." In the case of *Krause v. Commonwealth*, 93 Pa. 418, 39 Am. Rep. 762, the syllabus is as follows: "The owner of horses delivered them to defendant under an agreement that the defendant was to buy them; the horses to remain the property of the owner till paid for, and to be returned at a specified period if not paid for. The defendant refused to pay for them, or to return them. Held not larceny, nor larceny by a bailee." In discussing a similar statute of that state (Act March 31, 1860 [P. L. 409] § 108), the court said: "The term 'bailee' is one to be used, not in its large, but in its limited, sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receives the goods bona fide, and then fraudulently converts. Where it does not appear that a fiduciary duty is imposed on the defendant to return the specific goods of which the alleged bailment is composed, a bailment under the stat-

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ute is not constituted. Whart. Crim. Law (8th Ed.) § 1855."

The court said: "A delivery of chattels upon a sale made on condition that the title shall pass upon payment of the purchase money at a future day is something more than a bailment. It gives the buyer a conditional title." So, in the present case, the payment of the purchase money would have been a complete performance of the contract. Settles was not bound to return the identical property. He was something more than a bailee. He had an interest which he could sell or mortgage. Hence we conclude that Settles was not a bailee within the meaning of section 1839, Kirby's Dig., under which the indictment was found, and that there was no evidence which would warrant the jury in finding a verdict of guilty.

Therefore the judgment will be reversed, and the cause remanded.

SMITH v. SCOTT et al.

(Supreme Court of Arkansas. Nov. 1, 1909.)

1. HOMESTEAD (§ 143*)—RIGHTS OF MINOR CHILDREN.

Under Const. art. 9, §§ 6, 10, providing that the homestead inures to the benefit of the minor children at the death of the parent, a homestead, at the death of the father, inures to his minor children, and their right to share with their mother becomes a vested interest at that time, so that during minority the mother has no absolute dominion over it, and a sale by her under order of the probate court after she has abandoned the homestead and acquired a new one in a sister state is void as against the children.

[Ed. Note.—For other cases, see Homestead, Dec. Dig. § 143.*]

2. LIMITATION OF ACTIONS (§ 127*)—AMENDMENT OF PLEADINGS.

Where the complaint, in ejectment against several defendants for a specified tract and other land, alleged that plaintiffs were the owners of the tract specified and other land, and that defendants were in the unlawful possession thereof, an amended complaint eliminating the other land and the defendants in possession thereof, and confining the action to the specified tract and the defendant in possession thereof, did not change the cause of action, and that the amendment was filed after the running of limitations did not defeat the action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.*]

3. LIMITATION OF ACTIONS (§ 44*)—ACCRUAL OF RIGHT OF ACTION—ADULT HEIRS—HOMESTEAD OF MINOR HEIRS—EFFECT.

As adult heirs have no right to the possession of the homestead of the decedent until the termination of the homestead of a minor heir, which occurs on his reaching full age, limitations within which to sue for the possession of the homestead do not begin to run until the homestead right of the minor heir ceases.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 44.*]

4. APPEAL AND ERROR (§ 930*)—VERDICT—PRESUMPTIONS.

In the absence of an abstract setting forth the evidence, the court on appeal must assume

that there was evidence sufficient to uphold the verdict rendered on correct instructions.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 930.*]

5. APPEAL AND ERROR (§ 923*)—INSTRUCTIONS—PRESUMPTIONS.

In the absence of an abstract of the evidence, the court on appeal must presume that the instructions given were based on the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 923.*]

Appeal from Circuit Court, Columbia County; George W. Hays, Judge.

Ejectment by Dan Scott and others against A. W. Smith. From a judgment for plaintiffs, defendant appeals. Affirmed.

This is an ejectment suit instituted on the 9th day of August, 1906, in the Columbia circuit court by the appellees, Dan Scott et al., against the appellant, A. W. Smith, to recover possession of certain lands in Columbia county, Ark. The appellees claim title to this land through their father, William Scott, who died the owner and occupying same as his homestead in October, 1883. At the time of his death appellees were minors. Soon after their father's death, their mother, Fannie R. Scott, moved to Louisiana and acquired land and established a home for herself and children there. She moved to Louisiana with no intention of returning to Arkansas to live. On the 11th day of November, 1885, the probate court of Columbia county, Ark., made an order vesting title to the land in controversy (which was the land occupied as a homestead by William Scott at the time of his death) in his widow, Fannie R., and the minor children. Fannie R. Scott deeded the land to J. C. Green on March 18, 1886, and Green deeded the land to appellant, Smith, on the 25th of April, 1894. Appellant claims title through his deed from Green deraigned as above.

Stevens & Stevens and J. E. Hawkins, for appellant. McKay & Lile, for appellees.

WOOD, J. (after stating the facts as above). Under sections 6 and 10, art. 9, of the Constitution, appellees, at the death of their father, acquired homestead rights in the land in controversy of which their mother, the widow, could not deprive them by establishing another home and by selling the one occupied by the husband and father at the time of his death. The homestead of the minors in the land in controversy inured to them through the death of their father. Section 10, art. 9, supra. The abandonment by the widow and mother of the interest which she acquired in the same homestead by the death of her husband in no manner affected the rights of the appellees, the minor children. The right to share it equally and to one-half of the rents and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

profits thereon became a vested interest in the children upon the death of their father. During minority the widow and mother could share it equally with the children; but she had no absolute control or dominion over it. At the time the probate court declared the widow the owner of the land in controversy, and at the time she conveyed same to Green, the appellees had no homestead rights in the home of their mother in Louisiana. Their homestead in that land could only inure at the death of their mother. Section 10, art. 9, Const, supra. So the question of inconsistent homestead rights is not before us. The only homestead rights they had at the time the order of the probate court was made were in the land in controversy. Having homestead rights in this land at the time of such order, it follows that same was void, and appellant therefore acquired no title. *Sansom v. Harrell*, 51 Ark. 429, 11 S. W. 683; *Harrison v. Lamar*, 33 Ark. 827. See, also, *Grimes v. Luster*, 73 Ark. 266, 84 S. W. 223, 108 Am. St. Rep. 34, for review of homestead cases, and discussion of inconsistent rights of homestead.

Second. Appellant pleads the statutes of limitations of three and seven years. The youngest child of William Scott was 21 years of age April 21, 1904. This suit was instituted August 9, 1906, against appellant and others for the recovery of the land in controversy and other lands, and for \$1,500 damages for the detention thereof. January 10, 1908, appellees amended their complaint dismissing the action as to all the defendants except appellant, and as to all the lands except the land in controversy, and praying for the possession of this and for damages for the detention thereof in the sum of \$1,500. Appellant contends that the amendment to the complaint was tantamount to the bringing of a new suit against appellant, and that therefore the suit should date from the filing of the amendment, January 10, 1908; but we are of the opinion that the amendment did not change the cause of action. The suit still remained a suit by appellees against appellant for the land in controversy. The original complaint, although it included other lands and was against other parties, also included the tract in controversy, and was against appellant. The amendment did not allege that appellant held by any other or different title than that set up in the complaint before it was amended. The complaint before amendment was not a suit "for several distinct parcels of land in possession of several defendants each claiming for himself," as appellant contends. The complaint before amendment was simply a suit in ejectment against several defendants, including appellant, for the tract of land in controversy, and other lands, alleging that the appellees were the owners of all the land including the tract in contro-

versy, and that the defendants, including appellant, were in the unlawful possession thereof. A mistake as to the other tracts of land and as other defendants being in possession of the tract in controversy did not alter the case as to the tract in suit, and as to appellant being in possession of that tract. Correcting the mistake by an amendment to the complaint eliminating the defendants and the lands that should not have been embraced in the complaint in the first place did not change the cause of action as to the tract that was sued for and the party who was really in possession thereof. The allegations of the original complaint as to the tract in suit and as to the appellant being in the unlawful possession thereof were not changed by the amendment. The suit as to the tract in controversy was therefore brought within three years after the youngest child became of age. As to the appellees who were adults at the time the youngest child became of age, the statute of limitation of seven years does not bar them, for this statute did not begin to run against them until the termination of the homestead of the youngest child. Their right of entry to the land in controversy did not accrue till the homestead right of the youngest child ceased. *Kessinger v. Wilson*, 53 Ark. 400, 14 S. W. 96, 22 Am. St. Rep. 220; *Gannon v. Moore*, 83 Ark. 196, 104 S. W. 139; *Harris v. Brady*, 87 Ark. 428, 112 S. W. 974. The homestead of the widow in the land in controversy terminated upon her abandonment thereof soon after her husband's death. Appellees therefore are not barred by any statutes of limitation.

Third. The court submitted the question of betterments, rents and taxes upon correct instructions. Appellant does not abstract the evidence on these questions. In the absence of an abstract setting forth the evidence pro and con, we must assume that there was evidence sufficient to uphold the verdict. Appellant sets forth in his brief a statement of the improvements made by him and of the taxes paid, and a statement as to the value of the rents since the filing of the complaint; but he does not cite us to the page of the transcript where the evidence supporting this statement is to be found, and he makes no statement as to what the rental value of the land was for three years next before the commencement of the suit. The court correctly instructed the jury to consider this. *Brown v. Nelms*, 86 Ark. 386, 112 S. W. 373; *Schofield v. Rankin*, 124 S. W. —. In the absence of an abstract of the evidence showing to the contrary, we must presume that the instructions were based upon the evidence, and that the verdict had sufficient evidence to warrant the jury in its finding.

There is no error.

Affirmed.

BAILEY et al. v. O'NEAL et al.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. CORPORATIONS (§ 349*)—LIABILITY OF OFFICERS—ACTIONS BY CREDITORS.

Under Kirby's Dig. §§ 841, 848, 859, 862-864, providing that the business of a corporation shall be managed by the directors, and making the officers of a corporation who intentionally neglect to comply with the statutes or to perform the duties required of them jointly and severally liable for the debts of the corporation contracted during the period of such neglect, etc., the directors of a corporation are liable for debts contracted during the period of their failure to perform their duties and the creditors may sue them therefor, though the corporation is in the hands of a receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1459, 1462; Dec. Dig. § 349.*]

2. BANKS AND BANKING (§ 54*)—LIABILITY OF OFFICERS.

Kirby's Dig. §§ 841, 863, 864, providing that the business of every corporation shall be managed by the directors, and making the officers of a corporation who intentionally neglect to comply with the statutes and to perform the duties required of them jointly and severally liable for the debts of the corporation contracted during the period of such negligence, etc., require the directors of a corporation to perform the functions required of them by statute, common usage, and the by-laws, and the directors of a banking corporation who appoint a cashier cannot thereby divest themselves of the duty of general supervision and control and cannot rely entirely on the good faith and judgment of the cashier, but they must themselves manage the affairs of the bank, so that where the directors of a bank knowingly allowed the cashier to lend to one man and his various enterprises without substantial security sums largely in excess of the capital stock of the bank and to continue that course of dealing for a period of several years, resulting in the insolvency of the bank, the directors were personally liable to creditors becoming such during such period.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 92, 94; Dec. Dig. § 54.*]

3. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

Where the competent evidence authorized the act of the court in directing a verdict, error in ruling on other evidence was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.*]

Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

Consolidated actions by W. R. O'Neal and S. Heineman against A. B. Bailey and others. From a judgment for plaintiff in each action, defendants appeal. Affirmed.

Stuckey & Stuckey, Gustave Jones, S. D. Campbell, and Morris M. Cohn, for appellants.

HART, J. W. R. O'Neal and S. Heineman brought separate suits in the Jackson circuit court against A. D. Bailey, George W. Becker, Thomas J. Graham, J. M. Jones, Joseph M. Stayton, E. P. Shoffner, and T. S. Stephen. The complaint in each case in substance alleges: That the Bank of Newport was a corporation, organized under the laws of the state of Arkansas, and was engaged in car-

rying on a general banking business at Newport, Ark. That the plaintiff was a depositor in said bank, and that the defendants were directors thereof. That said bank became insolvent, and on the 20th day of April, 1906, a receiver was appointed by the chancellor of Jackson chancery court to take charge of its affairs. That the defendants as directors of said bank intentionally neglected and refused to perform the duties required of them by statute, and that thereby the bank became insolvent. Wherefore plaintiff asks judgment for the amount due him as a depositor of said bank. The defendants answered, denying any liability under the statutes. The cases were consolidated for the purpose of trial for the reason that they were causes of a like nature and relative to the same question. See Acts 1905, p. 798. On petition of the defendants a change of venue was granted to the Independence circuit court. The cause was heard before a jury, and at the conclusion of the testimony, after hearing the argument of counsel on the instructions, the court directed the jury to return a verdict in favor of the plaintiffs, which was accordingly done. From the judgment rendered upon the verdict, the defendants have appealed to this court.

It is first insisted by counsel for the defendants that the plaintiffs as creditors of the bank could not maintain the action, but that it should have been brought by the receivers. In considering this question, it may be well to set out all our statutes that may have any bearing on the subject. They are the sections of Kirby's Digest, which read as follows:

Section 841: "The stock, property, affairs and business of every such corporation shall be under the care of, and shall be managed by not less than three directors, who shall be chosen annually by the stockholders, at such time and place as shall be provided by the by-laws of said corporation, and shall hold their offices for one year, and until others shall be chosen in their stead."

Section 848: "The president and secretary of every corporation shall annually make a certificate showing the condition of the affairs of the corporation," etc.

Section 859: "If the president or secretary of any such corporation shall neglect or refuse to comply with the provisions of section 848 and to perform the duties required of them respectively, the persons so neglecting or refusing shall jointly and severally be liable to an action founded on this statute, for all debts of such corporation contracted during the period of any such neglect or refusal."

Section 862: "If the directors of any such corporation shall declare and pay a dividend when the corporation is insolvent, or any dividend the payment of which would render it so, the directors assenting thereunto shall

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be jointly and severally liable in an action founded on this statute for all debts due from any such corporation at the time of such dividend."

Section 863: "If the president, directors or secretary of any such corporation shall intentionally neglect or refuse to comply with the provisions of this act, and to perform the duties therein required of them respectively, such of them as so neglect and refuse shall be jointly and severally liable, in an action founded on this statute, for all the debts of such corporation contracted during the period of any such neglect or refusal."

Section 864: "If any corporation, organized and established under the authority of the act, shall violate any of its provisions, and shall thereby become insolvent, the directors ordering or assenting to such violation shall be jointly and severally liable, in an action founded on this statute, for all debts contracted after such violation as aforesaid."

In construing section 859, this court has recognized the right of the creditor to bring suit against the officers of the corporation. *Nebraska National Bank v. Walsh*, 68 Ark. 433, 59 S. W. 952, 82 Am. St. Rep. 301; *Beekman Lbr. Co. v. Ahern*, 75 Ark. 107, 86 S. W. 842; *Myar v. Poe*, 79 Ark. 465, 95 S. W. 1005; *Jones v. Harris*, 90 Ark. 51, 117 S. W. 1077. It is true that in *Fletcher v. Eagle*, 74 Ark. 585, 86 S. W. 810, 109 Am. St. Rep. 100, a case precisely similar to the one at bar, the suit was brought by the creditors in the name of the receiver of the bank, but no objection was made on that account, and the case turned on other issues. In the case of *Beekman Lumber Co. v. Ahern*, supra, the court held that when an officer fails to file the annual certificate as required by section 848, and, upon discovering his oversight, files it, he is not liable for debts thereafter contracted by the corporation until he makes another default in filing another statement. The reason given for such holding is "that it was the intention of the law to make it to the interest of the officer to file his statement at as early a day as possible, when he discovers the oversight." The object of each of the statutes is to make the officers named therein liable for the debts of the corporation during the period of their neglect. Liable to whom? Manifestly to the creditors of the corporation; for any other rule would ignore the real policy of the statute, which is for the protection of the creditor. The act expressly provides that the director shall be liable in any action founded on the statute for certain debts of the corporation, and it plainly means that he is liable to the person to whom the debt is due. In each of the sections of the statute above quoted the liability is directly to the creditor, and not to the corporation. In the case of *Patterson v. Stewart*, 41 Minn. 84, 42 N. W. 926, 4 L. R. A. 745, 16 Am. St. Rep. 671, the Supreme Court, in a well-considered opinion

delivered by Mr. Justice Mitchell, in construing a similar statute of the state of Minnesota, expressly held that a right of action is given to the creditor directly against the directors, and that the fact that the affairs of the corporation have been placed in the hands of a receiver neither takes away nor suspends this right of action. See, also, 3 *Thompson on Corporations*, § 4265. In such cases the decision reached must come from the terms of the statutes themselves. Hence there can be no profit in reviewing decisions based upon the common law, or upon statutes, unlike those now under consideration.

The most serious question in this case arises upon the merits, and is: Did the court err in directing a verdict for the plaintiff? In considering this question we must determine whether malfeasance or nonfeasance on the part of the directors is the test of their liability. This action is founded on sections 863 and 864 of our statutes quoted above. The statute creates the duty to be performed by the directors, and the liability that attaches for a failure to perform that duty. It changes the rule of the common law, and is therefore the exclusive test of liability. Hence it will not be pertinent or useful to consider whether the defendants are liable at common law, and a review of the cases based upon the common law or upon statutes essentially different from our statutes will be passed by. Our statutes in question have been construed by this court in the case of *Fletcher v. Eagle*, 74 Ark. 585, 86 S. W. 810, 109 Am. St. Rep. 100. Chief Justice Hill, who delivered the opinion of the court, in discussing the instructions given in the case, said: "The circumstances mentioned in the sixth instruction, and they are sustained by the evidence, fully authorized the directors to have implicit confidence in England, and justified their selection of him as president; but no circumstances justify directors in committing the management of the bank to the president further than the duties of that office require. No matter how honest and capable the president is, the directors have their duties to perform, and cannot fail to perform them because their confidence in the president renders them unnecessary in their opinion. It was their duty as directors to perform the functions required of them by statute, common usage, and the by-laws of the corporation; and any committal of management to the president which meant a non-fulfillment of their duties as directors was negligence for which they are liable, provided other facts fixing their liability were present. See, also, *Patterson v. Stewart*, supra. Section 841 requires that the affairs and business of the corporation shall be under the care of, and shall be managed by, the directors of such corporation.

By law certain duties also devolve upon the cashier of a bank. The cashier and directors of a bank stand in a reciprocal relation to each other. The duties of a cash-

ler are rather executive, and those of the directors administrative. They have the power to appoint a cashier, and to confer upon him the powers and duties usually exercised in such an office; but they cannot divest themselves of the duty of general supervision and control. They must not be mere figureheads, and may not confide the exclusive management of the affairs of the bank to the cashier. They cannot rely entirely on his good faith and judgment; and thereby escape liability. In short, the law by positive enactment makes it the duty of the directors to manage the affairs of the corporation; and they cannot discharge that duty by delegating it to another person. Sections 863 and 864 do not make the directors liable for a single act of negligence however inconsequential, but they make them liable for a series of connected acts of negligence continued for such a length of time as it must be inferred that their acts of negligence were intentional. Tested by this rule, we are of the opinion that the evidence in this case considered in its most favorable light to the defendants renders them liable under our statutes. The testimony taken in the case was very voluminous, and embraced a vast amount of details in connection with the conduct of the affairs of the bank. Having reached the conclusion that the undisputed evidence in the case makes the directors liable, it will not be necessary to abstract all of the testimony, but only to state the substance of that part of it that goes to fix the liability of the defendants.

The Bank of Newport was organized in 1899, with a capital stock of \$50,000, 50 per cent. of which was paid up, for the purpose of doing a general banking business. It conducted its business as a bank until the 30th day of April, 1906, at which time it applied to the chancellor of the Jackson chancery court in vacation for a receiver, stating in its petition therefor that it was insolvent. Alcorn Ferguson and T. D. Kinman were appointed receivers. At the time of its application for a receiver the plaintiffs were depositors of the bank and the defendants were its directors. Almost from its inception C. B. Kelley and the Kelley Lumber Company, of which he was the principal stockholder, were the principal borrowers from the bank. The indebtedness of the Kelley Lumber Company and the various other subsidiary corporations chiefly owned by C. B. Kelley increased their debt to the bank by progression. In the statement for 1902 the indebtedness of the Kelley companies to the bank had increased to over \$70,000. The statement for 1903 shows the amount to exceed \$120,000. For 1904 the bank's statement shows that it had increased to \$157,415, and for 1905 it had reached the sum of \$162,197.43. The condition of the bank on April 28, 1906, the time of its failure, in short, was as follows: liabilities, \$241,684; assets, \$324,154.44; Kelley indebtedness, \$174,646.94. The

Kelley indebtedness was never secured by anything except the stock of the various companies. In September, 1903, it had reached the sum of \$80,000. V. Y. Cook, then one of the directors of the bank, began to complain of this increase, and ordered it stopped. In November of that year he resigned. All the directors knew that the Kelley indebtedness was rapidly increasing, and that no security other than the stock of the companies was being given to the bank. They knew that the Kelley Lumber Company was in the business of running a sawmill, and that the ability to pay the debt depended upon the profits of the business. All of the directors had been in office since 1903, and most of them for several years prior to that time. They all knew and recognized the hazard of the enterprise engaged in by Kelley. They talked over the situation in 1903, and knew that the debt was being rapidly increased. They knew that prospects of paying the Kelley indebtedness depended entirely upon the profits to be made by the companies. They knew that the failure of the bank would cause the failure of the Kelley corporations, and must have known that, if the Kelley companies increased their indebtedness, it would mean the insolvency of the bank. They say they relied entirely in the matter upon the cashier. No more than one-half of the subscribed capital stock was ever paid up. Here we have the anomalous condition of directors, whose duty it was to manage the affairs of the bank, allowing the cashier to lend to one man and his various enterprises without security sums of money largely in excess of the capital stock of the bank, and to continue that course of dealing for a period of several years. In 1903 the debt had been increased to \$80,000. With a knowledge of this fact, they still permitted the cashier to pursue the same reckless course of dealing, so that at the time of the failure of the bank the indebtedness had been increased to the sum of \$174,646.94. The inevitable result of such management of the affairs of the bank was the insolvency of the bank and of the Kelley Lumber Company and its subsidiary corporations. Reasonable minds could come to no other conclusion, and the defendants must be presumed to have intended the natural and probable consequence of such acts of negligence on their part which continued for a period of several years and to have assented to the negligent acts of the cashier. To hold otherwise would be to say that the statute imposes no duty on the directors other than to elect a cashier whom they believe to be competent, and then to turn over to him the management of the bank. Such was not the intention of our lawmakers. They prescribed certain positive duties upon the directors, and imposed certain liabilities upon them for the intentional neglect of these duties, and for assenting to such violation whereby the corporation becomes insolvent; and we are of the opin-

ion that the facts and circumstances in this case will lead all fair-minded men to believe that the directors must have known that their neglect of their duties would lead to the insolvency of the bank. Therefore there was no question of fact to be submitted to the jury, and the trial court was right in directing a verdict for the plaintiffs.

Having reached this conclusion from the evidence, admittedly competent, it is not necessary to review the assignments of error in regard to the admission and exclusion of evidence; for no prejudice could have resulted to the defendants in that regard.

Finding no prejudicial error in the record, the judgment will be affirmed.

DERRICK v. STATE.

(Supreme Court of Arkansas. Oct. 18, 1900.)

1. CRIMINAL LAW (§ 1153*)—APPEAL—DISCRETION OF TRIAL COURT.

The allowing of leading questions by the state's attorney in examining a witness is not reversible error unless the trial judge abused his discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3064; Dec. Dig. § 1153.*]

2. WITNESSES (§ 380*)—IMPEACHMENT—INCONSISTENT STATEMENTS.

Where the state's attorney is surprised at the testimony of a witness called by him, he may examine the witness as to his testimony before the grand jury.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1219; Dec. Dig. § 380.*]

3. CRIMINAL LAW (§ 715*)—ARGUMENT OF COUNSEL.

Where, on a trial for assault with intent to kill by cutting with a knife, accused made no denial as to the number of times he cut prosecutor, nor as to the places where the wounds were inflicted, and prosecutor identified the coat worn by him at the time of the assault, it was not improper for the state's attorney to refer, in his closing argument, to the coat, and hold it before the jury commenting on its appearance, though it was not formally introduced in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1666; Dec. Dig. § 715.*]

4. CRIMINAL LAW (§ 1171*)—APPEAL—HARMLESS ERROR.

Where, on a trial for assault with intent to kill by cutting with a knife, the evidence showed that accused cut prosecutor nine times, once after he was down, and continued the assault until a third person interfered, the inaccuracy of the argument of the state's attorney that the proof showed that accused tried to cut prosecutor's throat after he was on the ground was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3126, 3127; Dec. Dig. § 1171.*]

5. CRIMINAL LAW (§ 823*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

Where, on a trial for assault with intent to kill, the court charged on all the degrees of assault, and stated that, if the jury had reasonable doubt of accused's intention to kill, they should acquit him of that charge and then consider aggravated assault, etc., referring in turn to all the degrees of assault, a charge that insulting language did not justify an assault,

and that if accused assaulted prosecutor because of insulting language used by prosecutor the jury would find accused guilty "as charged in the indictment," was not misleading as leaving it open to the jury to find accused guilty of the higher crime without finding the specific intent to kill.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 823.*]

6. HOMICIDE (§ 96*)—ASSAULT WITH INTENT TO KILL—SELF-DEFENSE.

The jury, in considering whether one charged with assault with intent to kill acted in self-defense, should consider the physical facts and circumstances connected with the assault, the condition of prosecutor as to being drunk or sober, and the nature and extent of the wounds inflicted by accused, with all the other facts shown by the evidence.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 96.*]

Wood, J., dissenting.

Appeal from Circuit Court, Monroe County; Eugene Lankford, Judge.

Sam Derrick was convicted of assault with intent to kill, and he appeals. Affirmed.

H. A. Parker, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. Appellant was indicted for assault with intent to kill, and was convicted of that offense. The alleged offense consisted of cutting one Newton with a pocketknife. The testimony shows that he cut Newton nine times, two or three of the wounds inflicted being serious ones, and the last was inflicted after Newton fell to the ground. Newton was intoxicated at the time, and does not pretend to remember all that occurred, but relates a good deal that he says he remembers. Suffice it to say that the testimony which he gave at the trial of the case was sufficient to make out a case of assault with intent to kill against appellant. The testimony introduced by appellant was sufficient, if it had been accredited by the jury, to reduce the offense below the crime of assault with intent to kill; but it is doubtful that his own testimony is sufficient to show that he was justified in cutting Newton as he did, for it is probable, even according to his own version of the facts, that he continued to cut Newton after the necessity therefor, in what appeared to him to be his own defense, ceased.

Appellant, in his motion for new trial and in oral argument of his counsel before this court, attacks the method of the state's attorney in examining witnesses; but we do not find that his grounds of attack are fully borne out by the record. It is true that there are some leading questions asked; but this is not reversible error without an abuse being shown of discretion of the trial judge in regulating and controlling the examination of witnesses. *Traylor v. State*, 80 Ark. 617, 96 S. W. 505.

The propriety of the conduct of the state's

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

attorney is also challenged in asking one of his witnesses, who appeared to be an unwilling one, as to his testimony before the grand jury, and in producing the minutes of the grand jury and examining the witness as to same. There was no impropriety in this, for, if the prosecuting attorney was surprised at the testimony of his witness, he had a right to examine him as to what his testimony before the grand jury had been.

The coat said to have been worn by Newton when he was cut was handed to him while on the witness stand, and he identified it. It was not formally offered in evidence; but in his closing argument the state's attorney referred to the coat and held it before the jury, commenting upon its appearance. This was objected to by appellant and assigned as error. After the coat was identified as the one worn by Newton, it was not improper for the prosecuting attorney to refer to it in argument, although it had not been formally offered in evidence. Appellant had an opportunity to cross-examine Newton concerning the coat if he desired to do so, or he could have introduced any other testimony to show that it was not the coat worn by Newton. He contented himself merely with an objection to the state's attorney making reference to the coat in his argument. We can really see no hurtful effect anyway, in the reference to the coat, as all it could have shown was the rents in it made by the knife thrusts of the appellant, and appellant made no denial as to the number of times he had cut Newton, nor as to the places where the wounds were inflicted.

Objection is also made to the following remark of the state's attorney in his closing argument: "The proof shows that the defendant not only murderously cut the said Newton, but tried to cut his throat after he was on the ground." The only evidence which justified this remark was the statement of Newton to the effect that the defendant had jumped on him after he had fallen to the ground and cut him again, and had to be stopped by a third person. No witness testified that appellant tried to cut Newton's throat after he fell; but it was competent for the state's attorney to argue from the evidence that the defendant persisted in his effort to murder Newton after the latter fell to the ground, and this is about all that the remarks amounted to. It added little, if anything, to the force of the statement for him to say that defendant tried to cut Newton's throat after the latter had fallen, when in fact he did cut Newton nine times, once after he was down, and continued his vicious assault until it was arrested by the interference of Yelvington. We do not think that such inaccuracy in the statement or deduction from the evidence by the prosecuting attorney in argument, under the circumstances of this case, calls for a reversal.

The giving of the following instruction is assigned as error: "The court instructs the

jury that language, be it ever so vile or insulting, does not justify an assault. So, you are instructed that, if you believe from the evidence that the defendant made an assault upon Luther Newton because of any insulting language so used by the said Newton to the defendant, you will find the defendant guilty as charged in the indictment." The objection urged to this instruction is that it fails to take account of the degree of assault or of the specific intent to kill, and leaves it open to the jury to find appellant guilty of the higher crime of assault with intent to kill, without finding that the specific intent to kill existed at the time. We are not prepared to say that this instruction, if it stood alone in the record, would be free from that objection; but it must be read and considered in connection with the others given to the jury along with it. The court gave to the jury instructions in the language of the statute on all degrees of assault, and then gave one containing the following statement of the law: "If you have reasonable doubt of his intention to kill Newton, then you should acquit him of that charge, and then next take up and consider aggravated assault," etc., referring in turn to all the degrees of assault. Now, when these instructions are read together, we do not think they have any misleading effect, as they show clearly that the court did not, by the concluding words of the first instructions, "as charged in the indictment," mean that an assault made because of insulting language necessarily constituted assault with intent to kill. The jury could only have understood it to mean just what the court intended, that an assault merely because of insulting words would be an unlawful assault, and would not be justifiable in law.

Another instruction objected to and assigned as error is as follows: "The court instructs the jury that, in determining whether the defendant was acting in necessary self-defense, you should take into consideration all the physical facts and circumstances connected therewith, and the condition of the party assaulted with reference to being drunk or sober, and the nature and extent of the wounds made upon the witness Newton by defendant, with all the other facts and circumstances shown by the evidence." No well-founded objection can be stated to this instruction, as it was proper for the court to submit all the circumstances which there was any evidence tending to establish.

Other objections were made to the rulings of the court in giving and in refusing instructions; but we find no error in this respect, and nothing calling for further discussion. The case was fairly tried, and the defendant was convicted on legally sufficient evidence.

Therefore the judgment is affirmed.

WOOD, J., dissents.

WARD et al. v. BLYTHE et al.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. PLEADING (§ 409*)—ANSWER—WAIVER.

In a suit to foreclose a trust deed in which the mortgagor and his grantee were parties defendant, plaintiff cannot take advantage of the grantee's failure to answer the complaint where he went to trial and no judgment was entered against the grantee, since the answer was waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1376; Dec. Dig. § 409.*]

2. APPEAL AND ERROR (§ 1033*)—DETERMINATION OF CAUSE—LACK OF INJURY.

A trust deed was given to secure notes, which deed and notes were void for usury, and thereafter the mortgagor conveyed the premises under an agreement that the grantee should pay all legal liens existing at the time. In a suit to foreclose, the grantee filed no answer, and no judgment was rendered against him and judgment went for plaintiff for the debt, minus the interest and for foreclosure, and plaintiff appealed. *Held*, that plaintiff had no right to complain, as the deeds and notes were void, and as the mortgagor did not complain the judgment would be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1033.*]

Appeal from Cross Chancery Court; Edward D. Robertson, Chancellor.

Suit by Joe Ward, trustee, and others, against T. S. Blythe and others, to foreclose a trust deed. From a decree for plaintiffs for an insufficient amount, plaintiffs appeal. Affirmed.

T. E. Hare and J. H. Watson, for appellants. John B. Jones, for appellees.

BATTLE, J. T. S. Blythe borrowed of H. C. Grigger \$1,500, and, in consideration thereof, executed to him his note for \$1,725 and 10 per cent. per annum interest from maturity; the note being dated January 11, 1902, at Smithdale, Ark., and payable one year after date at the First National Bank of Memphis, Tenn. Blythe and his wife, Fannie M. Blythe, conveyed certain lands in the state of Arkansas to Joe Ward in trust to secure the payment of the note. In the deed of trust it was stipulated: "This contract embodied in this conveyance and the note secured hereby shall in all other respects be construed according to the laws of the state of Arkansas, where the same is made." The mortgage was duly acknowledged and filed for record on the 18th day of January, 1902. On the 24th day of October, 1902, Blythe sold and conveyed the land to O. N. Killough, and entered into the following agreement in writing as to such sale:

"The said T. S. Blythe guarantees the lands, this day sold to O. N. Killough, are incumbered only for the following amounts, for which amounts mortgages have been by him executed, to wit: \$3,267 of date 1-11-1902, to Crosgry, trustee, on Nov. 15, 1903;

\$500 of date 8-12-1902, to Cross County Investment Co., due 2-12-1903; and that this is all the debts and liens against the lands, except for \$1,725 to one Grigger, which Blythe states is usurious and void, and Blythe agrees to resist the payment of the same, provided suit is brought against him to recover. O. N. Killough agrees on his part to satisfy and pay all the liens existing at this time on the lands this day purchased of Blythe that may be declared legal."

Ward and Grigger are citizens and residents of the state of Tennessee, and Blythe and his wife are citizens and residents of the state of Arkansas.

On the 24th day of August, 1903, Ward and Grigger brought suit on the note and deed of trust in the Cross chancery court against Blythe and his wife, and O. N. Killough and Blanche Killough, his wife, to foreclose the deed of trust. An answer was filed for Blythe, in which he alleged that the note was void for usury. Killough and his wife did not answer, and no judgment was rendered against them on account of the failure to do so. Evidence was adduced which proved that Blythe borrowed of Grigger \$1,500, and executed him the note sued on in consideration of the same.

Upon final hearing, the court found "for the plaintiff in the sum of \$1,500, and that the same bear interest at 6 per cent. per annum from the date of the note," and rendered judgment in favor of plaintiff H. C. Grigger for \$2,050, and decreed that the deed of trust was a lien on the lands for that amount, and ordered the same sold to satisfy the lien. Plaintiffs appealed.

An answer by Killough to the complaint was waived by plaintiff by the failure to take judgment against him and going to trial. The parties thereby treated the cause at issue, and cannot now take advantage of the failure to answer. *Pembroke v. Logan*, 71 Ark. 364, 74 S. W. 297; *Oribbs v. Walker*, 74 Ark. 104, 85 S. W. 244.

Killough by the stipulation made by him in the purchase of the lands did not unconditionally assume payment of the note of Blythe for \$1,725. Blythe represented the note as usurious and void and agreed to resist the payment of the same, provided suit should be brought against him to recover, and only so far as it may be declared legal did Killough agree to pay it, and only to that extent he is bound.

By the stipulation in the deed of trust the parties made the note and deed an Arkansas contract. *Lanier v. Union Mortgage, Banking & Trust Co.*, 64 Ark. 39, 40 S. W. 406. And, being such, they are void for usury. Appellants therefore have no right to complain, and appellees do not.

Decree affirmed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

CHESAPEAKE & O. RY. CO. v. NASH.

(Court of Appeals of Kentucky. Nov. 24, 1909.)

1. MASTER AND SERVANT (§§ 286, 289*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

While a railroad repair crew, living in camp cars, was at a station on the way to a job, the engine and some cars were temporarily detached. Held, that the engineer, on returning, might reasonably expect some of the crew to be moving about, or from car to car, so that the shock of recoupling might cause injury, imposing the duty of giving warning of the return, and rendering it a question for the jury whether on the evidence there was failure to do so; nor could a member of the crew be held negligent as a matter of law in going from one car to another at such time, if he was without warning of the return of the engine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1032-1050, 1116-1122; Dec. Dig. §§ 286, 289.*]

2. MASTER AND SERVANT (§ 137*)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER.

The engineer in charge of the detached engine and cars owed the duty under the circumstances of giving warning of the return of the engine to couple, and the ringing of the bell, being the warning ordinarily given in such cases, was the only warning to which the occupants of the camp cars were entitled, and it was not necessary to blow the whistle or send to the camp cars to inform the occupants that the engine was returning.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 269, 270, 273, 274, 277, 278; Dec. Dig. § 137.*]

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Action by John R. Nash against the Chesapeake & Ohio Railway Company and others. Judgment for plaintiff against the defendant named, which appeals. Reversed, and remanded for new trial.

Worthington, Cochran & Browning and Galvin & Galvin, for appellant. George Doniphan and James C. Wright, for appellee.

CLAY, C. Appellee, John R. Nash, instituted this action against appellant, Chesapeake & Ohio Railway Company, John T. Dwyer, and Albert A. King to recover damages for personal injuries. The jury found for Dwyer and King, but returned a verdict in appellee's favor for \$10,000 against the railroad company, and from the judgment based thereon the latter appeals.

The facts of the case are as follows: In the month of January, 1907, there was a washout on the line of appellant's railway between Glenn Park and Melbourne, in Campbell county, Ky. On the morning of January 23, 1907, a freight train, consisting of an engine and eight cars, in charge of Albert A. King, conductor, left K. C. Junction, Covington, Ky., for the point of the washout. At Newport, Ky., the train picked up six camp cars, containing the road carpenter force; appellee Nash being one of the force. The

train next stopped at Dayton, Ky., and laid a hand car on a flat car and got the balance of the men. About two miles east of Dayton, at a point called D. N. Cabin, the train again stopped and picked up 50 or 60 laborers. It then proceeded to a station called Brent. Here the engine and some of the cars were uncoupled for the purpose of doing some switching, and the conductor went to the telegraph office to receive orders. The engine and cars engaged in the switching went ahead about 65 car lengths, and the camp cars were left standing upon the main line. At the time of the accident appellee was in one of these cars. After completing the work of switching, the engine, with two or three material cars, returned for the purpose of securing the camp cars, which had been left on the main line, and then proceeding to the train's destination. The camp cars were used to carry the force of carpenters from place to place on appellant's road, for the purpose of doing such repair work as might be necessary. These cars were ordinary box freight cars, with doors in each end. One of them was known as the "kitchen car." The carpenters made their home in these camp cars while being transported from point to point on the railroad. There were no platforms at either end, and in passing from one car to another it was necessary to step over the coupling apparatus. At the time of the accident, appellee had been in appellant's employ for some three or four months. He was boarded and transported from place to place in the camp cars. He was paid by appellant for the time taken in carrying him the same as if he were actually at work. Appellee knew that the train had stopped at Brent on the main line, and that the engine and a few cars had left the balance of the cars standing thereon. He also knew that they had not reached their destination, and that the engine had to return and get the camp cars before they proceeded on their way. Just before the accident the appellee passed from one car to another and got a pair of gum boots. He then started a second time for the kitchen car, for what purpose does not appear. While walking to the end of the car, and when very near to the door, the engine was backed up and against the train. The shock caused him to be thrown forward. He caught the jamb of the open door, and his body was swung out. His head was caught between two cars, and he was seriously and permanently injured. Appellant's witnesses testify that the bell on the engine was being rung as the engine approached the camp cars. On the other hand, appellee and others, who were in position to hear, testified that they did not hear the ringing of the bell.

It is first insisted by appellant that the court erred in failing to give a peremptory

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

instruction in its favor. In this connection it is argued that it was not shown that any rule of the company required those in charge of the engine and cars under such circumstances to give warning of their approach. This may be true; but negligence does not always depend upon whether a rule of the company has or has not been violated. Sometimes the company's rules may require a greater or less degree of care than the law requires. So the company may be negligent in certain respects, where there is no rule covering such a case. But it is contended that the company had a right to presume that appellee and others on the camp cars were in a place of safety, and was not required to anticipate that any one of them would be in a position so dangerous that the ordinary coupling of a car, without great force or violence, would injure any one. Then, too, it is further claimed that appellee was himself guilty of contributory negligence in placing himself in a position of danger when he had reason to believe that the engine and the cars thereto attached would return and get the camp cars. In discussing these questions it must be borne in mind that the appellee and other members of the carpenter force were making their home in the camp cars. That they would move about in the cars was not an unreasonable expectation. That being the case, we cannot say, as a matter of law, that appellee was guilty of contributory negligence in attempting to go from one car to another, especially in view of the fact that he knew that the engine and cars had been detached from the camp cars, and claims to have received no warning that they were then approaching. Our conclusion is that the engineer and conductor in charge of the engine and detached cars could reasonably anticipate that some one in the camp cars would be moving about, or proceeding from one car to the other, and that the shock of coupling under such circumstances might cause injury. It follows, therefore, that the probability of injury was such as to impose upon the company the duty of giving warning of the return of the engine. The case was, therefore, one for the jury, and the court did not err in refusing to award appellant a peremptory instruction.

The court in its instructions authorized a recovery by appellee if the railway company, by its agents and servants in charge of the locomotive and train of cars, at the time and place described in the proof, without timely warning and with negligence, moved its locomotive so that it came against the cars at a time when appellee was rightfully upon one of said cars and exercising ordinary care for his own safety. Thus the court left to the jury to determine what was a timely warning. The ringing of the bell, however, in our opinion, was sufficient warning, under the circumstances of this case. Had the en-

gine whistled, it would not have apprised appellee of the fact that the engine, with the detached cars, was then returning for the purpose of coupling. Nor do we think it was necessary for the conductor or engineer to send some one to the camp cars to inform those occupying them that the engine was returning. While it is true that appellee and others engaged in a similar work were not like ordinary trainmen, in that they were required to be on the lookout for the return of the engine, yet they knew they had not reached their destination, and that the engine would return. In view of the position those on the camp cars thus occupied, it seems to us that the only warning to which they were entitled was the one ordinarily used for that purpose, to wit, the ringing of the bell. Upon the next trial, the court, in addition to the instructions given, will instruct the jury to the effect that the timely ringing of the bell as the train came back was a timely warning of the approach of the engine, within the meaning of the first instruction.

For the reasons given, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

REES v. WILSON et al.

(Court of Appeals of Kentucky. Nov. 23, 1909.)

SCHOOLS AND SCHOOL DISTRICTS (§ 97*) — ELECTIONS—PETITION TO DECLARE VOID—DEMURRER.

Where the petition in an action to have an election whether a school district should issue bonds for erecting a schoolhouse, declared void, and to prevent the issue of the bonds, shows that the election was conducted strictly according to law, and that the citizens of the district had a fair chance to vote, and there was nothing alleged showing that the election was conducted improperly, or that it should be declared void, a demurrer to the petition was properly sustained.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 226; Dec. Dig. § 97.*]

Appeal from Circuit Court, Henry County. "Not to be officially reported."

Action by W. A. Rees against James H. Wilson, and others. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

D. A. Sachs, Jr., for appellees.

NUNN, C. J. In the early part of the year 1909 the schoolhouse of the graded common school district in Eminence, Henry county, Ky., was condemned as being unfit and unsafe in which to teach school. The trustees of the district took necessary steps to have a vote on the proposition as to whether or not the district should issue and sell bonds to the value of \$15,000 for the purpose of erecting a suitable building to be used as a schoolhouse. The vote was taken on the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

23d day of July, 1909, and 155 voted for the issual of the bonds and 55 against it.

Appellant, W. A. Rees, instituted this action ostensibly for the purpose of having the election declared void and to prevent the issual of the bonds. In his petition he alleged minutely every fact and every step necessary to have been taken to a valid election, as required by sections 4464 to 4500, inclusive, of the Kentucky Statutes (Russell's St. §§ 5736-5739, 5741-5747, 5751-5778), and in addition negatived the supposed defects which were claimed to have existed in the case of Taylor v. Sparks, 118 S. W. 970, and, after stating all the steps taken by the trustees in calling and conducting the election, which were necessary to make it complete, fair, and valid, he closed his petition with the following language, to wit: "Plaintiff alleges that said bonds, if so issued, and said tax, if so levied, would each and all be entirely null and void, and work great and irreparable hardship on this plaintiff and others similarly situated; that the proceedings herein taken were each and all contrary to law, and null and void. Plaintiff says that he brings this suit as a taxpayer, for himself and all others similarly situated, and that he believes the proceedings as hereinabove set out are improper and irregular, and are all null and void." He does not allege a fact or give an intimation of any act or proceeding by the trustees or any one else that would make the election or the issual of the bonds null and void, improper, or irregular. Appellees filed a demurrer to the petition, which was sustained.

The proceedings as alleged in the petition show that the election was conducted strictly according to law, and that the citizens of that district had a fair and full opportunity to exercise their right of suffrage in regard thereto, and there was not one thing stated which would indicate that the election was conducted improperly, or that it should be declared null and void. See the case of Taylor v. Sparks, supra.

For these reasons, the judgment of the lower court is affirmed.

FUNK v. FUNK.

(Court of Appeals of Kentucky. Nov. 23, 1909.)
CONTRACTS (§ 334*) — ACTION — PLEADING — CONSIDERATION.

In an action on a contract to pay for the support and maintenance of certain infants, the petition was insufficient in not alleging consideration for the promise, or showing any duty or obligation to pay for such support.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1660; Dec. Dig. § 334.*]

Appeal from Circuit Court, Bullitt County.
"Not to be officially reported."

Action by Margaret Funk against A. E. Funk. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

See, also, 118 S. W. 419.

Ben Chapeze and E. C. Waide, for appellant. J. F. Combs, for appellee.

NUNN, C. J. This appeal is from a judgment for \$840 against appellant. Appellant filed a demurrer to appellee's first petition, which was sustained, and the petition was then amended, and another demurrer was filed to the petition as amended, which was overruled. Appellant then answered, denying specifically the allegations contained therein, which answer he afterwards withdrew, and elected to stand by his demurrer. The court then rendered the judgment above mentioned, and he has appealed.

As the petition and amended petition are short, we copy them. The petition is as follows: "The plaintiff, Margaret Funk, states that on the ——— day of March, 1904, Joseph L. Funk died, leaving surviving him a daughter, Viola Funk, and sons, G. B. Funk, W. J. Funk, Everet Funk, and Earl Funk, all infants under 12 years of age, and the defendant, A. E. Funk, was by an order of the Bullitt-county court, duly and regularly made on the 11th day of April, 1904, appointed guardian of said infants and accepted the appointment. The plaintiff avers that said infants were left under her care and in her custody, and she has since the 1st day of March, 1905, up to the 1st day of May, 1908, furnished to the said Viola Funk food, clothing, books, washing, ironing, and all things necessary to her care and maintenance, and to the other said infants from the 1st of March, 1905, up to the 1st of December, 1908, food, clothing, books, washing, ironing, and all things necessary to their maintenance, and the defendant, A. E. Funk, agreed with the plaintiff to pay her the reasonable value of the food, clothing, books, and things furnished said infants, and the reasonable value thereof was \$75 per year. She says she has been paid the sum of \$250 on her demand, but the remainder is wholly unpaid and is due. Wherefore plaintiff prays a judgment for the sum of \$1,087 and her cost herein expended."

The amended petition is as follows: "The plaintiff, for amended petition, adopts the allegations of the original as part of this, and avers that early in the year 1905 the defendant promised to pay this plaintiff, and at divers times thereafter promised to pay plaintiff, a reasonable sum for the maintenance, clothing, books, and necessary things furnished said infants; that the defendant refused to pay this plaintiff anything for maintenance of said infants from the death of their father up until the 1st of March, 1905, because the plaintiff claimed articles usually set apart by law to widows, and the payment of \$250 made was applied to that part of her account accruing in the year 1905, and plaintiff is willing to accept \$60 per year for each infant from defendant, if

paid. Wherefore she prays as in her original petition."

A year or two before the filing of this suit appellee instituted an action against appellant, as guardian for her children, and recovered a judgment in the lower court; but this court reversed it. See opinion in 113 S. W. 419, to be officially reported. In that opinion the court said: "Before a judgment will be rendered in such action, it should be made to appear what estate the ward has, as upon that fact will largely depend the reasonableness of the charge—a fact which cannot be substituted by the admission of the guardian and the judgment of a court of law upon it. The petition should have set out what estate the ward has, its kind and productiveness, the age and sex of the ward, so that the court might have seen whether the allegation was well founded that the application of the principal of the estate was required, in addition to its income, to properly maintain and educate them."

On the return of the case to the lower court, instead of appellee preparing her case against appellant, as guardian, as indicated in that opinion, she filed the petition and amended petition above copied, in which she sought to recover from appellant individually the amount sued for on his verbal promise to pay her for the support furnished her children. Appellee's counsel concedes that appellant is not responsible, as guardian for the infant children, for the judgment obtained against him, but contends that he is responsible as an individual, and should pay it out of his estate.

We are of the opinion that the court erred in failing to sustain the demurrer to the petition as amended. It contains no averment showing the slightest consideration for the alleged agreement and promise by appellant; nor does it state any fact or circumstance from which the court could determine there was an obligation or duty devolving upon appellant to pay for the support of her children. It is a universal rule of pleading, when suing upon a contract not in writing, to allege the consideration for the agreement and promise to pay upon the part of the defendant, or, at least, to allege facts from which the court might determine that there was a legal obligation resting upon the defendant to pay the amount sued for. In Newman on Pleading and Practice, p. 322, it is said: "The consideration is another of the general facts which must ordinarily be alleged in an action founded upon a contract, expressed or implied. The consideration of a contract is the recompense or reason which induces the contracting party to enter into the agreement. When applied to ordinary contracts, which require a valuable consideration, it is that which has been or is to be given, done, or suffered as the reason that the other party agrees to do, to give, or to

suffer something; and in bringing an action to enforce the performance of the undertaking, as the consideration is essential, it must in general be stated in the petition. A good and sufficient consideration or recompense for making, or motive or inducement to make, the promise upon which the party is sought to be charged, is of the very essence of the contract."

In the case of *Adams' Trustee v. Wathen*, 50 S. W. 962, 21 Ky. Law Rep. 101, it was alleged that Wathen promised and agreed to pay \$1,000 for his sister, a part of the purchase price of a tract of land she had bought; that he had failed and refused to pay; and she sought to recover a judgment against him for that amount. No consideration was alleged or proved for the promise on his part, and the court adjudged that the petition was insufficient, and dismissed it. Many other cases might be cited to the same effect, and we believe that none to the contrary can be found in this state. We are at a loss to understand upon what principle appellant is legally bound to pay for the support of appellee's children. There is nothing showing that he is related to them, other than he is of the same name, and, if related at all, it cannot be nearer than uncle.

For these reasons, the judgment of the lower court is reversed, and the case is remanded for further proceedings consistent herewith.

SANDERS v. IDOL.

(Court of Appeals of Kentucky. Nov. 23, 1909.)

SPECIFIC PERFORMANCE (§ 121*)—EVIDENCE—SUFFICIENCY.

In an action by a purchaser to compel the vendor to convey an acre of a tract of about 19 acres which was inclosed under a single fence, and which the purchaser claimed to have bought and paid for with the remainder of the tract, evidence held to show that the vendor, either by mistake or with fraudulent intent, omitted to include the acre in his deed to the purchaser who was ignorant of the omission, so as not to sustain a finding for the vendor.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 390; Dec. Dig. § 121.*]

Appeal from Circuit Court, Oldham County.

"Not to be officially reported."

Action by Henry Sanders against William Idol. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

A. T. Ladd, Edwards, Ogden & Peak, and Chas. H. Morris, for appellant. William H. Holt and R. T. Crowe, for appellee.

NUNN, C. J. Appellee on and prior to January 15, 1907, owned a survey of land, on which he lived, which actually contained 18²⁵/₁₀₀ acres, situated on the Rollington pike and near the town of Pewee Valley, in Oldham county, Ky. The whole survey was inclosed as one tract; there being no separate lots or division fences. It appears that

appellee became the owner of the land by two purchases—one from the Jennie Rest Cottage Association of $17^{95}/_{100}$ acres, and the other from Sallie Sherman for an acre. This acre was situated in one corner of the survey, and abutted on the Rollington pike. Appellant claims that he purchased the whole survey from appellee at the price of \$3,000 in cash. Appellee made him a deed of conveyance on January 15, 1907, and only conveyed the Jennie Rest Cottage part of the survey. The one acre was omitted from the description given in the deed. Appellant was put into possession of the whole survey, and remained in possession thereof until the trial of this action in the lower court. The action was instituted by appellant to compel appellee to convey to him the one acre he obtained from Sallie Sherman, or to recover its value, \$400. On a trial in the lower court appellant's petition was dismissed, and he appealed.

After a careful investigation of the record, we have arrived at the conclusion that appellant thought he was buying and that the deed included the whole survey of land which was surrounded by one fence; that he did not know, at the time, that appellee had obtained it by two conveyances; that appellee knew at the time that appellant so understood the contract and believed that the deed covered the whole of the land. It is a doubtful proposition, however, as to whether or not appellee innocently or intentionally excluded the Sallie Sherman acre from the deed, but this cannot affect the rights of appellant. The testimony shows, without contradiction, that appellant was without education, that he could neither read nor write nor understand figures. His testimony, and that of one other witness who was present, shows that at the time he first met appellee, which was on the pike near the Sherman lot, appellee represented that he would sell his place to appellant for \$3,000 in cash; that he pointed out the boundary of it, including both pieces, and never said a word to him about not including the Sherman lot, but did point out a boundary which included it. Appellant introduced two other witnesses, who stated that appellee came to their house to have one of them telephone a Mr. Ellis, who lived near where appellant then lived, in the edge of Shelby county, about 15 miles distant. The message he directed sent to Mr. Ellis was to have him send a man over and "tell Henry Sanders to come down; that he would sell him his property—20 acres for \$3,000." The witnesses stated that they showed appellee the phone and told him to telephone himself, but he said that he was in a hurry, and, as the exchange in La Grange was so slow, he wanted them to do it. The witnesses said that they sent the message as directed, and appellant stated that he so received it. Another witness, C. J. Maher, a neighbor of appellee, testified, in effect, that on the afternoon of the day the deed was executed, when

appellee returned to his home, he said to him (witness) that he did not own a foot of land in Oldham county, and that he believed that he would go to Tennessee and buy him a home. Another witness, O. J. Smith, an acquaintance and friend of appellee, testified that on one occasion several months after the conveyance he was at appellee's house, and in speaking about the trade he asked appellee if he had not made a good trade, and appellee answered that he believed he had, that he still owned one acre of that place, but never intended to say anything about it so long as Henry Sanders lived.

Appellee and his step-son, William Sinkhorn, who was present at the time appellee showed appellant the property from the pike and near the Sherman lot, denied, in part, the testimony of appellant and his witnesses as to what occurred at that time; but admit that appellee showed Sanders the corners of both lots, and say that it was for the purpose of defining the boundaries of each lot and explaining to him that he desired to sell only the Jennie Rest Cottage property. They denied that appellee told Sanders that there were 20 acres in the lot, but admitted that he said there were between 18 and 20. Appellee admits that he went to the house of the two witnesses referred to, to telephone Mr. Ellis to send a man over to Henry Sanders, and inform him that he was ready to convey the Jennie Rest Cottage property to him for \$3,000, but says that he did the telephoning himself from the home of these witnesses, and that he did not ask either of them to do it for him. We will here remark that appellant testified that he never heard of this property being called the "Jennie Rest Cottage property" until the deed was prepared; that he had no knowledge or information from whom appellee obtained the property until that time; that he never heard of the Sherman lot until long after the deed was executed; that, when he bought the property, it was all under one fence. The fact that appellant testified that he never heard the land called the "Jennie Rest Cottage property" until the deed was executed makes the telephone message to Ellis very important, as it aids the court in getting at this issue of fact between the parties. We have two disinterested persons and a party in interest on one side and the other party in interest on the other. If appellee had telephoned the message himself, it was important to him to introduce Ellis to prove that fact, but Ellis was not introduced. Appellee also positively denied that he had any conversation with C. J. Maher as related by him. He also stated that he did not remember having the conversation related by Smith.

Appellee introduced as a witness the attorney who prepared the deed. He testified that he read the deed to Sanders very carefully; that it described the land conveyed as the "Jennie Rest Cottage property," being $17^{95}/_{100}$ acres; that appellant made no ob-

jections and accepted the deed; that there was nothing said at any time in his presence about the Sherman lot. Appellant testified that he did not know at the time from whom appellee purchased the property; that he did not know anything about the lines and corners as called for in the deed; that he did not know what "ninety-five hundredths acres" meant, but supposed that he was getting a conveyance for the land he had purchased, the whole of it, and did not know the difference until long afterwards, when the tax collector visited him and inquired if appellee did not own an acre of land there in that boundary, and it was then that he began to investigate the matter and found that he had an acre inclosed that his deed did not cover. There is one other circumstance that convinces us more strongly of the equity of appellant's contention, and that is appellee nowhere in the pleadings or testimony indicates that he had any understanding with appellant with reference to the acre which he says he did not, or intend to, convey to him. He knew, as he admits, that the acre was inclosed with the premises which he put appellant in possession of; that appellant used it the same as he did the other portions of the survey, but, notwithstanding this knowledge on the part of appellee, he at no time approached Sanders or said anything to him about how long he could continue to use it in this way. It looks reasonable that at the time of the execution of the deed, or at least some time thereafter, appellee would have had some understanding with Sanders as to when he was to cease using the acre, and as to when they would build their division fence. The testimony clearly indicates that appellee either by mistake left the one acre out of the conveyance, or intentionally left it out with a view of defrauding appellant, for appellee knew at the time that Sanders was ignorant of the fact that it was being retained.

Our opinion is that appellant is entitled to this acre of land, and the judgment is reversed and remanded, with directions to the lower court to make an order directing appellee to convey the acre of land to appellant, giving him a reasonable time within which to comply therewith, and, in case of his failure to do so, to direct the commissioner to convey it at the expense of appellee, and to render judgment for appellant's cost.

ILLINOIS CENT R. CO. v. GUNTERMAN.
(Court of Appeals of Kentucky. Nov. 23, 1900.)

1. CARRIERS (§ 320*)—PASSENGERS—INJURIES BY CARRIER'S AGENT—QUESTION FOR JURY.

In an action for injuries to a passenger from a shot fired at a third person by the carrier's flagman, evidence held to warrant submission to the jury.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 320.*]

2. CARRIERS (§ 302*)—PASSENGERS—INJURIES.

It is the duty of a carrier to protect its passengers not only on the train, but while they are alighting, and until they have a reasonable time to leave the platform.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1221; Dec. Dig. § 302.*]

3. CARRIERS (§ 284*)—PASSENGERS—PROTECTION FROM THIRD PERSONS.

It is a carrier's duty to protect passengers from unruly persons.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1126; Dec. Dig. § 284.*]

4. CARRIERS (§ 283*)—PASSENGERS—INJURIES FROM ACTS OF FLAGMAN.

Where trainmen were attacked, and the flagman in the performance of his duty while repelling the attack shot and injured an innocent passenger, the carrier was liable if the act was wrongful.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1121; Dec. Dig. § 283.*]

5. CARRIERS (§ 305*)—INJURY TO PASSENGER—ACT OF FLAGMAN—PROXIMATE CAUSE.

Where a conductor, hearing a disturbance in a car, entered and quieted the passengers causing the trouble, his failure to eject such passengers was not the proximate cause of injury to an innocent passenger from a renewal of the difficulty after reaching a station.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1245; Dec. Dig. § 305.*]

6. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY TO PROOF—INJURY TO PASSENGER—ACT OF CARRIER'S AGENT.

In an action by a passenger for an injury from being shot by a flagman who attempted to shoot another who had attacked him, there being no question of negligence, an instruction using the word "negligently," instead of the words "not in the necessary or apparently necessary defense of himself or associates," was erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 602, 603; Dec. Dig. § 252.*]

7. CARRIERS (§ 321*)—INJURY TO PASSENGER—SHOOTING BY TRAINMAN—INSTRUCTIONS.

In an action by a passenger for injury from being shot by a trainman, who shot at another person, an instruction to find for defendant unless one of defendant's agents while attempting to shoot another person negligently shot plaintiff, should have stated that if defendant's trainman, when he fired the shot, believed and had reasonable ground to believe that it was necessary to fire the same to protect himself or associates from death or harm, and he so fired the shot to protect himself or associates, they should find for defendant.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1326; Dec. Dig. § 321.*]

8. CARRIERS (§ 321*)—INJURY TO PASSENGER—INSTRUCTIONS—EVIDENCE.

In an action for injury to a passenger from being shot during a disturbance between the trainmen and disorderly passengers, where the evidence was conflicting as to whether the shot injuring plaintiff was fired by a trainman or a passenger, the court should have instructed that defendant was not liable if the shot was fired by a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1336; Dec. Dig. § 321.*]

Appeal from Circuit Court, Muhlenberg County.

"To be officially reported."

Action by G. W. Gunterman against the Illinois Central Railroad Company. From a

judgment for plaintiff, defendant appeals. Reversed and remanded.

Trabue, Doolan & Cox, R. Y. Thomas, Jr., Taylor & Eaves, and Blewett Lee, for appellant. Willis & Meredith, for appellee.

HOBSON, J. G. W. Gunterman was a passenger on the accommodation train of the Illinois Central Railroad Company running from Central City westward. The train was much crowded, and Gunterman rode upon the platform of one of the cars, as his destination was a station known as Mercer, about three miles from Central City. The proof for him tends to show these facts: After the train pulled out from Central City, a crash was heard in the smoking car, and there was some disturbance in there. The conductor went forward hurriedly to the car, and soon he and the flagman came out bringing with them a man named Jackson, whom the conductor said he was going to put off; but he then decided not to put him off, but to take him on to Greenville, and allowed him to go back into the car. After Jackson returned to the car, there was still a disturbance in there. When the train reached Mercer, Gunterman got off and was standing on the platform, while the flagman was helping a lady off. At this juncture a man named Laswell, who had gotten off the train, picked up a rock and knocked down the porter, who was by the side of the car, and struck Langley, the flagman. The proof for the plaintiff shows that at this point the conductor and Langley took out their pistols and Langley began shooting; one of the balls from Langley's pistol striking Gunterman in the back of the neck.

The proof for the railroad company is to the effect that, when the conductor went forward into the smoker, he found that Jackson and Laswell had kicked down the door to the water-closet, claiming that some one had locked them in there, although the fact was that they simply had failed to turn the lock the right way. The conductor undertook to quiet them, and, Jackson being unruly, the conductor struck him. He thereupon quieted and took a seat; and the conductor left the car and went back to the ladies' car to take up his fares. After the conductor left, Laswell, who was with Jackson in the water-closet, became boisterous again, and the flagman, who was in the car, undertook to quiet him, and struck him on the head, from which he bled considerably. He then became quiet, and soon the train pulled into Mercer, where Jackson, Laswell, and a man named Hopkins, among others, left the train. As soon as Laswell got on the ground, he began hunting for a rock, with which he knocked down the porter who had his back to him, and then struck Langley, the flagman, and Langley drew his pistol and snapped it. At this juncture Hopkins drew his pistol and fired two shots at Langley, the first of which struck Gunterman in the neck. The con-

ductor was standing on the platform of the car, but had not gotten off the car when the difficulty took place. There was testimony for the plaintiff to the effect that Hopkins had drawn his pistol in the car before he reached Mercer; but there was no proof that any of the railroad men saw this, or that he was in any way connected with the difficulty that had taken place in the car. The proof for the railroad company was to the effect that Hopkins had done nothing until after the difficulty began on the ground. On this conflicting testimony the circuit court instructed the jury as follows:

"(1) The court instructs the jury that if they believe from the evidence that the plaintiff was a passenger on the defendant's (railroad company's) train from Central City to Mercer station, and that when the plaintiff was on the station platform at Mercer Station on the occasion of his leaving the cars after he had been carried from Central City to Mercer Station, and before he had had a reasonable opportunity to leave said station platform after getting off the cars, the agents of defendant railway company, or any of them in charge of said passenger train, while attempting to shoot another person, unintentionally but negligently shot and wounded the plaintiff upon his body and person with a pistol, then, and in that event, the jury should find for the plaintiff such compensatory damages, if any, as were thereby caused to the plaintiff, and which were the direct and natural result of the negligence aforesaid, not exceeding \$1,000 the amount claimed.

"(2) The jury should find for defendant unless they should believe from the evidence that some one of the defendant's agents in charge of said train while attempting to shoot another person negligently shot and wounded the plaintiff while he was on the station platform, and before he had had a reasonable opportunity to leave the platform after getting off the cars."

"(4) Negligence as used in the instructions means the failure to use ordinary care, and ordinary care is such care as an ordinarily prudent person would usually exercise under similar circumstances in matters involving his own interest."

He refused to give this instruction, which was asked by the defendant: "The court instructs the jury that, although they may believe from the evidence that one of the defendant's agents fired the shot which struck and injured the plaintiff, but should further believe from the evidence that the said agent who fired said shot, if he did so fire it, was being attacked by some other person, and at the time believed or had reasonable grounds to believe that it was necessary for him to fire same to protect himself from death or great bodily harm at the hands of said person, then the law is for the defendant, and they will so find."

The jury found for Gunterman, and fixed

his damages at \$1,000. The railroad company appeals.

The court did not err in refusing to instruct the jury peremptorily to find for the defendant, for in helping the passengers from the train the flagman was discharging a duty assigned him by the defendant. It was the duty of the defendant to protect its passengers, not only on the train, but while they were alighting from it, and until they had had a reasonable time to leave the platform. It was incumbent upon it to protect its passengers from unruly persons as they alighted from the train no less than while they were on the train. If the flagman was attacked while he was performing the duty assigned him by the defendant, he had a right to stand his ground and meet force with force, and to use as much force as was necessary to protect him or his associates from death or great bodily harm at the hands of their assailants. In doing all this he was acting for the company, and therefore it is responsible for his acts. Gunterman had just alighted from the train, and a reasonable time had not elapsed when the shooting was done.

The court also properly refused to submit to the jury the question whether the conductor in the exercise of ordinary care should have put Jackson and Laswell off the train before they reached Mercer. When the conductor went to Jackson, he quieted down, and it does not appear that he was afterwards disorderly on the train. There was nothing in the conduct of Laswell and Jackson that should have made the conductor anticipate that after they reached Mercer and got upon the ground they would make an attack upon the trainmen. As what happened at Mercer was not to be reasonably anticipated from what had taken place in the presence of the conductor on the train, it cannot be said that his failure to put Laswell and Jackson off before they reached Mercer was the proximate cause of this trouble. The fact is that the difficulty at Mercer seems to have followed the flagman striking Laswell after the conductor had left the car and without his knowledge; for it is evident that Laswell got the rock and began the assault at Mercer to avenge himself for the blow which the flagman had given him on the train. This occurred just as the train was pulling into Mercer, and the conductor had no opportunity to do anything before the train reached Mercer. He was then taking up the tickets in the ladies' car, and had no knowledge of it until after the difficulty at Mercer. There was no evidence in the case that any one of the trainmen but Langley, the flagman, did any shooting. In instruction No. 1, in lieu of the words "the agents of defendant railroad company or any of them in charge of said passenger train," the court should have used the words,

"the defendant's flagman, Langley." There is no question of negligence in the case. If Langley drew his pistol and fired it into the crowd, shooting the plaintiff, the company is responsible unless he acted in self-defense. In lieu of the words in the first instruction "but negligently," the court should have used the words "and not in the necessary or apparently necessary defense of himself or his associates on the train." In lieu of instruction No. 2, the court should have told the jury that it was the duty of the defendant's agents in charge of the train to protect the passengers while they were alighting from the car, and that, if they were attacked, they had a right to stand their ground and meet force with force, and that, though they should believe from the evidence that Langley fired the shot which struck the plaintiff, yet, if they further believed from the evidence that when he so fired it he or his associates on the train were being attacked by some other person or persons, and he believed, and had reasonable grounds to believe, that it was then necessary for him to fire same to protect himself or them from death or great bodily harm at the hands of such person or persons, and he so fired the shot to protect himself or one of his associates from the said danger real or to him apparent, they should find for the defendant. *Crabtree v. Dawson*, 119 Ky. 148, 83 S. W. 557, 26 Ky. Law Rep. 1046, 67 L. R. A. 565, 115 Am. St. Rep. 243. By another instruction the jury should have been told that the defendant was not liable if the shot which struck the plaintiff was fired by Hopkins.

The other objections urged are as to matters which will probably not occur on another trial. In view of all the evidence, we conclude that there should be a new trial.

Judgment reversed and cause remanded for further proceedings consistent herewith.

WYNN v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 23, 1900.)

1. ROBBERY (§ 24*)—EVIDENCE—SUFFICIENCY.

In a prosecution for robbery, evidence held to sufficiently identify accused as the perpetrator of the robbery to warrant a verdict of guilty.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 34; Dec. Dig. § 24.*]

2. CRIMINAL LAW (§ 742*)—CREDIBILITY OF WITNESSES—QUESTIONS FOR JURY.

Where the prosecuting witnesses identified accused as the perpetrator of the crime, the jury had the right to accept their testimony as against that of accused and his witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1719; Dec. Dig. § 742.*]

3. ROBBERY (§ 5*)—WHAT CONSTITUTES—SEARCH OF PERSONS UNDER ARREST—RIGHT OF OFFICER.

Though a deputy marshal had the right to arrest, without a warrant, persons who were drunk and disorderly, and following such arrest to search them to ascertain whether they possessed weapons or other means of resisting his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

authority, or of effecting their escape if imprisoned, if in making such search he obtained money from them, it was his duty to return it upon discharging them from arrest, and if, after making the arrest, he took advantage of the duress under which such arrest placed them, and by force or putting them in fear took from them money in their possession feloniously, intending at the time to convert it to his own use, his act was robbery.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. § 5; Dec. Dig. § 5.*]

4. LARCENY (§ 23*)—PETIT LARCENY—WHAT CONSTITUTES—MONEY TAKEN FROM PERSONS UNDER ARREST.

In a prosecution for robbery, where it appeared that accused, a deputy sheriff, arrested the complaining witnesses for being drunk and disorderly, and after making the arrests searched their persons and obtained an amount of money, which he did not return upon releasing them, it was error not to charge the jury on petit larceny, since, if accused made the search in good faith, and not for the purpose of robbing them, but after thus getting the money feloniously kept and converted it to his own use, his act in so doing was petit larceny.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 50, 52; Dec. Dig. § 23.*]

Appeal from Circuit Court, Hopkins County.
"To be officially reported."

James Wynn was convicted of robbery, and appeals. Reversed and remanded.

Jonson & Jennings, for appellant. James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

SETTLE, J. This is an appeal from two judgments of the Hopkins circuit court, each convicting the appellant, James Wynn, of the crime of robbery. By agreement he was tried under the two indictments at the same time, and by the single verdict of the jury his punishment under one of the indictments was fixed at three and under the other at two years' confinement in the penitentiary.

According to the commonwealth's evidence, the alleged robberies were committed by appellant in the village of Nortonville, at night, in August, 1907, under the following circumstances: Naaman Wilson and J. L. Kenny, who were going from Central City to Crofton, reached Nortonville upon a train of the Illinois Central Railroad, at which place they had to await a later train of the Louisville & Nashville Railroad upon which to go to Crofton, situated upon the last-named railroad. Having several hours to wait at Nortonville, Wilson and Kenny visited one or more saloons and took two drinks of beer and one of whisky each, and then went to the depot, intending to take the Louisville & Nashville Railroad train upon its arrival. While in the depot, Kenny became sick from intoxication or the mixture of drinks he had taken, and vomited upon the floor, which displeased the ticket agent in charge of the depot, who ordered both Kenny and Wilson from the building. At this juncture, appellant, who claimed to be acting as deputy marshal of Nortonville, appeared on the

scene and arrested Wilson and Kenny, and ostensibly started with them to the town prison. They both testified that appellant upon reaching a point on the railroad track about 75 yards from the depot stopped and told them he would have to search their persons, to which they objected, but that he nevertheless proceeded with the search, and took from the pocket of Wilson two \$5 bills, after which he told Wilson and Kenny that if they would go to an adjoining woodland, which he pointed out to them, and quietly remain there until the time arrived for reaching the depot to take the train upon which they expected to go to Crofton, he would release them from arrest, whereupon they agreed to follow appellant's commands and were discharged by him, but that he retained the money he took from Wilson, and did not thereafter return it. Wilson and Kenny further testified that they went to the woods as directed by appellant, but there encountered some negroes who "bummed" them for money, and that, to avoid the negroes, they returned to the depot, and were again arrested by appellant, who took them to the place of the first search, and again searched their persons, taking at that time from Kenny \$2, which he appropriated as he had done the \$10 of Wilson, after which appellant turned them loose, and again ordered them to the woods. In addition to the testimony of Wilson and Kenny, the commonwealth proved the flight of appellant to Indiana after his indictment for the robberies, and the forfeiture of the bail bonds executed to secure his appearance for trial under the indictments. Appellant in testifying admitted his escape from jail and flight to Indiana, but claimed that he was confined in jail for a misdemeanor, and that the escape and flight were caused by the need of his services by his family in Indiana, some of whom were then ill. It does not appear from the evidence, however, whether his return from Indiana for trial was voluntary or because of his arrest for that purpose; but it does appear that his bail in the robbery cases, following his escape and flight, procured of the clerk of the Hopkins circuit court copies of the bail bonds, with a view to his arrest and return to answer the indictments.

Appellant, upon being introduced as a witness in his own behalf, admitted that he twice arrested Wilson and Kenny as stated by them, but denied that he searched or took any money from either of them. He was corroborated as to what took place at each arrest by three companions who claimed to have been with him at the time, one of whom was a saloon keeper who seemed to have been considerably under the influence of intoxicants. In addition, appellant proved by the ticket agent that Wilson and Kenny after their arrest accused him

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

of being the person who robbed them, but later retracted the accusation, apologized to him therefor, and informed him that appellant was the guilty party. It also appeared from the evidence that the ticket agent resembled appellant in figure, and wore clothing of the same fashion and color. Appellant also proved by one of the town trustees that Wilson and Kenny on the morning following the robberies claimed that they had been robbed by a man who had arrested them as marshal, but that they failed to identify appellant as the guilty party when he was called to them.

Appellant contends that he should have been granted a new trial, and is entitled to a reversal of the judgments of conviction, because the verdict was contrary to and unauthorized by the evidence. This contention cannot prevail, for the reason that the testimony of both Wilson and Kenny make it appear that he was the guilty party, both identified him as the perpetrator of the crimes, and related with particularity the facts and circumstances tending to establish his guilt, and the jury had the right to accept their testimony as against that of appellant and his witnesses. And the trial court, even if of opinion that the weight of the evidence conducted to prove appellant's innocence, could not have usurped the powers of the jury by determining the matter of his guilt or innocence.

It is further contended by appellant that the trial court in addition to the instructions given should have given one under which the jury might have found appellant guilty of petit larceny. We are disposed to sustain this contention. If Wilson and Kenny when found by appellant were drunk or disorderly, he had the right as deputy marshal of Nortonville to arrest them without a warrant, and, following such arrest, to search their persons for the purpose of ascertaining whether they were in possession of weapons or other means of resisting his authority as an officer, or of effecting their escape if imprisoned, but, if in making such search appellant obtained from their persons money, it was his duty to return it upon discharging them from arrest. If, however, after making the arrest, he took advantage of the duress under which such arrest placed them, and by force or by putting them in fear took from them money in their possession, feloniously intending at the time to convert it to his own use, his act in doing so was robbery. On the other hand, if appellant searched Wilson and Kenny in good faith, and not for the purpose of robbing them, but after thus getting the money feloniously kept and converted it to his own use, his act in so doing constituted petit larceny.

We are of opinion, therefore, that on a retrial of the case the circuit court in addition to the instructions given on the former trial

should give another or others embodying substantially in terms as above indicated the law as to petit larceny.

On account of the error of the trial court in instructing the jury, the judgments are reversed and cases remanded for a new trial in conformity to the opinion.

RECTOR et al. v. RECTOR.

(Court of Appeals of Kentucky. Nov. 9, 1909.)

1. DEEDS (§ 124*)—CONSTRUCTION—ESTATES CONVEYED.

A deed conveying land to the grantee, his heirs and assigns, prohibited the sale or renting thereof during the life of the grantors, husband and wife, and stated that the title should remain with the grantors during their lives, and that the grantee could make improvements on the land, and to have and hold the property unto himself, his heirs and assigns forever. The land was not homestead, and was owned by the husband in fee, in which the wife had only an inchoate right of dower. The grantee died after the death of the husband, but during the lifetime of the wife. *Held* that, on the husband's death, the fee passed to the grantee, subject only to the dower right of the wife.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 346; Dec. Dig. § 124.*]

2. APPEAL AND ERROR (§ 1171*)—TRIVIAL ERROR.

The error in a judgment awarding dower arising from the failure of the court to take into consideration the life interest of a third person living at the time of the institution of the suit for dower, but dying before the rendition of the judgment, is infinitesimal, and does not authorize a reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4546-4548; Dec. Dig. § 1171.*]

Appeal from Circuit Court, Casey County.
"Not to be officially reported."

Action by Bettie W. Rector against W. S. Rector and others. From a judgment for plaintiff, defendants appeal. Affirmed.

N. H. W. Aaron and McQuown & Beckham, for appellants. Stone & Stone, for appellee.

NUNN, C. J. This litigation involves the proper construction of the following deed: "This indenture made, this 12th day of January, 1900, between S. L. Rector and J. M. Rector his wife, of Casey county, Ky., parties of the first part and R. S. Rector, their son, of the same county and state, party of the second part, witnesseth: That in consideration of the love and affection which they have and do bear toward the party of the second part and for the sum of one dollar in hand paid, the receipt of which is hereby acknowledged, the parties of the first part have bargained and sold and do hereby give, grant and convey unto the party of the second part, his heirs and assigns the following described land on the terms and conditions named below: [The boundary of 250 acres of land is here given.] This indenture prohibits the sale or renting of the above described real estate during the life of par-

ties of the first part except by their consent, the title to remain with the parties of the first part during their lives and by this indenture they forfeit none of their rights and privileges therein. Party of the second part has the right to make any improvements on the said land. To have and to hold said property unto the party of the second part his heirs and assigns forever. In testimony whereof the parties of the first part hereunto set their hands the year and day above written." The grantee, immediately after the execution of the deed, entered upon and took possession and control of the land conveyed, and proceeded to and did erect a dwelling house and outbuildings thereon and made lasting and valuable improvements, and continued in the actual possession and control of the land for his own benefit from the time he entered to the date of his death, June, 1908. The grantor, S. L. Rector, who owned the fee-simple title at the date of the deed, died a few months after the execution thereof, and left surviving him his wife, J. M. Rector, who had only an inchoate right of dower in the land. This action was instituted by Bettie Rector, the widow of R. S. Rector, to have dower allotted to her in the 250 acres of land conveyed to her husband. J. M. Rector, the widow of S. L. Rector, who took by descent from her son, R. S. Rector, all the interest he had in the land, defended the action, controverting appellee's right to dower or any interest in the land. After the case was prepared for trial and submitted, but before any judgment was rendered, J. M. Rector died and her heirs, appellants, filed a pleading and entered their appearance to the action, and the case was resubmitted for judgment, and the lower court awarded appellee a dower interest in the land. Hence this appeal.

It will be observed that the granting and habendum clauses of the deed conveyed to R. S. Rector a fee-simple title in the land, but between the granting and habendum clauses the following conditions were inserted, to wit: "This indenture prohibits the sale or renting of the above described real estate during the life of parties of the first part except by their consent, the title to remain with the parties of the first part during their lives and by this indenture they forfeit none of their rights and privileges therein. Party of the second part has the right to make any improvements on the said land." Appellants contend that by reason of this insertion the grantor reserved a life estate in the land, and that the grantee, R. S. Rector, took the fee in remainder after the termination of the life estate of the grantors, and that as the grantee, R. S. Rector, died after his father and during the lifetime of J. M. Rector, that his estate in fee in remainder did not vest during his lifetime, and therefore he was not during coverture with his wife, Bettie Rector, or at the time of his death, seised of such an estate in

the land as entitled his widow, appellee, to dower therein. Appellee's contention is that, by the conditions in the deed referred to, the sole intention was to limit and restrain the grantee's power, right, and authority to either rent or alienate the land conveyed to him during the lifetime of the grantors, and that, by reason of the deed, the grantee took and became vested with an estate in fee, with a restriction only upon the power and right to either rent or sell the land during the lifetime of the grantors without their consent. Appellee also contends that R. S. Rector took under the deed an estate in fee, subject to the life estate therein by the grantor S. L. Rector and to a dower right of the grantor J. M. Rector, as the surviving wife of S. L. Rector.

The parties, by counsel, present their contentions with much ability and reasoning. We have not been cited to nor have we been able to find a case wherein a conveyance containing conditions like those contained in the deed in the case at bar has been discussed. Appellants' counsel, in support of their contention that R. S. Rector took a fee in remainder after the death of his mother and father, and that appellee has no dower interest in the land, cited several cases. The first—*Arnold's Heirs, etc., v. Arnold's Adm'r*, 8 B. Mon. 202—is unlike the case at bar. In that case John Arnold devised to William W. Arnold the plantation on which he lived with his wife, containing about 300 acres. He requested his son to remain with himself and mother as long as they might live and cultivate the farm; and the son was to have a third of the surplus made on the farm. By the second clause of the will he devised to his wife the use of the plantation during her life. In the case before us the home place of S. L. Rector and wife was not conveyed by the deed. It appears to have been a separate place. The important difference is that by the deed S. L. Rector did not convey to his wife anything. Her interest in the land remained as it existed prior to the execution of the deed, to wit, an inchoate right of dower. Another case referred to is *Northcut, etc., v. Whipp and Wife*, 12 B. Mon. 63. In that case Archer Northcut devised to his wife one-half of all his land, slaves, and personal property during her life, then to her son, William L. Northcut. He devised the other half to William L. Northcut in fee. By another provision of his will he stated that if his son, William L. Northcut, should die before his mother without children, then that portion devised to him should go to testator's four sisters. William L. Northcut married, and died before his mother and without children. His widow sought dower in the land. The court decided that she was not entitled to dower in the one-half which was devised to testator's wife for life, but that she was entitled to dower in the half devised to his son, her husband, he taking the fee in that

portion subject to be defeated only in the event that he died without children before his mother. In that case the court said: "Upon principle and authority, therefore, we are satisfied the true and substantial test of the right of dower is that the issue of the wife by the marriage might inherit the estate from the husband as his heir or heirs. And, as W. L. Northcut had in the lands devised to him immediately in fee an estate of inheritance which must have descended on his death to any surviving issue of his marriage, we are satisfied that, although he died without leaving such issue, his widow is entitled to dower in the land." In the case at bar S. L. Rector did not convey the land to his wife for life, but she only retained the interest she had in it at the date of the deed. The other two cases referred to by counsel for appellants are *Reynolds v. McFarland & Co.*, 11 S. W. 202, 10 Ky. Law Rep. 932, and *Hunt v. Hunt*, 119 Ky. 39, 82 S. W. 998, 26 Ky. Law Rep. 973, 68 L. R. A. 180. In each of these cases the conveyance was by father and mother to their child or children of the home place, and each contained this recital, to wit: "This deed is not to take effect until the death of the grantors." And it was held that a life estate was reserved and the child or children took a fee in remainder. These cases are unlike the one before us. In this case the homestead was not conveyed. The grantors only restrained the grantee from selling or renting the land within the lifetime of the grantors. They gave the grantee possession at once with power to improve and use the same for his sole benefit. The main thought and purpose uppermost in the minds of the grantors was to compel the grantee to reside upon the place and improve it, and therefore they prohibited the renting or selling of it. The deed was evidently drawn by a layman, and it was evidently thought that the first words used in the condition did not accomplish that purpose; hence the insertion of the words in the condition referred to, to wit, "the title to remain in the parties of the first part during their lives and by this indenture they forfeit none of their rights and privileges therein."

What we have said is upon the idea that the sole purpose of the condition and restriction in the deed was to compel the grantee to reside upon and improve the land, and that he was not to enjoy the benefits thereof by sale or renting it, and that the fee simple passed to the grantee subject only to these restrictions. Conceding, however, for the purpose of this case the construction we have given the inserted conditions in the deed to be erroneous, it appears that S. L. Rector owned the fee simple in the whole of the land, and his wife, J. M. Rector, owned only an inchoate

right of dower in same, and there is nothing in the terms of the deed to change in any way their interest therein. Therefore, when S. L. Rector, the father, died, which occurred before the death of the son, the fee passed immediately to the son, subject only to the dower right of his mother, J. M. Rector. The lower court in rendering judgment in behalf of appellee committed a slight error in not taking into consideration the life interest of the mother, J. M. Rector; but, as she died before the judgment was rendered, her interest in that should have been considered as infinitesimal, and does not authorize a reversal of the case.

For these reasons, the judgment of the lower court is affirmed.

BRANDENBURG v. SANDIDGE'S COMMITTEE.

(Court of Appeals of Kentucky. Nov. 23, 1909.)

INSANE PERSONS (§ 67*)—SALE OF REAL ESTATE—VALIDITY.

Where the appointment of a committee for a lunatic was void, and an order for the sale of the lunatic's real estate to pay debts made in a suit by the committee against the lunatic confined in an asylum and his creditors was void, the court could not compel the purchaser to accept a deed from the lunatic while in the asylum on the mere ex parte affidavit of the asylum physician, averring that the lunatic had been restored to reason.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. § 101; Dec. Dig. § 67.*]

Appeal from Circuit Court, Hardin County. "To be officially reported."

Action by James Matt Sandidge's committee for the sale of land to pay debts. From a judgment requiring W. A. Brandenburg, purchaser of the real estate, to purchase the same, he appeals. Reversed and remanded.

H. L. James, for appellant. Layman & Holbert and L. A. Faurest, for appellees.

NUNN, C. J. Prior to May 25, 1908, one James Matt Sandidge owned about 185 acres of land in one body in Hardin county, Ky. He was indebted to the Leitchfield Deposit Bank in the sum of about \$2,300, which was secured by a mortgage on the land and to C. Z., and something over \$100, which was also secured by a mortgage on the land. He owed two or three merchants' accounts which were unsecured. All of his indebtedness amounted to something like \$2,700. On the date above named Sandidge was given a form of trial as to his sanity in the county court. The jury found him of unsound mind and to be a lunatic. The court so adjudged him, and directed his immediate conveyance to the asylum in Lakeland, Ky., which was done. W. H. Gardner was appointed his committee, and he instituted this action, alleging that Sandidge was a lunatic and then confined in the asylum in Lakeland, and made him a de-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant with the creditors of Sandidge, and asked that the land be sold to satisfy the creditors. The case was referred to a master commissioner to take proof of and report claims against Sandidge's estate. He reported the amount thereof, which was, in substance, as stated. The court directed a sale of all the land for the reason that it could not be divided without materially impairing its value, and directed that the creditors of Sandidge be paid out of the purchase price. The land was sold by the commissioner, and appellant, Brandenburg, bid the sum of \$4,450, about \$1,200 or \$1,400 more than the proof shows that it was worth. The sale was reported by the commissioner to the court, and at the first term after the sale a guardian ad litem appeared for Sandidge's infant children and filed exceptions to the sale of the whole of the land, stating that Sandidge and his children were entitled to a homestead, which should be set apart and the balance sold to pay the debts. Brandenburg appeared at the same time, and filed exceptions to the report of sale, making the point that the whole proceeding by which the land was sold was void; that the confinement of Sandidge in the asylum was without legal authority because he had not been lawfully adjudged to be a lunatic. Both parties agree that these contentions are true, and the court so stated in its judgment, but compelled Brandenburg to take the land at his bid for the following reasons: After it was discovered that all the proceedings leading up to the sale of the land by an order of the court were void, a deed was prepared from James Matt Sandidge to appellant, Brandenburg, the purchase price being fixed at appellant's bid, which contained a clause of general warranty, and was sent or carried to Jefferson county, where the asylum is situated, and was signed and acknowledged by J. Matt Sandidge before Victor Swope, a notary public for that county, who certified that Sandidge freely ratified and confirmed the sale to Brandenburg. On the same day one W. E. Gardner made an affidavit stating, in effect, that he was the first assistant physician at the Central Kentucky Asylum for the Insane in Lakeland, Ky.; that as such physician J. Matt Sandidge was placed under his care when sent to the asylum; that he had been restored to his right mind, was then, and had been for several months, of sound mind, and thoroughly capable of attending to his own business, although somewhat physically disabled; that he had mind and capacity to understand a contract to sell and convey his real estate and other property. This affidavit was filed in court, and the court directed its commissioner who made the sale of the land to join Sandidge in the deed to appellant, and from this order the appeal was prosecuted.

The only question to be considered is

whether the court erred in compelling appellant to accept the deed so made and tendered and pay the purchase price. Appellees' counsel concedes in his argument that the lower court had no jurisdiction to make the sale of the land, but as Sandidge, when in his right mind, as shown by the affidavit of the assistant physician, ratified and confirmed the attempted sale of the land by the court and executed a deed of general warranty, appellant should be required to take the land and pay the purchase price. In support of this contention, counsel refer to some authorities to the effect that, when an agent makes a sale of land without disclosing his agency, the purchaser was compelled to take the land when the principal made a good title. The case at bar is not like those cases. We have found no case where the purchaser of land who believed that he was getting a good title from the person who sold it to him was compelled to take the land when he discovered that the seller did not own it and his principal was an infant, idiot, or lunatic, or there were reasonable grounds to believe that the principal was laboring under any one of these difficulties. Brandenburg knew the owner of the land was in the asylum, and believed that the court had jurisdiction to make a sale and pass a good and perfect title to the land, and he should not have been made to accept the deed from Sandidge made while he was in the asylum; the only evidence of his having been restored to his right mind being an ex parte affidavit of the assistant physician of the asylum. While it is agreed that all the proceedings which led up to the placing of Sandidge in the asylum were void, yet the record shows that a jury was impaneled, the proper oath administered, and a verdict returned to the effect that Sandidge was of unsound mind and a lunatic, and that he was immediately sent to the asylum, where he remained until after the court ordered appellant to accept the deed. Appellant traded with the court and expected a good title from it, and the court had no power to compel him to accept a deed from another vendor, especially when that vendor's sanity was in doubt, and appellant might be put to the expense and trouble in maintaining his title against the claim of Sandidge's heirs. If the creditors of Sandidge had made their answers to the petition a cross-petition against Sandidge and had him served with process before the sale of the land, it would have been valid, but they did not do that. Sandidge was before the court only upon the petition of Gardner, his alleged committee, whose appointment was void, wherefore Gardner had no right to institute the action.

For these reasons, the judgment of the lower court is reversed and remanded, with directions to set aside the sale and to dismiss the petition.

BORNSTEIN v. LOUISVILLE SCHOOL BOARD et al.

(Court of Appeals of Kentucky. Nov. 26, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—CONTRACTS—ILLEGAL CONTRACTS—REMEDIES OF TAXPAYER.

A taxpayer could maintain an action as such to prevent the waste of the public school fund, or to prevent the school board from making a construction contract with one of its own members in violation of law.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 265-268; Dec. Dig. § 111.*]

2. SCHOOLS AND SCHOOL DISTRICTS (§ 79*)—CONTRACTS—INDIVIDUAL INTEREST OF OFFICER—VALIDITY.

Ky. St. § 2975 (Russell's St. § 854), provides that no person shall be eligible to the office of trustee of the public schools, who at the time of his election is directly or indirectly interested in any contract with the school board, or is in any way benefited by the appropriations of the board, and section 2976 (Russell's St. § 855) vacates the office of any member of the school board who after election does or incurs anything which would have rendered him ineligible for election. *Held*, that the statute was simply declaratory of the common law, and made void contracts with the school board in which members thereof were interested, either directly or indirectly, so that a contract with a school board for the erection of a building, in which a member of the board was the real party interested, though it was made in the name of his cousin, was void.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 191; Dec. Dig. § 79.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—CONTRACTS—INDIVIDUAL INTEREST OF OFFICER—EVIDENCE—SUFFICIENCY.

In an action to enjoin the construction of a school building, on the ground that the contract was in fact made with a member of the school board, though nominally made with another, evidence *held* to show that such member was interested in the contract, and that the bid was really made by him in another's name.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 111.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—CONTRACTS—INVALIDITY—EFFECT.

Though a school building, constructed under a contract with a member of the school board, which was void for that reason, as in violation of Ky. St. §§ 2975, 2976 (Russell's St. §§ 854, 855), was completed with money furnished by the board and was accepted by it, the parties to the transaction will not be permitted to profit from it, and the school board will be enjoined, in a suit by a taxpayer, from paying the amount not actually put into the building, and the costs of the suit adjudged against the nominal and the real contractor, and, if the whole contract price has been paid by the board, the nominal and the real contractor will be required to repay the amount not actually spent by them on the building to the board, with interest from the time of the last payment.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 111.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Suit by Jacob Bornstein against the Louisville School Board and others. From a decree dismissing the petition, plaintiff appeals.

Reversed and remanded for judgment as directed, and for further proceedings.

M. A., D. A. & J. G. Sachs, for appellant.
Wallace A. McKay and W. P. Hillsman, for appellees.

HOBSON, J. The Louisville school board advertised for bids for the brickwork of the Duker Avenue school building, and it was specified in the advertisement that the bidders should state what they would charge if Louisville brick were used, and what they would charge additional if Akron brick were used. A number of bids were made for the work, among others one by Jacob Bornstein, in which he offered to do the work for \$9,600, and there was added to the foot of his bid a statement that, if Akron brick were used, he would charge \$40 per 1,000 additional. George Hoertz also made a bid in which he offered to do the work for \$11,923 with Louisville brick, and a certain higher sum if Akron brick were used. John Hoertz was a member of the school board and also chairman of the building committee. When the bids were opened, at the suggestion of the architect, Bornstein's bid was thrown out as irregular because he did not specify what he would charge if Akron brick were used in a lump sum, but only stated that he would charge \$40 per 1,000 extra. The committee thereupon decided to use Louisville brick, and the bid of George Hoertz was accepted, which was lower than any other bid except the Bornstein bid, and this had been thrown out. The committee reported its action to the school board, who approved the action of the committee, and made a contract with George Hoertz for the brickwork of the building. Bornstein then brought this suit to enjoin the school board from having the building constructed by Hoertz upon the ground that the committee had capriciously rejected his bid, although he was the lowest and best bidder, and that the bid made in the name of George Hoertz was in fact the bid of John Hoertz, the chairman of the committee, and that the school board was making a contract with one of its own members for the building of the schoolhouse at a higher price than the lowest and best bid, and was thus wasting \$2,323 of the school money. The application for a preliminary injunction was refused; answers were filed. On final hearing his petition was dismissed, and he appeals.

Bornstein sued as a taxpayer, and as such he might maintain an action to prevent the waste of the school fund in which he was interested, or to prevent the school board from making a contract with one of its own members for the work. He made the school board, John Hoertz, and George Hoertz parties to the petition. The house was built pending the action, and was about completed when

the last depositions were taken. It is not easy to see on what ground the bid of Bornstein was rejected as irregular when it was decided to build the house of Louisville brick, for it was clearly stated in his bid that he would do the work for \$9,600, and, after throwing out his bid, the board accepted the bid of George Hoertz for \$11,923. Bornstein was a contractor in good standing. He was then just finishing another schoolhouse for the board, and it is hard to believe that, if these persons had been accepting bids to build a house for themselves, they would have thrown out a bid that was the lowest by \$2,323, and then accepted the next higher bid, after they had determined not to use Akron brick; for, whatever defect there might have been in Bornstein's bid as to Akron brick, it was perfectly definite as to what he would charge if Louisville brick were used.

But, passing by this question, we come to the main question in the case: Was the bid made in the name of George Hoertz really made by John Hoertz, a member of the school board, and chairman of the building committee? Sections 2975, 2976, Ky. St. (Russell's St. §§ 854, 855), among other things provide as follows:

"No person shall be eligible to this office who, at the time of his election, is directly or indirectly interested in any contract with the board, or who holds any office of trust, agency or salary with any corporation which holds any contract with the board, or who is in any way benefited by the appropriations of the board; or whose father, son, brother, wife, daughter or sister is employed as teacher or as professor, or in any other capacity by said board, or in any of the public schools, or who is, directly or indirectly, interested in the sale to the board of books, stationery, or other property."

"If, after election, any member of the board should become a candidate for nomination or for any office or agency, the holding and discharging of which would have rendered him ineligible before his election, or should he remove out of the district for which he was chosen, or should he do or incur anything which would have rendered him ineligible for election, or should any of the relatives above specified be employed by the board, his office shall become vacant and be filled as herein directed."

It will thus be seen that the statute makes any person who is directly or indirectly interested in any contract with the board ineligible for election, and declares that if after election he shall become directly or indirectly interested in any such contract his office shall become vacant. By section 2768, Ky. St. (Russell's St. § 556), members of the general council are forbidden to be directly or indirectly interested in any contract with the city, and under this provision it has been held that, if a member of the council is interested in any contract made with the city, the contract is void. *Nunemacher v.*

Louisville, 98 Ky. 334, 32 S. W. 1001, 19 Ky. Law Rep. 933; *Jacques v. Louisville*, 32 Ky. Law Rep. 574; *Bradley Gilbert Co. v. Jacques*, 110 S. W. 836, 33 Ky. Law Rep. 618. Section 2768, Ky. St., provides no penalty for its violation, while section 2976 provides that the violation of its provisions shall vacate the office. The providing of this severe penalty shows that the Legislature intended to forbid the members of the school board from being interested directly or indirectly in the contracts made by it; and such contracts are no less void in the case of a trustee than in the case of a councilman. How then stands this case? John Hoertz had been for 20 years a member of the school board. During this whole time he had been making contracts with the school board for the erection of buildings. He was a contractor by business. For a while he made his contracts in the name of one Neumeyer, who was his partner. After Neumeyer's death, he made contracts in the name of others. About two years before this he had built for the school board in the name of this same George Hoertz the Sylvia Avenue Schoolhouse. He had a son, whom we shall call for distinction George, Jr.; the other George Hoertz, whom we shall call George, Sr., being a cousin of his, 66 years old, living at Beechmont, not known among the contractors of Louisville as a contractor of brickwork, and who had done no contracting of brickwork for himself in four or five years except to remodel a house for his daughter-in-law. When the advertisement appeared for the brickwork for the Duker Avenue Schoolhouse, George, Jr., went to his father and asked him if he was going to bid on the job; the father and son being then partners in contracting. He and his son say he told his son, "No," that since the new board had come in they had agreed that no members of the board should do any contracting, and George, Jr., then went to see George, Sr., without, as he says, any suggestion from his father. A bid was prepared, and the name of George Hoertz, Sr., was signed to it by John Hoertz. The proof as to the signature to this bid leaves no doubt in our mind that this is the writing of John Hoertz. When this bid was accepted by the committee, Bornstein began this proceeding, and George Hoertz in person signed the contract which was made with the school board, but he gave as his surety on his bond the father-in-law of John Hoertz, and George Hoertz, Jr., took entire charge of the matter of building the schoolhouse. He bought the material, he employed the hands; George, Sr., paying practically no attention to what was going on, and giving the matter no supervision. When estimates were made upon the work, George, Sr., would go to the school board and get the check, turn the check over to John Hoertz, and John Hoertz cashed the check. George, Sr., put not a dollar in the building and received not a dollar from it up to the

time the depositions in this case closed, and at that time the school board had paid out upon it \$9,000. George, Jr., testifies that he was by agreement with George, Sr., the foreman of the building, and was to receive \$5.50 a day. He also testifies that his father, when he collected the checks, turned all the money over to him and that he kept it in a drawer in his desk at home until he paid it out on material or to the hands as the work progressed. When the depositions closed, there was something over \$2,000 still payable by the school board, and there were some bills outstanding. But, although \$9,000 had been collected, no account had been asked by George Hoertz, Sr., of George Hoertz, Jr., and none had been rendered him. Before this work was begun, John Hoertz and son had built some cottages on Brook street with certain bricklayers. They had taken their force from there to C. T. Dearings, and added a story to his printing establishment, and these hands were taken from there to the Duker Avenue school building. John Hoertz says that he was doing nothing while George, Jr., was building the schoolhouse, and that he merely cashed the checks for convenience of George, not retaining a dollar of the money or having any interest in the contract. While George Hoertz, Sr., was rarely about the building, John Hoertz was frequently there, often going as often as twice a day. After this schoolhouse was built, he did work for the school board in six small jobs amounting to \$147, and put the voucher in the name of Joseph Kipp, having Kipp to recopy it so that it would appear in his handwriting; and, when the account was allowed, he had Kipp to sign the check and paid Kipp \$5 for his trouble. This was after the agreement between the trustees not to be interested in any contracts made with the board, and after John Hoertz says he had determined not to be interested in any such contracts, and for that reason did not bid on the Duker Avenue School. While he and his son, George, and George Hoertz, Sr., all state that he had no interest in the Duker Avenue School contract, their testimony is very unsatisfactory taken as a whole.

George Hoertz, Sr., does not know who wrote the bid to the Louisville school board, does not remember if he signed it himself, does not know the dimensions of the building, did not have any bills for the material presented to him, does not know whether the bills were paid by cash or check, or how much material was used, or how many men worked on the building, or the names of any of the men, or the average pay roll, or when or where or how the men were paid off, or how much was paid for labor or material, or how much the time of his foreman came to. To say that a man who had undertaken a contract involving over \$11,000 could be so ignorant about it as George Hoertz was, is

to say either that he was lacking in ordinary prudence or that he had for some reason no substantial interest in it; and that George Hoertz is a man of good sense is shown by his deposition. John Hoertz's testimony is inconsistent with the declarations made by him to disinterested parties whom he contradicts; and, in addition to this, his testimony lacks frankness, and has not the ring of a sincere desire to hold back nothing material to the controversy. To uphold such a transaction simply because interested parties say that John Hoertz was not interested in the contract would be in effect to hold the statute inoperative except where the parties confess to its violation. The statute is simply declaratory of a common-law rule, which lies at the basis of the proper administration of municipal affairs, and the court cannot countenance evasions of it. To permit it to be evaded in such a way, as is shown by this record, would be to destroy it.

What, then, are the rights of the parties? The house was built with money furnished by the school board. It has been accepted by the board, and, though the contract was void, the money of the board went into the house, and the board has the house. But the court will not allow either of the parties who were parties to the transaction with the school board to make a profit out of it. And we are satisfied from the record that the money paid by the board did not go into the house at least to the amount of \$2,300. Under the evidence, the circuit court should have entered a judgment enjoining the school board from paying to George Hoertz, Sr., \$2,300 of the contract price, and adjudging John Hoertz and George Hoertz, Sr., to pay the cost of the action. If, on the return of the case to the circuit court, it shall appear that the whole contract price for the schoolhouse has been paid, the circuit court will enter a judgment adjudging John Hoertz and George Hoertz, Sr., to pay to the school board \$2,300 with interest from the time the last payment was made.

Judgment reversed and cause remanded for a judgment, and further proceedings consistent herewith.

KOEHLER et al. v. BIERBAUM et al.

SAME v. OSTERHOLT et al.

(Court of Appeals of Kentucky. Nov. 24, 1909.)

1. PAYMENT (§ 38*)—APPLICATION.

Where materialmen asked for payments on particular jobs and contractors thereafter made payments in response to the demand, the contractors were entitled to have the money credited on the jobs on which they were paid.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 99, 100; Dec. Dig. § 38.*]

2. PAYMENT (§ 38*)—APPLICATION—DISCRETION OF DEBTOR.

A debtor may direct to which of two or more demands payments shall be applied, which

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

direction may not be expressed in terms, but may be inferred from circumstances.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. §§ 99, 100; Dec. Dig. § 38.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"Not to be officially reported."

Actions by Henry Koehler and others against Emelia Louise Bierbaum and others, and against Anthony Osterholt and others. Judgment for defendants in each case, and plaintiffs appeal. Affirmed.

Wehle & Wehle, for appellants. Boldrick & Gocke, for appellees.

CLAY, C. The suit by Henry Koehler, etc., lumbermen, against Emelia Louise Bierbaum, etc., was brought to enforce a mechanic's lien for \$303, with interest from April 18, 1906, on a house and lot in Louisville, Ky., for lumber furnished to the building contractors, F. W. Ballman & Son, and used by the latter in constructing the house. The suit by Henry Koehler, etc., against Anthony Osterholt, etc., was brought to enforce a mechanic's lien for \$472.04, with interest from April 18, 1906, on a house and lot situated on Jacob avenue in Louisville, Ky., for lumber furnished to the same contractors, F. W. Ballman & Son, and used by the latter in building a house on Osterholt's lot. The two cases were consolidated and heard together, because the lien in each case depends upon the state of accounts between plaintiffs, Henry Koehler, etc., and F. W. Ballman & Son, the contractors, and upon the application of certain payments made by the contractors. Judgment was rendered in each case for the defendants below, and the plaintiffs appeal.

It appears that the contractors, F. W. Ballman & Son, had been dealing with appellants for a number of years, and had purchased from them lumber for the construction of numerous houses. Appellants did not keep a separate account for each house, but kept a general account with the contractors. While the point is made that appellants failed to show that the lumber sold the contractors, and for which they seek a lien on the houses in question, was actually used in the construction of the two houses, we are of the opinion that the evidence of Henry Koehler and his bookkeeper, when considered in connection with the dray tickets accompanying the lumber, and the admissions of the contractors themselves, clearly shows that the lumber for which the lien is sought, in each instance was furnished the contractors and used by them in the construction of the houses. That being the case, the only question remaining to be considered is one of application of payments.

The evidence for appellants upon this point is to the effect that they kept only one ac-

count with the contractors. This account had been kept for years, and they had never had occasion to file any mechanic's lien. Whenever a payment was made, they simply credited it, as they had a right to do, upon the oldest item of the account. No directions were ever given by the contractors to apply any payments made by them upon either the house belonging to Mrs. Bierbaum or the house belonging to Anthony Osterholt. The proof shows that each of the appellees paid the contractors for the construction of the respective houses. Immediately thereafter the contractors made payments to appellants. There appear in the record two checks. One is dated October 31, 1905, drawn on the German Security Bank, payable to the order of Henry Koehler & Co., for \$250, and signed by W. Ballman. In the middle of the check, under the words "Henry Koehler & Co." and above the words "Two hundred and fifty dollars" are the words "For Bierbaum house." The other check is dated December 30, 1905, drawn on the German Security Bank, payable to the order of Henry Koehler & Co., and signed by Wm. Ballman, for the sum of \$400. Under the words "Henry Koehler & Co." and over the words "Four hundred dollars," and in the middle of the check, is written "For Osterholt house." It is contended that the words "For Bierbaum house" and "For Osterholt house" were not in the checks at the time they were delivered to the appellants. The testimony upon this point is not convincing either way. Neither William Ballman nor his son testified that the apparent interlineations were in the checks when they were delivered. Neither Henry Koehler nor his bookkeeper had any definite recollection of the particular checks. They state only circumstances going to show why they believed the words in question were not in the checks. The words interlined in each check were apparently written by some person other than the signer of the checks or the party who wrote the body of the checks. This is not conclusive, however, that the words were interlined after the checks were delivered. It is possible that the signer of the checks may have gotten some one to write the words in the checks before they were presented to Henry Koehler & Co. The presumption in such a case is that the words were there, and it may be doubted if the evidence for appellants is sufficient to overcome this presumption. However this may be, we are of the opinion that, aside from the checks, there is sufficient evidence of application of the payments by the contractors to each house in question. Ernest Ballman, a son of William Ballman, testified that he was at work on the Bierbaum house; that appellants sent their collector, Mr. Thornton, out to the house. He came there on Thursday or Friday, and requested the son to tell his

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

father that he would like to have some money on the job. His father paid him on the following Saturday. He also testified that Thornton called at the Osterholt house, and asked for a payment on that job. He thereafter went down and paid the \$400 check on that house. Maj. Thornton, who was collecting for Henry Koehler & Co. at the time, testified that he had called on the contractors, but that he did not ask them for payment on any particular house. He had with him just a general account, and he asked payment on the account. He did testify, however, that he used the following language: "You have got two houses going up, here one and there another one, and I think it is time for you to make a payment." Further along the witness testified: "He said he would be down on Saturday and pay and settle with Mr. Brown."

A careful reading of the whole record convinces us that there was considerable evidence tending to show that appellants, through their collector, asked for payment on each job—that is, on the Bierbaum house and the Osterholt house—that thereafter the contractors, in response to the demands made upon them, did make the payments as demanded. If appellants did ask for payments on a particular job, and the contractors thereafter made a payment in response to that demand, they had a right to expect that the money so paid should be credited upon the job upon which it was paid. Of course, the debtor has a right to direct to which of two or more demands payments made by him shall be applied. It is not necessary that this direction should be expressed in terms. It may be inferred from all the circumstances. *Foote v. Miller's Adm'r*, 15 Ky. Law Rep. 302; 30 Cyc. p. 1230. The evidence shows payments sufficient to cover the indebtedness on each house. The circumstances under which the payments were made are sufficient to show an intention on the part of the contractors that they be applied as the chancellor held they should be applied. Even if the evidence were such as to leave the mind in doubt, we would not disturb his finding.

The judgment in each case is affirmed.

PERKINS & MANNING CO. v. DREW & LANDRUM'S ASSIGNEE.

(Court of Appeals of Kentucky. Nov. 23, 1909.)

1. MORTGAGES (§ 16*)—FUTURE ADVANCES—VALIDITY.

A mortgage given in fact to secure future advances, not to exceed a certain amount, is valid, and is a lien upon the mortgaged property for advances not exceeding the amount specified in the mortgage, though by mistake the consideration for the mortgage is therein stated as an indebtedness already accrued.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 18, 19; Dec. Dig. § 16.*]

2. EVIDENCE (§ 419*)—FUTURE ADVANCES—CONSIDERATION—PAROL TESTIMONY.

Where a mortgage given to secure future advances indicates that it was given to secure an indebtedness for goods, wares, and merchandise, it was immaterial that the account was reduced to the form of notes, as the true consideration could be shown by parol.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1921; Dec. Dig. § 419.*]

3. ASSIGNMENTS FOR BENEFIT OF CREDITORS (§ 390*)—DEMURRER—ALLEGATIONS TO BE TAKEN AS TRUE.

Where the effect of the lower court's holding was to sustain a demurrer to exceptions to the assignee's report denying appellant a lien on the mortgaged property, on appeal, the allegations of the exceptions must be taken to be true.

[Ed. Note.—For other cases, see *Assignments for Benefit of Creditors*, Dec. Dig. § 390.*]

Appeal from Circuit Court, Hopkins County.

"Not to be officially reported."

Action by C. M. Lisanby, as assignee of Drew & Landrum, for the benefit of their creditors, against the Perkins & Manning Company and others. From an order overruling the Perkins & Manning Company's exceptions to the assignee's report, it appeals. Reversed and remanded.

Jonson & Jennings, for appellant. Letcher R. Fox, for appellee.

CLAY, C. C. M. Drew and H. S. Landrum were engaged in the saloon business at Dawson, Ky., and on September 21, 1908, made a deed of assignment to appellee, C. M. Lisanby, by which they conveyed to him, in trust for their creditors, the property in controversy in this action and other property. The deed of assignment was lodged for record on September 21, 1908, and recorded that day. The assignee qualified, and undertook to carry out the trust. Prior to the beginning of the partnership between C. M. Drew and H. S. Landrum, the former owned the partnership property. On November 8, 1905, he executed, acknowledged, and delivered to appellant, Perkins & Manning Company, a mortgage upon the property in controversy. This mortgage was accepted by appellant and lodged for record in the office of the clerk of the Hopkins county court. The property was in Hopkins county at the time, and remained there until sold by the assignee. This action was instituted by the assignee against the creditors of the assigned estate to settle the same. Appellant duly verified its claim against said estate, and filed it with the assignee. The latter allowed appellant's claim as a general claim against the estate, but refused to allow appellant a lien on the property covered by the mortgage. Appellant then filed exceptions to the assignee's report. These exceptions were overruled by the court. To review the propriety of this ruling, this appeal is prosecuted.

The consideration expressed in the mort

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

gage is as follows: "That whereas the party of the first part is indebted to parties of the second part for wares and merchandise delivered them as shown by the books of the party of the second part, now, therefore, to secure payment of the account, said account not to exceed \$500.00, the party of the first part has this day mortgaged and sold to the party of the second part and to their assigns and successors the following property: [Here follows a description of the property in controversy.]" In its answer and counterclaim appellant set forth six notes for \$25 each, all executed prior to the execution of the mortgage. It also set forth a claim for \$225.35 for goods, wares, and merchandise furnished to Drew and Landrum during the year 1907, and also a note for \$75, dated June 25, 1908, and due 30 days thereafter. It is charged in the answer and counterclaim, and also in the exceptions to the assignee's report, that the notes in question were executed for goods, wares, and merchandise furnished to Drew, and, after the formation of the partnership, to Drew and Landrum. It is further alleged that the mortgage was executed, not only to cover an indebtedness then due, but to secure future advances, but by mistake no provision as to future advances was stated in the mortgage.

The question whether or not a mortgage to secure future advances is valid was before this court in the case of Louisville Banking Co. v. Leonard, 90 Ky. 106, 13 S. W. 521, 11 Ky. Law Rep. 917. There the question was fully discussed and many authorities cited. The court reached the conclusion that a mortgage to secure future advances is valid to the extent of the amount named in the mortgage, although it purports on its face to be given to secure an amount advanced at the time, and that parol testimony is admissible to show the true consideration. There the consideration expressed in the mortgage was \$5,000. There was nothing in the mortgage to indicate that it was to secure future indebtedness. The court held that subsequent creditors could not be prejudiced by showing by parol evidence that the mortgage was intended to cover future advances, for the reason that the mortgage gave notice that the property was in lien to the extent of \$5,000. In the case at bar the mortgage gave notice that the property was in lien to the extent of \$500. This is the limit of appellant's lien.

There is no merit in appellee's contention that appellant is not entitled to a lien because it proved an indebtedness in the form of notes instead of an account. The language of the mortgage itself indicates that it was given to secure an indebtedness for goods, wares, and merchandise. It is immaterial that the account was reduced to the form of notes. The mortgage was given for the purpose for which it was executed,

whether the indebtedness was represented by a mere statement of account, or the account itself, or a portion of it had been merged into, and was thereafter represented by notes. Parol testimony is admissible to show the true consideration. The effect of the lower court's holding was to sustain a demurrer to the exceptions to the assignee's report denying appellant a lien on the mortgaged property. If the allegations of the exceptions are true, however—and we must take them to be true for the purposes of this discussion—appellant is entitled to a preference by reason of its mortgage. We therefore conclude that the court erred in overruling appellant's exceptions to the assignee's report.

For the reasons given, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

CLEAR SPRING DISTILLING CO. v. BOARD OF TRUSTEES OF BARDSTOWN GRADED COMMON SCHOOL DIST. et al.

(Court of Appeals of Kentucky. Nov. 23, 1909.)

SCHOOLS AND SCHOOL DISTRICTS (§ 30*) — GRADED COMMON SCHOOL DISTRICT—BOUNDARIES.

Ky. St. 1909, § 4464 (Russell's St. § 5736), providing that no point on the boundary of a proposed graded common school district shall be more than $2\frac{1}{2}$ miles from the site of its proposed schoolhouse, etc., when considered in connection with section 4481 (section 5758), authorizing the trustees to order an election to submit the question of the issuance of bonds to provide grounds and buildings, etc., and section 4439 (section 5715) authorizing proceedings to condemn a site for a schoolhouse not exceeding one acre, requires that the $2\frac{1}{2}$ -mile boundary for a graded common school district shall be measured from the outer boundary of the site of the school building, provided the site does not exceed one acre.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 50; Dec. Dig. § 30.*]

Appeal from Circuit Court, Nelson County.
"To be officially reported."

Action by the Clear Spring Distilling Company against the Board of Trustees of Bardstown Graded Common School District and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

John D. Wickliffe, for appellant. Redford C. Cherry and John S. Kelley, for appellees.

NUNN, C. J. The county court of Nelson county recently established a graded common school district in the city of Bardstown, the boundary of which included several warehouses containing 15,000 barrels of whisky, upon both of which the trustees claim the school district is entitled to taxes. The trustees obtained 8 or 9 acres of land and erected a schoolhouse upon it, and the county court, in establishing the outside boundary line of

the district $2\frac{1}{2}$ miles from the outer boundary of the eight or nine acres survey, included the warehouses and whisky. We copy an excerpt from the facts as agreed by the parties, which is as follows: "If a straight line is run from the northwestern portion of said school site in a northwesterly direction towards plaintiff's distillery warehouses, the line inscribed by this radius will include the whisky and warehouses in controversy; while, if such line is run from the main school building, said whisky and warehouses will be excluded from the $2\frac{1}{2}$ -mile boundary line of said district."

The only question to be determined is: From what point should the measurement begin to arrive at the outer boundary $2\frac{1}{2}$ miles from the school site? It is provided in section 4464, Ky. St. (Russell's St. § 5736), under title of "Graded Common Schools," as follows: "No point on the boundary of any proposed graded common school district be more than two and one-half miles from the site of its proposed schoolhouse, and that the location and site of said schoolhouse in said district are set out with exactness in said petition to the county judge." Section 4481 of the Statutes (Russell's St. § 5758) provides that the trustees of graded common school districts may order an election, and submit to the voters of the district the question whether or not the trustees thereof shall issue bonds for the purpose of providing suitable grounds, school buildings, furniture, and apparatus for the proposed graded common school district. It is further provided in this section that: "Said board of trustees shall provide funds for purchasing suitable grounds and buildings, or for erecting or repairing suitable buildings, and for other expenses needful in conducting a good graded common school in their graded common school district." There is no direct and positive authority given the trustees in graded common school districts to purchase suitable grounds, etc., for the erection of school buildings, but this must necessarily be inferred from the language quoted from section 4481, and it would be unreasonable to construe the statute as confining the trustees to a site only sufficient to erect a building upon. It is our conclusion that the General Assembly never contemplated that the measurement of the $2\frac{1}{2}$ miles should begin at the building. We are also of the opinion that it did not contemplate that such measurement should begin at the outer boundary of any survey of land that the trustees might procure by purchase or gift for school purposes, for the

trustees might procure 100 acres or more, and thereby enable their district to obtain an advantage for educational purposes over the surrounding districts, and it would enable them to tax persons in that district who would be unable to derive any benefit from the school by reason of the great distance therefrom. As stated, under the title of "Graded Common Schools," article 10 of the General Statutes, the General Assembly, by inference only, authorized the trustees to purchase a site for a school building, but did not authorize them to take steps in the county court to condemn land for such purposes, in case they could not agree with the owner of the land for its purchase. The General Assembly, when it enacted the sections of the statute included in article 10, and which have special reference to graded common schools, knew that it had enacted section 4439 (section 5715) under the head of "Common Schools," applying to all common schools, which includes graded common schools. By that section the trustees are authorized to condemn a site for a schoolhouse when they cannot agree with the owner on the price. It is also provided by that section that "the quantity of land thus condemned shall not in any case exceed one acre."

Our conclusion is that the General Assembly, in enacting section 4464 of the Statutes, intended that the $2\frac{1}{2}$ -mile boundary of graded common school districts should be measured from the outer boundary of the site of the school building, provided the site does not exceed one acre. It was not intended to confine the trustees of a graded common school to one acre of land if they saw proper to procure more, but meant to confine the taxing district within the above limits. This, in our opinion, is the only reasonable construction that can be given the statutes upon this subject. The following authorities, while not exactly in point, throw some light upon the subject: *Trustees Paintsville School District v. Davis*, 64 S. W. 438, 23 Ky. Law Rep. 838, *Jackson v. Brewer*, etc., 112 Ky. 554, 66 S. W. 396, 23 Ky. Law Rep. 1871, and *Hundley*, etc., v. *Singleton*, Supt., etc., 66 S. W. 279, 23 Ky. Law Rep. 2006. The agreed state of facts is insufficient to enable us to settle this case. We cannot tell whether the warehouses and whisky will be included when the measurement is made to begin at the outer boundary of an acre, considering the school building as in the center of the acre.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

HONAKER et al. v. JONES.

(Supreme Court of Texas. Dec. 1, 1909.)

VENDOR AND PURCHASER (§ 281*)—VENDOR'S LIEN—EVIDENCE.

Evidence held not to show that a note was given for a part of the purchase money for which property was originally sold, so as to make it a vendor's lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 281.*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. E. Jones against W. B. Honaker and others. From a judgment of the Court of Civil Appeals, reforming and affirming a judgment for plaintiff (115 S. W. 649), defendants bring error. Reformed and affirmed.

Smith & Wilcox and Garnett & Hughston, for plaintiffs in error. Wm. M. Jones, for defendant in error.

GAINES, C. J. This suit was brought by defendant in error, J. E. Jones, against plaintiffs in error, J. N. Shelton, W. B. Honaker, and W. P. Herron, to recover of Shelton on three promissory notes and to enforce a lien for their payment. The first and second of the notes are each for \$1,000, and are payable on the 14th day of December, 1895, and the 14th day of December, 1896, respectively, and each of which expresses that it is given for a part of the purchase money "for a livery stable and outfit with two lots of land situated in Farmersville, Collin county, * * * upon which a vendor's lien is expressly retained to secure the payment hereof." The third of the notes is dated June 10, 1903, and is for \$260.75, due July 1, 1903, but contains no expression as to any lien. All the notes provide that, in case they are put in the hands of an attorney for collection, 10 per cent. attorney's fees shall be due. We have examined the opinion of the Court of Civil Appeals in connection with the application for the writ of error, and are satisfied that no error is pointed out save in one particular, which we shall now proceed to discuss.

The trial court decreed that a lien existed upon the lots of land which were originally sold by Jones to Shelton and Hill to secure the payment of the note for \$260.75, for which judgment was given. The note as we have seen expresses no lien. To make it a lien, it must have been given for a part of the purchase money for which the property was originally sold. Is such the fact? We think not. Shelton himself testified that a part of the note was for rent of the shed to the barn at \$45 per annum, but for how many years he does not say. Jones in his testimony is just as indefinite. There were many transactions between Shelton and Jones, and it is hardly probable that after

this long lapse of time any one could tell how this \$260.75 was involved, and how much, if any, was a part of the original purchase money for the livery stable outfit. Accordingly the judgment upon the two promissory notes for \$1,000 each and with a decree enforcing a lien for their payment upon the property mentioned in the judgment will be permitted to stand, and a personal judgment on the \$260.75 note will be rendered, but without any lien for its payment.

The judgment will be accordingly reformed and affirmed. The plaintiffs in error will recover the costs of the Court of Civil Appeals and of the Supreme Court.

CLEVINGER v. BLOUNT.

(Supreme Court of Texas. Nov. 24, 1909.)

1. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.

Where, in trespass for cutting timber, the jury found that defendant intentionally and knowingly cut the timber, and he did not exercise the care of a prudent man to ascertain that the timber was not on plaintiff's land, the refusal to charge that plaintiff was estopped, if his agent pointed out the land from which the timber was taken as land purchased from plaintiff by defendant, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. § 1068.*]

2. TRIAL (§ 256*)—INSTRUCTIONS—REQUESTS—NECESSITY—"PRUDENT PERSON."

A charge in trespass for cutting timber that if defendant cut the timber intentionally and willfully, and did not exercise the care a "prudent person" would have exercised, he was liable, was sufficient as against the objection that the phrase "a prudent person" in the instruction should have been qualified by the word "ordinarily," in the absence of a request for a more specific charge; for the phrase "a prudent person" in the charge meant an ordinarily prudent person.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.*]

For other definitions, see Words and Phrases, vol. 6, p. 5770.]

3. APPEAL AND ERROR (§ 1082*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN APPLICATION FOR WRIT OF ERROR.

The Supreme Court will not notice objections to the instructions unless made in the application for a writ of error to review the judgment of the Court of Civil Appeals affirming the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1133, 4231; Dec. Dig. § 1082.*]

4. ESTOPPEL (§ 54*)—ACTS CONSTITUTING ESTOPPEL.

Under the rule that, where a party has the means of readily ascertaining the true facts, the adverse party is not estopped when a party failed to procure a surveyor to run the lines of his lands and ascertain that the agent of the adverse party, pointing out the lines, was mistaken, the adverse party was not estopped from claiming damages for the timber cut on his land, though within the lines pointed out by his agent.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128-135; Dec. Dig. § 54.*]

5. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

The error in taking interrogatories propounded to a party, and not answered by him, as confessed, is cured where the party is permitted to testify as to the matters inquired about.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by E. A. Blount against Joe P. Clevenger. There was a judgment of the Court of Civil Appeals (114 S. W. 868) affirming a judgment for plaintiff, and defendant brings error. Affirmed.

Hunt, Myer & Townes, King & Strong, and D. M. Short & Sons, for plaintiff in error. Blount & Garrison, for defendant in error.

GAINES, C. J. This action was brought by E. A. Blount against Joe P. Clevenger to recover damages for the cutting and appropriating of timber upon the land of plaintiff. The plaintiff recovered a judgment for \$7,000—the value of the lumber into which the timber was manufactured. Clevenger was a sawmill owner, and bought of Blount 829 acres of land. The defense to the action was that if defendant had cut the timber upon plaintiff's land, which was denied, it was cut under a mistake of fact evidenced by the representation of John S. Doughtie, who acted as agent of the plaintiff in the sale of the land, and who, as alleged, pointed out the land upon which the timber was cut as the land that was to be sold.

The first assignment of error in the application for the writ of error was that the court erred in not instructing the jury that if Doughtie pointed out the land purchased or to be purchased, and showed the land from which the timber was taken as a part of that purchased or to be purchased, Blount would be estopped to claim any damage for the timber so cut. The court charged the jury that if they should find that defendant, Clevenger, cut the timber intentionally and wrongfully, and could have known by the use of the care which a prudent person would have exercised, in order to ascertain the fact, whether the timber belonged to him or to plaintiff, then they should return a verdict for the plaintiff for the value of the timber as manufactured into lumber by the defendant; but that, if they should find that defendant cut and appropriated the timber on the land of plaintiff, after having exercised the care of a prudent person to ascertain that the timber was not on the land of the plaintiff, then they should find for the plaintiff the value of the timber as it stood on the land. The jury found expressly for \$7,000, the value of the timber as manufactured into lumber. Thus, it is seen, that the jury found that the defendant intention-

ally and knowingly cut the timber, and that he did not exercise the care a prudent man would have exercised, in order to ascertain that the timber cut by him was not upon the land of the plaintiff. So it appears that, if the issue of estoppel had been submitted to the jury, the verdict would necessarily have been the same.

These charges are also objected to for the reason that they say "a prudent person" without annexing the qualifying adverb "ordinarily." But we think that "a prudent person" means an "ordinarily" prudent person, and that, if defendant wanted a more specific charge, he should have asked for it. We do not notice any objection to the charges except those made in the application for the writ.

There is much complaint in the application for the writ of error that the jury were not told that, if the agent of the plaintiff pointed out the timber upon the land and made a mistake in so doing and the defendant cut the timber so pointed out, plaintiff would be estopped to claim damages for the timber so cut. But the authorities hold that, if a party has the means of readily ascertaining the true facts and fails to exercise such means, the other party will not be estopped. 16 Cyc. 738, and cases there cited; Hale v. Skinner, 117 Mass. 474; Park Ass'n v. Shartzer, 83 Md. 10, 34 Atl. 536; Perkin's Lumber Co. v. Thomas, 117 Ga. 441, 43 S. E. 692; Western Land Ass'n v. Banks, 80 Minn. 317, 83 N. W. 192; Murphy v. Clayton, 113 Cal. 153, 45 Pac. 267. The defendant, by getting a surveyor and running the lines, could easily have ascertained that the agent was mistaken in his statements, and could have ascertained the true facts, and this he failed to do. Besides, it seems that the rules of estoppel do not apply to representations as to the boundaries between estates. Liverpool Wharf v. Prescott, 7 Allen (Mass.) 494; Thayer v. Bacon, 3 Allen (Mass.) 163, 80 Am. Dec. 59; Brewer v. Boston & W. R. Co., 5 Metc. (Mass.) 478, 39 Am. Dec. 694. It is to be observed that the witness Doughtie did not admit that he had misrepresented the boundaries of the land. He testified that he showed the defendant the line about which he is claimed to have been mistaken.

It is also assigned that the court erred in permitting the interrogatories to defendant, which had been propounded to him by plaintiff and which he had not answered, to be read and taken as confessed. The interrogatories were propounded by the plaintiff, and the notary to whom they were committed issued a notice to the defendant to appear at 2 o'clock on a certain day, at his office, to take the deposition. The defendant told the notary that he would not answer the interrogatories. As to the question of answering the interrogatories, the de-

defendant Clevenger and the notary both testified. The court held that the interrogatories should be taken as confessed. But counsel for the plaintiff withdrew all objection to Clevenger testifying in his own behalf, and he subsequently testified in the case upon all the points inquired about in the interrogatories. We think that, if the court erred in taking the interrogatories as confessed, the error was cured when the defendant was permitted to testify fully as to the matters inquired about, and that no prejudice was done by the court to the defendant in its ruling.

Finding no error in the proceedings which led to the judgment, it is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. REYNOLDS.

(Supreme Court of Texas. Nov. 24, 1909.)

1. RAILROADS (§ 401*)—DISCOVERY OF PERSON ON TRACK—DUTY TO AVOID INJURY—INSTRUCTION.

Where those in charge of a locomotive discover a person on the track, and it becomes reasonably apparent that he will not leave the track before the engine reaches him, the law requires of them the exercise of such care to avoid injury as persons of ordinary prudence would use in such emergency proportionate to the danger, but what acts and expedients are required in a given situation is for the jury, and not for the court, except when the facts leave no room for difference of opinion; and hence in an action for injuries to a person struck by a locomotive, where it appeared that the railroad employes on the foot board of the engine gave warning cries, tried to turn the angle cock to set the brakes, and tried with partial success to push the injured person from the track, and there was a question what was the best course of conduct, and whether what was done was all that ought reasonably to have been expected of persons of ordinary prudence called upon to act in such surroundings, a charge that it was the duty of an employé operating an engine upon discovering a person on the track when it became reasonably apparent that he would not leave it before the engine reached him to use every means within his power in the exercise of ordinary care "to stop the engine" and avoid striking a person was error.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 401.*]

2. RAILROADS (§ 401*)—INJURY TO PERSONS ON TRACK—INSTRUCTIONS—"KNOWING."

The fact that the charge did not require that employes on the engine should have "realized" the danger, but made it suffice to raise the duty defined if they had "reasonable ground to believe and it was apparent to them" that the person was in danger, would not render it objectionable, since for practical purposes a person must be treated as knowing a fact when he has reason to believe it and when it is apparent to him.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 401.*]

For other definitions, see Words and Phrases, vol. 5, p. 3937.]

3. RAILROADS (§ 401*)—INJURY TO PERSON ON TRACK—INSTRUCTIONS.

A requested charge that if the employes on the engine did all they could to avoid injuring the person on the track, and that the means

they used were such as a person of ordinary care would have used under the same or similar circumstances, defendant should recover, though the employes did not apply air on the engine nor attempt to stop it, was erroneous as unduly restricting the inquiry, since it might be true that a person of ordinary care would have used the means adopted and at the same time would also have attempted to stop the engine.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 401.*]

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by C. T. Reynolds against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment of the Court of Civil Appeals affirming a judgment for plaintiff (115 S. W. 340), defendant brings error. Reversed and remanded.

Coke, Miller & Coke, Jno. C. Wall, and Head, Dillard, Smith & Head, for plaintiff in error. Wolfe, Hore & Maxey, for defendant in error.

WILLIAMS, J. This writ of error is from a judgment affirmed by the Court of Civil Appeals in favor of defendant in error (plaintiff below) against plaintiff in error for damages sustained by the former from being struck by an engine of the railroad company under the following circumstances: Reynolds walked east along a street in Denison to its intersection with another street running north and south along which run several tracks of the defendant. He stopped upon one of these tracks to await the passing of a train upon another track in front of him. Just at this time, about 15 or 20 feet from plaintiff, a switch engine was backing north along the track upon which he stood, moving two to four miles an hour. Three employes rode upon a foot board at the end of the tender, and saw plaintiff as he stopped in the perilous position, and knew that he was in danger of being struck. Their testimony is to the effect that each of them at once gave warning cries to plaintiff, one of them directed another to turn the angle cock, near which the latter stood, so as to set the air brakes, which the latter at once tried to do, while the third, seeing that plaintiff did not heed their shouts, leaned forward to shove him out of the path of the engine, in which the employé so far succeeded that only one of plaintiff's legs was caught and crushed. According to this testimony the man who attempted to set the brakes could not do so sooner than they were set by the engineer—too late to prevent the injury. The plaintiff was not seen from the cab, but the engineer says he heard the halloo of one of the men on the foot board, and made a service application, and that then the fireman hallooed and he made an emergency application. The plaintiff had then been knocked down.

The plaintiff introduced testimony of ex-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

perts tending to show that the engine, moving at the rate of speed stated by some of the witnesses, could have been stopped by the proper use of the air brakes in a shorter distance than that traversed by it before it struck plaintiff, and inferentially that the servants did not make proper effort to stop. This will serve to show the state of the evidence sufficiently for the purposes of the decision.

The error for which this writ was granted will appear in the following instruction given to the jury; the objectionable feature appearing also in other parts of the charge: " * * * But, on the other hand, if such employé, while so operating an engine, sees a person standing on such track and it reasonably appears that such person is not aware of the approach of the engine, and it becomes reasonably apparent that he will not leave the track before the engine reaches him, it is the duty of such employé to use every means then reasonably within his power in the exercise of ordinary care to stop such engine and avoid striking such person." In this the court determines for the jury as a matter of law that the effort of the defendant's employes must have been directed to the stopping of the engine. There is no rule of law that requires that specific thing. What the law requires is the exercise of the care to avoid injury which persons of ordinary prudence would use in such emergencies. This care must, of course, be proportioned to the danger, but what acts and expedients constitute it in a given situation is a question to be determined by the jury, and not by the court. *S. A. & A. P. Ry. Co. v. Hodges*, 120 S. W. 848; 2 *Thompson on Neg.* §§ 1734, 1738. The evidence shows that several things suggested themselves as proper to be done and that some of these were done, or attempted, by the employes to avert the collision. Was it best for the employes to do as the jury might find they did, or that they should have directed their attention more to the stopping of the engine? Was what they did in the emergency in which they thus suddenly found themselves the exercise of that kind and degree of care that men of ordinary prudence would have used in their situation? We think it quite clear that these are questions to be determined by the jury, and to be determined from the facts and circumstances as they existed and appeared at the time, and not by looking backward and inquiring merely whether or not the event proved that some other course than that pursued would have been more effectual in preventing the injury. Of course, if it be true that all was not done that could have been done to stop the engine, that fact is to be considered, but it is to be made the reason for liability only in case the jury shall find that what was done fell short of the measure of care required by the law. It is true that such a charge as that in question, applied to some

states of fact, would not be subject to the objection made to this, for the reason that those facts might show that there was no other course open to those in charge of an engine but to try to stop it. Such charges have been presented in cases coming before this court and have not been regarded as objectionable, for the reason that the court always may assume that about which there is no dispute. This cannot be said in cases like this, where the question is raised by the evidence as to what was best among several courses of conduct and whether or not that which was done was all that ought reasonably to have been expected of persons of ordinary prudence called upon to act in such surroundings. Under the facts of this case, the charge not only determined a question which belonged to the jury when it assumed that the engine must have been stopped if that could have been done by the means at hand, but in thus confining the jury to that one question improperly narrowed the issue. The most complete diligence to stop an engine while under some conditions constituting all that could be expected might under others be less than the full performance of the duty to exercise the care of an ordinarily prudent person. In some situations warnings and other expedients are more effectual than any effort to stop would be. *Sanches v. Railway*, 88 Tex. 120, 30 S. W. 431. While we are far from any purpose to relax the requirement which the law for the preservation of life makes of those controlling agencies in the operation of which life is put in peril, we must hold that such requirement is that they exercise the care which persons of ordinary prudence would employ in situations involving such immediate danger, and that the jury are the judges as to what measures of diligence are necessary to constitute that care under given circumstances. It is only when the facts leave no question open for controversy or difference of opinion that the court may assume that a particular course of action is required.

Further objection is made to the charge because it did not require that the employes should have "realized" the danger, but made it suffice to raise the duty defined if they had "reasonable ground to believe, and it was apparent to them," that plaintiff was in danger. For practical purposes, we think a person must be treated as knowing such a fact when he has reason to believe it and when it is apparent to him. When facts are seen by those operating an engine which ought to produce the conclusion in the ordinary mind, they must act upon them. No other rule could be practically applied.

The seventh special charge requested by defendant is as follows: "If you believe from the evidence in this case that defendant's servants on its engine did all they could to make the plaintiff leave the track and to place the plaintiff into a place of

safety and avoid injuring him, and that the means they used in doing this were such means as a person of ordinary care would have used under the same or similar circumstances, you will find for the defendant, although you may believe they did not apply air on the engine or attempt to stop the engine." This is open to one of the criticisms passed upon the charge of the court. It unduly restricts the inquiry in that it makes sufficient that which defendant's servants did, although they did not attempt to stop the engine, if the means they used "were such means as a person of ordinary care would have used under similar circumstances." It might be true that such a person would have used such means and at the same time be true that he would also have attempted to stop the engine. To the completeness of a charge constructed as this is, it is essential that it require that the means used by the servants constituted all that a prudent person would have done. We do not sustain the contention of plaintiff in error that the court should have directed a verdict for it.

We find nothing else needing discussion.

Reversed and remanded.

HOUSTON OIL CO. OF TEXAS et al. v. KIMBALL et al.

(Supreme Court of Texas: Dec. 1, 1900.)

1. VENDOR AND PURCHASER (§ 242*)—BONA FIDE PURCHASERS—BURDEN OF PROOF.

One claiming under a junior deed taken while Act Dec. 20, 1836 (1 Laws 1836, p. 156, § 40; Hart. Dig. art. 2757), providing that no deed shall take effect as to the rights of third parties until it has been presented to the court as required by the act for the recording of land titles was in force, held title until those claiming under a prior unrecorded deed proved notice to the subsequent grantee, or want of a valuable consideration; the burden not being on the claimant under the junior deed to prove that the junior grantee was an innocent purchaser for value without notice.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 603-605; Dec. Dig. § 242.*]

2. TRIAL (§ 84*)—OBJECTIONS TO EVIDENCE—SECONDARY EVIDENCE—FAILURE TO OBJECT.

Rev. St. 1895, art. 2312, provides that every writing which has been duly recorded after being proven or acknowledged as provided shall be admitted as evidence without proving its execution; provided the party offering it files it at least three days before the commencement of trial and with notice to the opposite party, unless the latter files an affidavit of forgery. The act also provides that whenever any party shall file an affidavit stating that a recorded instrument has been lost, or that the original cannot be procured, a certified copy thereof may be admitted in evidence. When a certified copy of a deed was offered in evidence in trespass to try title, defendant objected to its admission on the ground that it did not sufficiently identify the land conveyed, and offered in evidence an original grant to another in the same colony in which the land conveyed was situated, and of

the same date of the survey of the parties' remote grantor and issued by the same commissioner, but did not call the court's attention to an affidavit of forgery of the deed to plaintiff's grantor, or object to the admission of the copy for want of proof of execution, or of the loss of the original deed, or object that the copy had not been filed for three days before trial with notice to them. Held, that the certified copy was properly admitted, and was prima facie evidence of the execution of the deed by the grantor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-222; Dec. Dig. § 84.*]

3. TRIAL (§ 105*)—OBJECTIONS TO EVIDENCE—FAILURE TO OBJECT TO COPY—EFFECT.

Defendant could disprove the execution of the deed under which plaintiffs claimed in trespass to try title, so as to overcome the prima facie case made by the introduction of a certified copy, though he did not object to the copy for want of proof of the execution of the original.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 265; Dec. Dig. § 105.*]

4. DEEDS (§ 207*)—EVIDENCE—FORGERY—CIRCUMSTANTIAL EVIDENCE.

Forgery of a deed may be proved by circumstantial evidence.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 615; Dec. Dig. § 207.*]

5. DEEDS (§ 53*)—FORGERY—QUESTION FOR JURY.

Evidence held not to justify a finding that a deed, through which plaintiff claimed in trespass to try title, was a forgery, so that a requested charge submitting the issue of forgery was properly refused.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. § 53.*]

6. VENDOR AND PURCHASER (§ 230*)—DEEDS—BONA FIDE PURCHASERS—NOTICE—RECITALS—EFFECT.

A provision in a deed binding the grantor, his heirs, executors, etc., to return the purchase money if it should appear of record in Texas that the described land was incumbered, was not evidence that the grantee had knowledge of a conveyance of the land by his grantor to a third person prior to the deed to himself; such senior conveyance being then on record, much less to show that he suspected that the deed to him was a forgery.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 508; Dec. Dig. § 230.*]

7. APPEAL AND ERROR (§ 672*)—REVIEW—ERROR "APPARENT" ON FACE OF RECORD.

Rev. St. 1895, art. 1014, providing that in all cases of appeal to the Court of Civil Appeals the trial shall be on an error in law, either assigned or apparent on the face of the record, means by "apparent on the face of the record," fundamental error which can be readily seen to go to the foundation of the action without looking into the record and considering the evidence, etc., to determine whether there is error; "apparent" meaning clear or manifest to the understanding, plain, evident, obvious.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2867; Dec. Dig. § 672.*]

For other definitions, see Words and Phrases, vol. 1, p. 440; vol. 8, p. 7577.]

8. APPEAL AND ERROR (§ 719*)—ASSIGNMENT OF ERRORS—EFFECT OF FAILURE TO ASSIGN.

Errors not apparent on the face of the record and not assigned in the trial court for presentation to the Court of Civil Appeals, as required, cannot be considered by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2968; Dec. Dig. § 719.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

9. APPEAL AND ERROR (§ 1068*)—HARMLESS ERROR—FAILURE TO INSTRUCT.

Where the court assumed that defendants' title was sufficient to sustain the three-year limitations and charged the statute, and the jury found that they had not held possession for three years, defendants were not injured by failure to charge the five and ten year limitations, since the character of possession necessary was the same under either statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4223-4227; Dec. Dig. § 1068.*]

10. TRIAL (§ 252*)—INSTRUCTIONS—APPLICABILITY OF EVIDENCE.

Where, in trespass to try title, there was no evidence to show that the tenants of defendants' grantor held possession of the land for three years, there was no error in not submitting the question of possession of such tenants in a charge upon the three-year limitations as to such grantor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 600; Dec. Dig. § 252.*]

11. ADVERSE POSSESSION (§ 44*)—SUFFICIENCY OF POSSESSION—CONTINUITY.

Even if a tenant agreed to hold possession of a league of land for one claiming title thereto, there was no title by limitations through such tenant, where the evidence did not show continued possession of the tenant or of persons claiming under him, acknowledging the title of the claimant, and exercising the right of possession of the entire league.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 226-231; Dec. Dig. § 44.*]

12. ADVERSE POSSESSION (§ 96*)—EXTENT OF POSSESSION—PROPERTY IN ACTUAL POSSESSION.

In order to establish title by limitations to a league of land by the possession of tenants, there must be possession by the tenant or those claiming under him of the entire league in the name of the claimant.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 533-536; Dec. Dig. § 96.*]

13. DEEDS (§ 40*) — DESCRIPTION — SUFFICIENCY.

A deed conveyed all of a tract, containing 4,428 acres, commencing at a post on the west bank of the Neches, thence west, 10,000 yards, thence north, 2,500 yards, thence east, 10,500 yards, thence down said river, to commencement, 11 labors arable and 14 labors pasture land, it being the league granted by the commissioner named of a certain colony on a certain date, and referred to the original plat and field notes on file in the General Land Office for a more particular description. The field notes in the grant corresponded with the description in the deed, except the word "varas" was used instead of "yards," and the grant particularly described the northeast corner of the survey by calling for bearing trees marked so that they could be identified, and a certified copy of the original English field notes corresponded with the description given in the grant and deed, except that it described the corners with more particularity. Held, that the original grant and English field notes, to which reference was made in the deed, sufficiently described the land conveyed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 81-83; Dec. Dig. § 40.*]

14. DEEDS (§ 40*)—DESCRIPTION—SUFFICIENCY—REFERENCE TO OTHER INSTRUMENT.

The description of the land conveyed by a deed which referred to the grant and field notes for a more particular description was sufficient,

if the description in the instruments referred to sufficiently described the land.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 81-83; Dec. Dig. § 40.*]

15. ADVERSE POSSESSION (§ 104*)—PRESUMPTION OF GRANT—REBUTTAL OF PRESUMPTION.

In trespass to try title, where defendants claimed that another by long silence and non-action as to his title to the land in controversy had abandoned claim thereto, and relied on that fact to raise a presumption of a transfer of his right to one under whom defendants claimed, testimony of such other's children as to declarations by him as to his ownership of the land was admissible to show that he had not abandoned his claim thereto.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 602; Dec. Dig. § 104.*]

16. NEW TRIAL (§ 102*)—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

There was not sufficient diligence to entitle defendants to a new trial where the judgment was entered September 24th and the court adjourned October 25th, and on October 24th defendants filed their motion for new trial on the ground of newly discovered evidence consisting of an affidavit, which was made by the witness on October 8th, as plaintiffs did not have sufficient time after the filing of the affidavit to contest it.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 210, 212; Dec. Dig. § 102.*]

17. DEEDS (§ 199*)—EXECUTION—ADMISSIBILITY OF EVIDENCE.

In trespass to try title, in which defendants claimed that the deed to plaintiff's remote grantor was forged, but the evidence did not justify a finding of forgery, evidence that such grantor was reputed to be a forger of land titles was not admissible.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 595, 596; Dec. Dig. § 199.*]

18. VENDOR AND PURCHASER (§ 233*)—INNOCENT PURCHASERS—APPLICATION OF DOCTRINE—UNRECORDED DEED.

Under the law of 1837, a conveyance of the same land made after a prior conveyance to another by an unrecorded deed vested in the subsequent grantee the legal title with an equity in the prior grantee to show a superior title by proving notice to the subsequent grantee, or want of a valuable consideration and, since the latter need not record his deed to give notice to the prior grantee, and the prior grantee or his vendees were not bound to examine the record for subsequent conveyances, the doctrine of innocent purchasers would not apply.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 563-566; Dec. Dig. § 233.*]

19. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—SEARCHING RECORD.

A purchaser need only examine the record for conveyances made prior to his purchase by his immediate or remote vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 514; Dec. Dig. § 231.*]

20. VENDOR AND PURCHASER (§ 220*)—INNOCENT PURCHASERS—PROTECTION OF PERSON CLAIMING UNDER INVALID DEED.

Under the law of 1837, a deed which passed no title had no effect so that, if a description in a subsequent deed to the same land was insufficient to pass title, title would remain in the prior grantee under an unrecorded deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 462; Dec. Dig. § 220.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

21. TRESPASS TO TRY TITLE (§ 40*)—ADMISSION OF EVIDENCE—DEEDS—RECITALS.

In trespass to try title, in which both parties claimed through deeds from N., a certified copy of the deed from N.'s grantee, through whom plaintiffs claimed, to another, was not inadmissible because it referred to a prior grant for a fuller description and recited that it was acquired by the grantor by deed from N., which deed was also therewith delivered duly recorded; the recital being merely descriptive of the land sold.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. §§ 55-61; Dec. Dig. § 40.*]

22. APPEAL AND ERROR (§ 843*)—QUESTIONS CONSIDERED—QUESTIONS UNNECESSARY TO DECISION—EFFECT OF CURATIVE ACT.

Whether a foreign acknowledgment of a deed was defective need not be determined on appeal, where any defect in the acknowledgment was cured by a subsequent statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. § 843.*]

23. ACKNOWLEDGMENT (§ 47*)—DEFECTS—CURATIVE ACTS.

The act of 1871 (Laws 1871, p. 77, c. 76), permitting acknowledgment of every instrument for record, when acknowledged within the United States, to be taken before some judge or clerk of a court of record having a seal, was in force when Act April 27, 1874 (Laws 1874, p. 152, c. 105), was enacted, which provided that every deed required to be registered, which shall have been heretofore acknowledged in the manner required by law, within the United States, before any officer now authorized by law to take such acknowledgments, and which shall have been duly certified by such officer, shall be held to be acknowledged with the full consequences of existing laws. *Held*, that since a judge of the Supreme Court of Louisiana could have legally taken an acknowledgment of a deed when the act of 1874 was passed, any defect in the acknowledgment of a deed, acknowledged before a judge of such court a number of years before that date, because the statute of the republic of Texas then in force required foreign acknowledgments to be taken before consular agents, etc., was cured by the act of 1874, and hence a copy of such deed was admissible in evidence.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 235-240; Dec. Dig. § 47.*]

24. EVIDENCE (§ 84*)—FOREIGN COURTS—PRESUMPTIONS.

From the known powers of appellate courts and pursuant to statute, the Supreme Court will presume that the Supreme Court of Louisiana is a court of record, and hence has a seal.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 106; Dec. Dig. § 84.*]

25. COURTS (§ 48*)—COURTS OF RECORD—SEAL.

While a seal is not necessary to a court of record, the term "court of record" implies that it has a seal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 173; Dec. Dig. § 48.*]

26. ACKNOWLEDGMENT (§ 47*)—CURATIVE ACTS—RETROACTIVE EFFECT—AFFECTING RULES OF EVIDENCE.

Act April 27, 1874 (Laws 1874, p. 152, c. 105), provides that every deed required to be registered, which shall have been heretofore acknowledged in the manner required by law, within the United States, before any officers now authorized to take such acknowledgments, and which shall have been duly certified by such officers, shall be held to be duly acknowledged with the full consequences of existing laws, provided that the act shall not affect any right acquired prior to its passage. *Held*, that the act

only affected rules of evidence, and gave no greater effect to a deed, the defective acknowledgment of which it cured, than it had under the law existing when it was executed.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 235-240; Dec. Dig. § 47.*]

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Walter E. Kimball and others against the Houston Oil Company of Texas and others. A judgment in favor of plaintiffs was affirmed by the Court of Civil Appeals (114 S. W. 662), and defendants bring error. Affirmed.

Lanier & Martin, Talliaferro & Nalle, and Denman, Franklin & McGown, for plaintiffs in error. Pressley K. Ewing, J. D. Martin, E. E. Easterling, S. M. Johnson, and W. D. Gordon, for defendants in error.

BROWN, J. Walter E. Kimball and others instituted this suit in the district court of Hardin county against the Houston Oil Company of Texas and others to recover a league of land granted by the government of Coahuila and Texas to O. C. Nelson, and located in said county. The plaintiffs' petition contained the usual allegations of trespass to try title, which was answered by the defendants by a plea of not guilty, and the statutes of limitation of three, five, and ten years, to which plaintiffs replied by a general denial and disability of some of the plaintiffs.

Briefly stated, the following are the principal facts of this case: O. C. Nelson, from whom both parties claimed, owned the land in controversy, and by a deed duly executed on the 28th day of November, 1837, conveyed the entire tract to David Brown, which deed was not recorded until the 16th day of March, 1842. On the 13th day of March, 1838, O. C. Nelson executed and delivered to Isom Farmer a deed conveying to him the same tract of land. This deed was recorded in the proper county on the 23d day of February, 1842. Payment of the consideration was acknowledged in each of said deeds. Plaintiffs in the court below had a consecutive chain of transfers from Isom Farmer to their father, and defendants had such transfers from David Brown down to the Houston Oil Company of Texas. The foregoing statement presents the case in its general outline; and such other facts as may be relevant to questions raised by assignments of error will be discussed and stated in connection therewith.

Plaintiffs in error request that this court again consider the point decided on certified question, now contending, as before, that the burden was upon the plaintiffs to prove that Farmer paid a valuable consideration to Nelson, and did not have notice of the deed from Nelson to Brown. We are of opinion that the decision of this court in Kimball v.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Houston Oil Company, 100 Tex. 336, 99 S. W. 852, is a correct interpretation of article 2757 (Hartley's Digest), being an act of 1836 (Laws 1836, p. 156, § 40) which was in force when the deeds from Nelson to Brown and from Nelson to Parmer were made. The first deed being unrecorded when the second was executed, the deed to Parmer conveyed the title unless those who claimed under the deed to Brown should prove that Parmer had notice of the deed to Brown when he bought, or that he did not pay a valuable consideration for the land.

The first assignment of error presented by the application reads as follows: "The court erred in refusing to give to the jury special charge No. 1 requested by the defendants, which is as follows: 'Should you believe from the evidence herein that the deed from O. C. Nelson to Isom Parmer introduced in evidence herein was not executed and delivered by said O. C. Nelson, but that the said deed was a forgery, then you will find for the defendants herein.'" Under that assignment, the plaintiffs in error present this proposition: "Whether the deed referred to in the above-requested charge was a forgery, was an issue made by the pleadings in the case, and there was evidence tending to establish said issue, and it was error to refuse the requested instruction." There appears in the record an affidavit by Alvan Jones, in which he makes the statutory oath of a belief that the deed from O. C. Nelson to Isom Parmer was a forgery. When the certified copy of that deed was offered in evidence, defendants below made these objections to its admissibility: "We object to this instrument because it does not describe the land sued for in this suit, nor any other land; that the deed is ambiguous, and has no calls in it by which the land can be identified on the ground; that it conveys no land in any manner on account of its uncertainty of description, and does not mention this league of land, nor does it say in what county or state the land is located, nor does it refer to any other data by which it can be identified; that there are no allegations in the petition by which the patent and latent ambiguities can be explained." Defendants also offered to prove by expert surveyors that they could not from the field notes in the deed identify the land on the ground, and, in connection with their objection, they offered an original grant to James Rafferty for 4,428 acres as a colonist in the same colony on the Neches river, and bearing date the same as the O. C. Nelson survey, and issued by the same commissioner. The defendants did not call the affidavit of forgery to the attention of the court, nor did they object to the admissibility of the copy of the deed for want of proof of the execution of the original. Neither did they object to the admissibility of the certified copy because the loss of the original had not been proved nor its absence accounted for. Neither did

they make the objection that the certified copy had not been filed among the papers for three days prior to the commencement of the trial and notice thereof given to the opposite party. Under this condition of the record, we hold that the certified copy was properly admitted, and was prima facie evidence before the jury of the execution by O. C. Nelson of the deed to Parmer. Article 2312, Rev. St. 1895; *Hancock v. Tram Lumber Co.*, 65 Tex. 225. It is true that, notwithstanding the failure to make the objections stated, the defendants had the right to disprove the fact of execution of the deed, and thus overthrow the prima facie case of the plaintiffs.

If there was before the jury evidence sufficient to justify a finding that the deed from Nelson to Parmer for the land in controversy was a forgery, the refusal of the court to give the charge was error, and the judgment should be reversed. The plaintiffs in error do not point out any specific evidence which tends to prove the forgery of the deed, but rely upon circumstances as tending to establish that fact. It is undoubtedly true that forgery might be proved by circumstances, if sufficient to satisfy the mind of the jury of that fact, but the only circumstances called to the attention of the court on the subject are that Parmer and those who claim under him have not claimed the land openly for a great number of years, and that Parmer had in making his sale to Barnes introduced a warranty which the plaintiffs claimed furnishes sufficient ground of suspicion to justify a finding by the jury that the deed was not executed by Nelson. The facts shown by the record are that Parmer's deed was made in 1838, and was placed upon the records of Menard county in 1842, before the deed from Nelson to Brown was recorded. In 1845 Parmer sold the land to one Barnes in the city of New Orleans, La., and conveyed it to him by deed which contained the usual clause of general warranty, and, in addition thereto, the following: "And I do moreover bind myself, my heirs, executors, and administrators to return the purchase money if it shall of record in the said republic of Texas appear that the above-described land is in any way incumbered to the prejudice of this sale." It cannot be urged with any consistency that the length of time which transpired between the conveyance to Parmer and the time of his selling the land constituted such nonclaim as would justify any presumption against the validity of his title. It is, however, pressed upon the court that the clause above copied, which was inserted in the deed, manifests a distrust of his title on the part of Parmer, and therefore is a circumstance which would justify a jury in concluding that the instrument was probably a forgery. At the time that Parmer made the deed to Barnes, the deed from O. C. Nelson to Brown had been put upon the

record, and, if he knew that fact and desired to sell the land because the title was bad, he would not probably have given the additional warranty that the record did not show any adverse claim, whereby his vendee would have the right to an immediate return of the purchase money without waiting for an eviction. He gave a general warranty such as a vendor selling in good faith would have given, and, in addition, that copied above which tends to show that he did not know of the prior conveyance to Brown. We are not able to see in this clause any evidence of a distrust on the part of Parmer of the title that he was conveying, much less does it tend to prove that Parmer knew that the deed to him was a forgery, and was therefore endeavoring to part with his title.

The long continued nonclaim on the part of Barnes and Kimball is urged, also, as circumstances from which the fact of forgery might be presumed, but we deem it unnecessary to argue that proposition, for surely counsel would not contend that the action or nonaction of persons who had no part in the execution of the instrument could be taken as evidence of the fact that Parmer had committed a forgery in securing the deed from Nelson. We are of opinion that there was no evidence before the jury which would justify the court in giving the charge requested.

The plaintiffs in error filed in the Court of Civil Appeals an additional assignment of error, as follows: "The trial court erred in its charge to the jury in instructing them to find for the plaintiffs for the land described in their petition, unless they should find for the defendants upon the defense of three years' limitation, which said error of the trial court is hereby charged and assigned as being an error in law apparent on the face of the record, for which they respectfully ask a reversal of the judgment below and the remanding of the cause for a new trial." Under this assignment of error is also presented a number of propositions which are denominated "assignments," but which depend upon the assignment, and are used to point out the supposed error of the court in giving the charge complained of. Article 1014, Rev. St. 1895, contains this provision: "In all cases of appeal or writ of error to the Court of Civil Appeals the trial shall be on statements of facts, * * * or on an error in law, either assigned or apparent on the face of the record." Does the assignment here presented come within the terms of the statute; that is, is it apparent upon the face of the record? Webster defines the word "apparent" thus: "Clear or manifest to the understanding; plain; evident; obvious; appearing to the eye or mind." This does not mean that an error which can be ascertained by looking into the record and considering the evidence may be considered without an assignment, for that would include every error which can be con-

sidered at all. Nothing can be considered as an error which cannot be made apparent by an examination of the record. Therefore the language of the statute must be given that construction which will make it consistent with its requirements in other respects. The language, "apparent upon the face of the record," indicates that it is to be seen upon looking at the face of the record (that is, the assignment itself), the fact pointed out by it must show a good and sufficient ground for the court to interfere to prevent injustice being done to one of the parties. Perhaps the best expression is that it must be a fundamental error, such error as being readily seen lies at the base and foundation of the proceeding and affects the judgment necessarily. *Wilson v. Johnson*, 94 Tex. 272, 60 S. W. 242; *Searcy v. Grant*, 90 Tex. 97, 37 S. W. 320; *Fuqua v. Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241; *Harris v. Petty*, 68 Tex. 514, 1 S. W. 525. This view of this assignment is supported by the course of the plaintiffs in error. If we take the first assignment in its terms, there is not apparent upon the face of that record any one of the things pointed out in the propositions under it. By an examination of the record it might be found that the facts existed as claimed in the propositions, but they are not manifest and not evident, not obvious, without an examination and weighing of the evidence to determine whether or not the assignment is well taken. We are of opinion that the assignments which were made in the Court of Civil Appeals and presented here in the application cannot be considered, because they do not come within the meaning of the statute that we have quoted above, and were not assigned in the district court for presentation to the Court of Civil Appeals as required by law.

Defendants in the court below pleaded the statutes of limitation of three, five, and ten years. The trial judge gave to the jury the following instruction: "If you believe from the evidence that the trustees of the Texas Pine Land Association, by their agents or employees, had peaceable and adverse possession of the league in question for three years before the institution of this suit (which was on the 19th day of October, 1901), then find for the defendants." The effect of that charge was to withdraw from the consideration of the jury the issues of five and ten years' limitation; and it confined the issue to the possession by the Texas Pine Land Association, its agents, etc., and excluded the claim that tenants had so occupied the land. The charges also excluded from the consideration of the jury the issue made by the pleading that persons under whom the Pine Land Association claimed had held the land in peaceable possession sufficient time to give title under the statutes of limitation. The charge assumed that the title of the association was sufficient

to sustain the plea of three years' limitation; therefore, the plea of five and ten years' limitation became immaterial in the trial because the character of the possession which would bar the recovery was the same under either plea, the difference in that respect being in the length of time for which the possession must be held. If, therefore, the defendants had not held the possession for three years, as was found by the jury, they could not have maintained limitation under either the five or the ten years' statute, and no injury resulted from the failure to submit those issues.

It is contended that the court erred in restricting the possession of the Pine Land Association to its agents or employes, which excluded the possession of tenants who might have held under it. We find no evidence that any tenant who held directly under the Pine Land Association, and who claimed to have possession of the entire league, was in possession for three years before the institution of this suit. There was neither pleadings nor evidence upon which a finding for the particular tracts occupied by the tenants could have been sustained; therefore, there was no error in that respect as to the tenants holding directly under the Pine Land Association. If there was evidence before the jury upon which they could have found that any one or more of the vendors, immediate or remote, of the land association had held possession by one or more tenants of the league of land in such manner as to comply with the statutes of limitation, then the charge would be erroneous, and would require a reversal of this judgment. The evidence shows that Copley, who represented J. P. and E. A. Irvin, who severally and at different times owned the title to the league under which the defendants claim, went upon the land in about 1883, and found on the league three squatters, each of whom had a portion of the land in cultivation with improvements thereon. Two of them, Lewis and Hester, each entered into a written contract of lease, whereby each agreed to hold possession of the entire league of land for one of the Irvins, who was then claiming title, in consideration of the use of the land that each had under cultivation, the houses, etc. It appears from the evidence that Lewis had acquired possession of the portion that he was on from a man named Bush, and that afterwards, by some arrangements, the premises were restored to Bush. This is not explained by the evidence, but the proof does not establish that Bush undertook to take the place of Lewis as the tenant of the Irvins. But, if we grant that such was the fact, the evidence fails to show the continued possession of persons claiming under the said Lewis and Bush, acknowledging the title of the Irvins, and claiming and exercising the right of possession of the entire league in the name of the owner of the Brown title. Failing in this

particular, the evidence was not sufficient to sustain limitation by the possession and tenancy of Lewis.

Hester was occupying a small portion of the land and the improvements thereon when the lease was executed and continued to do so up to his death, which was within a year of the date of the lease. A short time after his death, his wife and son sold the improvements to S. A. J. Haire, who did not in any way assume the tenancy contract of Hester. The proof shows that Haire and his son together did occupy the part of the land and improvements which had been in cultivation and which had been occupied by Hester, but there was no evidence that they asserted any right of possession either for themselves or for the owner of the land to any other portion of the league. No doubt it is true that Haire could not have disputed the title in the Irvins to the portion of the land which he received possession of from Hester, but this does not establish the possession by Haire, nor by his son, or those who were claiming under them, of the entire league of land in the name of the owners thereof, which is a necessary element in order to sustain the plea of limitation to the whole league. The court did not err in the charge complained of.

The plaintiffs in error present in different forms the proposition that the deed from O. C. Nelson to Isom Farmer is void because it does not sufficiently describe the land sought to be conveyed. This objection was urged when the copy of the deed was offered in evidence, and is raised also by a number of assignments of error based upon charges asked by the plaintiffs in error, which were refused by the court. The description contained in the deed reads as follows: "I, O. C. Nelson, of the county of Jasper and Republic aforesaid, * * * have granted, bargained, sold, aliened, and conveyed, and by these presents do grant, bargain, sell, alien and confirm in bona fide sale all that of land containing four thousand, four hundred and twenty-eight acres of land, commencing at post on the W. bank of Neches. Thence W. 10,000 yds. Thence N. 2,500 yds. Thence E. 10,500 yds. Thence down said river to commencement, 11 labors arable, and 14 labors pasture land, it being the league of land granted by George A. Nixon, Commissioner of Zavalla Colony on the 18th day of August, 1835, and for a more particular description reference is here made to the original plat and field notes on file and of record in the General Land Office of this Republic." Both parties introduced the original grant, dated August 18, 1835, made by George Antonio Nixon, commissioner of the colony of Enterprise, of Lorenzo D. Zavalla to O. C. Nelson. The field notes in this grant correspond with the field notes in the deed as above given, except that in the grant the word "varas" is used to express the measurement instead of "yards," as it is in the

deed, which is an evident mistake, and in the grant, "at the S. E. corner of a survey on the west side of the Neches river, which is the N. E. of this survey, from which an ash 18 inches in diameter is to the north seventy degrees west at the distance of 18 varas, and a white oak of ten inches in diameter is to the north forty-five degrees at the distance of seven and four-tenths varas." It will be seen that the only difference in the description of the deed and of the original grant is that the grant to which reference is made by the deed makes it more definite by describing particularly the northeast corner of the survey by calling for bearing trees that are marked so that they can be identified. A certified copy of the original English field notes in the General Land Office was also introduced by both parties, and correspond with the description in the deed and in the grant, except that the field notes describe the corners with more accuracy and detail than was done either in the deed or the grant. The field notes and the grant, being referred to in the deed for a more particular description of the land, render the description in the deed valid, if the description in the papers referred to is sufficient to describe the land. The sufficiency of the original grant and the English field notes has not been questioned by the plaintiffs in error, nor, indeed, could it be. They are sufficiently certain; that is, they furnish the data from which the land could be identified upon the ground. This question has been presented, as before stated, in a number of forms and by objections and special charges asked, etc., but this will be a sufficient answer to all of those objections upon every point, except the question as to whether the record of that deed was sufficient to put a subsequent purchaser upon notice. We reserve this for examination and discussion hereafter.

The plaintiffs in error complain of the action of the court in admitting the testimony of Alice Puig and Timothy Kimball, each of whom testified to having heard their father speak of owning lands in Texas, and each testified to the finding of a certain memorandum in a trunk of the father after his death which related to the lands in Texas and to the O. C. Nelson Mexican grant, which memorandum was forwarded to their brother in Denison, Tex., and introduced in evidence on the trial of this cause. The defendants in the trial court were claiming that Kimball by his long silence and nonaction with regard to his title had abandoned all claim to the land, and sought to use the fact as the basis upon which to rest a presumption of a transfer of his right to persons under whom the defendants claim. Upon this issue, the evidence of Kimball's declarations with regard to his ownership of land in Texas was admissible to show that he had not abandoned his claim thereto. The judgment of the trial court was entered on the

24th day of September, 1907, and the court adjourned on October 25, 1907. On the 24th day of that month (October) the defendants filed an amended motion for a new trial, in which, as a ground for granting the motion, they set up as newly discovered the evidence of a witness A. J. D. Sapp, whose affidavit was filed, in which he stated, in substance, that he was 87 years old; that he was acquainted with Isom Parmer in 1839, 1840, and for a number of years afterwards, and that Isom Parmer had the reputation of being a forger of land titles and dealer in fraudulent land titles, and stated that at the date of the affidavit the witness resided in Jasper county some distance from the place of trial; that he was requested to attend the trial at Koonz, but, on account of the distance he lived from the post office, the letter did not reach him in time for him to attend the trial.

The affidavit of W. G. Tallaferra was attached to the motion, who swore that the defendants did not know of the testimony of Sapp as to the reputation of Isom Parmer as a forger of land titles, nor as to his financial condition in 1839 until after the trial of the case. He also stated that the records of Menard county show that on the same day the deed from Nelson to Isom Parmer was recorded there were also recorded about a dozen other deeds from original grantees of land to the said Parmer for large tracts of land in Menard county, reciting cash consideration from \$800 to \$2,000. The application for a new trial does not show sufficient diligence to entitle the parties to a rehearing. The affidavit of Sapp was made on the 8th day of October, 1907, but the amended motion was not filed until the 24th day of that month. The affidavit was filed so late that it did not afford time for the plaintiffs in the case to contest the truth of the same or to meet it in any way. *Railway Co. v. Scarbrough* (Sup.) 108 S. W. 805. In the case cited this court said: "Now, let us suppose that the amended motion for a new trial had been filed but a short time before the court adjourned, and before it would have adjourned by operation of law; would not the court have been justified in overruling it, because it afforded the counsel for the other side no opportunity to meet it? We think that an affirmative answer should be given to the question. There is nothing in the order overruling the motion to show upon what ground the court acted. Now, all presumptions must be indulged in favor of the court's ruling. We think, therefore, we should presume that the court overruled the motion because it was filed too late. We think a party should not only be diligent in discovering testimony, but also diligent in making use of it when discovered." Besides, we are of opinion that the evidence as to the reputation of Parmer would have been inadmissible if the witness had been present at the trial.

Defendants offered evidence to prove the reputation of George F. Moore, but, whether it was good or bad, the evidence was irrelevant to any issue before the jury, and was properly excluded.

Plaintiffs in error sought, by special charges, to have the court submit to the jury the issue that the Houston Oil Company was a purchaser for a valuable consideration without notice of the title derived through the Parmer deed, which charges were refused. To test the correctness of the ruling, we will assume that the Houston Oil Company had no actual notice of the deed made by Nelson to Parmer, and that it paid a valuable consideration for the land. Let us suppose that the Parmer deed had not been placed upon record at any time. Under the law of 1837, the fact that the deed to Brown was not on record when the deed to Parmer was executed gave to the latter deed the effect of vesting the legal title in the land in Parmer, with the equity in Brown to show a superior right by proving that Parmer had notice of the prior conveyance or that he did not pay a valuable consideration for it. If Parmer had failed entirely to record his deed, it would not have affected the title of Brown or of any one holding under him. No duty rested upon Parmer to record his deed as notice to the prior purchaser, Brown, nor to his vendees. Neither was it the duty of Brown nor any person purchasing from him to examine the records to see whether Nelson had conveyed the land subsequently to his deed to Brown. A purchaser is required to look only for conveyances made prior to his purchase by his immediate vendor, or by any remote vendor through whom he derives his title. *White v. McGregor*, 92 Tex. 558, 50 S. W. 564, 71 Am. St. Rep. 875. In that case the court said: "Do the words mean all persons who purchase the land after the deed is recorded, or only those who are subsequent in the chain of title? If a grantor conveys the same property twice and the second grantee puts his deed upon record, is it notice to one who subsequently purchases from the first grantee? We think not. The record is not notice to the first grantee, for he is a prior purchaser. Nor do we think it was intended to be notice to any one who should purchase from him. In other words, we think the subsequent purchasers who are meant are only those the origin of whose title is subsequent to the title of the grantee in the recorded deed. * * * The object of all the registry acts, however expressed, is the same. They were intended to affect with notice such persons only as have reason to apprehend some transfer or incumbrance prior to their own, because none arising afterwards can, in its own nature, affect them. And, after they have once, on a search instituted upon this principle, secured themselves against the imputation of notice, it follows that every one coming into their

place by title derived from them may insist on the same principle in respect to himself. It is a general rule that, when once a man has granted away his right, anything which he can do or say shall never be received to affect another claiming under him." "There being no duty resting upon Parmer to record his deed to give notice to Brown, or his vendees, nor upon Brown, or his vendees, to examine the record for the subsequent conveyance by Nelson to Parmer or his vendees, the doctrine of innocent purchaser has no application in this case. If the description of the land in the deed to Parmer were insufficient to pass the title to him, then the superior title would have remained in Brown, because a deed which passed no title could not have any effect under the law of 1837. We conclude that it is not a question of notice, but a question of title that is involved, and, as we have said before, the description in the deed from Nelson to Parmer was sufficient to convey the title, because it gave data from which the land could be identified, and the superior title having passed out of Nelson to Parmer, those persons who claim under the deed made by Nelson to Brown "stand in the shoes of the latter." The facts of this case did not call for nor justify the submission to the jury of the issue of innocent purchaser, and the court did not err in refusing to give the special charges requested by the plaintiffs in error.

The defendants in the court below objected to the introduction of a certified copy from the records of Hardin county of the deed from Isom Parmer to Jose Barnes, whereby the land in controversy was conveyed to the latter: (1) Because "the law in force at the time of the execution of this deed provided that all foreign acknowledgments, when taken before a judge of a court of record, should be certified to by one of two officers, either a resident minister, or a consul of the Republic of Texas." It was objected that the consular agent was not authorized by the statute to make the certificate of the official character of a judge who took the acknowledgment. (2) The defendants objected to this recital contained in the said copy: "And in which grant said land is more fully described and was acquired by me by deed from O. C. Nelson March 13, 1838, which is also herewith delivered duly recorded." The last objection could not be sustained, for the recital was merely descriptive of the land sold, furnishing data by which it could be identified. It is not necessary for us to determine whether the consular agent had authority to make the certificate of official character or not, because, if it should be held that he had no such authority, the defect was cured by subsequent legislation. We do not intimate that the consular agent had no such authority, but simply decline to discuss the question because it is immaterial in the present case. In 1871 the Legislature

enacted a statute (Laws 1871, p. 77, c. 76) upon the subject of registration of instruments of this character, designating the officers before whom the acknowledgment or proof of the execution of such instruments might be made, from which we copy as follows: "Proof or acknowledgment of every instrument of writing for record may be taken before some one of the following officers: * * * When acknowledged or proven without the state, and within the United States or their territories, before some notary public, commissioner of deeds for this state, or before some judge or clerk of a court of record having a seal." 2 Paschal's Dig. art. 7418. On the 27th day of April, 1874, the law as above quoted was in effect in this state, when the Legislature enacted another statute from which we quote as follows: "Every grant, deed, mortgage, power of attorney, or other instrument of writing for the conveyance of real or personal estate, required or permitted by law to be registered, that shall have been heretofore acknowledged or proven in the manner prescribed by law, without the state and within the United States and their territories, before any one of the officers in such cases now authorized by law to take such acknowledgments or proofs, and which shall have been duly certified by such officer, shall be held to be duly acknowledged or proven with the full effects and consequences of existing laws; and any such instrument, which shall have been so acknowledged or proven before either of such officers, and which shall have been heretofore registered, shall be held to be duly registered with like full effects and consequences of existing laws: Provided, however, that this act shall not be so construed as to give it any retroactive operation, or to affect any right acquired prior to its passage." From the known jurisdiction and powers of courts of last resort and in conformity to the laws of this state, we presume that the Supreme Court of the state of Louisiana is a court of record, and, being a court of record, that it has a seal, because it is so uniformly the case that courts of record have seals as to raise a presumption to that effect. A seal is not necessary to a court of record, but to use the term "court of record" implies that it has a seal. *Ingoldsbey v. Juan*, 12 Cal. 580; 11 Cyc. 658; *Blethen v. Bonner*, 98 Tex. 141, 53 S. W. 1016. In the first case above cited the Supreme Court of California said: "It is next objected that Tracy, the clerk of Santa Clara, had no power to take the acknowledgment, because he had no seal of office. But this construction of the statute is too narrow. The court of which he was clerk was entitled to a seal. This general phrase 'having a seal' was only intended to denote a court of record, which is defined to be a court having a seal. The power

of the clerk was never intended to be made to depend upon the fact of his having procured this article, or the care with which he preserved it."

On the 27th day of April, 1874, a judge of the Supreme Court of Louisiana could have taken such an acknowledgment as that which was taken by Judge Morphy, certified on the deed from Farmer to Barnes. The conclusion follows without argument that the last-quoted statute cured the defect, if any existed, in the acknowledgment of the deed above named, that the record of that deed was validated by the statute of 1874 (Laws 1874, p. 152, c. 105), and the copy was admissible the same as if it had been regularly acknowledged according to law in existence at the time it was taken. The act of 1874 affected alone rules of evidence, and gave no greater effect to the deed than it had under the law in existence at the time of its execution, simply making it admissible in evidence when it might not have been. It affected no right of the defendants acquired prior to the passage of the act. The assignment is overruled.

We have carefully examined the many assignments of error, and have discussed the material questions presented. The assignments not mentioned are overruled. We find no error in the proceedings of the courts. Therefore the judgments of the Court of Civil Appeals and district court are affirmed.

WARREN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

1. PERJURY (§ 1*)—WHAT CONSTITUTES "PERJURY."

"Perjury" is a false statement, written or verbal, deliberately and falsely made under the sanction of an oath or affirmation legally administered, under circumstances where an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or for the ends of public justice.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 1; Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5305-5310; vol. 8, p. 7751.]

2. PERJURY (§ 6*)—FALSE JUSTIFICATION BY SURETY—FALSE SWEARING.

The false statement as to the property owned by him, made by one justifying as cognizor in a criminal prosecution, is in a judicial proceeding, within White's Ann. Pen. Code, art. 205, which includes, as a basis of the offense of perjury, all oaths or affirmations legally taken in such proceedings.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 11; Dec. Dig. § 6.*]

3. PERJURY (§ 6*)—WHAT CONSTITUTES.

A false statement as to the property owned by him, made by one justifying as cognizor in a criminal prosecution, is perjury, rather than false swearing.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 11; Dec. Dig. § 6.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from District Court, Delta County; R. L. Porter, Judge.

Whig Warren was convicted of false swearing, and appeals. Reversed.

D. Thornton, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of false swearing; his punishment being assessed at two years' confinement in the penitentiary.

The indictment alleges the false swearing to have occurred in a judicial proceeding in substance as follows: There was a felony case pending in the district court of Delta county. The accused in the case desired to enter into a recognizance. Appellant was called as one of the cognizors. The court, not being satisfied, placed the cognizors under oath; and it is alleged that appellant swore falsely to the effect that he had bought land in Wood county, for which he had paid \$600, and that this statement was false. The point is made in an attack on the indictment, as well as in regard to the sufficiency of the evidence, that this is not false swearing, but perjury.

We are of opinion that this contention is correct, and the motion to quash ought to have been sustained, and, further, that the facts do not justify the conviction for false swearing. The definition of perjury is that it is a false statement, written or verbal, deliberately and falsely made, relating to something past or present, under the sanction of an oath, or such affirmation as is by law equivalent to an oath, when such oath or affirmation is legally administered under circumstances in which an oath or affirmation is required by law, or is necessary for the prosecution or defense of any private right, or for the ends of public justice. Article 205, White's Ann. Pen. Code, is as follows: "All oaths or affirmations legally taken in any stage of a judicial proceeding, civil or criminal, in or out of court, or before a grand jury, are included in the description of this offense." There can be no question of the fact that this order was taken in a judicial proceeding, a pending felony case; and any steps that may be taken during the pendency of that case, in any way connected with it, would constitute a judicial proceeding.

It is true that appellant need not have offered himself as a cognizor; but he did, and it was in a pending felony case. This was a matter incident to the judicial proceeding by which the accused in that case sought to obtain his liberty, and was authorized by the law. This oath was taken by appellant under order of the court. Article 315, White's Ann. Code Cr. Proc., reads as follows: "In order to test the sufficiency of the security offered to any recognizance or bail bond, unless the court or officer taking

the same is fully satisfied as to the sufficiency of the security, the following oath shall be made in writing and subscribed by the surety: * * * which affidavit shall be filed with the papers of the cause, or criminal proceedings." This affidavit is not conclusive as to the sufficiency of the security, and if the court or officer taking the recognizance or bail bond is not fully satisfied as to the sufficiency of the security offered, further evidence shall be required before approving the same. Article 316, White's Ann. Code Cr. Proc.

It is not necessary here to set out the form of the oath. A recognizance can only be taken, under the Code of Criminal Procedure, in court. A bail bond answers the same office, when taken by an officer; the court not being in session. Under the terms of the statutes cited, therefore, we think it a legal conclusion, and cannot be otherwise than that this oath was taken in a judicial proceeding, and was, therefore, perjury, if false, and not false swearing.

The judgment is reversed, and the prosecution ordered dismissed.

BENJAMIN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1900.)

CRIMINAL LAW (§ 673*)—PROSECUTION—INSTRUCTIONS.

In an action for unlawfully carrying a weapon, the defense was that what was claimed to be a pistol was so wholly lacking in the essentials of a firearm as not to bring it within the statute. On cross-examination, a witness denied that, shortly after a difficulty between accused and another whom accused had attempted to shoot, witness had stated that the pistol in question was his, and that it was the first time that it had ever failed to fire, and other witnesses were introduced, who attributed to him in substance the language which he had denied. *Held*, that it was error to refuse a requested charge that the evidence was admitted solely for the purpose of impeaching the witness, and that it could not be considered as tending to prove that the pistol was in a shooting condition.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1875; Dec. Dig. § 673.*]

Appeal from Navarro County Court; J. M. Blanding, Judge.

Pleas Benjamin was convicted of unlawfully carrying a pistol, and he appeals. Reversed and remanded.

Callicutt & Call, for appellant. F. J. McCord, Asst. Atty. Gen., for the state.

RAMSEY, J. This appeal is prosecuted from a conviction had in the county court of Navarro county on the 26th day of April of this year, wherein the appellant is charged with unlawfully carrying on or about his person a pistol.

The fact that appellant had what was claimed to be a pistol in the city of Cor-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sicana about the time charged in not denied. His defense was that what was claimed to be a pistol was so wholly lacking in the essentials of a firearm as not to bring it within the definition of a pistol, as that term is used in the statute, and on this issue much testimony was offered by him. On cross-examination the witness Johnson was asked if it was not a fact that, some two days after the difficulty between appellant and Charlie Bowen, whom he is charged with attempting to shoot, he did not tell Charlie Bowen, Mary Bowen, and Effie Johnson that this was his pistol, and that it was the first time it had ever failed to fire, and that the Lord must have been on the side of Bowen on the occasion when the pistol was snapped at him. This was denied by Johnson, and thereafter the state introduced the witnesses named, who, on examination, attributed to him in substance the language which he had denied. In this state of the record, appellant requested a special charge to the effect that this impeaching evidence was admitted solely for the purpose of impeaching the witness Johnson, and for no other purpose, and that same will not be considered by the jury as proving or tending to prove that the pistol was in a shooting condition. This charge was refused by the court, and for this refusal exception was properly taken.

This charge should have been given. This was testimony that might, and ordinarily, in the absence of an instruction, would, have been applied by the jury, and doubtless appropriated by them, as affirmative evidence of the condition of the pistol, and therefore of appellant's guilt. *Maples v. State*, 119 S. W. 105; *Harris v. State*, 34 Tex. Cr. R. 494, 31 S. W. 388; *Winfrey v. State*, 41 Tex. Cr. R. 538, 56 S. W. 920; *Wilson v. State*, 37 Tex. Cr. R. 373, 35 S. W. 390, 38 S. W. 624, 39 S. W. 373.

There are other questions in the record, some of which will not arise on another trial. We are not prepared to agree with counsel for appellant that there was no evidence in the record from which the jury might have found appellant guilty.

For the error pointed out, the judgment is reversed, and the cause is remanded.

COOTS v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1906.)

GAMING (§ 98*)—CRIMINAL PROSECUTIONS—EVIDENCE.

Where the state proved that accused bet on a game of cards, and he introduced no evidence, a conviction of gaming was supported by the evidence.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 291-298; Dec. Dig. § 98.*]

Appeal from Howard County Court; L. A. Dale, Judge.

Bill Coots was convicted of gaming, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of gaming.

The only ground of the motion for new trial is based upon the statement that the evidence is not sufficient and the conviction is against the law. The evidence fully justifies this conviction, showing that appellant bet in a game of cards. We deem it unnecessary to collate the facts. Appellant introduced no evidence, and the state proved that he bet while they were playing cards.

The judgment is affirmed.

BRYANT v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1906.)

1. EMBEZZLEMENT (§ 10*)—WHAT CONSTITUTES. Where no fiduciary relation of principal and agent existed between prosecuting witness and defendant, the latter was not guilty of embezzlement.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 8; Dec. Dig. § 10.*]

2. BAILMENT (§ 16*)—CONVERSION BY BAILEE—EVIDENCE.

Evidence held insufficient to show conversion by a bailee of a horse.

[Ed. Note.—For other cases, see Bailment, Dec. Dig. § 16.*]

Appeal from District Court, Jackson County; James C. Wilson, Judge.

Doc Bryant was convicted of embezzlement of a horse, and he appeals. Reversed and remanded.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with the embezzlement of a horse. The indictment charges that the horse was bailed to appellant by J. N. Whitely; that the horse was the property of Whitely, and came into appellant's possession and was under his care by virtue of his said agency and employment as bailee aforesaid; and that he subsequently fraudulently appropriated the property. The evidence shows, in substance, that Whitely had a horse that was old and poor, and desired to sell it to appellant.

Whitely's account of the transaction is about as follows: That appellant came to his house, and, after some conversation in regard to other matters, finally led up to the horse trade; that appellant bought the horse from him on condition that the horse would work; that he (Whitely) told appellant that he did not know whether the horse

would work or not, but gave appellant permission to take the horse off and try him, and that he was either to return the horse the evening of the same day or pay him \$10, the price agreed upon, that appellant took the horse away, and did not return him that evening; that Whitely subsequently went to see him about it, and appellant told him he was below the town of Edna in a pasture; that appellant refused to tell him in what pasture he placed the horse. Appellant's version of the matter is that he and Whitely discussed the matter of the purchase of the horse; that the horse was very poor; that he was to take him off and fatten him up, so he could be fit for work; that he would buy him if he could work him; that he would take him to the pasture, so that he might recuperate in flesh and strength. His statement is at variance with the statement of Whitely as to the conversation between them in regard to the pasture in which he (appellant) had placed the horse. Appellant testifies he informed Whitely where the horse was.

There was other testimony in regard to the time of returning the horse, and in which appellant should bring him to town, and when Whitely was to come after him. Whitely's statement was that, appellant was to carry the horse to his house, while appellant's was he was to bring him to town. Appellant introduced evidence showing that he had the horse brought to town, and Whitely did not come for him, and he turned the horse loose one night, thinking he would stay about the place, but the horse returned to the pasture where he had been keeping him; that the horse stayed in that pasture until Whitely recovered him some year or so afterwards; that appellant had no further connection with the horse, but after a month or so appellant went to Palacios and worked as a hotel waiter, and then went to Runge, in Karnes county, where he had been raised, and which he claimed as his home; and that a year or so afterwards, the grand jury indicted him, and the officers arrested and brought him to Edna for the trial. This is about the substance of the testimony without going into all the details.

It is contended by appellant that this is not a case of embezzlement. We are of opinion the contention is correct. If he had violated any law, it was the statute which punishes for conversion of property under bailment. The fiduciary relation of agent and principal is not suggested by the testimony from either or both sides; but we are further of opinion that the evidence does not show a conversion. Appellant never claimed the horse, further than is stated that he had placed him in the pasture, where the horse remained, except on one occasion, when he brought him to the town of Edna for Whitely to receive, and his testimony to the

effect that the horse was placed in the pasture and remained there all the time is not controverted. Appellant's evidence is corroborated by the man who was in charge of the pasture, and the same party who says he brought the horse to town at the request of appellant to be delivered to Whitely.

We are of opinion that the judgment should be reversed, and cause remanded; and it is accordingly so ordered.

MATTHEWS v. STATE.

(Court of Criminal Appeals of Texas, Nov. 10, 1909. On Rehearing, Dec. 1, 1909.)

1. CRIMINAL LAW (§ 157*)—MISDEMEANOR—LIMITATIONS.

One charged with a misdemeanor may, as a general rule, be convicted for any violation occurring within two years prior to the return of the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 282; Dec. Dig. § 157.*]

2. CRIMINAL LAW (§ 772*)—INSTRUCTIONS—TIME OF COMMISSION OF OFFENSE.

Where the indictment charging a violation of the local option law was returned on December 11, 1908, and the state was not required to elect on which transaction a conviction would be sought, an instruction that if, at any time during 1908, and before December 11, accused sold intoxicating liquors, they should render a verdict of guilty, was not objectionable, in that it did not correctly state the law as to the time within which accused might or might not be convicted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1814; Dec. Dig. § 772.*]

3. CRIMINAL LAW (§ 787*)—INSTRUCTIONS—FAILURE OF ACCUSED TO TESTIFY.

An instruction, in a misdemeanor case, that the jury could not use as a fact against accused that he failed to testify in his own behalf, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1902, 1903; Dec. Dig. § 787.*]

4. CRIMINAL LAW (§ 575*)—TRIAL—TERMS OF COURT.

One convicted at a term of the county court fixed by the commissioners' court, as authorized by Const. art. 5, § 29, cannot complain of the failure of the county court to hold a term every month for criminal business, as required by section 17.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1294; Dec. Dig. § 575.*]

On Motion for Rehearing.

5. CRIMINAL LAW (§ 564*)—VENUE—EVIDENCE—SUFFICIENCY.

Evidence held to show that accused unlawfully sold liquor in the county in which the indictment was found, justifying a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1277-1284; Dec. Dig. § 564.*]

6. INTOXICATING LIQUORS (§ 239*)—INSTRUCTIONS—ADOPTION OF LOCAL OPTION LAW.

A charge, on a trial for violating the local option law, that it was agreed between the state and accused that during the year within which accused could be found guilty of selling intoxicating liquors the local option law was in effect and the sale of intoxicating liquors prohibited,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

sufficiently charged that the local option law was in force.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 331-347; Dec. Dig. § 239.*]

Appeal from Grayson County Court; J. W. Hassell, Judge.

Jack Matthews was convicted of violating the local option law, and he appeals. Affirmed.

Cox & Cox, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law; his punishment being assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

The facts are sufficient to sustain the verdict. The evidence covered several transactions. There was no objection to the introduction of these various matters, and no election asked by appellant as to which transaction should form the basis of conviction. These matters occurred principally during the summer and fall of 1908.

1. The court charged the jury, in substance, that if they believed from the evidence beyond a reasonable doubt that at any time during the year 1908, and before the 11th day of December of that year, the appellant sold intoxicating liquor to the alleged purchaser, T. E. Bailey, they would find a verdict for the state. Exception was reserved to this charge, because it did not correctly state the law as to the time within which appellant might or might not be convicted, because the same is an incorrect expression as to the time appellant could be convicted under the evidence. We are of opinion there is no merit in this contention. So far as this particular question is concerned, it seems to bear principally upon the question of limitation. The usual rule is a party can be convicted in misdemeanor cases for violation of the law, if it occurred within two years prior to the return of the indictment. The indictment in this case was returned on the 11th of December. Inasmuch as the state was not required to elect upon which transaction the conviction would be sought, there was no reversible error in the court giving the charge criticised. If the state had been required to elect upon which transaction a conviction would be sought, then the charge would have to be confined to the particular transaction relied upon by the state.

2. There was also an exception reserved to that portion of the court's charge which instructed the jury that they could not use as a fact against appellant that he failed to testify in his own behalf. This question has been decided so often, adversely to appellant's contention, we deem it unnecessary

to cite authorities in support of the correctness of the court's charge.

3. Another bill of exceptions recites that appellant pleaded specially to the jurisdiction of the county court to try this cause, because under article 5, § 17, of the state Constitution, the court is required to hold one term every month for criminal business, as may be provided by law; second, it is shown that there are no regular monthly terms of said county court, either provided by law or the commissioners' court; and, third, because the present term of the court began on the first Monday in March and continued for eight weeks, which is in violation of said article 5, § 17, of the Constitution. Said article 5, § 17, does provide that the county court shall hold a session every month for the disposition of criminal cases, as may be provided by law. Section 29 of the same article of the Constitution provides that the county court shall hold at least four terms for both civil and criminal business annually, as may be provided by the Legislature, or by the commissioners' court of the county under authority of law, and such other terms each year as may be fixed by the commissioners' court, etc. The evidence in the bill of exceptions shows that the commissioners' court had provided certain terms of the court, at one of which appellant was convicted. We deem it unnecessary to go into a discussion as to whether or not there is a conflict between these two provisions of the Constitution. The commissioners' court, under authority vested in them by the Constitution and laws, did provide for terms of the county court as shown in the bill of exceptions. At one of these terms appellant was tried. We are of opinion that appellant has no ground of complaint. The Constitution authorized the commissioners' court to provide for terms at which civil and criminal causes could be tried. Appellant was tried at a term of court authorized by law. In *Hughes v. Doyle*, 91 Tex. 421, 44 S. W. 64, the court said: "We are of opinion that the section of the Constitution referred to in the statement conferred power upon the commissioners' court of the several counties in this state to regulate the times of holding the terms of the county courts in their respective counties, within the limitations therein prescribed." This language of the court was construing section 29 of article 5 of the state Constitution. The commissioners' court having authority to provide terms of court under section 29, *supra*, there would be no legal reason why a conviction should be set aside, had at one of said terms, because of the failure of the county court to hold a session for the disposition of criminal business exclusively once every month. The term at which appellant was convicted was authorized by law, and he cannot interpose the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 122 S.W.—35

objection urged—that there was not a term held once every month. See, also, *Ex parte Cole*, 51 Tex. Cr. R. 163, 101 S. W. 249, and *Wilson v. State*, 15 Tex. App. 150.

There being no error in the record requiring a reversal, it is ordered that the judgment be affirmed.

On Motion for Rehearing.

On a former day of this term the judgment was affirmed. Appellant files motion for rehearing, alleging, first, the insufficiency of the evidence; second, that the trial court, in defining the law applicable in local option cases, failed to charge the jury that local option law was in full force and effect in Grayson county; and, third, the evidence fails to show the offense was committed in Grayson county, and, further, that there is no evidence of venue proven; fourth, that the witness T. E. Bailey never identified the defendant as having at any time within the last two years, before the filing of the complaint or indictment, sold intoxicating liquors to him.

In regard to the evidence, we would say that the witness Bailey testified that he bought intoxicating liquors in a certain building situated on an alley just west of North Travis street, in Sherman; that he went into this place at various times during the summer of 1908 and purchased intoxicating liquors; that he called for tea, and they gave him what, in his judgment, was whisky; and that he had been accustomed to drinking more or less for a number of years, and in his judgment the liquor that he bought was whisky, and that he paid for it. He says, "My best recollection is that the defendant, Jack Matthews, has served me with whisky in this place during the summer of 1908," and that he paid him for the whisky. The witness testified, further as follows: "This building is situated in Grayson county, Tex., and these purchases occurred in Grayson county, Tex." Again he says: "My recollection is that on different dates during the summer of 1908 the defendant served me with whisky, and that I paid him for the whisky. I told Mr. Cox and Mr. Adamson, about one hour ago, in a conversation that I had with them, that I had bought whisky at this place, but that I had no definite recollection of ever buying any whisky from this defendant, and this statement I made to Mr. Cox and Mr. Adamson is the truth. I know positively that some time during the summer and fall of 1908 I bought from the defendant, Jack Matthews, liquor which was in my opinion whisky." We are of opinion this sufficiently covers those questions suggested in the motion for rehearing in regard to the sufficiency of the evidence, the venue, and the identification of appellant by the witness Bailey.

In regard to the criticism of the charge,

we find this in the instruction given the jury by the court: "In this case it is agreed between the state and the defendant, and you are charged, that during the year 1908 local option was in effect in Grayson county, and the sale of intoxicating liquor was prohibited in said county by law." This fully meets the statement, in motion for rehearing, that the jury were not charged that local option was in full force and effect in Grayson county.

There being no sufficient merit in the motion for rehearing, requiring that it be granted, it is in all things overruled.

BUCKLEY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—CONFLICTING EVIDENCE—CONCLUSIVE-NESS.

Where, in a prosecution for disturbing religious worship, there was some evidence justifying a finding of guilty, the judgment of conviction will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Appeal from Sabine County Court; J. H. McGown, Judge.

William Hayson Buckley was convicted of disturbing religious worship, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the county court of Sabine county on February 17, 1909, of disturbing religious worship, and his fine assessed at the sum of \$25.

The motion for a new trial is based solely on the ground that the evidence is insufficient to sustain the verdict. The court gave a satisfactory charge, in which the issues were fairly submitted to the jury, and gave, in substance at least, the only special charges requested by counsel for appellant, except the one instructing them to return a verdict of not guilty. That the congregation was disturbed is undoubted. That appellant used profane language, calculated to disturb the congregation, is undoubted. It seems, from the evidence, that he engaged in a serious affray near where the religious services were being conducted, with one Marcellus Kyle, in which he was very seriously cut in the neck with a razor. While not wholly satisfactory, we think there was some evidence from which the jury was justified in finding the substance of the charge laid against appellant.

It follows, therefore, that the case, on the issues made, should be affirmed; and it is so done.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

CRAFT v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

1. HOMICIDE (§ 295*)—MANSLAUGHTER—EVIDENCE OF PROVOCATION—INSTRUCTIONS.

Where decedent seized the bridle and gave the horse, on which accused was riding, a jerk, which threw accused against the pommel of the saddle, injuring him, and decedent held onto the bridle over accused's protest, and accused shot decedent, the failure to charge, in submitting the issue of manslaughter, that, if decedent's assault created pain and engendered sudden passion, accused would be guilty of no higher offense than manslaughter, was erroneous, notwithstanding a charge that the provocation causing sudden passion must arise at the time of the killing, and that the jury, in determining adequacy of the provocation, must consider all the facts, etc.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 606-609; Dec. Dig. § 295.*]

2. HOMICIDE (§ 214*)—EVIDENCE—DYING DECLARATIONS.

The state may show, as a part of decedent's dying declarations, that he stated that accused killed him for nothing, and that he could not run out of it, or beg out of it.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 448-450; Dec. Dig. § 214.*]

3. CRIMINAL LAW (§ 780*)—IMPROPER ARGUMENT OF COUNSEL—INSTRUCTIONS.

The misconduct of the prosecuting attorney in stating to the jury that accused, who had objected to evidence, did not want the truth brought out, and that there was no better proof of his guilt than his objection to the evidence, was obviated by the charge of the court that the evidence was not admissible, and that accused could object to its introduction without being criticised therefor, and that the remarks of the prosecuting attorney should not be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.*]

Appeal from District Court, Ft. Bend County; Wells Thompson, Judge.

West Craft was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Russell & Pearson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for murder in the second degree; the punishment being assessed at 14 years in the penitentiary.

The court gave a charge with reference to manslaughter, in which he informed the jury that it is not enough that the mind is merely agitated by the passion arising from some other provocation, nor the provocation given by some person other than the party killed. Exception was reserved to this portion of the charge, especially that which refers to the provocation given by some other person than the deceased. Applying the law to the case, the court gave the following charge: "Although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty, in determining the adequacy of the provocation (if any), to consider in connection therewith all

the facts and circumstances in evidence in the case; and if you find that, by reason thereof, the defendant's mind at the time of the killing was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law, and so in this case you will consider all the facts and circumstances in evidence in determining the condition of the defendant's mind at the time of the alleged killing, and the adequacy of the cause (if any) producing such condition." Appellant requested the following instruction, which was refused: "If the deceased caught the bridle of defendant's horse and jerked it, and thereby caused the horse to rear or plunge, and thereby caused defendant to be thrown against the pommel of the saddle with such force as to cause defendant pain, and because of such conduct, if any, on the part of deceased, and such pain, if any, the defendant, in a sudden passion caused by such conduct and pain, if any, shot and killed deceased, you will not find the defendant guilty of any higher offense than manslaughter." The court refused this charge, he says, because it was covered by other charges.

We are of opinion that under the facts of the case this charge should have been given. The charge of the court was very general, and virtually left the jury to decide whether or not the facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, and, if they should so find, then the evidence as to the sufficiency of the provocation would satisfy the requirements of the law. The facts, briefly stated, are about as follows: The deceased had made an assault upon appellant some months prior to this killing with a knife, growing out of appellant's refusal to join him in taking a drink of whisky, and also another trouble growing out of the fact that appellant had made a statement to the effect that the deceased had cut his saddle at a party, which enraged the deceased. The deceased denied, in conversation with appellant, that he had cut the saddle, and appellant apologized for the statement he made. Upon the particular evening of the difficulty they met at a store, and the deceased began to talk to appellant in such a manner that appellant concluded that it was the part of wisdom to leave, and mounted his horse and rode away. Subsequently, and on the same evening, they met, and the conversation and threats were renewed on the part of deceased toward appellant. Deceased ordered appellant to dismount from his horse, which he did. Appellant had a knife, which, on account of some threats made by deceased, he handed to deceased. Deceased then said, "You've got a pistol," and appellant handed deceased the pistol. Through others his knife and pistol

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

were handed back to appellant, and appellant turned and went to his horse, with a view of mounting it and leaving; and he was unaware, he says, of the fact that deceased was following him, and was getting on his horse when deceased seized his bridle rein and gave a jerk which threw appellant against the pommel of the saddle and hurt his stomach right badly, which caused him pain and a bruise which remained for several days. The deceased held onto the bridle rein over appellant's protest, and would not let him go. Whereupon appellant drew his pistol and fired three shots, which brought about the death of deceased. There was also evidence introduced to the effect that appellant believed that deceased was going to kill him, and that he thought deceased was armed; but it is not necessary here to collate the facts with reference to the issue of self-defense. Under these conditions we are of opinion that the court should have charged the statutory definition of provocation, or adequate cause, as contained in his requested instructions. Where the statute names the adequate cause, the charge, in submitting the issue of manslaughter, should inform the jury directly that, as in this case, if this assault created pain, and thereby was engendered sudden passion which rendered the mind incapable of cool reflection, appellant would be guilty of no higher offense than manslaughter. We think, therefore, there was error on the part of the court in not giving this special instruction as requested, as well as not giving it in a general charge. This question should have been directly brought to the attention of the jury. Upon another trial the court, if the facts are the same as embodied in this record, should not charge with reference to provocation by some other person. That issue was not raised by the testimony, and, therefore, not called for in the charge.

There are quite a number of errors assigned with reference to the charge of the court, some of which will not arise upon another trial, and the others were sufficiently charged upon by the court. This much with reference to the charge.

Bills Nos. 1 and 2 were reserved to the introduction of the dying declarations, and recite that the witnesses were permitted to repeat the following language as the statement of dying declarations of the deceased: "Son killed me for nothing. I could not run out of it, and I couldn't beg out of it." See the opinion in Lockhart's Case, 53 Tex. Cr. R. 589, 111 S. W. 1024, and Clark v. State, 120 S. W. 179. The Clark Case reviews the authorities upon which appellant relies for a reversal on this question, and overrules them. For a discussion of the matter, see Clark's Case, supra. In this ruling of the court, therefore, there was no error.

There was a question raised in regard to the forming of a special venire in the case,

and incidental questions which will not occur upon another trial.

Bill of exceptions shows that Maggie Hayes testified, stating that she was an eyewitness to the killing, and her testimony was materially adverse to appellant. Appellant denied all of her statements while upon the witness stand, and his and other testimony made it impossible, if true, that she could have seen the difficulty. Ed. Robertson testified at the examining trial. His testimony was reduced to writing under the terms of the statute. He did not, however, appear at the trial, and there was nothing to show that he was either dead or out of the state. In fact, there was no predicate laid for the introduction of his testimony. The state offered it before the jury. Appellant objected on two grounds, which objections were sustained by the court. In regard to these matters, private prosecuting counsel in the case stated that there was no better evidence that defendant was guilty than that he had objected to the testimony of Ed. Robertson, that the state only wanted what was right and true, and for that reason wanted the jury to know what Ed. Robertson said about the killing, but the defendant did not want the truth to come out, and therefore objected to said testimony being introduced, and made other remarks, and finally said: "Why, if defendant wanted the truth, did he object to the introduction of the testimony?" Appellant requested an instruction withdrawing these remarks from the jury, and instructing them not to consider the same, or other remarks of similar import. This was refused, as requested; but the court modified it to some extent, and gave the charge in the following form: "Mr. Williamson, of counsel for the state, saw fit in his opening argument to say that the state had offered in evidence the alleged testimony of one Ed. Robertson, alleged to have been given on the examining trial in this case, and that defendant had objected to it being introduced, and that, if defendant wanted the truth, why did he object to the admission of such testimony, and other remarks of similar import. You are instructed that the alleged testimony of Robertson, which was offered by the state and excluded by the court, had absolutely no standing as legal evidence in this case, and was not admissible for any purpose, and the defendant had the perfect right to object to its introduction without in any wise being criticised for making such objection, and the said remarks on the part of Mr. Williamson—you will not consider said remarks in any degree." Appellant objected to the court giving the instruction as modified. We are of opinion that this charge was sufficient, and pertinently instructed the jury to disregard the remarks of the attorney. The evidence did not get before the jury, except as implied in the fact that it was offered. Exceptions were sustained as to its introduction as evidence, and we are of opinion,

as presented, the charge of the court sufficiently protected appellant from any injury before the jury.

For the error discussed in this opinion, the judgment is reversed, and the cause remanded.

LEONARD v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

1. BURGLARY (§ 46*)—INSTRUCTIONS—POSSESSION OF STOLEN PROPERTY.

In a prosecution for burglary, where the court charges as to possession of recently stolen property, it must charge that possession, to be evidence of guilt, must be recent, personal, and exclusive.

[Ed. Note.—For other cases, see *Burglary*, Cent. Dig. § 118; Dec. Dig. § 46.*]

2. CRIMINAL LAW (§ 761*)—INSTRUCTIONS.

In the absence of evidence in regard to possession of recently stolen property, a charge thereon is erroneous as assuming a fact.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1731, 1761; Dec. Dig. § 761.*]

Appeal from District Court, Fayette County; L. W. Moore, Judge.

Anderson Leonard was convicted of burglary, and he appeals. Reversed and remanded.

E. H. Moss, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment charges in separate counts a night and day burglary. The alleged owners were Ferd. Kneip, Jr., and William Kneip. The court charged the jury with reference to possession of stolen property recently after it was taken and a reasonable explanation of such possession. As far as the charge went, it followed the form set out in *Wheeler v. State*, 34 Tex. Cr. R. 350, 30 S. W. 913.

There were two serious objections urged to the conviction: First, there was no evidence in the case authorizing a charge on possession of recently stolen property accompanied by an explanation; and, second, under the facts of the case, and where the state is relying upon possession of property recently stolen as the main fact to prove burglary, then it was fatal to the conviction that the court failed to charge the jury that, to warrant an inference of guilt of burglary from the circumstances of possession of recently stolen property, such possession must be personal, exclusive, unexplained, and involve a distinct and conscious assertion of possession of the property by the accused. We have read the statement of facts carefully, and have failed to find any evidence in the case that puts appellant in personal possession of the property, if in fact the property was taken. The owners testify that they had been missing some cot-

ton from their gin, and, as they were buying up small remnants of cotton, they decided to place some slips of paper in among 400 pounds of cotton on the upper floor of their gin. This was on the 24th of December. They were not back at the gin until the 30th. On the 31st appellant's little son, about nine or ten years of age, proposed to sell to the owners of the gin a small lot of seed cotton. They testified that this little boy was named Dykes Leonard. They took the cotton upstairs, the little boy remaining downstairs, and emptied it on the floor from the sacks, and some of their slips of paper were found in the cotton, and from this the inference is to be deduced or reached that the ginhouse was burglarized.

At this point it may be well enough to state that there was no evidence in the case that the house was broken, nor did the owners of the ginhouse undertake to swear that the house was broken, at any point. So it will be seen that the main fact relied upon to show the burglary was that the slips of paper were found in the cotton that they bought from the little boy, Dykes Leonard, or Johnnie Leonard, or at least the cotton that they emptied from the sacks that he brought there. Neither of these witnesses undertook to swear that appellant ever had possession of the cotton, and expressly so state. There was one door by which a party could enter the ginhouse without breaking; that door having been blown down. That door was upstairs. This would have to be reached by climbing a ladder, or getting up in some way to it; but there was no evidence introduced showing or tending to show that, if this cotton was taken from the gin, it was taken in that manner. So, as before stated, the state relied upon the fact that the pieces of marked paper were in the sacks of cotton brought to their gin and sold to them by the boy, Dykes Leonard. The state introduced a son of appellant, whose name was Johnnie, but commonly called "Coon," Leonard. His testimony was, in substance, that about the last of the year he went to the gin in question to sell some cotton, which his father instructed him to take there and sell. He says that his father gave him no instructions as to what to do with the money, but simply told him to take the cotton down to the gin and sell it. He said that one sack of the cotton belonged to himself, and the other the boys could have. This witness said he never saw any tags in the cotton, either at that time or since that time. He further testified, speaking of himself and younger brother, that they picked some cotton during the holidays, and this was the cotton that was carried to the gin; that his father had nothing to do with the picking of the cotton; that he took this cotton down to Kneip's gin, but his father was not with him, and had nothing to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

do with the taking of the cotton to the gin; that before taking the cotton to the gin he saw Mr. Knelp, and asked him if he wanted to buy some cotton that he had, and, being answered in the affirmative, he took it to the gin. This conversation was the day before he sold the cotton. He says: "We picked the cotton we sold him down in the field." He says: "After we got to the gin, Mr. Knelp told us to go and tell father to come." This cotton was emptied upstairs, and this witness did not go up there to see where they put the cotton, as he never got off of the horse; that the people at the gin did not show him the tags they said they found in the cotton at that time, or at any time, nor did they say anything about seeing the tags in the cotton; that the cotton was kept in the smokehouse at home, and he did not know whether his father knew that or not.

Appellant testified in his own behalf that he had some cotton left in his field, and told his boys they could have it if they would pick it; that some of this cotton was unpicked at the time he was arrested and placed in jail; that his little boys asked him, if they would pick the cotton in the field, would he give it to them? and he answered them in the affirmative, and they picked some of the cotton before he was arrested, and what became of the other he did not know; that he told his little boys to sell the cotton and they could have the money; that on the day in question, when he got home from Roundtop, his little son came to him and told him that Mr. Knelp wanted him up at the gin. He says he did not claim the cotton at that time, nor did he tell the boys to take the cotton to the gin for him, but told them to take it to the gin, and that they could have the money that they got for it; that he didn't know whether he told them to take it to the gin and sell it or not, but just told them they could have the cotton. He says: "When Mr. Knelp showed me the cotton with the tags in it, I told him I didn't see how they got in there, as I couldn't understand how they would get in there;" that he was sure his cotton would have no tags in it. He denies going into the gin, or getting the cotton out of the gin. The Knelps testified that when they sent for appellant, and he reached the gin, they asked him, "How came those slips of paper in the cotton?" and he claimed that he did not know; that one of the sacks of cotton belonged to his boys, and one to his mother. This the appellant denies. This is practically the case on the facts.

We are of opinion that the charge in regard to possession of recently stolen property, if called for by the facts, was deficient in not charging that possession must be recent, personal, and exclusive. Having given the charge on this subject, under the circumstances detailed above, it was clearly

incumbent upon the court to have charged further that, in order to constitute possession under this character of case as an evidence of guilt, possession must be recent, personal, and exclusive. As a prerequisite to a charge applicable to the possession and explanation of such possession of recently stolen property, the fact of possession must be shown, and, where this has not been done, it is an assumption of a fact by the court against the record, and a charge upon the weight of the evidence, to give such charge, because it is the assumption of a fact in the case not proved, and turns the guilt upon such assumed unproved fact.

The judgment is reversed, and the cause is remanded.

WESLEY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

1. INTOXICATING LIQUORS (§ 36*)—VIOLATION OF LOCAL OPTION LAW — QUESTIONS REVIEWABLE.

The court, on a trial for violating the local option law, must assume that the election putting the law in force was valid, where there was no contest as provided by Acts 30th Leg. 1907, p. 447, c. 8; and it cannot consider questions as to the sufficiency of the orders and judgments of the commissioners' court putting local option into effect.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 36.*]

2. INTOXICATING LIQUORS (§ 235*)—VIOLATION OF LOCAL OPTION LAW—EVIDENCE—ADMISSIBILITY.

Where, on a trial for violating the local option law, prosecutor testified that he got whisky by, or from, or through accused, that accused told him that he would get whisky from C., that accused, in company with another, went to C.'s house, and that after they had returned from the house the whisky was delivered to prosecutor, the court properly permitted the state to show that C. had recently purchased whisky, which he had either drank or given away, but none of which he had sold.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 235.*]

3. CRIMINAL LAW (§ 1120*)—QUESTIONS REVIEWABLE—EXCLUSION OF EVIDENCE.

A bill of exceptions complaining of the sustaining of an objection to the question, asked prosecutor on cross-examination, as to whether he had ever been indicted for murder, theft, or rape, which does not show what the answer of the witness would have been, is insufficient, for an affirmative answer alone would affect the witness' credibility.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2932; Dec. Dig. § 1120.*]

4. INTOXICATING LIQUORS (§ 205*) — VIOLATION OF LOCAL OPTION LAW—INFORMATION—SUFFICIENCY.

An information charging a violation of the local option law, which alleges that the commissioners' court of the county had duly made, passed, and entered an order declaring the result of the local option election and prohibiting the sale of intoxicating liquor within the county, as required by law, and had caused the order to be published in the manner and form and for the length of time required by law, is sufficient,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

without alleging in terms that the county judge published the order declaring the result of the election.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 225; Dec. Dig. § 205.*]

Appeal from Howard County Court; L. A. Dale, Judge.

Jim Wesley was convicted of violating the local option law, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant appeals to this court, and seeks reversal of the judgment had in the county court of Howard county on April 5, 1909, where he was convicted of selling intoxicating liquors in violation of the local option law.

Many of the questions raised on the appeal relate to the sufficiency of the orders, judgments, and decrees of the commissioners' court of Howard county putting local option into effect. Since there was no contest, as provided by acts 30th Leg. 1907, p. 447, c. 8, these matters cannot be considered by us; but we must assume and hold, as the court below did, that the law was in all respects regular and valid.

The testimony of the prosecuting witness, Walker, was to the effect, in substance, that he got the whisky by, or from, or through one Jim Wesley; that he met Wesley in Big Springs, and asked him if he knew where he could get some whisky, and Wesley replied that he might be able to get some for him from a man named Coots, Wesley claiming that Coots was afraid to let him have the whisky; that they went to town and met Coots; that Wesley gave the money to a man named Henry. He went off, and was gone a short time, and brought back a quart of whisky.

1. On the trial the state sought to show, and was permitted to show, by the witness Coots, that he had recently purchased and had shipped to him 12 quart bottles of whisky, which he said he had drank and given away, but none of which he had sold. This was objected to, because there was no evidence shown to connect the witness with the defendant in the sale with which he is charged. The bill of exceptions evidencing this matter was approved, with the qualification that the prosecuting witness, Walker, stated on the witness stand that the defendant told him he would get the whisky from Coots, and that the defendant, in company with Jet Henry, went to Coots' house, and after they had returned together from said house the whisky was delivered to him. We think, in view of the court's explanation, considered in connection with the entire statement of facts, that there was no error in this ruling of the court.

2. On the trial the prosecuting witness, Walker, was asked on cross-examination if

he had ever been indicted for murder, theft, or rape. This was objected to by counsel for the state, and the court sustained the objection, and witness did not answer. The bill of exceptions is defective, in not stating what the answer of the witness would be. It is not shown that he would have answered affirmatively, and such an answer alone would have affected his credibility.

3. It is further claimed that the information is insufficient, in that it does not in terms alleged that the county judge published the order declaring the result of the local option election. In the case of *Watson v. State*, 52 Tex. Cr. R. 551, 107 S. W. 544, on a review of all the authorities, an information very much like this was held sufficient, and it was there decided that, in a prosecution for violation of the local option law, an information which charged that the commissioners' court of said county had duly made, passed, and entered the order declaring the result of such election, and prohibiting the sale of intoxicating liquor within said county, as required by law, and had caused said order to be published in the manner and form and for the length of time required by law, was sufficient.

The other exceptions relate to the supposed invalidity of the local option election, which we have disposed of in the first paragraph of this opinion.

4. It is urged, further, that the verdict of the jury is not supported by the evidence. There was the usual conflict to be found in such cases. We are not prepared to say, in view of the entire record, that the testimony is insufficient.

It is therefore ordered that the judgment of conviction be and the same is hereby in all things affirmed.

FERGUSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 3, 1909. Rehearing Denied Dec. 1, 1909.)

1. WITNESSES (§ 53*)—CROSS-EXAMINATION—SCOPE—WIFE OF ACCUSED.

The wife of accused, on cross-examination, cannot be made to testify to any matter that is not germane to her testimony in chief.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 140; Dec. Dig. § 53.*]

2. CRIMINAL LAW (§ 1091*)—APPEAL—BILLS OF EXCEPTION—SUFFICIENCY.

Bills of exception setting out objections to testimony of accused's wife on cross-examination as not limited to a cross-examination of her direct testimony, but stating nothing to show that it was not so limited, cannot be considered.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2831; Dec. Dig. § 1091.*]

3. WITNESSES (§ 53*)—CROSS-EXAMINATION.

In a prosecution for assault, where accused's wife had testified on direct examination that accused was not at home at the time of the alleged offense, it was proper to ask her on cross-examination if he had been in her room

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that night before he came in at 4 o'clock the next morning.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 140; Dec. Dig. § 53.*]

4. CRIMINAL LAW (§ 390*)—EVIDENCE—EXPLANATION OF CONDUCT.

Where a person for any reason has failed to explain his silence when the circumstances would suggest a candid statement, he may give his reason for such silence, where the transaction is the subject of judicial inquiry; and where a prosecuting witness in a prosecution for aggravated assault had not told accused's wife who the assailant was, witness could explain on direct examination that she had not informed the wife because she and accused had been good to her and had treated her as their own child.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 858; Dec. Dig. § 390.*]

Appeal from Wood County Court; W. W. Campbell, Judge.

T. M. Ferguson was convicted of aggravated assault, and he appeals. Affirmed.

Jones & Jones, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of aggravated assault, and his punishment assessed at a fine of \$100.

1. Bill of exceptions No. 1 complains of the following: That while Mrs. T. M. Ferguson, wife of appellant, was on the stand testifying in behalf of appellant, the county attorney asked her upon cross-examination the following question: "What time did the defendant come home on the night of the alleged assault?" to which question appellant then and there in open court objected, because the same was immaterial and irrelevant, and the same was an attempt to cross-examine witness about matters not brought out in her direct examination, and because the same was requiring the wife of the defendant to give testimony against him, and the same was about matters not asked about on the direct examination of said witness, which said objections were in all things by the court overruled, and the witness was required to testify, and did testify, that it was about 4 o'clock in the morning when the defendant came home. Bill of exceptions No. 2 complains that, while appellant's wife was on the stand, the state asked her the following question: "What effort did the defendant make to notify the officers that Miss Bishop had been assaulted, after he came home on the morning after the alleged assault?" Appellant, through his counsel, made exactly the same objections, and the witness testified that appellant made no effort to notify the officers of Winnsboro that a man had been in Miss Bishop's room.

It is a well-known and established rule of this court, and under the law of this state, that a wife on cross-examination cannot be made to testify to any matter that is not germane to a cross-examination of her testimony in chief; in other words, that

the cross-examination must be limited to a cross-examination of the wife's direct testimony. These bills, however, are defective, in that we will not treat objections to testimony as certificates of fact that the cross-examination was not limited to a legitimate cross-examination of the wife. It is true appellant objected to the testimony on the ground that it was not; but there is nothing in the bills to show that it is not. This being true, there is no error on the part of the court shown. The same may be said of bill of exceptions No. 3. Bill No. 3 complains that the county attorney was permitted to ask this question: "Had the defendant been in your room that night, before he came in at 4 o'clock on that night?" The court approves the bill, with this statement: "The wife had testified on direct examination that her husband was not at home at the time of the alleged occurrence." Certainly this would render the cross-examination legitimate.

2. Bill of exceptions No. 3a shows that, while the witness Mrs. Marie Rash was testifying upon direct examination in behalf of the state, she testified as follows: "I just could not tell her that it was Mr. Ferguson, the defendant, as they had been so good to me, and had treated me like their own child." Appellant objected to this testimony, on the ground that same was immaterial and irrelevant, and because the witness was trying to explain her conduct about why she had denied the identity of the assailant, before she had been cross-examined about it, and because it was an attempt by the state to bolster up the witness before her credibility had been attacked, and because it called for a conclusion of the witness, and because the witness could only testify to facts, and let the jury reach their conclusion, and because the same was proving by the witness her reasons for not doing certain things, and her reasons could not bind the defendant; that same was prejudicial and inadmissible. The court appends to this bill the following statement: "This testimony was admitted as an explanation of why she did not tell Mrs. Ferguson who it was in the room; and it was admitted as part of the *res gestæ*, it occurring immediately after the offense was claimed to have been committed. She was fully crossed upon this testimony."

We see no error in the ruling of the court. Where a party for any reason fails to make a statement that is explanatory, it is proper for the witness to give a reason for silence when the circumstances often would suggest a candid statement.

3. Bill of exceptions No. 3b shows that while Marie Rash, who had been re-called to testify in behalf of the state, was on the stand, she stated: "I knew who it was in my room that night, and I knew who it was when Mrs. Ferguson asked me; but I could

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

not tell her. I did not tell her, and I could not so do." Appellant objects to this testimony for the same reasons stated above. This testimony was admissible.

Various objections are urged to the charge of the court, all of which we have carefully reviewed; and in the light of this record we must say there is no error in same authorizing a reversal of this case.

Finding no error in the record, the judgment is in all things affirmed.

DURHAM v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

1. CRIMINAL LAW (§ 1092*)—APPEAL—BILLS OF EXCEPTIONS AND STATEMENT OF FACTS.

The bills of exceptions and statement of facts, filed after adjournment of court, cannot be considered; the record showing no order authorizing such filing.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1092.*]

2. CRIMINAL LAW (§ 1038*) — REVIEW OF CHARGE—NECESSITY OF EXCEPTION AND REQUEST.

To authorize review of a charge in a misdemeanor case for omissions therein, defendant must have excepted to the charge, and asked special instructions covering the matter complained of.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2646; Dec. Dig. § 1038.*]

Appeal from Scurry County Court; C. R. Buchanan, Judge.

B. Durham appeals from a conviction. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for aggravated assault; the fine being assessed at \$100.

There are several bills of exceptions incorporated in the record, as well as a statement of the facts. The court adjourned on the 24th day of April, 1909. The statement of facts was filed April 28, 1909, four days after adjournment of the court. The bills of exceptions were filed on the 4th day of May, 1909. There was no order entered in the court below, so far as this record shows, authorizing the filing of the bills of exceptions and statement of facts after the adjournment of the term. In the absence of such order these matters cannot be considered. With the record in this condition—that is, in the absence of the statement of facts and the bills of exceptions—we are of opinion that the grounds of the motion for new trial do not present such matters as can be reviewed.

Some of the criticisms of the charge cannot be intelligently reviewed in the absence of the evidence. There were no special charges asked by appellant, and, if the supposed

defects in the charge could be considered at all, it must be done in the light of the facts. The rule is that in misdemeanors, where a party desires to take advantage of omissions in the charge, he must except to the charge of the court, and ask special instructions covering the matters of which he complains; otherwise, this court will not review the charges of the court, except where the charge is radically wrong, and this, it would seem, would apply not to omissions, but to the charges as given.

However, as this record is presented, we do not believe there are any such matters as can be reviewed; and, there being no error authorizing a reversal as the case is presented, the judgment is affirmed.

GRIFFIN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

1. HOMICIDE (§ 300*)—SELF-DEFENSE—NECESSITY FOR INSTRUCTION.

In a prosecution for murder, it appeared that there had been a difficulty between accused and his brother and decedent. There was testimony for the state that, at the time of the homicide accused met decedent and told him that he (decedent) had acted as a rascal. At that moment accused's brother came up behind and said, "Uncle, you are not game," and decedent turned around and said, "What have I done to you, Cal?" when accused struck decedent with an ax handle; that decedent had a pocketknife in his hand, but it did not appear what he was doing with it when he turned to accused's brother. Accused testified that he did not hear his brother's remark to decedent, and that, when decedent turned towards his brother, decedent caught his knife in both hands and accused struck him, because he thought he was going to cut his brother. Held, that a charge on self-defense should have been given, to the effect that if accused reasonably believed that decedent was assaulting, or was about to attack, his brother with the knife, he would be justified in defending his brother.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.*]

2. HOMICIDE (§ 122*) — SELF-DEFENSE — DEFENSE OF BROTHER.

If decedent undertook to assault accused's brother with a knife, or accused believed that he was going to do so, accused would have the same right to defend his brother as the brother would have had to defend himself.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 177-181; Dec. Dig. § 122.*]

3. HOMICIDE (§ 112*)—JUSTIFICATION.

The brother's remark to decedent, "You are not game," would not justify or excuse decedent in making an assault, but could only be used in mitigation of any offense decedent might commit.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 145-150; Dec. Dig. § 112.*]

Appeal from District Court, Nacogdoches County; James I. Perkins, Judge.

Mart Griffin was convicted of aggravated assault, on a charge of murder, and he appeals. Reversed and remanded.

King & King and Blount & Garrison, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This record presents but one question for revision, to wit: Did the court err in not charging the law applicable to self-defense? The evidence is quite voluminous. Appellant was charged with murder, and convicted of aggravated assault. In order to present appellant's question it may be necessary to make this statement:

The record discloses that about May 1, 1907, there was a difficulty in which appellant, his brother, and an uncle, I. M. Shepherd, were engaged. During the difficulty, appellant struck the deceased on the head with an ax handle, which knocked him down, and rendered him unconscious for a few seconds. After the trouble, deceased remained at home a few days, got up and went about his business for about three months, when he was taken sick, became paralyzed, and died. The result of the autopsy revealed a blood clot upon the brain immediately under that portion of the skull where the blow was inflicted. Physicians who testified in the case varied as to the cause of the death. Some state that it was the result of the stroke; others, that the lick had nothing to do with the death. Appellant and his uncle, the deceased, had disagreed about a settlement for a certain amount of lumber that appellant had purchased from the deceased. There had been an attempted settlement between them, and there was some contention that deceased had made appellant pay for more lumber than was right.

On the morning of the trouble the parties were all in town. The witness Manning testified that he and deceased were standing on the sidewalk at the post office, from which Mr. Shepherd had just a few moments before emerged; that the witness walked over and spoke to him, and that deceased had a circular or letter in his hand, which he doubled up, tore into pieces, and threw on the ground. Witness and deceased were talking about some mill matters; that is, in regard to the condition of the market, and lumber, and so on, and while thus engaged appellant "came up quartering from in front of the west side of town from the direction of Toplitz's store." When he walked up in front he said: "Uncle, you acted the damn rascal." The witness testified appellant "didn't seem to be mad, seemed to be in perfect good humor. 'Why,' Mr. Shepherd says, 'maybe you think so,' or 'probably so,' or something, and I think maybe Mart repeated the same thing, leaving off the 'damn.' I think he repeated the last part, 'You have acted the rascal,' and Mr. Shepherd says, 'Go on,' and at that instant Cal Griffin (brother of appellant) walked up from behind. I don't know where he came from. He just walked up behind, and says, 'Uncle, you are not game,' and Mr. Shepherd just

turned around and says, 'What have I done to you, Cal?' and Cal walked up then in front, and he looked like he struck at him with his left hand, just made a pass that way (witness indicates by a movement of the left hand), and at that instant Mart struck him over the head with an ax handle, kinder on the side of the head, and Mr. Shepherd fell forward. * * * Mr. Shepherd had the knife between his fingers, knocking it around, when Mart Griffin came up. The knife was closed. I saw the knife after Mart Griffin knocked Mr. Shepherd down. I saw it on the ground, when it was picked up, and it was closed. When Mr. Shepherd spoke back to Mart before the licks were struck, he spoke just like I would speak to you or anybody else. He just said, 'Go on,' or something like that. He didn't speak angrily to Mart. When he spoke to Cal, he didn't seem to be mad. Cal walked up and said, 'Uncle, you are not game,' and he turned around and says, 'What have I done to you, Cal?' Cal struck at Mr. Shepherd with his left hand. I couldn't see his right hand at that time. I was directly behind Mr. Shepherd, right at his back, about 12 or 15 inches directly behind him, and Cal was right in front of him. I didn't see Mart doing anything when he came up and spoke to Mr. Shepherd. He didn't seem to be mad. When Mart spoke to him, he was smiling. He seemed to be in perfect good humor. When Mr. Shepherd spoke, it didn't seem like he was mad. I was not thinking of any trouble until the lick was passed. Mart struck him with an ax handle, an ordinary club ax handle."

This witness testified for the state, and places the state's case as strongly as, perhaps, it was stated anywhere in the testimony. This witness further testified that he could not see what Mr. Shepherd was doing with the knife at the time he turned around, facing Cal Griffin. Ramblin testified that he was sitting in the post office window when the trouble began. When he first noticed the parties, appellant was standing opposite the witness in front of Shepherd, kind of leaning on an ax handle, talking to him (Shepherd), when Cal Griffin approached from on the side and spoke something to Shepherd. Shepherd turned to him to know what it was to him, and Mart struck him. When Mr. Shepherd turned towards Cal Griffin, he had a pocketknife in his hand, and as he turned he had his back to witness, from where witness was sitting in the window. "As he turned to where I could see, his hands seemed— From the appearance of his hands, they seemed to be thrown together, like his hands come together. He had his knife in one hand, and they come together right in front of him. Just as he did that, just as he turned to Cal, Mart struck him. Cal was about six feet from Mr. Shepherd at that time, and Mr. Shepherd fell towards Cal."

Appellant testified in his own behalf. After going into some of the details in reference to the lumber transaction and the attempted arbitration, he stated he had not seen Mr. Shepherd that morning before he went into Garrison & Langston's store, where he bought him an ax handle. When he walked out of Garrison & Langston's store, Shepherd and Manning were talking, and he walked down to where they were and commenced talking to Mr. Shepherd. "I says, 'Uncle, you are not treating me right; you are not doing right.' He says 'Why?' and I says, 'You are acting the rascal with me.' As I said, 'You are acting the rascal with me,' about that time Cal walked up, and Uncle Ike wheeled around to the right towards Cal, and caught his knife with both hands, and I struck him. He had his knife in one hand, and he just caught it together like that (throws both hands together). I struck him because I thought he was going to cut Cal with that knife. I thought he was going to use the knife on Cal, and I struck him. I did not strike him, or make any effort to strike him, until after he did that. There had been no further conversation between us, besides what I have stated. I struck him one time. I struck him with an ax handle. I struck him somewhere about the face. I never hit him on the side of the head, or on the head, either. I struck him in the face. When I struck him, he fell over. After I struck him, I raised the ax handle; but I didn't strike him any more."

Joe Garrison testified, after deceased got up from where he had been knocked down, he went into a drug store, and at the point where he fell he (witness) picked up an ordinary size pocketknife, and it was admitted by the state that this was the knife deceased had in his hand when he was struck. Some of the witnesses testified that appellant struck at deceased another blow as he was falling. This was also denied.

We are of opinion that a charge on self-defense should have been given, to the effect that, if appellant reasonably believed deceased was assaulting or was about to attack his brother with a knife, he would be justified in what he did. This question is properly presented and raised on the record. It will be noted that under our statute, if deceased had attacked appellant when he called him a rascal or charged him with treating him badly, he could not have pleaded justification. It will be noted, further, that the witnesses for the state and appellant both testify that there was no anger on the part of appellant and deceased towards each other during the colloquy. When Cal Griffin came up and made the remark he did, which appellant says he did not hear, and deceased undertook to assault him with a knife, and was opening it for that purpose, or appellant believed he was opening

it for that purpose, then he would have the right to defend his brother, and the same right that his brother would have to defend. The remark that Cal Griffin made to deceased, to wit, "You are not game," would not justify or excuse deceased in making an assault. It could only be used in mitigation of any offense of which deceased might commit on Cal Griffin. Then, if Cal Griffin had the right to have resisted any threatened attack on the part of deceased with a knife, Mart Griffin would have equal right to do so. We are discussing this only from the appellant's standpoint. The state had another view of it under the testimony. The appellant was entitled to have his side of the issue presented to the jury in an appropriate charge.

We are of opinion, therefore, that the court should have charged the jury with reference to self-defense; and, because this was not done, the judgment is reversed, and the cause is remanded.

BADER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

1. CRIMINAL LAW (§ 678*)—DIFFERENT ACTS—ELECTION.

In a prosecution for rape, the state may be required to elect on which of several instances of intercourse it will rely.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1580; Dec. Dig. § 678.*]

2. RAPE (§ 40*)—EVIDENCE—LEWDNESS WITH OTHERS.

In a prosecution for rape, circumstances of lewdness, familiarity, etc., indicating that prosecutrix might have been guilty of intercourse with others than accused, was admissible to rebut her testimony that she had never had intercourse with any other person than accused and to account for her general condition, the condition of her vagina, and the destruction of her hymen, as testified to by physicians, and to prove that others than accused had in fact had intercourse with her.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 55-57; Dec. Dig. § 40.*]

3. RAPE (§ 48*)—EVIDENCE—COMPLAINT BY PROSECUTRIX.

In a prosecution for rape, evidence of the details of the statement made by prosecutrix to her mother, to the effect that accused had done her very wrong, and the circumstances and reasons for the disclosure, which had been for some time withheld, was admissible.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 67-69; Dec. Dig. § 48.*]

4. WITNESSES (§ 389*)—IMPEACHMENT—PRIOR TESTIMONY OF PROSECUTRIX.

In a prosecution for rape, a written sworn statement, made by prosecutrix to the assistant county attorney of a different county, was admissible to impeach her testimony, though she admitted making practically all the statements in the statement, and stated that they were either incorrect or untruthful.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1243; Dec. Dig. § 389.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

5. WITNESSES (§ 373*)—BIAS—MOTIVE OF PROSECUTRIX—LAYING FOUNDATION.

In a prosecution for rape, evidence that defendant told the witness that M. had frequently been seen at prosecutrix's house, and had told defendant that he (M.) was sleeping with prosecutrix, and referred to her as his wife, that accused requested witness to go to prosecutrix's father and explain to him the statements of M., and that he did so, was inadmissible, in the absence of any evidence that such disclosures had been brought to the knowledge of prosecutrix, or that they procured or induced the prosecution, notwithstanding other evidence that M. was a repeated visitor and companion of prosecutrix, and that the offered testimony indicated motive of the prosecutrix and her parents for the prosecution.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1200; Dec. Dig. § 373.*]

Appeal from District Court, Navarro County; H. B. Daviss, Judge.

Ben F. Bader was convicted of rape, and he appeals. Reversed and remanded.

Callicutt & Call and El J. Gibson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. The appellant prosecutes this appeal from a conviction for rape, had in the district court of Navarro county on May 7th of this year.

Appellant was charged with the offense of rape upon one May Belle White, a girl under the age of 15 years. The evidence, indeed, shows her to have been at the time of the alleged rape, and at the time of the trial, less than 13 years of age. That she had had intercourse with some one, in view of the testimony of the physicians introduced, is unquestioned. Her testimony asserts that appellant had, with her consent, intercourse with her on three different occasions, once the latter part of February or 1st of March of this year, a second time on the first Sunday in March, and another time about the 20th or 25th day of March, this year. We deem it unnecessary to set out the details, which are, as usual, of the most disgusting character.

1. At the conclusion of the evidence, and before the argument of counsel, appellant filed a motion to require the state to elect upon which one of the occurrences or instances of intercourse it would rely for a conviction in the case. Under all the authorities, which are both numerous and uniform, this motion should have been granted. *Batchelor v. State*, 41 Tex. Cr. R. 501, 55 S. W. 491, 96 Am. St. Rep. 791; *Powell v. State*, 47 Tex. Cr. R. 155, 82 S. W. 516, 122 Am. St. Rep. 683; *Stone v. State*, 45 Tex. Cr. R. 91, 73 S. W. 956.

2. Appellant tendered certain evidence going to show circumstances of lewdness, familiarity, and tending to show that prosecutrix might have been, and raising the issue and tending to prove that she had been, guilty of acts of intercourse with other per-

sons than appellant. This was designed to meet the testimony of the prosecutrix that she had intercourse with no other person than appellant, and to account for her condition and the condition of the vagina and the destruction of her hymen, as testified to by the physicians, and to prove that other persons than himself had in fact had sexual intercourse with prosecutrix. This was offered for the purpose, also, of impeaching the prosecutrix, wherein she testified that no other person than appellant had had carnal knowledge of her, and to explain the facts and circumstances testified to by the physicians, tending to show that prosecutrix had submitted to repeated acts of intercourse. This testimony is quite voluminous, and consisted of a great many circumstances and facts which we deem unnecessary to set out. The effect of all the evidence tendered, if believed, was well calculated to induce the jury to believe that the little girl had been intimate with several persons near her own age. The court, in explaining the bill, says that he ruled that such proof of other acts of intercourse would be admitted for such purpose, and that no proof of other acts of intercourse was in fact offered.

It was not contended by counsel for appellant that the mere fact that prosecutrix had allowed other persons to have intercourse with her would be any defense, but that this evidence was offered, as stated, for the purpose of explaining, consistent with appellant's innocence, the condition of the prosecutrix. That this testimony is admissible is well settled in this state. *Bice v. State*, 37 Tex. Cr. R. 43, 33 S. W. 803; *Knowles v. State*, 44 Tex. Cr. R. 322, 72 S. W. 398. The rule is thus laid down in 23 *American & English Encyclopedia of Law*, p. 872: "Where the condition of the private parts of a female is relied upon to show the fact of sexual intercourse, evidence to show other acts of intercourse between the prosecutrix and other persons is admissible to show the cause of such condition and to rebut the contention that it was caused by defendant." *People v. Flaherty*, 79 Hun, 52, 29 N. Y. Supp. 641; *People v. Craig*, 116 Mich. 388, 74 N. W. 528; *Benstine v. State*, 2 Lea (Tenn.) 169, 31 Am. Rep. 593; *Shirwin v. State*, 69 Ill. 60; *Nugent v. State*, 18 Ala. 526; *People v. Knight* (Cal.) 43 Pac. 7; *People v. Betsinger*, 58 Hun, 606, 11 N. Y. Supp. 916. Judge BROOKS agrees to the rule here announced, notwithstanding the expression, apparently, of a contrary view, in the *Knowles Case*, supra. The trial court seems to have recognized the rule, but to have thought that, because the evidence was not positive and direct, that the testimony ought not to be admitted. If evidence of such intercourse is admissible, then it may be shown, either by direct and positive testimony, or by circumstances of such cogency and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

force as to warrant the belief that there had been intercourse with other persons. We think the nature of the testimony tendered was such as to render it admissible. If believed, we think it was sufficient to justify a fair, if not an inevitable, inference that the little girl had been criminally intimate with other persons.

3. Objection was made to portions of the testimony of Mrs. White touching the details of the statement of her daughter, and that at the time she was crying, despondent, and unhappy. We do not believe that, as presented, there was anything objectionable in the testimony admitted by the court. The details of the statement made by the child to the mother are not given, further than that appellant had done her very wrong; and the circumstances and reasons for the disclosure, which had been some time withheld, under the circumstances, were not objectionable or improper.

4. Objection is also made that the court erred in not permitting appellant to introduce in evidence a certain written statement, signed and sworn to by the prosecuting witness before the assistant county attorney of Limestone county, which is set out in the record. This testimony was admissible as a basis for impeaching the prosecuting witness. Since, however, she admitted making practically all the statements contained in it, and stated that they were either inaccurate or untruthful, it is not believed that this matter, if the case stood alone on this question, would be important. However, if offered on another trial, we think it should be admitted, if offered for the purpose of impeachment, and restricted to that use.

5. On the trial appellant offered one Roscoe, by whom he proposed to prove that he was principal of the public schools at Thornton, and that along in the latter part of February of this year appellant told said Roscoe, in substance, that McClellan, a 18 year old boy, had frequently been seen by him at the home of prosecutrix; that McClellan had told him (appellant) that he was sleeping with prosecutrix, and referred to her as his wife; that Roscoe was an intimate friend of appellant, and that appellant requested him to go to the father of prosecutrix and explain to him the statements of said McClellan, and that he (Roscoe) did explain to the father of prosecutrix these statements of McClellan. This testimony was offered in view of other evidence tendered that McClellan was a repeated visitor and companion of prosecutrix, and that said testimony was pertinent as tending to show a motive of prosecutrix and her parents for the prosecution. It will be noted it is not claimed that these facts, if, indeed, they were facts, were ever communicated to the prosecuting witness or to

her mother; nor is it shown that in any way the fact contributed to the institution of the prosecution, or related in any way to the charge against appellant. We think, before this testimony should be admitted, that some showing should be made that these disclosures had been brought to the knowledge of the prosecuting witness, or that they procured or induced the prosecution.

The record shows that W. W. White was offered as a witness by appellant. He is not shown by any evidence to have instituted or to have been concerned in the prosecution. We gather from the record that he was in bad health and probably a very infirm man. On his cross-examination he says: "I had a long spell of sickness, and have never been right since." We do not think, in view of the entire record, this testimony should have been admitted.

Many of the other questions raised on the appeal relate to matters that will not likely occur on another trial and need not now be discussed.

6. Finally, it is urged that the testimony is insufficient to sustain a conviction. We do not feel, in view of the fact that the case is to be reversed, that we should undertake at this time to pass on this question.

For the errors pointed out, it is ordered that the judgment of conviction be, and the same is hereby, set aside, and the cause reversed, and remanded for further proceedings in accordance with this opinion.

GIPSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

1. CRIMINAL LAW (§§ 763, 764*)—INSTRUCTION ON WEIGHT OF EVIDENCE—EFFECT.

In a prosecution for theft of cotton in the open boll by a lessee from his lessor, a charge that, in determining whether the cotton was the exclusive property of the lessor, the jury should consider how much cotton the lessor had received on his rental contract previous to the alleged theft and how much defendant had received, and if all the cotton the lessor had received, together with the cotton picked up to that time, was less in value than the cotton defendant had received, including a bale used to pay defendant's store account, then the jury should find that the cotton was the exclusive property of the lessor, otherwise not, was a charge on the weight of evidence; and as the ownership of the cotton was an issue in the case, not being dependent alone on how equitably the cotton theretofore raised had been divided, the charge grouping the facts and instructing the jury to determine the question by calculation was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748; Dec. Dig. §§ 763, 764.*]

2. LARCENY (§ 7*)—JOINT OWNERSHIP—LANDLORD AND TENANT.

Where cotton in the open boll, alleged to have been stolen, was the joint property of defendant and his lessor under a contract to share the crops, and defendant, after having moved off the place, later returned to finish gathering the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

crop, a conviction of the defendant for theft could not be sustained, since the lessor could not divest defendant of his ownership and possession by having the cotton picked, and there was no such severance of defendant's relation to the cotton as would make his possession of it unlawful or his sale of it theft.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. § 19; Dec. Dig. § 7.*]

Appeal from Wilbarger County Court; J. A. Nabers, Judge.

D. L. Gipson was convicted of theft of property under the value of \$50, and he appeals. Reversed and remanded.

Cook & Cook, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. This was a conviction for theft of property under the value of \$50. Appellant was, or had been, the tenant of one Allison, and was charged with the theft of 400 pounds of cotton in the open boll, of the value of \$5.

On the trial, among other things, the court instructed the jury to this effect: "In determining whether or not the cotton bolls which defendant is charged with stealing were the exclusive personal property of A. Allison, you will take into consideration how much cotton Allison had received on his rental contract previous to the alleged taking, and how much defendant had received, and if you find that all the cotton Allison had received up to that time, together with the amount of bolls picked up to that time, was less in value than the cotton defendant had received, including the bale used to pay defendant's store account with Hall & Gilbert, then if you so find you are instructed that the said bolls were the exclusive personal property of said A. Allison; otherwise, not." This was clearly a charge on the weight of evidence. The question of ownership of the cotton being an issue in the case, and such ownership not being dependent alone as to how equitably the cotton theretofore raised had been divided, a charge such as this, grouping the facts and instructing that the jury would determine the question by calculation, was manifest error.

Again, we feel like saying, though the case is to be reversed, that we do not believe, in any event, as the matter is here presented, that a conviction for theft could be sustained. The evidence shows that these cotton bolls were raised on land owned by Allison, which had been rented to appellant on shares; the contract being that the proceeds of the cotton were to be divided equally between them. There had not been, as we gather from the record, a settlement between the parties. These particular bolls, it is claimed, were picked and piled on the ground by an employé of Allison, without defendant's consent or knowledge. Allison states that in the summer appellant came to him and said they would divide the crop by his

taking the first bale and Allison the second, and so on, which was agreed to. Appellant claims he had never abandoned the bolls or his crop. The testimony does show that he had moved off the place, but had later returned to finish gathering his crop. The cotton, with the theft of which he is charged, was the joint property of appellant and Allison, and under the contract Allison could not divest him of his ownership and possession by having the same picked. It is true, these matters were to some extent the subject of dispute; but we think there was no such severance of appellant's relation to the cotton as tenant as would have made his possession of same unlawful, or would have made his sale of same theft.

We deem it unnecessary to discuss the other matters, as what we have said disposes of the case.

The judgment is reversed, and the cause is remanded.

MARTIN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

1. CRIMINAL LAW (§ 770*)—INSTRUCTIONS—THEORIES OF CASE.

In a prosecution for assault to murder a child, accused's sister-in-law, who gave birth to the child at accused's house, testified that accused was its father. The child was put in a sack a few hours after birth and placed some distance from the house. There was evidence that, after another person had found the child in the sack, accused insisted on taking it to his house, and actually took it there, though his wife protested against it. He had it cared for, and it was not injured by the exposure or otherwise, and was afterward cared for by its mother. Accused denied that he had ever seen the child before it was found, though he knew of its birth, and there was no substantial evidence to show that the tracks around where it was found were accused's. His wife did not testify at trial. *Held* error to refuse to charge accused's theory that he did not place the child where it was found, or know of its being placed there, but that it was placed there by his wife; and the error was accentuated by a charge that accused would be guilty if he acted alone or with another in placing the child there.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.*]

2. HOMICIDE (§ 310*)—INSTRUCTIONS—LESS DEGREE OF OFFENSE—ASSAULT TO MURDER.

The conduct and testimony of accused require the presentation of his theory, that if he put the child where it was found without any intent to kill it, but to prevent the exposure of his sister-in-law's shame and his connection with its paternity, he must be found guilty of a lesser degree of assault or acquitted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 658, 659; Dec. Dig. § 310.*]

3. CRIMINAL LAW (§ 519*)—EVIDENCE—CONFESSIONS—VOLUNTARY CHARACTER—CONVERSATIONS WHILE UNDER ARREST.

A conversation between accused and a justice of the peace and constable, while accused was not under arrest, and did not consider himself under arrest, was admissible, though he was afterwards arrested by order of the justice,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and the officers testified that they would not have permitted him to depart at the time of the conversation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163, 1167; Dec. Dig. § 519.*]

4. HOMICIDE (§ 86*)—ASSAULT TO MURDER—INTENT.

If accused placed a child, to which his sister-in-law had just given birth, in an exposed position near his house, without any intent to kill it, but to hide his sister-in-law's shame and his own paternity of it until it could be carried away, he would not be guilty of assault to murder, but of some lesser degree of assault, if of anything.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 112; Dec. Dig. § 86.*]

5. CRIMINAL LAW (§ 770*)—INSTRUCTIONS—DIFFERENT THEORIES OF CASE.

In support of the presumption of innocence, every theory of the crime which the evidence suggests should be charged upon accused's request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.*]

Appeal from District Court, Cherokee County; James I. Perkins, Judge.

Sherman Martin was convicted of assault to murder, and he appeals. Reversed and remanded.

Bennett B. Perkins, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of an assault to murder under rather peculiar circumstances; his punishment being assessed at two years' confinement in the penitentiary. His sister-in-law gave birth to a child at his (appellant's) residence on Sunday morning about 11 o'clock. Appellant was not at home at the time, but returned about 2 o'clock that day. The mother of the child testified that appellant was the father of the infant. On Monday evening an infant was found in a sack a few hundred yards from appellant's residence, lying on some bushes or twigs. The twigs had been cut and piled, and the sack containing the infant had been placed on them, and other twigs placed on top of this bundle. The child was first discovered by Simon Monroe, who called his father to keep watch over the child while he (Simon) went to call other parties. Simon's father was named Alfred Monroe. Alfred testifies that, while keeping vigil, appellant came down and inquired what he was doing. Being informed of the discovery of the infant, appellant took it to his house. Appellant denied then and at all times that he carried the child to the point designated, and further denied ever seeing the child until after it had been discovered by Monroe. He was aware that his sister-in-law had given birth to a child, but denied any knowledge of the fact that it was carried away from the residence. His theory of the case was that the child was carried by his wife to the point where the child was

found. His wife did not testify on the trial.

The evidence further shows that, when appellant carried the child to the house, his wife forbade his bringing it into the house. This is proved by the state's witness Alfred Monroe. Appellant insisted on carrying the child into the house and having it taken care of. Finally the child was carried into the house. The officers were summoned, went to the house, and talked with appellant about the matter, and in his conversation with the officers he denied any knowledge of the child being carried to the point where it was found. The state introduced some evidence to the effect that on the following Tuesday night appellant in a conversation admitted that he did carry the child to the point where it was found; but this was strenuously denied. The theory of the state was that the child was carried by appellant and hidden at the place where it was found, and that by reason of the fact of its being only a few hours or a day old, at most, his purpose in carrying it to the point and placing it there without nourishment was to bring about its death, and, this being true, that it was an assault with intent to commit murder. Appellant's theory of the case was, and which he introduced evidence to sustain, that he did not himself carry the child to the point where it was, and had no knowledge of the fact, but that his wife was the party who did so.

A serious question, and one which we think is fatal to the conviction, is raised on the failure of the court to charge appellant's theory, to wit, that he had no connection with placing the child where it was found. The court, after charging the definition of assault and battery and the theory upon which a conviction could be predicated, instructed the jury, if they believed the state's theory, they would be justified in finding him guilty. The charge on accomplice's testimony, as well as the law of circumstantial evidence, was given. Appellant insisted in his motion for new trial that the court committed error in failing to present his theory of the case to the jury, and that under his theory he would not be guilty; that if his wife took the baby in his absence, without his knowledge or guilty connection, and placed it where it was found, he would not be responsible legally, and under that state of case the jury should have been instructed to acquit. We think this contention is correct, and that the error is intensified wherein the court instructed the jury that appellant would be guilty if he acted alone, or with another or others, in placing the child where it was. His theory of the case was that he had no connection with it, either unaided by or in connection with others.

As to how the child reached the point where it was found is a matter of spec-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ulation. The main fact pointing to appellant is found in the statement of one of the witnesses that he saw a track in the field near where the child was found which appeared to be a man's track; but the track was not measured nor compared with the track made by the shoes appellant wore. However, this was not very significant, because it is shown and admitted that appellant had plowed in that part of the field not a great way from where the child was found. There is no evidence showing or tending to show the character of tracks, if any, made at the point where the child was found, and yet the bushes and twigs were cut in sufficient quantities to form a sort of bed on which to lay the child. Whoever did the work evidently made tracks around where it was found. We are of opinion that this criticism of the court's charge, or failure to charge, has real and substantial merit, and the charge should have been given. Appellant avails himself of this error in a proper way to have it considered.

There was exception reserved to a conversation that occurred between appellant and the justice of the peace and constable. As presented by the bill, we are of opinion that there was no error in admitting this. Appellant was not under arrest at the time; nor does the bill show that he considered himself under arrest. He was subsequently placed under arrest by order of the justice of the peace. These officers testify, in this connection, that if appellant had undertaken to leave they would not have permitted it; but there was nothing said or done, so far as the bill goes to show, that indicated to him (appellant) that these officers intended to hold him. We are of opinion, therefore, that as the bill presents the matter there was no error shown.

The court's charge is also criticised because it fails to submit what is contended is another theory of the case, to wit, if there was a want of specific intent to kill, then an inferior grade of assault should have been charged, or an acquittal. We are inclined to think this view is justified by the record. If the child was placed there by appellant, and not for the purpose of killing the child, but of hiding the shame of his sister-in-law and his connection with the paternity of the child until it could be carried away, and the purpose was not to kill, but to spirit it away, so as to avoid the shame attached to the matter, he would not be guilty of an assault to murder. The actions, conduct, and testimony of the appellant would suggest this theory to our minds. At least, if upon another trial the testimony should develop as it did upon the last trial, we think this theory of the case should be presented in the charge. The child, it may be stated, did not die, but lived, and was carried home by the appellant, and at his instance and in-

sistence his wife took it, and subsequently the mother received it, and took proper care of it. It seems from the testimony, also, that it has never been sick or suffered any, and was in no way injured or hurt. The evidence showed no violence upon it of any character. It is sometimes a little difficult to fathom the reasons and purposes of parties connected with this sort of transaction under the circumstances contained in this record, and, in the submission of theories suggested by the evidence, all consideration looking to the presumption of innocence or the reasonable doubt of guilt should be given in charge. The law favors the accused to this extent upon all theories of law and fact.

For the reasons indicated, the judgment is reversed, and the cause is remanded.

RICHARDSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

1. CRIMINAL LAW (§ 598*)—CONTINUANCE—ABSENT TESTIMONY—WANT OF DILIGENCE—EXCUSE.

It is sufficient excuse for want of diligence in obtaining testimony, for absence of which continuance is sought, that the prosecuting witness by false statements to defendant misled him, so that the different testimony given by the prosecuting witness, and but for which the absent testimony would not have been necessary, was a surprise to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.*]

2. CRIMINAL LAW (§ 1086*)—APPEAL—RECORD—PRESENTMENT AND TRANSFER OF INDICTMENT.

It being impossible for a county court to obtain an indictment other than by transfer from the district court, the record on appeal from the county court must show the indictment was presented in the district court and transferred to the county court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2740-2752; Dec. Dig. § 1086.*]

Appeal from Nacogdoches County Court; G. D. Mims, Judge.

Frank Richardson appeals from a conviction. Reversed and remanded, with instructions.

B. F. Amonette, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant filed an application for a continuance. The absent testimony was material. There was no diligence shown. The indictment was filed in the county court on March 20, 1908. The application for continuance was not made until the 20th of January, 1909. The reason for the want of diligence is accounted for by the following state of facts set out in the application: It is alleged that the absent witness, Mitchell, was present at the time and place money was made up for the purchase of the whisky, if it was purchased; that this oc-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

curring in front of G. H. King's grocery store in the town of Nacogdoches; that Mitchell furnished part or all of said money, and Mitchell will testify that defendant was not present at any time during the making up of said money in front of King's store, as prosecuting witness alleges he will testify; that Mitchell will also testify, if present, that he was with Gunning, the prosecuting witness, all the time until said Gunning went into the wagon yard and secured the whisky, and that appellant was not in front of King's store or along said street or sidewalk in said town; that prosecuting witness did not pay appellant any sum or sums of money there at that time, and that the evidence of Gunning to the effect that he (appellant) sold the whisky to him is untrue; and that appellant had no way of finding out what the testimony of prosecuting witness would be until he informed appellant, as above stated, and did not know that he would need the testimony of Mitchell, and that it was then too late to have process issued for Mitchell. He further alleges in the application that the testimony of the prosecuting witness, Gunning, was a surprise to him, for the reason that Gunning, prosecuting witness, misled him by deception and by false statements; that appellant had frequently asked Gunning what he was going to swear and what his testimony would be, and each and all the times Gunning informed appellant that he (Gunning) never bought or purchased any whisky from appellant; that the only whisky he ever got was the whisky left by the appellant for other parties; that the money paid appellant was money on witness' account due by witness to Seals & Brashers, and was not for any whisky purchased of defendant at that or any other time, and that appellant need not fret about it, and he (Gunning) would so testify. In this connection appellant's attorney made affidavit that he never had any knowledge of the facts that would be testified to by prosecuting witness, Gunning, as set forth in the application for continuance, until the 19th of January, 1909, when Gunning informed him and appellant of what his testimony would be, and that at said time appellant's case had been called, it then being too late to have process issued and returned, and that this was the first time he had ever heard what witness' testimony would be, and was the first opportunity he ever had to talk with him about the case. On the trial of the case the evidence was in sharp conflict as to the real transaction of the purchase and sale; Gunning swearing one way and appellant swearing the other.

It is contended by appellant that under circumstances of this sort he gave a sufficient legal excuse for not using more diligence, and that under the circumstances, being misled as he was by the state's witness, he was

entitled to the continuance, and upon the refusal of a continuance to a new trial. We are of opinion that his contention is correct, and he should have been awarded another trial. See *Adams v. State*, 10 Tex. App. 677.

We call attention to a fatal defect in this record, which requires a reversal and dismissal of the case as the record is presented. The case was tried upon indictment, and there is nothing in this record to show that the indictment was presented by a grand jury into the district court, or transfer had from the district court into the county court. Under all of our authorities this omission is fatal. A county court cannot obtain an indictment otherwise than by a transfer from the district court, and there is nothing in the record, as before stated, to show that the indictment was presented in the district court and transferred to the county court.

There is another matter to which we desire to call attention. The caption shows that Hon. C. D. Mims was county judge and presided over the court, and that it met on the 8th of January, 1909, and adjourned on the 6th of February, with Hon. C. D. Mims as its presiding judge. The statement of facts is approved by F. P. Marshall as county judge. The bills of exceptions are signed by Marshall. There could not be two county judges in the same case, presiding over the same court, and if Hon. C. D. Mims was presiding judge, who tried the case, Hon. F. P. Marshall could not also be presiding judge of the same court at the same time. There may be a mistake on the part of the clerk in setting out Marshall's name, instead of Mims'. At least, there is a mistake somewhere.

The judgment is reversed, and the cause is remanded, with instructions to the county court, if there is not a transfer of the indictment from the district court to the county court, to dismiss the prosecution for want of jurisdiction.

BATTE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 24, 1909. On Motion for Rehearing, Oct. 27, 1909. Dissenting Opinion, Nov. 24, 1909.)

1. CRIMINAL LAW (§ 921*)—NEW TRIAL—NECESSITY FOR EXCEPTIONS AT TRIAL.

Where there was no exception to the admission of testimony, the question cannot be raised on motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2207; Dec. Dig. § 921.*]

2. FORGERY (§ 44*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence held to sustain a conviction of forgery.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. §§ 117-121; Dec. Dig. § 44.*]

3. FORGERY (§ 22*)—ELEMENTS OF OFFENSE—PLACE OF PASSING FORGED CHECK.

Under Code Cr. Proc. 1895, art. 225, providing that forgery may be prosecuted in any

county where the written instrument was forged, or where the same was used or passed, one passing a forged check in Texas may be prosecuted there for forgery, though the forgery were committed in another state, where the bank on which it was purported to be drawn is situated.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 58; Dec. Dig. § 22.*]

On Motion for Rehearing.

4. FORGERY (§ 44*)—EVIDENCE.

Under Code Cr. Proc. 1895, art. 794, providing that it is competent in every case to give evidence of handwriting by comparison made by experts or by the jury, but proof of comparison only shall not be sufficient to establish the handwriting of a witness who denies the signature under oath, it is not necessary that there should be positive testimony, in addition to proof of comparison of handwriting, in a prosecution for forgery, but circumstantial evidence may sustain a conviction.

[Ed. Note.—For other cases, see Forgery, Cent. Dig. § 117½; Dec. Dig. § 44.*]

Davidson, P. J., dissenting.

Appeal from Criminal District Court, Dallas County; W. W. Nelms, Judge.

C. E. Batte was convicted of forgery, and he appeals. **Affirmed.**

W. L. Curtis, W. L. White, and Albert S. Phelps, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of forgery; his punishment being assessed at confinement in the penitentiary for three years.

His contention is: First, that the evidence is not sufficient, in that he was convicted upon the testimony of L. H. Tyler, whom he alleges in his motion for new trial did not qualify as an expert on handwriting. Tyler testified that the same person who wrote the name of appellant in blank on the check alleged to be forged was the same person who wrote the name of the payor, A. A. Koup; that is, the handwriting is by the same person. There was no exception reserved to the testimony of Tyler, and this matter is brought up only as a ground in the motion for new trial. The statement of facts discloses that Tyler was an expert on handwriting, and was the paying teller of the American Exchange National Bank. We are of opinion that Mr. Tyler was an expert, as tested by this record, and, inasmuch as appellant did not except to the admission of this testimony, this question cannot be raised on the motion for new trial in the manner sought. It is true that, if this was all the testimony the state relied upon, there might be a question as to its sufficiency to sustain the conviction.

This brings us to the second ground, which is, that the evidence is wholly insufficient to warrant a conviction; there being no positive proof that the defendant signed the name of A. A. Koup, except the testimony of Tyler. We are of opinion that the evi-

dence is sufficient to show that appellant is guilty of the forgery. Tyler testified that on the morning of the 12th of May, 1908, appellant came to the bank where he was at work and exhibited to the witness a draft drawn on the Commonwealth Trust Company at St. Louis, showing him at the same time a passbook of said trust company, and claiming that he had money there. It was ascertained subsequently that appellant did not have any money on deposit with said Commonwealth Trust Company. The witness took appellant to the collection department and introduced him. In a short while, and without leaving the bank, appellant returned to witness Tyler and requested him to cash a check for \$150 on the Cleveland National Bank at Cleveland, Okl., which was signed, "A. A. Koup." This is the check appellant is charged with having forged. Witness requested appellant to indorse the check. Appellant went to the desk in the center of the bank, and was gone about two minutes, and returned with the check indorsed. Witness did not see the appellant indorse the check; but, when he returned with the check indorsed, witness cashed it. Then follows the statement in the statement of facts that witness qualified as an expert on handwriting and stated, in his opinion, the handwriting on the check in which the name "A. A. Koup" was written was the same as that in which the indorsement on the back of the check was written.

A. A. Koup testified that he did not sign the check; that he had never seen appellant; that he lived in New Mexico, but had a hardware, implement, and vehicle business in Cleveland, Okl., and that his son was the only one authorized to sign his name, and he always signed, "A. A. Koup," with his own name. Witness was not in Cleveland, Okl., on the 12th of May, 1908; but his son managed the business there. Lawrence Koup testified that he was the son of A. A. Koup, who owned a hardware business in Cleveland, Okl., on the 12th of May, 1908; that he managed the business for his father; that he did not sign the check shown him, did not authorize the defendant, nor any one else, to sign it, and had never seen the check until it was sent to Cleveland for collection; that it was on one of their blanks; and that, after appellant left Cleveland, he discovered that some of their blank checks had been torn out of a checkbook. He further testified that appellant was in Cleveland on the 12th of May, 1908, and was there about a week; that he was there to see Raymond Meade, who was employed by witness to assist him in his father's business; that there is no A. A. Koup in Cleveland, Okl., and that the whereabouts of Raymond Meade was then unknown to the witness; that Meade had continued in his employment for some time after appellant was there.

Appellant himself testified that on the morning of the 12th of May, 1908, he went to Cleveland, Okl., to collect \$35 from Raymond Meade, the young man who was working at A. A. Koups' place of business; that he collected the money and started to the hotel to get his grip, with the view of catching the train left; that he stayed in town that afternoon, and, seeing what he considered a bargain, he purchased a team of horses for \$200, hired a buggy from the livery stable, and went driving with Raymond Meade; that Meade suggested that he (Meade) could sell the horses, if he (appellant) desired to sell them; that they then drove to a residence, which Meade said belonged to A. A. Koup, and called a man out and introduced him as Mr. Koup; that a sale was made for \$300, and defendant then went to the hotel for supper, and Meade and the other man went to write out the checks; that defendant told them to make out two checks, for \$150 each; that it was then about 6 o'clock p. m., and the banks were closed; that defendant and Meade went over town to cash the checks, but were unable to do so; that appellant caught the early morning train of May 13th, arriving at Dallas in the early afternoon of the same day, and had the transaction with Tyler, testified about by Tyler. Appellant left Dallas that night for San Antonio, cashed the other check for \$150 there, and then went to West Texas, where he was arrested and brought to Austin for forgery; that he was also wanted in San Antonio for passing the other check on the Cleveland National Bank for the sum of \$150, signed by A. A. Koup.

This is the statement of facts. We are of opinion, under this testimony, that the state has sufficiently made out a case to legally justify a conviction.

Appellant urges, also, that he was not subject to prosecution in Texas, because the forgery, if committed, was in the town of Cleveland, Okl. Under our statute it would make no difference if the forgery was committed in Oklahoma, inasmuch as he passed the check in Dallas. See article 225, Code Cr. Proc. 1895, which reads as follows: "The offense of forgery may be prosecuted in any county where the written instrument was forged, or where the same was used or passed, or attempted to be used or passed," etc.

Finding no such error in the record as requires a reversal of the judgment, it is ordered that the same be affirmed.

On Motion for Rehearing.

BROOKS, J. At the late Dallas term of this court this case was affirmed, and now comes before us on motion for rehearing.

The only insistence of appellant we deem necessary to review is the contention that the evidence is insufficient. The facts in the

case are very fully stated in the original opinion. Appellant insists that the evidence is insufficient, because the same is circumstantial, and does not comply with the provisions of article 794 of the Code of Criminal Procedure of 1895, which article reads as follows: "It is competent in every case to give evidence of handwriting by comparison made by experts or by the jury; but proof by comparison only shall not be sufficient to establish the handwriting of a witness who denies his signature under oath." There are many facts in this case, in addition to those cited in the original opinion, that might be collated, going to show criminal connection of appellant with the execution of the instrument for which he was prosecuted, but we do not deem it necessary to do so; but suffice it to say that there is other evidence in the record that clearly establishes the guilt of appellant, in addition to the proof of handwriting. The statute last cited simply insists that no conviction shall be had against a defendant by comparison of handwriting alone; but where comparison of handwriting is supplemented by other evidence showing guilty knowledge, motive, and knowledge of the crime in question, this certainly ought to be and should be sufficient evidence. To hold otherwise would preclude any character of successful prosecution for forgery. It is not one case in a thousand where a party is seen by an eyewitness to forge an instrument, but it is merely established circumstantially that he did so. Then if the circumstances can be strengthened by expert testimony on handwriting, we then have a stereotyped case of forgery.

Appellant cites us to the case of Spicer v. State, 52 Tex. Cr. R. 177, 105 S. W. 813, and his contention was there very clearly sustained; but that case is not the law, and is hereby overruled. This court fell into error in construing the statute under consideration in said last-cited case, and practically held that before a conviction could be sustained there would have to be positive testimony, in addition to handwriting, before there could be a successful prosecution for forgery. This is not correct. But if there is no evidence at all for the state save and except proof by comparison of handwriting, then we would be forced to reverse the case by the sheer force and terms of the statute above cited; but in this case we have a very different condition. The proximity of appellant to the place and time when the forgery was committed, his motive for the forgery, the fact that he secured the money, the fact that he was cognizant of all the facts that would put him in a position to perpetrate the forgery, and all the other facts collated in the original opinion, clearly indicate and conclusively establish his guilty connection with the commission of this crime. In addition to the above, we have the proof by the expert witness of his handwriting by comparison. It follows,

therefore, that the evidence is entirely sufficient.

We might extend this argument further if we deemed it necessary; but we do not. We have carefully reviewed all of appellant's contentions, and believe the original opinion was correct, and the motion for rehearing is overruled.

DAVIDSON, P. J. (dissenting). The writer hereof wrote the original opinion affirming the judgment. On motion for rehearing the position enunciated by the court in the original opinion was strongly assailed, and after a careful review of the questions involved I have reached the conclusion that the motion for rehearing should be granted, and that the court was in error in affirming the judgment. Therefore I respectfully dissent from the opinion of the majority on the motion for rehearing.

The facts are sufficiently stated in the original opinion, and all the salient facts are stated. It was a case of circumstantial evidence, there being no eyewitness to the forgery, if one was committed, and there is no positive evidence that appellant forged the check. I am of opinion, therefore, that the circumstances do not show with that degree of legal accuracy required by law that appellant has been shown to be guilty of the crime of forgery. It will be remembered, in this connection, that appellant was charged with and convicted of forgery, and not of passing a forged instrument. The evidence is amply sufficient to show that appellant presented the check to the witness Tyler, cashier of the bank in Dallas, and it is also sufficient to show that he indorsed the check in the bank at the time that he passed it upon the bank. Therefore the signature upon the back of the check written by appellant may be taken as his genuine signature. This indorsement was taken as a basis of comparison of handwriting by the witness Tyler. Tyler testified that, taking appellant's handwriting as shown by the indorsement, and comparing it with the handwriting in the body of the check, in his judgment the handwriting was the same, though he stated the letters were differently constructed or made and show dissimilarity. That is all the evidence in regard to the handwriting in the body of the check; that is, there is no evidence in regard to appellant having written or signed the check, except the supposed expert testimony of Tyler that the handwriting in the check was, under the circumstances stated, in his judgment the same as that shown in the indorsement.

Appellant denied under oath the execution of the instrument, and testified, further, that the check was not drawn in his presence, but was signed out of his presence in Oklahoma, and brought and delivered to him by Meade, with the statement that Koup executed the instrument, or, at least, the man who was with him, whom appellant thought to be

Koup. This, therefore, is a denial under oath by appellant of the execution of the instrument and that he was a principal to the drawing of the check, and a denial, further, that he signed the name of Koup as drawer of the instrument. The statute provides that it is competent to give evidence of handwriting by comparison made by experts, etc. It was said in *Jones v. State*, 7 Tex. App. 457: "The fact, however, that our statute permits such evidence does not change the well-established rules as to the value of such testimony. Such evidence has always been considered feeble, and in some states unsafe to act upon. *Boman v. Plunkett*, 2 McCord (S. C.) 518, cited in *Hanley v. Gandy*, 28 Tex. 211, 91 Am. Dec. 315. In *Adams v. Field*, 21 Vt. 265, it was said: 'But those having much experience in the trials of questions depending upon the genuineness of handwriting will not require to be reminded that there is nothing in the whole range of the law of evidence more unreliable, or where courts and juries are more liable to be imposed upon.' 1 Greenl. on Ev. § 580, note 2." In *Heacock v. State*, 13 Tex. App. 97, the court said: "It is a well-established rule that the handwriting used as a standard of comparison must be either an admitted manuscript, or be established by clear and undoubted proof. The evidence establishing it as a standard must be either direct or equivalent to direct." This case cites several authorities in support of that proposition. See, also, *Spicer v. State*, 52 Tex. Cr. R. 177, 105 S. W. 813; Code Cr. Proc. art. 794, and collated authorities thereunder. The *Spicer Case*, supra, is directly in point, so far as the facts and law of this case are concerned, and my Brethren, on reaching the conclusion they arrived at in this case, found it necessary to overrule the *Spicer Case*. There is not a case decided in Texas, so far as I have been able to ascertain, that lays down a different rule, and in fact, if such case could be found, it would be directly in violation of the statute.

Omitting Tyler's expert testimony in regard to the handwriting, the facts that are relied upon to sustain the conviction may be stated as follows: Appellant's possession of the alleged forged draft in the city of Dallas, in Texas; that the draft or check was forged in Oklahoma; that Meade gave the check to appellant, signed as set out in the record; also that Koup testified he did not sign the check. There is not only no evidence that appellant was present when the check was signed, but such as was before the jury excluded the idea of his being present. All the evidence in the record in regard to this matter, outside of the mere fact of possession, came from appellant, who testified that through Meade he sold a pair of horses and received the check in question, and another check from Meade in payment of the horses; that he was not present at the time of the transaction, either as to the sale of the

horses or the drawing of the check. Meade was not used as a witness in the case, and in fact his whereabouts was not known at the time of the trial, and neither side sought to have him present as a witness. The case is not as strong on the facts as was the case of *Spicer v. State*, supra. It may be true, as stated by my Brethren, that the act of forgery is not often witnessed by others than the man who commits the forgery. This is true in all cases of circumstantial evidence, but that would be no reason to hold the facts sufficient.

I therefore respectfully enter this as my dissent.

BROWN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909.)

1. CRIMINAL LAW (§ 1098*)—APPEAL—STATEMENT OF FACTS.

A literal transcript of the stenographer's notes of the evidence taken on the trial will not be considered on review as a statement of facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2863, 2865; Dec. Dig. § 1098.*]

2. STATUTES (§ 105*)—SUBJECT AND TITLE OF ACT—CONSTRUCTION.

A liberal construction will be given an act, in determining whether or not it violates Const. art. 3, § 35, relating to the subject and title of acts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 117; Dec. Dig. § 105.*]

3. STATUTES (§ 118*)—SUBJECT AND TITLE OF ACT.

The title of Gen. Laws Sp. Sess. 1897, p. 16, c. 9, "To fix the venue and regulate the proceedings in prosecutions for rape," is sufficiently broad to fix the venue, and provide for the trial of a case in such county as may be provided by law, within the requirement of Const. art. 3, § 35.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 118.*]

4. STATUTES (§ 138*)—RECITALS OR REFERENCE TO OTHER ACTS.

Gen. Laws Sp. Sess. 1897, p. 16, c. 9, relating to the venue in prosecutions for rape, is complete in itself, and is valid, without reciting or referring to any other act, as required by Const. art. 3, § 30, on revival or amendment of an act.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 138.*]

5. CRIMINAL LAW (§ 1097*)—APPEAL—CONTENTS OF RECORD—ERROR.

The prosecuting attorney's reference, in violation of Code Cr. Proc. 1895, art. 770, to defendant's failure to testify in his own behalf on a former trial, is available on review, even in the absence of a statement of facts, where such reference appears from the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1097.*]

6. CRIMINAL LAW (§ 1114*)—APPEAL—CONTENTS OF RECORD.

In the absence of a statement of facts, the bill of exceptions must show on its face that

it contains all of the evidence as to the matter complained of.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1114.*]

7. CRIMINAL LAW (§ 730*)—FAILURE OF ACCUSED TO TESTIFY.

Under Code Cr. Proc. 1895, art. 770, providing that the failure of defendant to testify shall not be considered against him, nor commented on, it is reversible error for the prosecuting attorney to ask defendant whether he testified in a former trial, though the court withdrew the matter and instructed the jury not to consider the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1603; Dec. Dig. § 730.*]

Appeal from District Court, Donley County; J. N. Browning, Judge.

Hood Brown was convicted of rape, and he appeals. Reversed.

A. T. Cole, J. S. Stallings, H. H. Cooper, and D. W. Odell, for appellant. F. J. McCord, Asst. Atty. Gen., and Henry S. Bishop, Dist. Atty., for the State.

RAMSEY, J. This appeal is prosecuted from a conviction of rape, had in the district court of Donley county on the 12th day of January of this year, in which judgment the punishment of appellant was assessed at confinement in the penitentiary for a period of six years.

The Assistant Attorney General moves to strike out the statement of facts, for the reason that same is made up wholly of questions and answers, and is, in fact, a literal transcript of the stenographic notes taken on the trial of the case, and not in accordance with the law, which, in terms, prohibits a statement of facts from being so made up. We have heretofore held, in accordance with this motion, that such a statement of facts could not be considered. *Essary v. State*, 53 Tex. Cr. R. 596, 111 S. W. 927; *Hargrave v. State*, 53 Tex. Cr. R. 147, 109 S. W. 163. In the absence of statement of facts there are, as we believe, but few questions so presented that we are authorized to consider them. There are, however, some matters which are so presented that we are called on to decide them.

The original indictment was returned in the district court of Potter county, and was some time thereafter transferred on change of venue by the court of its own motion to Donley county, where the case was tried. This action of the court, we infer, was taken under the authority of the act of the special session of the Twenty-Fifth Legislature (Gen. Laws 1897, p. 16, c. 9). This action of the court was at the time properly excepted to, and is so presented that a review of the court's action is required. Appellant challenges the validity of this act of the Legislature, in so far as it can be held to apply to this case, because, as averred, same is void for two reasons: First, because it is violative of article 3, § 35, of the state Consti-

tution, in that the caption of the act only states one subject, that of fixing the venue, while the body of the act attempts to fix the venue, and also provide for a change of venue; and for the further reason that said act is violative of article 3, § 36, of the Constitution, in that same does not refer to or re-enact any of the statutes with reference to the change of venue. The caption of the act is as follows: "An act to fix the venue and regulate the proceedings in prosecutions for rape." The validity of this statute, in general, has been sustained by this court, notably in the cases of *Mischer v. State*, 41 Tex. Cr. R. 212, 53 S. W. 627, 96 Am. St. Rep. 780, and *Griffey v. State*, 56 S. W. 52. These cases, and the validity of the act in general, were thoroughly reviewed in the recent case of *Dies v. State*, 117 S. W. 979, and were expressly approved. However, the particular questions raised here are not, in terms, presented in the cases above referred to. We do not believe, however, that the act in question is void for any of the reasons named.

Recurring to the first objection urged, it is well settled that a liberal construction will be applied to an act of the Legislature, in determining whether or not it violates this section of our Constitution. *Joliff v. State*, 53 Tex. Cr. R. 61, 109 S. W. 176; *Breen v. Ry. Co.*, 44 Tex. Cr. R. 302; *Giddings v. San Antonio*, 47 Tex. Cr. R. 548, 26 Am. Rep. 321; *State v. Parker*, 61 Tex. Cr. R. 265; *Morris v. State*, 62 Tex. Cr. R. 728; *Ratigan v. State*, 33 Tex. Cr. R. 301, 26 S. W. 407; *Tabor v. State*, 34 Tex. Cr. R. 631, 31 S. W. 662, 53 Am. St. Rep. 726. The doctrine is well expressed in the case of *Fahey v. State*, 27 Tex. App. 146, 11 S. W. 108, 11 Am. St. Rep. 182: "Suppose that there be more than one subject mentioned in the acts. If they be germane or subsidiary to the main subject, or if relative directly or indirectly to the main subject—have a mutual connection—and are not foreign to the main subject, or so long as the provisions are of the same nature and come legitimately under one general denomination or subject, we cannot hold the act unconstitutional." And so where the general purport or subject is named, and the exercise of power complained of is reasonably to be gathered and comprised within the general subject, we think the act should be upheld. And so here, where an act, in terms, is denominated an act to fix the venue and regulate the proceedings of prosecutions for rape, it is sufficiently broad, not only to fix the venue, in the first instance, but to provide for the trial of the case in such county or counties as may be provided by law. Nor do we think the act violative of the last article of the Constitution referred to. Section 36, art. 3, is as follows: "No law shall be revived or amended by reference to its title; but in such case the act revived or the section or sections amended shall be re-enacted and published at

length." In construing this section of the Constitution our Supreme Court has held that same does not apply to a law which fully declares its provisions without direct reference to any other act, though its effect is to enlarge or restrict the operation of some other statute. *Clark v. Finley*, 93 Tex. 171, 54 S. W. 343. Nor does same apply to an act perfect in itself and covering the subject-matter of a former act. *Johnson v. Martin*, 75 Tex. 34, 12 S. W. 321.

2. There are contained in this record 55 bills of exception. In the absence of a statement of facts, there is only one matter which we feel we are authorized to pass on. That is raised by appellant's thirtieth bill of exception. With a view of assuring accuracy, and to present the matter so it will be readily understood, we copy entirely both the bill and the court's explanation of same, as follows:

"After the defendant, Hood Brown, had by his own counsel been placed on the witness stand, and after many and repeated references had been made to a previous trial of this case in Potter county at the county seat in Amarillo, as will be more fully shown by an inspection of the record in this case, the district attorney, H. S. Bishop, purposely and deliberately propounded to the defendant on his cross-examination, and without any effort to show the disappearance of any witness, or any material change in the testimony on the former trial and on this trial, the following question: 'This is the first time you have testified in this case, is it not?' The answer was: 'Yes, sir.' The question and answer being propounded in such a short time, and the answer elicited in such a short time, that the defendant's counsel had no opportunity to object thereto, except as heretofore shown, but instantly and immediately after the propounding of said question, and while said answer was being elicited, counsel for defendant arose in their seat and said to the court: 'If the court please, we object to the question and the answer, for the reasons that it is a comment on the failure of the defendant to testify in the case before.' Whereupon the court remarked: 'Gentlemen of the jury, you will not consider that remark, question, nor answer. I have ruled it out.' Counsel for defendant then stated that they wanted the bill to show that the question was asked in the presence of the jury and answered, to all of which proceedings, questions, answers, and observations, the defendant then and there in open court objected as hereinbefore shown, and he here and now says that the same was knowingly and willingly propounded to him in defiance of and in the face of article 770 of our Code of Criminal Procedure, and that without reference to the court's observations that under the facts in this case, as heretofore shown, it was an allusion on the part of the state's counsel to the failure of the defendant to testify to

the great and irreparable prejudice in this case of the defendant, and he asks the court, after examining this bill, to allow the same and order it filed as a part of the record in this case, which is here now done.

"Approved and ordered filed as a part of the record in this cause, with this explanation: 'I have no recollection of any reference being made to a former trial of the case in Potter county, except that the counsel for defendant, on cross-examination of the witness, Annie Womack, asked her something about her testimony on the trial of this case in Amarillo, immediately after the objection was made as set out in the bill. The court in very forceful and emphatic language withdrew the matter from the jury, and directed them not to consider the question and answer of the defendant for any purpose. The remarks in the bill as to the purpose and deliberateness of the district attorney in asking the question, I think, is more the imagination of defendant's counsel in preparing the bill than the facts would admit. I do not think the question was asked for the purpose of prejudicing the jury against defendant, and I do not think that it had one particle of effect on them. It was merely a slip of the district attorney.'"

While the court's explanation modifies to some extent the statement contained in the bill itself, we think these facts undoubtedly appear, considering both the bill itself and the court's explanation: First, that there was and had been a reference or references made to a former trial of appellant on this same charge; second (pretermittting any discussion as to whether purposeful or deliberate), the question itself assumed and implies, of necessity and by obvious inference, that there had been another trial of the case, at which appellant would have been permitted, as he had the opportunity, to testify; third, that proof was made by the state that he had not testified, except upon the trial then in progress; fourth, that these proceedings were had over the protest of appellant's counsel; and, fifth, that the court, as stated, in forceful and emphatic language withdrew the matter from the jury, and directed them not to consider the question and answer of the defendant for any purpose. So that the question recurs whether, under these circumstances, in the absence of a statement of facts, we may and should consider this bill, and whether, so considered, the matters referred to are grounds for reversal.

Article 770 of our Code of Criminal Procedure of 1895 provides that: "Any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him, nor shall the same be alluded to or commented on by counsel in the cause." As stated in the recent case of *Hare v. State*, 118 S. W. 544: "It has been uniformly held by this court that this statute is broad enough to

cover, and does cover, the proceedings on a former trial. From this ruling there has been no exception in the cases, and we have no doubt that this is a correct construction of the statute. See *Richardson v. State*, 33 Tex. Cr. R. 519, 27 S. W. 189; *Dorrs v. State*, 40 S. W. 311; *Bradburn v. State*, 43 Tex. Cr. R. 300, 65 S. W. 519; *Pryse v. State*, 54 Tex. Cr. R. 523, 113 S. W. 938; *Wilkins v. State*, 33 Tex. Cr. R. 320, 26 S. W. 409; *Templeton v. People*, 27 Mich. 501; *Miller v. State*, 45 Tex. Cr. R. 517, 78 S. W. 511." In most of the cases where this matter has arisen there was a statement of facts in the record. However, in the case of *Hare v. State*, supra, there was no statement of facts. Notwithstanding this fact, we there said: "Nor can we accede to the suggestion that, because there is no statement of facts in the record, appellant may not avail himself of this invasion of his rights. The bill of exceptions contained in the record states, in general terms, the proof on the part of the state and the nature and character of appellant's defense, and is sufficient to illustrate the contention of the respective parties, and is, as we believe, rather to be commended than condemned. It is the rule of this court, settled beyond dispute, that the statute above quoted is mandatory. Such, also, is the rule in other tribunals. It is thus stated in 12 Cyc. p. 576: 'A statute which provides that the neglect or refusal of the accused to testify shall not be commented upon by the prosecuting attorney is usually mandatory.'"

We may, by analogy, be aided in the settlement of this question by the decisions of this tribunal in cases where charges of the court have been considered in the absence of statement of facts. It is usually a well-settled rule that in the absence of a statement of the facts, if the charge is applicable to any state of facts that might be made by testimony under the allegations of the indictment, this court will assume that the court below submitted to the jury the law of the case, and all the law required by the testimony on any portion of same. *Wright v. State*, 37 Tex. Cr. R. 146, 38 S. W. 1004; *Jones v. State*, 34 Tex. Cr. R. 642, 31 S. W. 644; *Bell v. State*, 33 Tex. Cr. R. 163, 25 S. W. 769; *Hall v. State*, 33 Tex. Cr. R. 537, 28 S. W. 200; *Yawn v. State*, 37 Tex. Cr. R. 205, 38 S. W. 785, 39 S. W. 105; *Thurman v. State*, 37 Tex. Cr. R. 646, 40 S. W. 795; *Mootry & Rolly v. State*, 35 Tex. Cr. R. 450, 33 S. W. 877, 34 S. W. 126; *Stinnett v. State*, 32 Tex. Cr. R. 526, 24 S. W. 908; *Holland v. State*, 31 Tex. Cr. R. 345, 20 S. W. 750; *Alstrop v. State*, 31 Tex. Cr. R. 467, 20 S. W. 989; *Johnson v. State*, 29 Tex. App. 210, 15 S. W. 205; *Lynn v. State*, 28 Tex. App. 515, 13 S. W. 867. This rule is based evidently on the proposition and principle that in aid of the judgment of the court, the facts not appearing, it will be assumed that the court

charged the jury the law applicable to the facts which might under the charge have been admitted. There is, however, an exception to this rule, and it is thus expressed by Judge Hurt in the case of *Bryant v. State*, 35 Tex. Cr. R. 394, 33 S. W. 978, 36 S. W. 79: "In passing upon the charge of the court, the rule is that, if the charge as given was applicable to any state of facts, we must hold it sufficient, in the absence of a statement of facts, unless it contains an expression of the court as to the credibility of the witness or the weight to be given to the testimony, or unless it sums up the testimony or contains something which is calculated to arouse the passions and prejudice of the jury against the accused." So it is held ordinarily that a bill of exceptions, in the absence of a statement of facts, must show upon its face that it contains all of the evidence introduced on the trial in regard to the matter complained of. This rule is well illustrated and stated in the case of *Suit v. State*, 30 Tex. App. 323, 17 S. W. 460, where Judge Davidson uses this language: "A bill of exceptions should be full and explicit in its allegations, that the matters presented for revision may be comprehensible without recourse to inference, and its statements must be so full and certain that in and of itself it will disclose all that is necessary to manifest the supposed error. Willson's Cr. St. art. 2368. In the absence of a statement of facts, the rule is, the appellate court will only consider errors of a fundamental nature, and it will be presumed that all the material allegations contained in the indictment were proved by competent and sufficient evidence, and only such bills of exception will be considered as can be determined without a full knowledge of all the evidence in the case."

Applying these well-settled principles to the case at bar, we have this condition: Here is a defendant being prosecuted on a charge of rape of a woman under the age of consent. There had been sometime a former trial of the case. On that trial appellant had not testified. On the trial from which this appeal results he did testify. While, in the absence of a statement of facts, we do not know judicially what his testimony was, we must assume that it related to the charge, and that it is of a character which went to either a denial of the charge or possibly of a character which might have mitigated the punishment; otherwise, no testimony from him would have been admissible at all—that is to say, that no court would permit testimony by a witness, unless same had some relation to and was material, either as a defense of the charge or in mitigation of the punishment. To sustain appellant's position, we must, of course, hold that the statute is mandatory, and,

where proof is made that appellant did not testify on the former trial, that under any state of case made by the evidence this action was erroneous. This, we believe, to be a correct legal principle: That in no case, where a plea of not guilty is entered, it is ever competent at any time or under any circumstances to make proof that appellant did not testify, or that he had failed to testify, on a former trial of his case. This was permitted in this case in the face of the statute.

While it is true the court instructed the jury to disregard such proof and pay no attention to it, we do not think for such a grave invasion of appellant's rights we could or should under any circumstances affirm the judgment of conviction against him, when that had been permitted which the law says shall not be done. If we should hold that, because the court withdrew the matter from the jury, the error is cured, then in every case in which any party is tried in this state such proof could be made and the error cured by instruction of the court not to regard same. To hold this would be to nullify the statute and to deny litigants its benefit. It is unimportant, in our opinion, whether in this case the question was asked purposely by the district attorney, knowing same to be improper, with a view of embarrassing defendant, or whether inconsiderately propounded, without having in mind the fearful consequences and results to appellant in so doing. It is the proof and reference which the law condemns. We think, for this error, even in the absence of a statement of facts, the case should be reversed, because under any conceivable statement of facts, short of an admission of guilt, such proof and reference were inadmissible, and must under all the decisions be treated as harmful.

For this error the judgment is reversed, and the cause is remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v.
CUMBY MERCANTILE & LUMBER CO.
(Court of Civil Appeals of Texas. Nov. 18, 1909.)

CARRIERS (§ 134*)—FREIGHT—ACTIONS FOR LOSS—PROOF—RECEIPT OF GOODS—NECESSITY.

In absence of proof that the carrier received for transportation the goods claimed to be lost and damaged, a judgment against the carrier in an action for damages for loss and damage in transit is not sustained by evidence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 588; Dec. Dig. § 134.*]

Appeal from Hopkins County Court; F. W. Patterson, Judge.

Action by the Cumby Mercantile & Lumber Company against the Missouri, Kansas & Texas Railway Company of Texas. From a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

judgment for plaintiff, defendant appeals. Reversed and remanded.

Coke, Miller & Coke and L. L. Wood, for appellant.

LEVY, J. The suit was for damages, for loss and damage to certain articles claimed to have occurred in transit. Appellant contends, for error, that the evidence fails to show that the appellant railway company ever received for transportation, and lost or damaged, the articles claimed to be lost or damaged. The statement of facts in the record fully supports, we think, the contention of appellant in this respect. In the absence of such proof, the judgment rendered is not supported by evidence, and must be reversed.

The case is ordered reversed and remanded.

INTERNATIONAL & G. N. R. CO. v. HOOD. (Court of Civil Appeals of Texas. Nov. 13, 1909.)

1. CARRIERS (§ 384*)—ACTIONS FOR EJECTION OF PASSENGER—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

In a suit to recover for the ejection of a passenger, error was assigned as to the refusal of a portion of a charge that plaintiff had no right to demand that the train be run back to the station to enable her to get her ticket which she left without any fault of defendant. *Held* that, conceding that the assignment included a refused request by her, shown in evidence, to stop the train to enable her to go back and get her ticket, there was no material error in refusing such portion of the charge, there being no evidence showing she had the right to demand that the train be stopped for such purpose, nor that such contention was made at the trial.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 384.*]

2. TRIAL (§ 260*)—INSTRUCTIONS—DENIAL OF REQUESTS.

In a suit for putting a passenger off a train at a distance, at an improper place, after the conductor had been requested to let her and her mother, who accompanied her, off near the station, on discovering that they did not have tickets, there was no error in refusing defendant's request to charge that if at or about the place where she disembarked she or her mother requested to be let off, and that in putting them off the conductor used ordinary care, plaintiff could not recover, as it was sufficiently covered by the court's main charge that if she requested him to stop the train so that she might get off, and he caused it to stop as promptly as he reasonably could, she could not recover, though it stopped in an inconvenient place, but, if he disregarded her request after going a considerable distance beyond where it could have been safely stopped in the exercise of ordinary care, after receiving her request, and of his own accord, in a manifestly improper place for her to alight, he could not attribute the stopping to her request, and further that, if he stopped the train on her request, she could not recover, and that, if he did not stop it at her request, defendant was not liable if he was not wanting in ordinary care in choosing the place to stop.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

3. CARRIERS (§ 382*)—EJECTION OF PASSENGERS—EXCESSIVE DAMAGES FOR EJECTION.

Evidence *held* insufficient to authorize a verdict of \$1,250 for the ejection of a female passenger from a train.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1490; Dec. Dig. § 382.*]

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Action by T. J. Hood, as next friend of Alma Hood, against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition that a remittitur be entered in a certain sum.

King & Morris and Baker & Baker, for appellant. Richard Mays, for appellee.

TALBOT, J. T. J. Hood, the father of Alma Hood, a minor, brought this suit, as her next friend, against the International & Great Northern Railroad Company to recover damages sustained by Alma in an ejection by the railroad company's servants from one of its passenger trains. It is alleged, in substance, that appellee purchased from appellant's agent at Mertens on or about the 7th day of March, 1907, two round-trip tickets to Leroy; that one of said tickets was purchased for the said Alma Hood and the other for her mother; that Alma and her mother, upon the purchase of said tickets, took passage on appellant's south-bound passenger train, and that, when they arrived at Leroy, they left the train and visited relatives living several miles in the country; that on or about March 10, 1907, they returned to Leroy, and there boarded one of appellant's passenger trains to return to Mertens; that, after getting aboard of the train, they discovered they had left their return trip tickets in the wagon in which they had ridden to Leroy; that after the train left Leroy, and when only a very short distance therefrom, the conductor came into the coach in which Alma Hood and her mother were seated, taking up tickets, and that he was then informed by them that they had accidentally left their tickets on the seat of the wagon at Leroy, and, having no money with which to pay their fare, they requested the conductor to stop the train in order that Alma might run back and get the tickets, which he declined to do; that, after said request was declined, the said Alma and her mother stated to the conductor that they were without tickets and had no money, and asked him what he was going to do about it, to which he replied in a gruff manner that he was going to put them off the train; that the conductor did not stop the train at this time, but went to the other end of the car, taking up tickets, and then passed out of the car and remained for some little time, during which time the train had gotten faster and faster and under full headway; that, after the train had run about

a mile and a half, the conductor returned into the car in which Alma and her mother were riding, and stopped the train and put them off in a deep cut; that the only assistance rendered plaintiff in alighting from the train was the action of the negro porter in placing a footstool on the ground, which was so negligently done that it turned over and was not straightened; that at the point where plaintiff was put off there was a deep ditch; that in getting off the train she had to hold on to the handle bar and swing off until she could lower herself to a point where she could stand upon the ground, and that so great was the distance from the steps of the platform of the car to the ground her lower limbs were necessarily and unavoidably exposed to the view of the porter and conductor, in consequence of which she suffered shame and humiliation. The defendant plead the general issue, contributory negligence on the part of the plaintiff in entering appellant's car without a ticket, and that she got off the train voluntarily; that appellant did not know that plaintiff had entered its car without a ticket until its conductor approached her to take up her ticket, and, upon ascertaining that she did not have one, asked her her desire, whereupon she requested that she be allowed to get off, which request was complied with as soon as the train could be stopped. A jury trial resulted in a verdict and judgment in favor of plaintiff for the sum of \$1,250, and the appellant appealed.

Appellant requested the trial court to charge the jury as follows: "You are instructed that, if you believe from the evidence that plaintiff got on this train without a valid ticket entitling her to travel on said train, then and in that event the company would be authorized to eject the plaintiff in such manner as not to endanger her safety and with the force that a person of ordinary prudence and care would exercise under like or similar circumstances. You are further instructed that the plaintiff would have no right to demand of the defendant to put her off at any other place than a regular station or stopping place, nor to demand that the train be run back to the station to enable her to get her ticket, which she had left without any fault of the railway company." This charge was refused, and its refusal is assigned as error. The only proposition accompanying the assignment is that "the plaintiff had no right to demand of the defendant that the train be run back to the station to enable her to get her ticket, which she had left, without any fault of the railway company, because Alma Hood's evidence shows that she asked the conductor to stop the train and let her go back and get her ticket, and the appellant had the right to have the law applied to this evidence so that the jury could not blame the appellant or be prejudiced against it for not stopping the train and allowing her to

get off and get her ticket." As will be noted, the only error charged and complained of is the court's refusal to give the latter portion of the charge quoted to the effect that "the plaintiff had no right to demand of the defendant that the train be run back to the station to enable her to get her ticket, which she had left without any fault of the railway company." Whether the failure to give that particular portion of the charge was error is therefore the only question raised by the assignment. No evidence is pointed out by appellant calling for or authorizing the giving of such an instruction. The evidence cited in support of this assignment, under the statement required by the rules to be made, is that Alma Hood testified: "I simply asked him [the conductor] to stop the train, and let me go back and get my tickets and money, and he wouldn't do that." Under the head of "remarks" counsel say: "The undisputed evidence in this case shows that the plaintiff, accompanied by her mother, entered the appellant's coach without a ticket, having left the same on the seat of a wagon at the depot, and that they requested that the conductor stop the train and allow them to get off and get their tickets." A demand that the train be run back to the station to enable plaintiff to get her ticket is a materially different proposition to a simple request that the conductor stop the train and let plaintiff go back and get her ticket. But, if it should be conceded that the assignment or proposition was broad enough to include the request that the train be stopped to enable her to go back to Leroy and get her ticket, still we think there was no material error in refusing the instruction asked. There was no evidence offered with the view of showing that plaintiff had the right to demand that the train be stopped, and she allowed to go back to the station and get her ticket; nor do we find anything in the record indicating that any such contention was made by plaintiff during the trial of the case. It is not at all likely, we think, that the jury may have concluded from the simple request of plaintiff that the train be stopped to enable her to go back and get her ticket, that it was appellant's duty to grant the request, and that they were influenced thereby in rendering the verdict they did.

Complaint is made of the court's refusal to give the following charge requested by appellant, to wit: "If you believe from the evidence in this case that at or about the place where plaintiff's daughter disembarked from said train; that plaintiff's daughter or her mother, who accompanied her, requested the conductor to let them off at said place, and that in putting them off of said train the conductor used ordinary care (that is, such care as an ordinarily prudent person would exercise under such or similar circumstances), you are instructed that the plaintiff cannot recover in this case." There was no error

in refusing this charge because it was sufficiently covered by the court's main charge. Touching this issue, the court instructed the jury: "That if plaintiff requested the conductor to stop the train, so that she might get off, and he complied with her request, and caused the train to be stopped as promptly as he reasonably and properly could, then she could not recover, though the train did stop in an inconvenient place for alighting. But if the conductor disregarded her request to stop the train, and after going a very considerable distance beyond where the train could have been properly and safely stopped, in the exercise of ordinary care, after receiving her request, and of his own motion stopped the train in a manifestly improper place for her to alight, he could not properly attribute the stopping to her request." He further charged that, if the conductor stopped the train on plaintiff's request, she could not recover; that, if he did not stop the train at her request, yet, if he was not wanting in ordinary care (ordinary care being defined) in choosing the place to stop the train, the defendant was not liable. In *Railway Co. v. Hood*, 118 S. W. 1119, a companion case to the one at bar, it was held that the refusal of a charge identical with the one under consideration and practically under the same state of facts was not error.

It is assigned that the verdict of the jury is excessive, and we think the assignment well taken. The only element of damage submitted by the court's charge was the alleged shame and anguish of mind suffered by Alma Hood by reason of the exposure of her lower limbs while getting off of appellant's train. The testimony of Alma Hood, who will hereafter be referred to as plaintiff, and that of her mother, is the principal and material testimony upon the question. She testified, so far as we deem it necessary to state, as follows: "When the train stopped and he told us to come on and get off, neither the conductor nor the porter rendered us any assistance whatever. Neither the porter nor the conductor took my suit case or valise to take it off for me. We took them ourselves. When we walked out of the car and got down on the steps to get off, the conductor was standing on the platform of the train, and the porter was standing out on a little knoll against the embankment. In getting off, neither the porter nor conductor assisted us. We had a suit case and a little box. I was carrying the suit case and mamma was carrying the box. It was a little pasteboard box. Neither the porter nor the conductor offered to take the suit case from my hands as I was getting off. I held it in my hand and swung down with the other hand. They put a footstool for us to step on in getting off the train, but it had fallen down and was down on one side. They did not stand it up when they saw it had fallen down. There was a ditch on the

side of the track where we got off, a deep ditch. The stool had fallen over, and, in order to strike the bottom in swinging off the steps, I had to hold my suit case in one hand and hold the handle bar with the other and swing off, and I just could reach the stool with my toes while hanging to the handle bar. This negro porter was standing over on a sort of knoll on the side of the embankment opposite to where I got off, and the conductor was standing up on the platform. In my effort to get off there, I think I exposed some of my person. I do not remember whether the wind was blowing through that cut or not. I was embarrassed by having to stretch down there that far, and I felt ashamed because I thought my lower limbs were exposed to the porter standing on the knoll. The reason I thought my lower limbs were exposed to the gaze of that negro porter was because I had to stretch down so far. I felt like they were any way. They felt to me as if they were exposed. While we were getting off, and while the train was moving off and leaving us there, I saw the passengers on the train looking out to see what was going on. This place where they put us off was not in sight of the depot. When we got back to the depot, we found our purse and tickets. We staid at the depot a little while, and then went to the boarding house, which was about 500 yards from the depot. 'I don't know exactly what time we got away from Leroy. It was late that evening. We used the same tickets. My father met us at Mertens. * * * I did not request him to stop the train in that deep cut and voluntarily get off. I got off the train because he told us to get off. The conductor's manner towards us was very crabbed." Mrs. T. J. Hood testified substantially as did the plaintiff, her daughter, and that the conductor in telling them that he would not stop the train for Alma to go back to the station to get their tickets spoke in a gruff sort of way; that all he spoke was in a very gruff way; that, when her daughter was getting off the train, she exposed her lower limbs. This evidence does not show any injury whatever to the plaintiff, Alma Hood, in consequence of her ejection from appellant's train, except the shame, humiliation, and mental distress resulting from the exposure of her lower limbs to view in alighting from said train. The shame and humiliation experienced was due according to her own testimony to the fact that her lower limbs were exposed to the gaze of the negro porter of the train. She says: "I was embarrassed by having to stretch down there that far, and felt ashamed because I thought my lower limbs were exposed to the porter standing on the knoll." We regard the evidence clearly insufficient to authorize the verdict of \$1,250 returned by the jury and upon which judgment was entered. Therefore, unless the ap-

pellee shall enter a remittitur in the sum of \$750, the judgment of the court below will be reversed and the cause remanded for a new trial. The evidence was sufficient to show negligence and liability on the part of the appellant, and that a judgment for \$500 is not excessive. If, therefore, the remittitur above suggested is entered within 15 days, the judgment for \$500 will be affirmed.

ALEXANDER v. ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS.

(Court of Civil Appeals of Texas. Nov. 6, 1900.
Rehearing Denied Nov. 27, 1900.)

1. TRESPASS (§ 67*) — INJURIES CAUSED BY FREIGHT—QUESTION FOR JURY.

In an action against a railroad company for injury to plaintiff's wife caused by the company's agents going upon his premises in the nighttime, while plaintiff was absent, in discharge of their duty, and causing her fright and humiliation, where the evidence tended to show that plaintiff had been accused of taking defendant's property, and that the visit of defendant's agents was made to secure evidence against plaintiff, and that the wife was so frightened that she fainted and remained unconscious for a considerable time, had suffered from "drawing" of the nerves, and had since been unable to perform her household duties, it was error to direct a verdict for defendant.

[Ed. Note.—For other cases, see Trespas, Cent. Dig. § 150; Dec. Dig. § 67.*]

2. CORPORATIONS (§ 433*) — TORTS — ACTS OF CORPORATE AGENTS—SCOPE OF EMPLOYMENT—QUESTION FOR JURY.

Where the evidence showed a trespass on the part of defendant corporation's agents in seeking evidence against plaintiff accused by defendant of having stolen its property, whether the agents were acting within the line of their duty should have been left to the jury, though there was no direct evidence that defendant had authorized the trespass.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1706, 1719, 1738, 1744; Dec. Dig. § 433.*]

3. DAMAGES (§ 208*)—INJURIES FROM FREIGHT—CAUSE OF INJURY—QUESTION FOR JURY.

Where plaintiff claims that bodily injury resulted to his wife from fright caused by a willful trespass by defendant, it should be left to the jury to determine whether the shock and results were proximately caused by defendant's acts, and whether the injury should have been foreseen as a natural and probable consequence of such acts.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 54; Dec. Dig. § 208.*]

4. TRIAL (§ 139*)—PROVINCE OF COURT AND JURY—DIRECTION OF VERDICT.

Unless the evidence is so conclusively one way that there is no room for reasonable minds to differ as to the conclusion to be reached, the trial judge should not direct a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

Appeal from District Court, Hill County; W. C. Wear, Judge.

Action by W. J. Alexander against the St. Louis Southwestern Railway Company of Texas. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Morrow & Smithdeal, for appellant. E. B. Perkins, D. Upthegrove, and Scott, Sanford & Ross, for appellee.

RAINEY, C. J. This is a suit instituted by W. J. Alexander, appellant, against the railway company, appellee, to recover damages for injury to his wife caused by the railway company's agents in going upon his premises in the nighttime, while he was absent, and in the discharge of their duty, and causing her fright and humiliation. Defendant answered by general denial, and specially that the acts of its servants in going upon plaintiff's premises were not in performance of any duty they owed defendant, but were beyond the scope of their authority. A trial was had before a jury, and upon the conclusion of the evidence the court gave a peremptory instruction for the defendant, and thereupon verdict and judgment were rendered accordingly, from which this appeal is prosecuted.

The evidence tends to show: That Alexander had been accused of taking property from the railway company; that O. K. Wheeler, the company's special agent and detective, whose duty it was to investigate and look up the evidence relative to said charge, procured C. G. Denman, the company's station agent at Hillsboro, and Roy Scarbrough, an employe under Denman, to assist him, and the three went to the residence of said Alexander in the city of Hillsboro, at night, about 11 or 12 o'clock, to secure a piece of lumber it was charged Alexander had appropriated, as evidence to sustain said charge. Alexander was not at home at the time, which was known to said parties; but they knew Mrs. Alexander was at home. Said parties went into the yard and near the window of the room in which plaintiff's wife was at the time, and there was a street light shining across the yard which rendered it easy for plaintiff's wife to see the said parties.

Plaintiff's wife testified as follows: "I am acquainted with O. K. Wheeler. I understand that he is detective with the railway company of the defendant. I remember the occasion when some men about the 1st day of May this year at night came into my yard one night. I remember the circumstances of their coming there. O. K. Wheeler called at my house a few days prior to that time, and then I gave him a statement, and in the conversation he drifted into chickens and was telling much about Mr. McDonald's chickens, and he went out and called me, and asked me if I would mind to show him the chickens. I told him I did not mind it. I did not think at the time he wanted me to show him chickens. He seemed apparently to be looking at lumber piled in the yard. That was in the daytime. He saw all of the piles of lumber that were there. He did not

at that time mention the lumber at all. I told him that day that my husband was not at home. I did not say anything to him as to how long I expected my husband to be away from home. That was about a week before the men came there at night. I guess Mr. Wheeler was out in the yard about 5 or 10 minutes when he came there around through my premises. He was in the house I guess 30 minutes or more. He did not say anything to me about the lumber on that occasion. About a week after that somebody came to my house about midnight. It was Mr. Wheeler, C. G. Denman, and Scarbrough. I mean O. K. Wheeler, the detective of the company, and Denman, the local agent of the defendant, and Mr. Scarbrough, who was in the employ of the defendant at that time. That was about 12 o'clock at night that they came there. When I first saw them on my premises, they were crossing to the south side. I did not recognize them when I first saw them. I was lying on the bed. I got up to the window thinking I would get my pistol, and when I got to the window I recognized Mr. Wheeler first and Mr. Scarbrough and Mr. Denman. The light shone across the yard, and just as they passed I recognized them, and that is when I got so frightened. I fainted. I don't know how long I was in that condition. Nobody was with me but Mr. Gibson and my little son, who was in the next room. No one at all was in the room with me. I don't know how long I remained in that condition; but it was day before I could remember anything, and as soon as I could I got up and went out to see. All three of them were in my yard. I became so frightened. I did not know what they were up to. I heard Mr. Alexander speak that they were trying to get some evidence against him, and the thoughts of it frightened me. It seems like my heart gave down on me, and I fell and fainted away, and I remained in that condition I don't know how long. I have never seen a well day since that time. At times I have been able and have tried to get out, and walked out several times. Dr. Buile advised me to walk up to his office several times. I went to Waco and stayed a while and rode out several times while there, and I walked out every chance that I felt like going. I have been to Hubbard City and to Sulphur, Okl.; but the spells continued to come on me, and I grow weaker all the time. My nerves draw very badly. It seems like every nerve in my body draws, and finally my heart becomes weak, and I feel it falling out, and I become perfectly unconscious. I have since that time suffered with the drawing of my nerves. They just draw; every nerve in my body seems to draw at times. The fact that I saw these men there at that particular hour of the night, and the fact that I heard what they had charged my husband with, had the effect on me mentally to produce a very disagreeable feeling of

mind. No one would know what it was unless they would pass through it. Since that time I have not been able to perform my household duties. I did all my work except my washing up to that time."

Said parties went upon said premises without the consent of plaintiff or his wife, nor were they possessed of any legal process authorizing such invasion.

Such being the evidence, was it error in the court to instruct a verdict? We think so. On the proposition of appellee that said parties were not acting within the scope of their authority, we think the issue was raised, and should have been submitted to the jury. The evidence shows a trespass on the part of said parties, and there is no evidence showing the company authorized the commission of a trespass; but corporations are responsible for damages resulting from torts committed by agents while in the performance of a duty for which they have been employed. It should have been left to the jury to determine whether or not the said parties were acting within the line of their duty in hunting up evidence to sustain the charge against Alexander.

The other proposition made by appellee is, in effect, that the injury, if any, was not the result of fright from fear of bodily injury, but from humiliation at the fact that the parties were in the premises searching for evidence to sustain the charge of theft against her husband. Our courts have held that an action will lie for bodily injury resulting from fright caused by the wrongful act of another. *Hill v. Kimball*, 76 Tex. 210, 13 S. W. 59, 7 L. R. A. 618; *Railway v. Hayter*, 93 Tex. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856, and authorities there cited. In the case last cited, Judge Gaines, speaking for the court, says: "We conclude when a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act or omission is the proximate cause of the injury, and the injury ought, in the light of all the circumstances, to have been foreseen as a natural and probable consequence thereof. In our opinion, as a general rule, these questions should be left to the determination of the jury." So in this case, under all the circumstances shown by the evidence, it should have been left to the jury to determine whether or not the shock and results, as claimed by appellant's wife, were proximately caused by the acts of the parties, and whether or not the injury ought to have been foreseen as a natural and probable consequence of such acts.

It is the province of the jury to determine all questions of fact, and, unless the evidence is so conclusively one way that there is no room for reasonable minds to differ as to the conclusion to be reached, the trial judge should not direct a verdict.

For the error in directing a verdict, the judgment is reversed, and cause remanded for a new trial.

MISSOURI, K. & T. RY. CO. OF TEXAS v. DUNBAR.[†]

(Court of Civil Appeals of Texas. Nov. 6, 1909.
Rehearing Denied Nov. 27, 1909.)

1. CARRIERS (§ 303*)—CARRIAGE OF PASSENGERS—CARE REQUIRED.

A carrier is charged with a high degree of care in guarding against possible dangers to passengers and in providing the safest means for alighting which are known and have been tested.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1224; Dec. Dig. § 303.*]

2. CARRIERS (§ 321*)—INJURIES TO PASSENGER—INSTRUCTIONS—APPLICATION TO CASE.

A charge, that a carrier was liable to a passenger injured in alighting if its failure to provide a safe step box was the proximate cause of the injury, was not erroneous, though the use of the box on a rough pavement was alleged as the proximate cause.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1404; Dec. Dig. § 321.*]

3. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

Where the jury were correctly instructed in the general charge and in a special charge as to defendant's duty to provide means for use by passengers in alighting, it was not error to refuse another special charge to the same effect.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

4. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTS.

Where a clause in the general charge correctly submitted the issue as to defendant's liability for neglect to provide means for use by passengers in alighting, a special charge submitting the same issue was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

5. CARRIERS (§ 317*)—CARRIAGE OF PASSENGERS—ACTION FOR INJURIES—EVIDENCE.

A passenger injured by the upsetting of a step box placed on a rough pavement as the means for alighting may show that step boxes used at the station had upset on other occasions when passengers stepped on them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1297; Dec. Dig. § 317.*]

6. DAMAGES (§ 134*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Where a stout, healthy man, able to do any kind of work on his farm, fell in alighting from a train, and his injuries made him unable to do farmwork, \$10,000 damages was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 363, 386-394; Dec. Dig. § 134.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Action by W. O. Dunbar against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 108 S. W. 500.

Coke, Miller & Coke and Templeton, Craddock, Crosby & Dinsmore, for appellant. Pienon & Starnes and S. W. Tenley, for appellee.

BOOKHOUT, J. This was an action for damages for personal injuries alleged to have been sustained by the appellee in alighting from one of the passenger trains of the appellant at Greenville, on the 14th day of November, 1905. It was alleged: That, when said train arrived at the station of Greenville, it was dark; that said train was backed up to the defendant's station on the second track from defendant's passenger station; that the passenger coach in which plaintiff was riding was backed some distance up said track to and near its said station house; that defendant and its agents had negligently failed to provide a platform or other safe means by which its passengers could alight in safety from its trains; that the defendant had negligently and carelessly provided a brick pavement to be used by its passengers in alighting from its passenger trains, and the said brick pavement was negligently constructed and was rough and uneven, in this, that the brick was not placed on a level, some projecting above, and others below one another, making it rough and uneven; that the said pavement had not been flushed with cement mortar so as to fill up the cracks and crevices between the bricks, some places being lower than others, and would hold water, and in the course and use of time had become in such condition as above described; that the defendant and its agents had negligently and carelessly provided a small box or footstool, which was badly worn and wholly unfit and unsafe for the purpose for which it was used, which it placed on said rough and uneven pavement for plaintiff and other passengers to use and step upon when alighting from its trains; that said box was too small to be safe for the purpose for which it was used; that the plaintiff, while exercising due care for his own safety, stepped from the bottom step of said car onto the box or footstool placed there by defendant, its agents and servants; and that by reason of the defective box and rough and uneven pavement the box or footstool slipped and turned over, causing him to fall backward with great force and violence against the steps and railings of the said car and into the said box, causing the injuries alleged.

Defendant answered by a general demurrer, a number of special exceptions not necessary to be here noted, a general denial, and a special plea of contributory negligence, to the effect that, if the plaintiff sustained any injuries at all, they were proximately caused and contributed to by his own negligence and want of ordinary care, that he was negligent in the manner in which he stepped from the platform of the coach, or in the manner in which he stepped upon the footstool, or in placing his foot on the said footstool or near the edge or the end thereof.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

or that he failed to look or heed how or where he was stepping upon the footstool, knowing all the time that the footstool was being used as a step box between the coach and the pavement upon which it was placed. There was also a plea of assumed risk. A trial before the court with the aid of a jury October 8, 1908, resulted in a verdict in favor of the appellee for \$10,000, upon which judgment was duly entered. Appellant's motion for a new trial having been overruled, it duly perfected its appeal to this court.

Conclusions of Fact.

The appellee, W. O. Dunbar, while a passenger on the appellant's railroad, was injured in alighting from one of its cars at Greenville, Tex., on or about the 14th day of November, 1905, by the upsetting of the step box or footstool furnished by appellant to assist its passengers in alighting from its cars at Greenville. The appellant was guilty of negligence in failing to provide a platform at Greenville upon which its passengers could alight and in providing a footstool or step box which was defective and unsafe, and in furnishing a pavement, upon which its passengers were to alight, which was rough and uneven, and plaintiff's injuries were the direct and proximate result of appellant's negligence in some one or all of these respects, and by reason of said negligence he sustained injury and was damaged in the amount of the verdict and judgment.

The appellee was not guilty of negligence, and he did not assume the risk.

Conclusions of Law.

The first assignment of error challenges the correctness of the first clause of the court's charge, as follows: "That the defendant railroad company was not an insurer of the safety of the plaintiff on the occasion complained of by him; but it was required to exercise such a high degree of foresight as to possible dangers, and such a high degree of prudence in guarding against them, as would be used by very cautious, prudent, and competent persons under similar circumstances in providing the safest appliances that had been known and tested, to enable him to alight, and a failure to exercise such care is negligence." The propositions presented are: (1) That this charge is erroneous, in that it imposes upon the defendant with respect to the means and appliances provided for the use of passengers in alighting from its trains a higher degree of care than is required of it by law. The defendant was required to exercise ordinary and reasonable care only in providing such means and appliances, and not the "highest degree of care," as defined in the charge. And (2) that the charge in requiring of defendant such a high degree of foresight as to possible dangers to the plaintiff in alighting from the train and the like degree of prudence in guarding against such possible dangers to

him in so alighting is erroneous and more onerous than is imposed by the law, because the defendant was required to do no more than provide against such dangers as could reasonably have been foreseen or anticipated by the use of that high degree of care, which very cautious and prudent and competent men would use, and not against every possible danger that might arise in the course of its business as a public carrier of passengers. Neither of these propositions is sustained. The charge is in accordance with the rule laid down by the decisions of the courts of this state and is correct. *Railway v. Halloren*, 53 Tex. 53, 37 Am. Rep. 744; *Railway v. Wortham*, 73 Tex. 25, 10 S. W. 741, 3 L. R. A. 368; *Railway v. Welch*, 86 Tex. 204, 24 S. W. 390, 40 Am. St. Rep. 829. A charge in all respects similar to the above was approved and held correct on a former appeal of this case. 108 S. W. 500.

Error is assigned to the third paragraph of the court's charge, as follows: "Therefore, if you believe from the evidence on the occasion complained of by plaintiff that the ground or pavement provided by defendant, where plaintiff was required to alight, was rough and uneven, and at said place that defendant had provided no platform on which its passengers were to alight from its train, but a box to step from its train, placed upon said pavement, and if you further believe from the evidence that by reason of said uneven pavement, if it was uneven, said box placed upon the same was caused to tilt over when plaintiff stepped thereon to alight, and he was injured as alleged by him, if he was injured, or if you believe from the evidence that said box was unfit or unsafe for the purpose for which it was used, and by reason thereof it tilted or turned over when plaintiff stepped thereon to alight, and he received injury, if any, as alleged, and if you further believe from the evidence that the defendant failed to exercise that high degree of foresight as to possible dangers to its passengers and that high degree of prudence in guarding against them as would be used by very cautious, prudent, and competent persons in providing said uneven pavement, if it was uneven, and placing said box thereon on which its passengers were to alight, or providing said box for said purpose, and if you further believe from the evidence that such failure, if any, was the proximate cause of the injury, if any, to plaintiff, as alleged by him, then and in either event you will find for the plaintiff. If you do not so find, you will find for defendant." It is contended that this charge, in so far as it directs the jury that if the defendant had provided no platform for passengers to alight from the train, but a box to step from the train placed upon the pavement, and that in so providing said box for such purpose the defendant failed to exercise that high degree of foresight as to possible dangers to its passengers

and that high degree of care in guarding against them as would be used by very cautious, competent, and prudent persons, and such failure was the proximate cause of plaintiff's injuries, to find a verdict in his favor, is erroneous, because the proximate cause of the accident, as alleged in the petition, was not the providing of said step box alone for use by passengers in alighting from the trains, but was the use of an alleged improperly constructed, defective, and worn step box upon an alleged rough and uneven pavement, and that the two combined made the box slip, move, and turn over, and caused the accident and injuries. This paragraph of the charge announced a correct proposition of law. It is clear that a public carrier is not only required to provide reasonably safe means whereby its passengers may alight from its cars, but the safest which are known and have been tested. See authorities above cited.

Error is assigned to the court's refusal to read to the jury appellant's requested charge No. 2, reading: "You are instructed that an accident which cannot be reasonably anticipated by the exercise of that high degree of care that a very careful, prudent, and cautious person under similar circumstances would have used is not actionable; and so, if you believe from the evidence in this case that the defendant, in the means that it had provided for passengers to alight from its train at the time and place of the accident, used the degree of care above defined, you will find for the defendant." The court had given a correct charge on contributory negligence. He further instructed the jury that the burden of proof was on plaintiff to make out his case by a preponderance of evidence. At the instance of defendant they were further instructed, in special charge No. 1, as follows: "In its provisions made for the alighting of its passengers from its trains, the defendant was not required to provide such means as to insure their safety. The measure of its duty in that respect was to use that high degree of care that very prudent and cautious persons under like or similar circumstances would have used, and a failure on its part to exercise such a degree of care in its provisions made for the use of its passengers in alighting from trains would be negligence. Unless therefore you believe from the evidence that the defendant was guilty of negligence in the provisions it had made for the alighting of its passengers from its trains at the time and place of the accident—that is, that it failed to use the degree of care above defined—and unless you further believe that such negligence of the defendant, if any, was the proximate cause of the injuries of the plaintiff, if any, your verdict should be for the defendant." And in special charge No. 6, as follows: "It was the duty of the plaintiff, in the manner in which he alighted from the train, to use that degree of care for his own safety, which a

man of ordinary care and prudence under like circumstances and surroundings would have used. If therefore you believe from the evidence that the plaintiff, in the manner in which he stepped from the car to the footstool or step box, failed to use such care as a man of ordinary care and prudence would, under like circumstances, have used, and that such failure, if any, caused or contributed to cause the accident, you will find for the defendant, and this, even though you may believe that the defendant was guilty of negligence."

In view of the court's charge and the above special charges, there was no error in refusing special charge No. 2.

For the same reason there was no error in the court's action in refusing special charges Nos. 3 and 4, requested by appellant, the refusal of which is made the basis of its fourth and fifth assignments of error, and the same are overruled.

In the sixth assignment it is contended by appellant that the trial court erred in refusing special charge No. 5, as follows: "If you believe from the evidence that the stool or step box used by the defendant for its passengers to alight from its trains at the time and place of the accident was such a stool or step box as would have been used by persons of a very high degree of care and prudence under similar circumstances, and if you further believe that the pavement or platform upon which the step box was used was smooth so that the step box would not turn or tip over with a passenger in alighting from the train who himself was using ordinary care in stepping thereon from the steps of the coach, your verdict should be for the defendant." The third paragraph of the court's charge, previously quoted herein, groups the facts which the jury are instructed, if they find exist, they should then find for plaintiff, and they were further instructed, at the close of the same paragraph, "if you do not so find, you will find for defendant." This clause submitted to the jury the same issue sought to have been submitted by requested charge No. 5, and its refusal does not constitute error.

It is contended that the trial court erred in admitting the testimony of the witnesses Hall and Melton, to the effect that they had on different occasions seen footstools or step boxes turn over or slip about when passengers stepped upon them in alighting from the east line trains at Greenville. These witnesses had been meeting passengers on the arrival of the trains for the purpose of carrying them to their homes or to hotels and had occasion to notice these step boxes. Their evidence was admissible. *Railway v. Dunbar*, 108 S. W. 500. The testimony of the witnesses, the refusal to admit which is made the ground of the ninth assignment of error, was held inadmissible on the former appeal, and we concur in that holding. 108 S. W. 500.

The remaining assignments of error, that the verdict of the jury is contrary to the evidence and is excessive, are disposed of adversely to appellant in our conclusions of fact.

There is evidence tending to show that plaintiff was seriously and permanently injured by the fall, that he has suffered greatly, mentally and physically, and will continue to so suffer by reason of said injuries, that there is a chronic case of inflammation in one of his kidneys, and he is seriously injured in the lumbar region, and he suffers from irritability of the spine. Appellee was a farmer, and previous to being injured he was a stout, robust man able to perform any kind of work on his farm. He was in good health. Since being injured, he has not been able to do farmwork. There is nothing in the record to indicate that the verdict of the jury was the result of passion or prejudice. In view of these facts, we cannot say that a verdict for \$10,000 is excessive.

Finding no error in the record, the judgment is affirmed.

WILSON v. MOORE et al.

(Court of Civil Appeals of Texas. Nov. 6, 1909. Rehearing Denied Nov. 27, 1909.)

1. LANDLORD AND TENANT (§ 180*)—WRONGFUL EVICTION—DIRECTION OF VERDICT.

In a suit for wrongful eviction and conversion of a tenant's property, evidence held insufficient to justify the direction of a verdict for plaintiff.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 722; Dec. Dig. § 180.*]

2. LANDLORD AND TENANT (§ 180*)—TENANCY FROM MONTH TO MONTH—EVICTION.

A tenant from month to month at an agreed monthly rental, payable in advance, whose contract was to terminate if it was not so paid, is not entitled to possession, and cannot recover for an eviction after termination of his lease by failure to pay rent in advance.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. § 722; Dec. Dig. § 180.*]

3. LANDLORD AND TENANT (§ 180*)—WRONGFUL EVICTION—DAMAGES—EVIDENCE.

Where, in a suit for wrongful eviction, the undisputed testimony showed the value of the use of the premises did not exceed the amount of rent to be paid under the tenant's contract, he failed to show damage.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 180.*]

4. SHERIFFS AND CONSTABLES (§ 98*)—PROCESS AS PROTECTION FROM LIABILITY—WRIT OF RESTITUTION AGAINST TENANT.

A writ of restitution being fair and regular on its face, and issuing out of a court of competent jurisdiction, is valid, and it is a constable's duty to execute it; and, though issued on an irregular and void judgment, it will protect him in ousting a tenant.

[Ed. Note.—For other cases, see *Sheriffs and Constables*, Cent. Dig. § 153; Dec. Dig. § 98.*]

5. TROVER AND CONVERSION (§ 4*)—PROPERTY OF EVICTED TENANT—NECESSITY OF ILLEGAL ASSUMPTION OF OWNERSHIP.

To charge one with a wrongful conversion, an illegal assumption of ownership is necessary,

and such a conversion of the property of an evicted tenant is not apparent when it is shown that he was requested to remove it, but refused, and voluntarily left it, and none of the persons charged with its conversion made claim to or assumed any ownership over it.

[Ed. Note.—For other cases, see *Trover and Conversion*, Cent. Dig. §§ 25-37; Dec. Dig. § 4.*]

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Suit by I. B. Wilson against Ella Moore and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Geo. D. Green, for appellant. Ramsey & Odell, A. S. Bledsoe, H. P. Brown, and W. H. Bledsoe, for appellees.

BOOKHOUT, J. On the 5th day of December, 1907, the appellant brought this suit against appellee Ella Moore for damages in the sum of \$1,000. It was alleged that said defendant on November 7, 1907, through one W. W. Barr, constable, wrongfully ejected plaintiff from a certain house and the contents thereof in which plaintiff was then carrying on the business of a photographer, of which contents plaintiff was the owner, and appropriated the same to her own use. On September 8, 1908, the plaintiff filed his first amended original petition, in which he made the remaining appellees defendants; the new defendant W. W. Barr being the constable of precinct No. 1 of Johnson county, Tex., and the others sureties on his bond as constable. He avers, in substance, that he was the owner and in possession of a leasehold interest in a certain picture gallery in Cleburne, Tex., and the contents thereof, in which he was carrying on the business of photographer; that on November 7, 1907, W. W. Barr, as constable, at the request of his codefendant, Ella Moore, with a void writ of restitution placed in his hands by Ella Moore, ejected the plaintiff from said premises and from the property situated therein and turned the same over to Ella Moore, who converted the same to her own use to the damage of the plaintiff in the sum of \$1,200, for which plaintiff prayed judgment. The defendant Ella Moore answered by a general denial, and specially denied that plaintiff had any leasehold interest on the house in question, but alleged that plaintiff occupied said house as her tenant from month to month, and that upon plaintiff's failure to pay the rent monthly in advance she had the right to declare the lease forfeited, and that, the plaintiff having failed to pay his rent, she declared said rental contract forfeited and demanded of plaintiff the possession of the premises. She obtained the possession of said premises by the execution of a writ of restitution by said constable issued on a judgment in which she was plaintiff and Wilson was defendant, and she further answered that plaintiff's property was taken

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

under a mortgage executed thereon by plaintiff to the Traders' State Bank, and sold, and therefore she was not liable for same. The remaining defendants pleaded general denial, and, in substance, the same issue as these defendants. On the 16th day of March, 1906, the case was tried by the court and a jury, and judgment rendered in favor of all the defendants that plaintiff take nothing. Plaintiff's motion for new trial having been overruled, he perfected an appeal to this court.

The first assignment of error presented in the brief of appellant complains of the court's action in refusing a requested charge instructing a verdict in his favor. The evidence shows that the defendant Mrs. Ella Moore was the owner of a two-story business house in the city of Cleburne, the second or upper story of which she rented to one T. M. Mills for the term of three years in consideration of \$10 per month, payable monthly in advance, with the right to transfer the lease subject to the consent of the lessor. Mills entered into possession of said premises and conducted a photographic business therein until the month of August, 1907, when he sold the business to I. B. Wilson, to whom Mrs. Moore consented the lease could be sold on condition that he pay the rent of \$10 per month monthly in advance. Wilson entered into possession and conducted the photographic business therein, but, having failed to pay the rent monthly in advance, an unlawful detainer suit was filed on October 17, 1907, against him in the justice's court of precinct No. 1 of Johnson county. On November 22, 1907, a writ of restitution was issued out of the justice's court of precinct No. 1 of Johnson county directed to the sheriff or any constable of Johnson county, commanding him to deliver to said Ella Moore the possession of the premises, describing same, and being the same premises occupied by I. B. Wilson. This writ was regular on its face. It was placed in the hands of the constable of said precinct, who executed the same on the 30th day of November, 1907. At the time of the execution of said writ, there was contained in said photographic establishment certain instruments and material belonging to I. B. Wilson, consisting of a portrait camera, a portrait lens, a portrait stand, a set of furniture, and a few other articles of the alleged value of several hundred dollars. As to how the writ was executed, and what took place at the time and how the property of Wilson came to be locked up therein, is best stated in the language of the constable, Barr. He testified: "When I went over there to see the plaintiff in November, 1907, I had a writ for him. I had a writ of restitution which I served on him. I told him as an officer of the law I would have to put him out of the house. He says, 'You won't have to put me out, I'll get out'; and he went downstairs and I locked up the doors, and nailed up the windows. There was a photo-

graph gallery outfit in the house, and I locked it up in there under the directions of this writ, which was issued by the justice of the peace of precinct No. 1, Johnson county, Tex. The lawyers for Mrs. Moore instructed me to do this. I don't know how many, but I told different ones that I had locked up this place of the plaintiff. I told Albert Bledsoe, one of the attorneys for the defendants in this case, that I had locked up the house and nailed it up, etc. I don't know that I told him about the things being in there, but I suppose he knew it. I don't know that he asked me about that. I think I turned the key over to Mrs. Moore or Mr. A. S. Bledsoe, one; I don't remember which." Upon cross-examination he testified: "Yes, sir; this is a writ I had. This is the one I had when I locked up the premises referred to. This writ came into my possession the 22d day of November, 1907, at 1:30 o'clock p. m., and I executed it on the 30th day of November, 1907. I went to Mr. Wilson, the plaintiff, between the time I got this writ and the time I executed it several times and talked to him with reference to his giving possession of the premises. I think I went some three or four times anyway. I was trying to get him out of the premises and to take his stuff out of the building. I don't think he ever told me he would take his stuff out of the building at any of these times I talked to him. I think it was the evening before I closed up the place I had a conversation with Mr. Wilson, and he told me that he had some work in his place of business, and that it would be a loss to him to close it up just then; that some parties had work there and he wanted until the next day to get it out or finish it for them. I never did take possession of plaintiff's property only in the manner I have indicated; that is, by nailing it up. I tried to get him to take his goods and stuff out of the building two or three different times. I think I put another lock than the one already on the door on there. Mr. Wilson did not turn over the keys to the building to me, and I got another lock and put on the door. It was after I went up there and told him I had a right under the law to put him out if he resisted. Then he got out the next morning I believe it was. He consented to get out the next morning. Mrs. Moore nor no one for her directed me to take possession of Mr. Wilson's property. She wanted the building I understood, wanted possession of the building. I was directed to get possession of the building, and was not directed to take possession of the goods. I executed this process on the 30th of November, 1907. This is my handwriting on the back of this writ handed me. I did that at the time I executed the writ."

Wilson testified: "Mr. Barr came up and said he had a writ to close my business, and I said all right, if you have got authority to close it, go ahead and close it, and he closed it up and I went out. He nailed up my back

windows and front windows and partition doors, and asked me if I would get out, and I said, 'No; you are an officer, and you can put me out'; and he says, 'I'll have to do it,' and he put me out and asked me if I would give him the key and I told him no, and he got another lock and locked it up. I went out of the house. This outfit was in there as I stated when he locked it up. I went out on the street and have never been back there since that time. I think the place remained locked up there about four months. I was in town when it was opened up. I think it was about four months before it was opened after it was locked."

The evidence further shows that the Traders' State Bank of Cleburne had a mortgage on all the property, which not being paid, the property was taken possession of by the bank, and, after notice to Wilson, the bank sold the same to satisfy said mortgage. This property was never claimed by Mrs. Moore or any one for her, nor did she authorize any one to take the same. Under these facts, the court did not err in refusing to instruct a verdict for appellant. The plaintiff based his right of recovery against appellee Mrs. Moore on the allegation that he had a contract with her entitling him to the possession of the rented premises from the 1st day of January, 1907, to the 1st day of January, 1909, which allegation she denied, she alleging that the only contract between herself and appellant was a rental contract for one month and from month to month at the agreed rental of \$10 per month, payable monthly in advance, and that appellant was only to have possession of said premises so long as he paid said rental in advance, and that, if the rent was not paid in advance, the contract should terminate, and the court having submitted in his charge this issue to the jury, and the jury having found in favor of appellee, appellant would not be entitled to recover any damages from said appellee by reason of being evicted from said premises. The jury found that the plaintiff Wilson did not have a lease on the premises as alleged by him, but that the same had terminated by his failure to pay the rent monthly in advance as he had contracted to do and that he was not entitled to the possession of the same, and could not recover damages on the ground that he had been evicted from the premises. Again, this being a suit by a tenant against his landlord for wrongful eviction from the rented premises, and the undisputed testimony showing that the value of the use of the rented premises did not exceed the amount of the rent to be paid by him under his contract, he failed to show that he was damaged by reason of such eviction.

The trial court, after hearing the evidence, instructed a verdict in favor of the constable and sureties on his official bond. The writ

of restitution under which the constable acted in ousting appellant from the premises was fair and regular on its face, and issued out of a court of competent jurisdiction and was a valid writ. It was the duty of the constable to execute the writ. *Rice v. Miller*, 70 Tex. 615, 8 S. W. 317, 8 Am. St. Rep. 630; *Randall v. Rosenthal*, 31 S. W. 822. If it be true that the writ issued on an irregular or even a void judgment, it would be sufficient to protect the officer where the writ is valid on its face and issued from a court of competent jurisdiction.

Again, the evidence fails to show that any of the defendants wrongfully converted any of the personal property of plaintiff. On the contrary, it shows that plaintiff was requested to remove his property from the rented premises, but refused to do so, and voluntarily left it therein; that none of the defendants made any claim to the same or assumed any ownership over the same, and no conversion is shown by the evidence. In order to charge one with a wrongful conversion of property, there must be an illegal assumption of ownership. *Arwine v. Arwine*, 3 Willson, Civ. Cas. Ct. App. 196, § 155; *Walker v. Simkins*, 2 Willson, Civ. Cas. Ct. App. 58, § 69; *Johnson v. Barker*, 1 White & W. Civ. Cas. Ct. App. 115, § 283.

Finding no error in the record, the judgment is affirmed.

ABERNATHY v. PICKETT et al.

(Court of Civil Appeals of Texas. Nov. 17, 1909.)

1. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASERS—NOTICE—RECORD.

The existence of two recorded deeds, viz., a warranty deed from A. to B. of "all lots now owned by" A. in a certain block, and a quitclaim deed from B. to A.'s wife of certain lots in the block, is notice to a subsequent purchaser from A. and wife of the rights of one claiming under a recorded, but not duly acknowledged, deed made by A. prior to A.'s deed to B.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 513-539; Dec. Dig. § 231.*]

2. ESTOPPEL (§ 78*)—EQUITABLE ESTOPPEL—ACQUIESCENCE.

A grantee who has received and cashed a check which states on its face that it is in full payment for land conveyed to him by one whose title was defective by reason of a prior deed which was recorded but not duly acknowledged cannot repudiate the payment and reassert his claim to the land.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 204-210; Dec. Dig. § 78.*]

Appeal from District Court, Lubbock County; L. S. Kinder, Judge.

Action by M. G. Abernathy against Charles L. Pickett and others. From a judgment for defendants, plaintiff appeals. Affirmed.

H. C. Ferguson and W. D. Benson, for appellant. H. C. Randolph, for appellees.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

FISHER, C. J. This is an action of trespass to try title, brought by appellant against Charles L. Pickett, P. B. Penny, and E. B. Penny, to recover lots 11 and 13, in block 118, of the town of Lubbock. Defendants filed a general demurrer, general denial, and a plea of not guilty, and specially pleaded that plaintiff claims title through a deed from W. E. Rayner and his wife, Alice Rayner, and that he took the title with notice of the claim of the estate of A. J. Shaw, and that subsequently he complained to Rayner of the defect in his title by reason of a prior conveyance under which Shaw claimed the land, and that Rayner refunded to appellant \$65, which appellant accepted in payment for the lots in controversy. To this special plea appellant replied, in substance, that he had acquired the title to the lots sued for by warranty deed and paid the full value without actual or constructive notice of any prior conveyance made by his vendor, and believed at the time that he was acquiring good title; that, after the payment and purchase of the lots appellees informed him that one Shaw or his estate claimed the lots in controversy under a deed executed by W. E. Rayner, appellant's vendor, prior to the conveyance to the appellant, and that it had been duly registered prior to appellant's purchase, and the appellant, not knowing the truth, and believing these statements to be true, he wrote and demanded from Rayner a conveyance of other lots of equal value in lieu of the lots in controversy, and that Rayner remitted to him \$65 and made no demand for a reconveyance, and appellant did not agree to make a reconveyance, and at no time reconveyed or relinquished his title to the lots, and did not accept the money so sent him by Rayner as a return of the purchase money, but as an indemnity on his warranty; that the appellant subsequently learned that the deed under which the estate of Shaw then claimed said lots and under which appellees now claim the lots was not duly acknowledged, and therefore was not duly recorded, so as to affect him with constructive notice of its existence, and he thereupon repudiated his acceptance of said money for any purpose. The said Rayner then being dead, he has since and now holds the money as the property of the estate of Rayner, intending to return it to the estate when a representative is qualified.

The case was tried before the court below and judgment rendered against the appellant and in favor of appellees for the lots on their cross-action. The appellant relies upon the following facts:

(1) A patent from the state of Texas to Hiram G. Ferris, assignee of the T. W. & N. G. Railway Company, dated June 14, 1878, and recorded in book 6, p. 154, of the Deed Records of Lubbock county.

(2) Deed from Hiram G. Ferris and wife, Julia E. Ferris, to Frank E. Wheelock and

W. E. Rayner, dated January 12, 1891, and recorded in book 5, p. 412, of the Deed Records of Lubbock county.

(3) Deed of dedication of streets and alleys, with map, from W. E. Rayner and F. E. Wheelock to the public for public use, dated January 15, 1891, and filed January 16, 1891, and duly recorded in the Deed Records of Lubbock county, platting and mapping the lands described in the above patent and deed in the town of Lubbock, Lubbock county, which shows lots 1 to 20, inclusive, in block 118, as well as other lots and blocks.

(4) A general warranty deed from F. E. Wheelock to W. E. Rayner, dated January 21, 1891, and filed February 26, 1891, and duly recorded, conveying to W. E. Rayner lots 11, 13, and 15 in block 118 of the town of Lubbock.

(5) A general warranty deed from W. E. Rayner and wife, Alice Rayner, to the appellant M. G. Abernathy, dated April 18, 1903, conveying lots 11, 13, and 15, in block 118, of the town of Lubbock, filed and recorded May 4, 1903.

The first four instruments above mentioned were also introduced in evidence by appellees, and, in addition, the appellees introduced in evidence a deed of date March 9, 1891, from W. E. Rayner to F. E. Wheelock, conveying the lots in controversy. This deed was filed March 16, 1891, and recorded in the Deed Records of Lubbock county. This deed was not properly acknowledged, but its execution by Rayner was sufficiently established. Appellees also introduced in evidence a deed from F. E. Wheelock to A. J. Shaw, dated August 2, 1904, and filed for record February 25, 1905, which deed was duly recorded in the Deed Records of Lubbock county, and conveys lots 11 and 13, in block 118. They also introduced a certified copy of the will and order of the probate court from the records of Knox county, Ill., of A. J. Shaw to M. A. Shaw, dated June 18, 1891, and probated in July, 1901, and recorded in book 16 of the records of Lubbock county, devising and bequeathing to M. A. Shaw, his wife, all property of every kind and description which the testator may possess at the time of his death. This will was duly probated, and shows that Shaw died at Galesburg, Ill., the 26th of July, 1901. They also introduced deed from M. A. Shaw to Charles L. Pickett, dated February 15, 1907, filed for record February 21, 1907, and recorded in the Deed Records of Lubbock county. This deed conveyed all of lots 11 and 13, in block 118, of the town of Lubbock. They introduced warranty deed from Charles L. Pickett to P. B. and E. B. Penny, conveying to them an undivided two-thirds interest in the lots in controversy. Defendants also introduced a general warranty deed from W. E. Rayner to W. R. Yates, of date April 23, 1891, and filed for record April 27, 1891, and duly recorded in the Deed Records of Lubbock county, con-

taining the following description of the property conveyed: "All the lots now owned by me in the town of Lubbock, Lubbock county, Texas, in the following blocks, to wit: Block 118, and other blocks in the town of Lubbock, Lubbock county, Texas, as the same appears upon the map of said town recorded in book 5, pp. 384-5 of the Deed Records of said county," reciting a consideration of \$7,000 paid. They also introduced a quitclaim deed from W. R. Yates and wife to Alice Rayner, dated November 23, 1894, filed November 30, 1894, recorded in book 8, p. 70, of the Lubbock county Deed Records, conveying among other lots 11, 13, and 15, in block 118, of the town of Lubbock. The deed from W. E. Rayner and wife, Alice Rayner, introduced by the plaintiff, is a general warranty deed dated April 18, 1903, and filed for record May 4, 1903, and conveys lots 11, 13, and 15, block 118, in the town of Lubbock; this being the same deed introduced by the plaintiff as above set out. The deed from Rayner to Yates and from Yates and wife to Alice Rayner were offered in evidence by the appellees as links in the chain of appellant's title for the purpose of charging the appellant with notice that Rayner had conveyed to Yates only such lots as he at that time owned in block 118, and other lots in the town of Lubbock, and that he had nothing left to convey out of that block when he and wife executed the deed to appellant.

On the other issue of fact in the case there is evidence which justifies the conclusion reached by the trial court that the appellees were not estopped by reason of the facts pleaded by appellant, and that the appellant, when he discovered that Rayner had previously sold the lots, called his attention to that fact and requested a conveyance of other lots in lieu of those in controversy. He was informed by Rayner that he owned no other lots in Lubbock, and he thereupon remitted to appellant the sum of \$65, represented by a check which was in Rayner's handwriting, with the following notation in the left-hand corner: "In full payment for lots 11 and 13, in block 118 of the town of Lubbock." This check was received by the appellant and was cashed. The evidence shows that the appellant purchased the lots in controversy for a valuable consideration, and at the time had no actual notice of the conveyance from Rayner to Wheelock, which deed was recorded, but not properly acknowledged.

From the facts, as stated, only two questions arise: First. Could the appellant in deraigning title omit the deeds from Rayner to Yates and from Yates and wife to Alice Rayner? Are they instruments in the line of his title which would put him upon notice that Yates only acquired such lots in block 118 as were then owned by Ray-

ner on April 23, 1891, the date of the execution of the deed? As before said, subsequent to this, on November 23, 1894, Yates and wife conveyed the lots in controversy to Alice Rayner. These two deeds were properly recorded prior to the time that W. E. Rayner and wife executed their conveyance to the appellant of date April 18, 1903. We are of the opinion that the existence of these deeds is sufficient to impart notice to the appellant of the state of Rayner and wife's supposed title at the time that they attempted to convey to him in 1903.

The other question in the case is, in effect, disposed of by the findings of fact. The draft from Rayner to the appellant, which he accepted and cashed, states upon its face that it was in full payment for the lots in controversy. These facts are sufficient to conclude appellant, and he cannot relieve himself of the effect of this transaction by now offering to return the money and reasserting a claim to the lots in controversy.

Judgment affirmed.

WILLIAM CARLISLE & CO. v. KING et al.
(Court of Civil Appeals of Texas. Oct. 21, 1909. Rehearing Denied Nov. 18, 1909.)

1. LIMITATION OF ACTIONS (§ 39*)—MISTAKE—REFORMATION OF DEED.

An equitable action to correct mistakes in field notes in deeds to a party's predecessors in title would be barred by four years' limitations under Rev. St. 1895, art. 3358, providing that every action other than for recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years after the right of action accrues.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 195; Dec. Dig. § 39.*]

2. REFORMATION OF INSTRUMENTS (§ 32*)—"STALE" DEMANDS—ACTION TO CORRECT DEED 40 YEARS OLD.

A suit to correct a mistake in a deed, brought more than 40 years after its date, with no excuse pleaded or proved for the delay, will be deemed a "stale" demand.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. § 32.*]

For other definitions, see Words and Phrases, vol. 7, p. 6622.]

3. VENDOR AND PURCHASER (§ 231*)—NOTICE—FILING DEED FOR RECORD—EFFECT.

Rev. St. 1895, art. 4607, provides that instruments required to be recorded shall be considered as recorded from the time they are deposited for record. Article 4642 provides that such instruments shall take effect, as to subsequent purchasers for value without notice, from the time they are acknowledged, proved, or certified, and delivered to such clerk to be recorded, and from that time only. *Held*, that a deed properly acknowledged or proved and certified is as effectual as notice, as if it had been duly and properly recorded, from the date it is properly deposited for record, and the person depositing it owes no duty to make inquiry as to whether it has been, in fact, recorded.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 520; Dec. Dig. § 231.*]

4. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASERS—RECORD AS NOTICE—CONSTRUCTIVE NOTICE.

A recorded deed, by virtue alone of the record, is constructive notice only of what appears on its face.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 515; Dec. Dig. § 231.*]

5. VENDOR AND PURCHASER (§ 230*)—BONA FIDE PURCHASER—NOTICE—RECITALS IN CHAIN OF TITLE.

A purchaser of land is bound to take notice of the recitals in a patent forming a link in his chain of title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 502; Dec. Dig. § 230.*]

6. VENDOR AND PURCHASER (§ 230*)—BONA FIDE PURCHASER—RECORDS—NOTICE.

Where from the recitals of a recorded deed, taken in connection with the field notes of the patent to the land and the lines of abutting surveys, an error in the field notes clearly appeared, and the only way in which the calls could harmonize and the survey be made to close was to take the call "east to the east line" as intended for "west to the west line," which would make clear the grantor's intention to convey certain land, the deed was constructive notice of the conveyance of that land, to a subsequent purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 502; Dec. Dig. § 230.*]

7. VENDOR AND PURCHASER (§ 230*)—BONA FIDE PURCHASER—EVIDENCE OF PAYMENT—RECITALS IN DEED.

A recital in a deed of payment by the grantee is not evidence of such payment to make him a bona fide purchaser, as against others claiming under another deed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 502; Dec. Dig. § 230.*]

Appeal from District Court, Trinity County; Gordon Boone, Judge.

Action by E. C. King and others against William Carlisle & Co. Judgment for plaintiffs, and defendant appeals. Affirmed.

Hill & Hill and J. P. Stevenson, for appellant. Stevenson & Stevenson and John S. Arnold, for appellees.

REESE, J. This is an appeal from a judgment in favor of plaintiffs in a suit instituted by E. C. King et al. against William Carlisle & Co. The land sued for is 160 acres, the south half of the J. S. A. Chessher 320-acre survey in Trinity county. As originally instituted the action was one simply in trespass to try title; but by amended petition plaintiffs alleged a mistake in the description of the land in the deed by J. S. A. Chessher and wife to one Burns, and in deed to their ancestor under which they claim title, and sought to have the mistake in the field notes corrected so as properly to describe the land which is alleged to have been intended to be conveyed. As set out in the petition, the land is described in the deed from Chessher to Burns as follows: "Beginning at the S. E. corner of a 320-acre tract of land, granted to James S. A. Chessher by virtue of his pre-emption certificate on the 25th day of July, 1860, Sam Houston, Governor of said state, and Francis M. White,

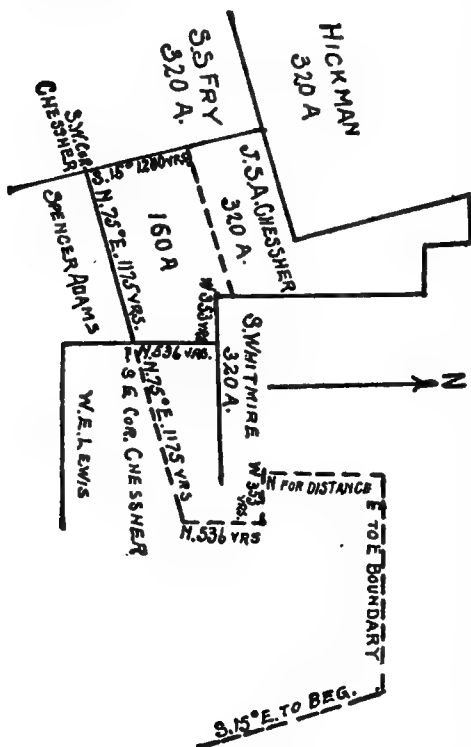
Commissioner of General Land Office. The patent to said 320 acres is marked No. 65, vol. 31. Thence N. 75 deg. E. with the N. B. line of Spencer Adams survey, 1,175 varas, to a stake for the S. E. corner, a black oak bears S. 14 varas, a pine bears N. 5 deg. W. 2½ varas. Thence N. 536 varas the S. line of S. Whitmire's survey, a post oak bears S. 68 deg. W., 10 varas. Thence W. with said Whitmire's survey, 353 varas, the S. W. corner of said survey, a stake from which a pine bears N. 9 deg. E., 86 varas, another bears N. 55 deg. W., 72 varas. Thence N. a sufficient distance so by running E. to E. boundary of said survey of 320 acres, and thence south 15 deg. E. to the place of beginning, so as to include 160 acres of land." It is alleged that by mistake the beginning corner is described as the S. E. corner of the Chessher survey, when it should have been the S. W. corner, and that the call next to the last, instead of being "thence E. to the E. boundary of said 320-acre survey," should be "thence W. to the W. boundary," as intended by the grantors and grantees. Plaintiffs pray that the description be so corrected, and that they have judgment for the land as described by such corrected field notes. It is alleged that the deed from Chessher to Burns was executed March 19, 1861. Defendants answered by general demurrer and general denial, and specially excepted as follows: (1) That Chessher and wife are not made parties. (2) That suit to reform and correct the deed after the lapse of 40 years is a stale demand and barred by the statute of limitation of 10 years. Article 3360, Rev. St. 1895. (3) Reiterates the plea of 10 years' limitation since the date of the deed. (4) Amended petition sets up new cause of action, and plaintiff should be taxed with costs up to date of filing the same. (5) Plaintiffs fail to show knowledge on the part of defendants of the alleged intention of Chessher and wife. (6) That it is not alleged that such alleged intention of Chessher and wife is shown to have been expressed in writing. The general demurrer and special exceptions were overruled, and upon trial without a jury judgment was rendered for plaintiffs for the land sued for.

Conclusions of law and fact of the trial court are in the record, as well as a statement of facts. The material facts are as follows: The 160 acres sued for is a part of a tract of 320 acres patented to J. S. A. Chessher July 25, 1860. The patent field notes are as follows: "Beginning at the N. E. corner of the J. Hickman survey a stake, a pine bears N. 40 deg. E., 10 varas, another S. 53 deg. W., 5 varas. Thence S. 15 deg. E., 1,120 varas, to Hickman's S. E. corner. Thence S. 75 deg. W. with S. boundary line of said survey, 80 varas, to the N. W. corner of Sarah Fry survey a stake, a pine bears

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

N. 36 deg. W., 6.2 varas, another N. 67 deg. E., 10 varas. Thence S. 15 deg. E. with Fry E. line, 1,200 varas, N. W. corner of a survey for Spencer Adams. Thence N. 75 deg. E. with the N. boundary line of said Adams survey, 1,175 varas, a stake for S. E. corner, a black oak bears S. 14 varas, a pine bears N. 5 W. 2½ varas. Thence N. 536 varas, the S. line of S. Whitmire survey, a post oak bears S. 68 deg. W. 10½ varas. Thence W. with said Whitmire's survey 353 varas the S. W. corner of said survey a stake from which a pine bears N. 9 deg. E. 8.6 varas, another N. 55 W. 72 varas. Thence N., 1,344 varas, to J. Y. Curry's S. line. * * * Thence W. on Curry's line, 300 varas, to his S. W. corner. Thence N. with same 264 varas. * * * Thence W., 310 varas, to beginning."

The following plat shows the location of the Chessher and surrounding surveys, upon which is shown the location of the 160 acres sued for according to the field notes as sought to be corrected, and east of the survey is shown the lines of the tract as literally described in the deed from Chessher to Burns:



By deed dated March 19, 1861, and recorded in deed records of Trinity county March 21, 1861, J. S. A. Chessher and wife conveyed to George Burns 160 acres of land, describing the same by the field notes herebefore set out as beginning at the S. E. corner of the Chessher survey. The records of Trinity county were destroyed by fire in the fall of 1872. This deed was afterwards,

on August 20, 1892, deposited for record with the county clerk and was filed for record by him, and the date and time of filing indorsed on the deed; but it was not recorded and was not entered on the file register, but remained in the clerk's office until 1906, when, upon search made for appellee, it was found in the vault and was then refiled and recorded on March 7, 1906. The evidence authorizes the conclusion that it was not recorded at the time of filing because the fee was not then paid; but there is no evidence that any demand for the fee was made by the clerk. By the same description Burns conveyed the land to M. Nall by deed dated in 1868 or 1869. Plaintiffs are sole heirs of Nall, who died in 1875. There is no administration on his estate.

Appellants claim title under the following conveyances: (1) Deed from J. S. A. Chessher and wife to Nancy Williams, dated March 29, 1862, duly recorded in 1862 and re-recorded in 1881, conveying 158 acres off of the east end of Chessher survey. (2) Deed from Nancy Williams to H. F. Craddock, January 19, 1872, recorded 1881, conveying the same land. (3) Deed from heirs of Craddock to appellants, March 9, 1900, duly recorded, conveying the same land. (4) Deed from heirs of J. S. A. Chessher to John W. Chessher, December 27, 1902, recorded January 21, 1903, conveying 160 acres, west end of the Chessher survey. (5) Deed from John W. Chessher and wife to appellants for same land, dated December 29, 1902, recorded January 21, 1903; consideration \$640. The consideration paid by appellants for the land in each of the deeds was the fair market value of the tract conveyed, and at the time of said conveyance appellants had no actual notice or knowledge of the existence of the outstanding deeds under which appellees claim title.

We will consider the questions presented without reference in detail to the several assignments of error in the brief. We may say, in limine, that, if it were necessary to invoke the jurisdiction of equity to correct the field notes in the deeds to Burns and to Nall before appellees would be entitled to recover the land, appellees were barred of such relief by the statute of limitations of four years. Rev. St. 1895, art. 3358; McCampbell v. Durst, 15 Tex. Civ. App. 522, 40 S. W. 318; Wright v. Issacks, 43 Tex. Civ. App. 223, 95 S. W. 57; Isaacs v. Wright (Tex. Civ. App.) 110 S. W. 971. If not barred by the statute referred to, such proceeding to correct the mistake in the deed, more than 40 years after the date of the deed, with no excuse either pleaded or proven for such delay, should be regarded as a stale demand; such proceeding being purely equitable in its nature. But we have concluded that the mistakes in the deed can properly be corrected and shown to be mere clerical errors, by the deed itself, in connection with the lines and boundaries of the Chess-

her and abutting surveys referred to in the deed, and also the field notes of the patent of the Chessher, and that it was not necessary to invoke the aid of a court of equity to correct the deed in order to entitle appellees to recover the land sued for.

Disregarding the count in the petition upon which appellees seek to have the deed corrected, they showed title by the face of the deed to the land sued for, unless defeated by appellants' defenses. This question is also intimately connected with appellants' defense that they are innocent purchasers without notice, which rests upon two grounds: First, that the deed to Burns was not in fact recorded, and the mere filing for record in 1892, without any record until 1906, was not constructive notice to appellants, who bought in 1900 and 1902, in good faith for value from those having the apparent title, and without actual notice of the deeds under which appellees claim; and second, that, even if the deed had been regularly recorded, it would not have operated as constructive notice to appellants that it covered any land on the Chessher survey which they proposed to buy.

The statute provides that every instrument of writing required to be recorded "shall be considered as recorded from the time it is deposited for record." Article 4607, Rev. St. 1895. Also, that such instrument, when delivered to the clerk of the proper court, to be recorded, "shall take effect and be valid as to all subsequent purchasers for valuable consideration without notice * * * from the time when such instrument shall have been so acknowledged, proved or certified and delivered to such clerk to be recorded and from that time only." Rev. St. 1895, art. 4642. Construing these statutory provisions, the Supreme Court, in *Throckmorton v. Price*, 28 Tex. 606, 91 Am. Dec. 334, held, in substance, that a deed properly acknowledged or proven, and certified and deposited with the clerk for record, was as effectual as notice as if it had been duly and properly recorded, from the date of such depositing. There has been no departure from the doctrine thus stated, so far as we can learn; but it has been consistently followed by later decisions of our Supreme Court. *Land Co. v. Chisholm*, 71 Tex. 527, 9 S. W. 479; *Kennard v. Mabry*, 78 Tex. 156, 14 S. W. 272; *Lignoski v. Crooker*, 86 Tex. 327, 24 S. W. 278, 788; *Dean v. Gibson* (Tex. Civ. App.) 48 S. W. 58. And similar statutes of other states have received the same construction. *Wade on Notice*, §§ 154-156, and cases cited; *Hoffman v. Mackall*, 5 Ohio St. 124, 65 Am. Dec. 649, and cases in note. There is no conflict between *Throckmorton v. Price* and *Taylor v. Harrison*, 47 Tex. 453, 26 Am. Rep. 304. *Dean v. Gibson*, supra; *Wade on Notice*, § 149.

Nor do we think that the effect of this rule is weakened in its application to the present case by the fact that, having left

the deed with the clerk to be recorded in 1892, the grantees thereunder made no inquiry as to whether it had been recorded until 1906. The statute imposes no such duty upon them; but, as interpreted, goes upon the principle that, as the law imposes the duty upon the clerk to first and at once enter the instrument on the file register and then enter it upon the records, the person depositing the instrument for record has no further duty in the premises, but may rely upon the clerk doing his duty. The damage and injury to the subsequent purchaser without actual notice are as palpable in case of an instrument which is not entered on the file register nor recorded within a few days, if he purchases in the interim, as where the act of recording is delayed for years. The grantee is told by the statute, in substance and effect, that in order to give notice he need only deposit his deed with the clerk for record, and there is nothing in the letter or spirit of the statute, or any decision we have found, that would require of him at any time thereafter to make inquiry in order to determine that the instrument had been recorded, under penalty of losing the benefit of the statute. Of course, great hardship may result from the application of this rule, as unquestionably has resulted to appellants in the present case, who neither knew, nor could have reasonably suspected, the existence of the outstanding deed; but it cannot be said that either appellees or those under whom they claim are at fault. As said by the court in *Throckmorton v. Price*, supra: "In whatever manner the question is decided it must operate to the injury of innocent parties. There is therefore no equitable considerations favoring a preference of the parties on the one side over those of the other."

It may be that the provisions of the statute referred to were not intended to reach and cover such a case as the present, and protect the holder of an unrecorded deed against the claims of an innocent purchaser for so many years, when such holder could so easily have discovered that his deed had not been recorded; but we do not feel at liberty to give the statute such construction in the present status of the authorities on the subject. Treating the deed, then, as though duly entered upon the record at the time appellants purchased, did it operate as constructive notice of a conveyance by Chessher of land out of the Chessher survey which they were about to buy? We understand it to be the well-settled rule that a recorded deed, by virtue alone of the record, is constructive notice only of what appears on the face of the deed. *McLouth v. Hurt*, 51 Tex. 115; *Carter v. Hawkins*, 62 Tex. 395. In our judgment, however, it sufficiently appears upon the face of the deed, when read in the light of such facts as appellants were bound to know—that is, the recitals in the patent to the land they were buying and the lines

of the abutting surveys called for in the deed—not only that there was error in the field notes, but what land, in fact, was intended to be conveyed. The recitals in the patent, in his chain of title, appellants were bound to know. *Peters v. Clements*, 46 Tex. 123; *Russell v. Kirkbride*, 62 Tex. 455. A decision of this question necessarily rests upon the same ground as that first referred to, that is, that the errors in the description can be corrected from the deed itself, and appellees could recover without a correction of the deed by an equitable proceeding for that purpose, and what is said here may also be considered as our reasons for our holding upon that question.

Any one examining the deed from Chessher to Burns would be struck with the ambiguous, contradictory, and inconsistent calls as they appear on the face of the deed. The first call is to begin at the southeast corner of the Chessher 320-acre survey, giving particularly the full history of Chessher's title to said survey in what would be considered a most unusual way, unless the land to be conveyed were a part of said survey, which was then in fact owned by Chessher, as shown by deed in appellants' chain of title. The line runs thence N. 75° E., which is the exact course of the south line of the Chessher, as shown by the patent, and calls to run with the north line of the Spencer Adams, which line is coterminous with the south line of the Chessher, begins at its southwest corner, and ends at its southeast corner. Further, this first call is for a line N. 75° E., 1,175 varas, which is the exact length, as well as direction, of the south line of the Chessher. Beginning at the southwest corner of the Chessher, and running thence N. 75° E., 1,175 varas, along the north line of the Spencer Adams, brings us to the southeast corner of the Chessher, as the end of this line. In no other possible way can the call for a line N. 75° E. along the north line of the Spencer Adams be met. Obviously, then, either the call to begin at the southeast corner of the Chessher must be discarded, or the call for the Spencer Adams line; but this is not all. At the terminus of this line running N. 75° E., 1,175 varas, from the southeast corner of the Chessher, this point is marked and identified in the deed by the same bearing trees, at the same distance as those which mark the southeast corner according to the field notes of the patent. The patent calls for the line running north from the southeast corner of the Chessher to strike the S. Whitmire south line at 536 varas. As this line, N. 75° E., is not parallel to the north line of the Whitmire, but converges towards it, running east, clearly at no point east of the southeast corner of the Chessher would a line running north to the south line of the Whitmire strike it at this distance; but we are not even driven to any conjecture about this, for the field notes of the Burns deed call for the third line to run with Whitmire's south

line 353 varas to its southwest corner, and according to the field notes in the patent this is the exact distance to the Whitmire southwest corner from the point where a line running north from the southeast corner of the Chessher strikes the Whitmire's south line.

Taking the field notes as they read in the deed and running north from the end of the first line N. 75° E., 1,175 varas, from the southeast corner of the Chessher, it clearly appears, from the field notes of the patent that such line would strike the south line of the Whitmire 1,175 varas further from its southwest corner than the distance called for in the deed; but, to remove all doubt about this line, the field notes of the deed, at the point where this line running north strikes the south line of the Whitmire, identify this point by exactly the same bearing trees, etc., as are called for in the patent to mark a point at which such line would reach the Whitmire south line, if run north from the Chessher southeast corner, harmonizing with the call for the third line in the deed—W. 353 varas, to the southwest corner of the Whitmire. Now if we take this call for the southeast corner of the Chessher as the beginning, as intended for the southwest corner it harmonizes exactly with the calls for the Spencer Adams north line, with the bearing trees at the southeast corner of the Chessher and with the calls for south line and southwest corner of the Whitmire as shown by the field notes of the patent. We think that there could be no hesitation or doubt in the mind of any one from these facts and circumstances that the call for the southeast corner as the beginning corner was a clerical error and was intended for the southwest corner. What follows only strengthens this conclusion.

Having reached the southwest corner of the Whitmire, the field notes in the deed call to run north a sufficient distance so that a line run east to the east line of the Chessher survey and then S. 15° E. to the beginning would include 160 acres of land. Taking the beginning call as the southwest instead of the southeast corner of the survey, reversing the calls in the deed, we have the last line running N. 15° W. from this point, to meet the line running east from the Whitmire's west and the Chessher's east line. The mistake is perfectly obvious, and the only way in which the calls can harmonize and the survey made to close is to take the call to run "east to the east line" of the Chessher (from a point clearly on the east line) as intended for "west to the west line." This harmonizes all the calls and describes exactly the 160 acres in controversy. Without this correction the survey cannot be made to close, and the deed does not convey any land at all. Again, if we begin at the southwest corner of the S. Whitmire, called for in the deed, and run back reversing the calls, we arrive, not at a point N. 75° E.,

1,175 varas, from the southeast corner, but at the southeast corner of the Chessher, not as the beginning corner, but as the end of a line running N. 75° E., 1,175 varas, from the beginning, and tracing 'this line back we arrive at the southwest corner of the Chessher as the beginning. Thus from the face of the deed, taken in connection with the field notes of the patent and the lines of the abutting surveys, the error in the field notes and the intention of the grantors are so clearly shown that there could be no hesitation or doubt as to the conclusion that the deed was intended to convey, and did convey, the land sued for. *Sanger v Roberts*, 92 Tex. 317, 48 S. W. 1; *Mansel v Castles*, 93 Tex. 415, 55 S. W. 559; *Gallup v Flood*, 46 Tex. Civ. App. 644, 103 S. W. 427; *Tompkins v Thomas* (Tex. Civ. App.) 118 S. W. 581.

We must be understood as clearly holding that unless the errors in the deed are of such a character that they can be corrected from the face of the deed, and a suit would not be necessary for this purpose (2 Pom. Eq. §§ 866, 867, p. 1533, note), the record or filing for record of the deed would not be constructive notice to a subsequent purchaser; but the converse of the proposition is equally true, and we hold that for this reason the defense of innocent purchaser cannot be sustained.

Nancy Williams conveyed to Craddock by deed dated January 10, 1872. The consideration recited in the deed is \$300. At this date the Burns deed was on record in Trinity county; the records not having been destroyed until the fall of 1872. Further, there was no evidence of payment of value by Craddock, nor of want of actual notice. The recital of payment in the deed was not evidence of payment. So there is no basis for appellants' claim that they are entitled to hold this 158 acres by virtue of Craddock's being an innocent purchaser.

The questions discussed and decided are presented by proper assignments of error. What we have said disposes of the several assignments, and the propositions thereunder, which are severally overruled.

Finding no reversible error, the judgment is affirmed.

Affirmed.

AVANT v. WATSON.

(Court of Civil Appeals of Texas. Oct. 27, 1909.)

1. TRIAL (§ 139*)—DIRECTION OF VERDICT—WHEN AUTHORIZED.

Where there is any evidence supporting an issue properly pleaded, it is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

2. SALES (§ 340*)—REFUSAL OF BUYER TO RECEIVE GOODS—REMEDIES OF SELLER.

Where the buyer refuses to receive the goods contracted for, the seller may hold them as the property of the buyer and sue for the price, or he may foreclose his lien thereon by a fair sale and sue for the balance, or he may treat the goods as his own and sue for damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 927-942; Dec. Dig. § 340.*]

3. SALES (§ 384*)—REFUSAL OF BUYER TO RECEIVE GOODS—DAMAGES.

The measure of recovery by a seller treating the goods as his own, after the buyer's refusal to receive them and suing for damages, is the difference between the contract price and the market value at the date when the goods ought to have been received.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. § 384.*]

Appeal from District Court, Reeves County; James R. Harper, Judge.

Action by Charlie Watson against Henry Avant. From a judgment for plaintiff, defendant appeals. Affirmed.

James F. Ross and McKenzie & Brady, for appellant. T. J. Hefner and J. W. Parker, for appellee.

RICE, J. Appellee brought this suit against appellant for the recovery of \$1,000 and interest, alleging: That theretofore, on the 15th of August, 1906, he and appellant had entered into a written contract, whereby appellant agreed to sell to him, for delivery on the 1st of October, 1906, 100 head of cows and 100 head of calves, out of certain specified brands, for the sum of \$20.25 for each cow and calf so delivered; said cattle to be good, smooth, merchantable cattle. That appellee paid to appellant, in part payment thereof, the sum of \$1,000. The balance of the purchase money was to be paid on the delivery of said cattle. That, though often requested, appellant failed to deliver said cattle in accordance with the contract, and that in consequence thereof plaintiff prayed for the recovery of the \$1,000 he had paid on said contract. Appellant answered by general and special demurrers, general denial, and specially pleaded that he had tendered for delivery to appellee the cattle called for in said contract at the place where the same were to be delivered, but that appellee refused to receive said cattle, or any part thereof, or to make payment to him for the balance of the purchase money, as required by said contract, that on account of said refusal he had been damaged in the sum of \$5 per head, the cost of gathering the same, and the further sum of \$3 per head, injuries suffered to said cattle in gathering the same, and \$345 for the loss of 20 head thereof with their calves, which sums, aggregating \$1,145, he prayed might be set off as against appellee's demand, and that he have judgment over and against him for the difference. There was a jury trial, in which the court, after the conclusion of

the wife of Branch T. Masterson, died in 1900. Rebecca died, single and intestate, in 1900. Lillie married Walter Fisher in July, 1887, and with her husband died in 1900, leaving a minor son, Frederick Kenner Fisher. The daughter Cora became Mrs. Wharton Davenport in January, 1889. The widow, Annie P. Harris, died in October, 1906. The two papers propounded as wills of Jno. W. Harris purport to have been executed by him on the same day, July 10, 1890. The existence of these instruments appears to have become known to the widow and children of Mr. Harris immediately after his death; but no step was ever taken to probate them, or either of them, until this proceeding was brought in the county court for that purpose by the orphan asylum in January, 1908, about 21 years afterwards.

The circumstances which led to the application to probate the will are, substantially, as follows: At that time, and until April 26, 1906, it was unknown to any one that Jno. W. Harris had in 1852, in Matagorda county, duly adopted Annie W. Dallam, and thereby made her one of his heirs in case of his intestacy. With this fact unknown and undiscovered, the widow and children of Judge Harris being, so far as known or imagined, his only legal heirs, and being the only persons mentioned in said instruments as his devisees, concluded for family reasons and considerations not to have the will or wills probated. This is reflected by the following finding of the district judge: "It was unanimously agreed by Mrs. Harris and Rebecca P., John W., Jr., Lillie B., and Cora L. Harris that the probate of the papers would seriously reflect on Judge Harris' memory, and they determined they should not be offered for probate, but should be withheld and ignored, and that Mrs. Harris' half interest in all the property should be recognized and the other half divided into four equal shares among themselves. It was not known to any of the parties, or probably to any living person, that Judge Harris had in fact executed the adoption and caused it to be recorded until Mr. Branch T. Masterson, being in the town of Matagorda about the 26th of April, 1906, discovered it in an examination of the deed records; and on the filing of suit by Mrs. Masterson's children and devisees and by the widow of her deceased son, claiming her interest as an adopted child, these proceedings to probate either or both instruments as Judge Harris' will were begun." Acting further upon the belief that they were the only persons interested in the property, Mrs. Harris and Jno. W. Harris, Jr., and his sisters dealt with the property as their own, as in case of Judge Harris' intestacy, and have made many sales of lands, warranting the title. The many purchasers from and under them proceeded also in good faith, upon that theory. Among these purchasers are the St. Mary's Orphan Asylum of land

in Galveston, and W. T. Hesley (who intervened, also asking for the probate of one or both of the wills), a purchaser of certain land in Milam county. The wills have all along remained in the possession of John W. Harris, Jr., who has exclusive charge of the estate, which remains undivided.

The court found as to Cora Davenport (who was 19 years of age at the time of her father's death and not 21 when she married, and who became a widow November 24, 1902), and also to the minor, Frederick Fenner Fisher (whose mother, Lillie Harris, was of age when her father died, and who lived until September 8, 1900), on the subject of "default," as follows: "The two wills now offered for probate were willfully withheld from probate or offer therefor by John W. Harris, Jr., and Cora L. Davenport for 21 years, and by Lillie W. Harris, afterwards Fisher by marriage, through whom Frederick Fenner Fisher claims, from the time of her father's death, until she, herself, died." The original application to probate was filed in the county court by the orphan asylum on January 25, 1908. It alleged the death of John W. Harris in April, 1887, that he left a written will of date July 10, 1890, a copy of which, the original not being in applicant's possession but believed to be in the possession of the persons named as executors therein, being annexed; and alleged, among other matters, the conveyance to applicant of certain land of the estate, by and under the devisees named in said copy of will, and the necessity of the probate of this paper to complete, protect, and make good of record and in fact applicant's title. As excuse, and to show itself not in default in asking the probate, the application alleged that at the time of its purchase it was informed and believed that Jno. W. Harris had died intestate, and that until about two weeks prior to this application it was ignorant of the fact that he had made a will.

John W. Harris, Jr., brought in and tendered for probate the two instruments, and asked that the will of John W. Harris, whether it be found to consist of one or both instruments, be admitted to probate. His pleading alleged that the reason there had been no tender for probate of such instrument or instruments was, in effect, the family understanding or arrangement, and for the reasons above stated, not to do so. Further, he alleged: That about 80 persons were occupying the same attitude as the orphan asylum as purchasers of property from the widow and children of John W. Harris through warranty deeds and representations of heirship from them, all relying on the intestacy of Jno. W. Harris and apparent heirship of said grantors, and about 250 person occupy the position of lessees under them, said lessees also so relying; that on January, 1908, a suit for partition was brought by the children of Annie P. Masterson claiming a one-fifth of the estate

involving a claim by the former based in part on said act of adoption and the intestacy of Jno. W. Harris; and that it has now become peculiarly important, in view of the recently discovered adoption, that his will be probated, though 21 years have elapsed since the testator's death. Hefley intervened, alleging his interest in the probate of the will as purchaser under Mrs. Harris and the children of certain land, asking for probate. Answers were also filed in the county court by Cora Davenport asking for the probate and alleging that she had not been in default and the circumstances. The guardian of Lillie Fisher's minor filed a like pleading. Branch T. Masterson and the devisees of his wife, Annie W. Masterson, opposed the probate.

The county court probated one of the instruments, as the will, it being the one hereinafter referred to as will "Y." On appeal the district judge denied the right to probate either, stating in his conclusions his reasons substantially as follows: (1) That it does not appear that Jno. W. Harris, Jr., Cora L. Davenport, and the minor Fisher, who was chargeable with the laches of his mother, Lillie Fisher, were not in default in failing to present the will for probate within four years from Judge Harris' death. (2) That the orphan asylum and Hefley, as to the question of default, stood in no better position than their grantors, the latter having been barred of the right to ask probate when they conveyed the lands to these applicants, and that they were subject to the disability of their grantors. As an additional reason for denying probate at the instance of the orphan asylum and Hefley, it appears, as found by the court, that the devisees of Mrs. Masterson had executed or tendered to each of them a special warranty deed to the land respectively claimed by them, which had the effect of perfecting their titles, if it was before defective by reason of the act of adoption, thereby removing any interest they had in the probate of the will. (3) A further reason of the trial judge for denying the probate is that even if the applicants, Jno. W. Harris, Jr., Cora Davenport, and the minor Fisher had not been in default, each instrument is a complete will in itself independent of the other, and they are inconsistent with each other and not intended to be read together, and because they purport to have been made on the same day, and each contains a clause of revocation revoking all former wills, and there is no evidence of probative force to show which was the last will.

Under our statute (Sayles' Ann. Civ. St. 1897, art. 1881) a will may be admitted to probate as a muniment of title in favor of a devisee or a purchaser under him, provided the applicant has not been in default in failing to present it for probate within four years after the testator's death. *Ochoa v. Miller*, 59 Tex. 460; *Ryan v. Railway*, 64 Tex. 241; *Elwell v. Universalist Gen. Convention*, 76

Tex. 519, 13 S. W. 552. Whatever laches or "default" may be ascribed to the devisees, in reference to probating the will in question, is in our opinion not chargeable to the orphan asylum and Hefley, under the evidence here. We start out with the principle established in the above cases that a purchaser from a devisee is a person entitled to have a will probated when the same constitutes an essential link in his title. The applicants, the orphan asylum and Hefley, occupy that position. Their right to have it probated is not dependent on the existence of the same right in their grantors, the devisees. The latter may have lost their right by reason of knowledge possessed by them concerning the will, and their vendee may at the same time have the right because of his want of such knowledge. It is to be borne in mind that it is the applicant's "default" that the statute has reference to.

Under the exceptional circumstances of this case, the applicants, the orphan asylum and Hefley, have been guilty of no conduct that can be characterized as "default." They became interested in their respective tracts by purchase from the same persons as those named in the will, and who by the laws of descent of the state were to all appearances the very persons who would have taken without a will. When they purchased, Judge Harris had been dead many years, and so far as the public knew, or had reason to know, he had died intestate. His wife and children were the apparent and recognized owners of the property in the capacity of heirs. This condition of things is emphasized by the extensive and uniform transactions by the public with them as heirs. These particular purchasers knew no better when they bought, nor until near the date of this proceeding, when there was unearthed a fact which no one had known or suspected, not even those nearest in life to the testator, viz., the fact that he had at a remote time adopted his stepdaughter. These applicants are not in the same attitude as the other applicants, for they knew nothing of the existence of the will when they became purchasers. They lawfully, and in regular course of dealing, came into a position that gave them an interest in the will and its probate if it was, as it has turned out to be, an essential part of their title. The discovery of the necessity of a will to assure their title, and even the discovery that there was a will, came to them just prior to the commencement of proceedings for probate. As applicants, no act or knowledge of theirs, nothing with which they were connected, and no situation they assumed, can, viewing the matter from the standpoint of a prudent person, be said to place them in default.

As we understand, the trial judge was of this opinion; but he refused the application of these purchasers, because they stood in no better position than their grantors, whom he expressly found to be in default. We do not

concur in this. We think an applicant for the probate of the will must be judged by his own conduct and circumstances in determining whether or not he is in default. The other reason given by the trial judge for denying the probate on their applications was that Mrs. Masterson's devisees had given or tendered deeds to them for the lands they were interested in, and thereby their titles were perfected. His finding of fact on this subject is: "The devisees of Mrs. Masterson tender both deeds of confirmation, renounce all claim to the lands so sold them, and elect to look exclusively to the parties receiving the purchase money, as they do with respect to all the sales made previous to the discovery of the act of adoption." The court added: "Out of deference to the supposed wish of the parties, not because deemed material, the court also finds the facts as stated in the written agreement of counsel." The written agreement states: "On or about the 30th day of January, 1908, Evelyn P. Masterson, Thos. W. Masterson, May Masterson Fisher, joined by her husband, Lewis Fisher, Reba B. Masterson, and Wilmer D. Masterson executed a special warranty deed to St. Mary's Orphan Asylum of Galveston, Tex., conveying all their right, title, and interest in all the property described in the application of said asylum herein and said deed was by said asylum. Later on, to wit, the 4th day of April, 1908, said deed was by the grantors, without authority of grantee, filed for record in the office of the county clerk of Galveston county, Tex., and is now again tendered by the grantors to the grantee the said orphan asylum, and again by the grantee declined." Also: "It is further agreed that May M. Fisher, joined by her husband, Lewis Fisher, Thos. W. Masterson, Reba B. Masterson, Wilmer D. Masterson, and Evelyn P. Masterson, have executed and tendered to W. T. Hefley, intervener, since the filing of his intervention herein, a deed confirming the deed described in his intervention as executed by Jno. W. Harris and others, and expressly disclaiming any right to contest the title of W. T. Hefley to said realty, and looking only to their interest in the proceeds of said sale paid over to John W. Harris, Jr., for the estate of John W. Harris, which deed so tendered the said Hefley has been refused."

Our opinion upon this subject is that these applicants had the right to probate the will and supply the missing link in their title by those means, and could not be deprived of that right, especially after they instituted proceedings to probate the will to that end; nor to accept what was offered to them as a substitute, or what might be a substitute, therefore. It is evident that a judgment of probate supplying the link is more comprehensive and unimpeachable than a deed with restricted warranty, or even one with general warranty, for that matter.

If the above conclusion is sound, the will is to be admitted to probate on said appli-

cations regardless of the right of the other applicants to ask it, and it really becomes an immaterial question whether or not these other applicants are in default. The court held them to be in default. They (the devisees), according to the court's finding, and according to the evidence, were aware of the existence of the wills all the time, knew where they were, had the custody of them, and voluntarily refrained from tendering them for probate. It is true they perceived no necessity for probating them, they being the devisees therein, and as they believed, and as they apparently were, all of the legal heirs, and that this, a mistake of fact, was the underlying cause of their withholding the wills. It is true, also, that this is what other prudent persons might have done under the same circumstances. The policy of the law, however, is to enforce the timely probate of wills, and we think no one who has custody of a will, and refrains for the statutory period from presenting it for probate, for mere personal considerations, or under the assumption that his title to property is safe without it, can be said to be not in default in the meaning of the statute. The statute makes it necessary to probate a will within four years, and a person having custody of such an instrument is charged with knowledge that it must be filed for probate within that time in order to rely on it, whether the necessity for doing so is apparent to him or not. He knows that unexpected events often happen, and that his present conclusions may be wrong, and he knows, also, that by complying with the requirements of the statute he is afforded a way, and the only way, to foreclose all contingencies, and, if he chooses not to resort to it, it amounts to willful neglect.

There remains the other question, whether or not it can be determined which of these instruments is the last will. We pass over the question of both being capable of constituting and being declared one will. We think they contain intrinsic evidence of the one designated in this record as will "Y" being the last will. They bear the same date. Extrinsic evidence is not to be consulted, where there is intrinsic evidence in such a case, and we therefore need not discuss the extrinsic evidence, which, according to the briefs of counsel, would seem to tend to opposite results. In both these documents the general form is the same. The one marked will "X" and the one marked will "Y" begin with a revoking clause, the former says, "Hereby revoking all others which I may have heretofore made," and the latter says, "Hereby revoking all other wills that I have heretofore made." This is significant. It indicates that X was made first, because of the probability that, if he on the same day had already made Y, it was made so recently that he would not have used an expression that retired it as one he may have theretofore made. On the other hand, the

language in will Y revokes all wills theretofore made, an expression he was likely to use to refer to all previous wills, whether recently made or not.

Again, it is evident from will X, in clause 4, that it was incomplete and needed correction in this: That it appointed as executors his wife, his son, Jno. W. Harris, and his daughter, Rebecca P. Harris. But in another clause it provides that his wife and any two of his other executors shall have power to make sales of property. It is apparent from this that he had intended to name at least four executors. In clause 4 of the will Y four are named, and this mistake corrected, indicating that this was the result of reflection after writing will X. The same can be said of the fact that in will X the clause giving the wife and any two of the executors power to make sales is not detached from clause 4 and follows it in such a way as to show that it was an afterthought, after finishing clause 4, while clause 4 of will Y embodies the whole matter connectedly, which indicates a revision of will X.

Other intrinsic circumstances are referred to by appellants as indicating that will Y was a rewriting and reforming of will X; but we think enough has been shown to enforce the conclusion that of these two papers the will Y expressed the final wishes of the testator.

There are assignments of error in the briefs of appellants, including Hefley, which complain of certain statements in the court's conclusions of fact as not warranted by the evidence. These statements are not of any material importance in view of the general facts which control the case. What has been stated in the course of this opinion disposes practically of all the assignments of error. The result we have reached is that the will Y should have been admitted to probate as the last will and testament of John W. Harris.

The judgment is reversed, and judgment rendered accordingly, upon the applications of the orphan asylum and the intervener, Hefley.

On Appellees' Motion for Rehearing.

In this motion it is claimed that we have overruled *Guffey v. Hooks*, 106 S. W. 690. The principle announced in that case is that the record of an act of adoption is constructive notice to all persons. Our opinion does not hold to the contrary. We simply hold that upon the issue of default, in reference to the probating of a will, the want of actual knowledge is a factor entitled to be considered. In *Henry v. Roe*, 83 Tex. 450, 18 S. W. 806, the Supreme Court indicates very clearly that all that is necessary is an equitable explanation of the apparent laches. The facts and circumstances of this case may, notwithstanding what is said in the main opinion, constitute a reasonable and

equitable excuse for the delay on the part of the children of John W. Harris; but our opinion is, as there expressed, that the persons having control and custody of the will are not excused, even by the apparent and peculiar conditions confronting said children, from its timely probate.

It is further contended in this motion that, as Mrs. Harris repudiated the will, the one-fifth which was conditionally devised to her was not disposed of by the will, and as to that Judge Harris died intestate. This seems to be a question not hitherto raised. However, we do not understand that she repudiated the provision the will made for her. The finding of the court was that upon his death the wills of Judge Harris were read at a family meeting, that all were surprised at their contents in regard to the recital that the great bulk of his property was his separate estate, when they knew it to be community, and at his devising only one-fifth of it to his wife, and Mrs. Harris was surprised that her daughter, Mrs. Master-son, was not treated on a parity with the others, and it was unanimously agreed by Mrs. Harris, Rebecca, Jno. W., Jr., Lillie B., and Ora L. Harris that the probate of the papers would seriously reflect on Judge Harris' memory, and they determined that they should not be offered for probate, but should be withheld and ignored, and that Mrs. Harris' half interest in all the property should be recognized and the other half divided into four equal shares among themselves. The above does not, we think, evidence a renunciation by Mrs. Harris of what the will devised to her. It shows that she accepted it, and, in addition, accepted what the others voluntarily and spontaneously yielded to her from what was devised to them. However, this would not seem a question that arises on an application to probate the will.

Another matter discussed in the motion is that the district court found "that the St. Mary's Orphan Asylum and Hefley's applications to probate were made at the instance of John W. Harris, Jr., owing to apprehensions that he and those claiming in like interest were barred by limitations." It was not found as a fact, nor could it be on the undisputed evidence here, that there was any collusion for said purpose between these parties when the orphan asylum and Hefley became interested parties. If they, in good faith, acquired the right to apply, the motives inducing them to assert that right are immaterial.

We are requested to modify the decree which we have entered, by having it read so that the probate will inure to the benefit of the orphan asylum and Hefley only and as a muniment to perfect their respective titles only, and without prejudice to the rights of other parties. There appear from this record to be numerous other vendees similarly interested. All we think it proper

for us to do is to grant the probate. The effect of this at this late date could extend no further than its use as evidence of title; letters testamentary being expressly forbidden. The effect of such a probate and the extent of its operation are questions not before us, and we decline to make any adjudication that may be construed as being an expression on that subject.

The motion is overruled.

GULF, C. & S. F. RY. CO. et al. v. FOWLER.

(Court of Civil Appeals of Texas. Nov. 17, 1909.)

1. RAILROADS (§ 256*)—INJURIES BY CAR—CONTROL OF CAR.

A railroad company left on its side track a loaded car for delivery to the consignee. The car stood there at 7 o'clock in the morning, and there was evidence that it was not there the preceding evening. *Held*, that the company's liability in respect to the car had not terminated at 7 o'clock, and the car belonged to it and had not been received by the consignee, and for injuries to third persons caused by such car the railroad company was liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 792; Dec. Dig. § 256.*]

2. RAILROADS (§ 273½*)—GUARDING FREIGHT—INJURIES TO THIRD PERSONS.

A railroad company in possession of freight as warehouseman for delivery to the consignee must exercise ordinary care in guarding the same so as to prevent the same injuring others.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 273½.*]

3. RAILROADS (§ 443*)—INJURIES TO ANIMALS—ESCAPE OF ACID FROM CAR—EVIDENCE.

Evidence *held* to show that a railroad company was guilty of negligence in leaving a car containing sulphuric acid on a side track for delivery to a consignee, while the car was leaking acid or that the carboys containing the acid were broken by its servants while placing the car on the side track, making the carrier liable to the owner for the loss of the acid, and hence liable to the owner of a horse for injuries to the horse caused by its stepping into a pool formed by the acid.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 443.*]

4. APPEAL AND ERROR (§ 854*)—REVIEW—REASONS FOR JUDGMENT.

Where the court correctly found in favor of the successful party on either one of two grounds on which it based its judgment, the judgment will be sustained.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3408, 3410; Dec. Dig. § 854.*]

5. RAILROADS (§ 273½*)—CARRIAGE OF DANGEROUS SUBSTANCES—LIABILITY.

The rule that a carrier need not acquaint itself with the character of its shipments, and cannot require the shipper to disclose the character of the articles offered for shipment, is subject to exceptions, and, when goods known to be dangerous to the person or property of others are offered to a railroad company for transportation, the shipper must disclose the dangerous qualities, and the railroad company, after receiving the same, must exercise ordinary care to the end that the same may be safely transported without injury to others, and such care must be

proportionate to the danger incident to the handling of the goods.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 273½.*]

6. RAILROADS (§ 443*)—IN RAILROAD CARS—INJURY TO ANIMAL—EVIDENCE.

In such case, evidence *held* to justify a finding that the carrier at the time of the receipt of the acid had notice of its dangerous character, and that it failed to exercise reasonable care, whereby the carboys were broken and the acid allowed to escape into the street.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 443.*]

7. NEGLIGENCE (§ 130*)—EVIDENCE—OBJECTIONS—SUFFICIENCY.

An objection to the testimony of witnesses testifying to the result of an investigation made and facts ascertained several hours after an accident, on the ground that the testimony is immaterial and irrelevant, and because there is nothing to show that at the time the investigation was made the same conditions existed as when the accident occurred, goes only to the weight of the evidence, and not to its competency.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 250-254; Dec. Dig. § 130.*]

Appeal from Tarrant County Court; John L. Terrell, Judge.

Action by M. W. Fowler against the Gulf, Colorado & Santa Fé Railway Company and others. From a judgment for plaintiff against defendant the Gulf, Colorado & Santa Fé Railway Company, it appeals. Affirmed.

Terry, Cavin & Mills, Chas. K. Lee, and Brown & Lomax, for appellant. R. M. Rowland, for appellee.

RICE, J. Appellee brought this suit in the justice's court against the Gulf, Colorado & Santa Fé Railway Company, the Kindel-Clark Drug Company, and W. Y. Binyon, Jr., to recover damages to his mare alleged to have been caused by the negligence of said defendants in allowing sulphuric acid to escape from a car of appellant, forming a puddle in the public street, through which plaintiff's mare was driven by his son, and into which she stepped, severely burning and injuring her feet. Appellee recovered in the justice's court, from which an appeal was taken to the county court, where a trial was had before the court without a jury, and judgment rendered in favor of appellee against the railway company, who alone appeals in this case, the other two defendants being acquitted of negligence, and judgment was rendered in their favor.

The court filed its conclusions of fact and law, and the evidence, in our opinion, supports the same. From the evidence it appears that on the morning of the 16th of April, 1907, while appellee's son was driving the animal in question along one of the public streets of the city of Ft. Worth, it stepped into a puddle of sulphuric acid which had escaped into the middle of the street from a car load of drugs that had been left

*For other cases see same topic and section NUMBER in Dec. & Am Digs. 1907 to date, & Reporter Indexes

standing on the side track near the premises of said drug company for the purpose of delivery to it. It is not definitely shown how long the car had been standing upon this side track or switch; but the accident occurred about 7 o'clock in the morning, and there is evidence to the effect that the car was not there the preceding evening. It appears that the car, among its other contents, contained a number of carboys of sulphuric acid, two at least of which had been broken, from which the contents escaped, forming a puddle in the middle of the street. There was nothing to show any contributory negligence on the part of the driver of the animal.

The trial court found as a fact that the car was in the possession of the company at the time of the accident, and that one or more of said carboys containing said acid was broken and in a leaking condition at the time the car was placed by the railway company on the switch, or else that one of said carboys was broken by the servants of said company while in the act of placing said car at said point, and that no effort was made to guard said car nor to prevent the acid from leaking and escaping into the street, nor any efforts made, by signs or otherwise, to warn the public of the presence of said acid in said street, finding that the acts of said railway company in the premises constituted negligence. And the court further found as a fact that said leaking carboys of acid constituted a nuisance, threatening injury to persons and animals using said street, for which said company was responsible. The court further found that sulphuric acid is a dangerous substance, calling for care and diligence in handling—liable to do injury if allowed to escape—and that the nature of the receptacles, called "carboys," in which the acid was contained, indicated the character of its contents, and that appellant knew, or ought to have known, at the time it first received the same, that it contained sulphuric acid, or some other dangerous liquid, which would do harm if allowed to escape. The court further found that the negligence of the appellant was the proximate cause of the injury; that neither the drug company, nor Binyon, the drayman, who had gone there for the purpose of unloading the car, had anything to do with causing the escape of said acid.

The court as a conclusion of law found that a common carrier who knows, or has reason to suspect, the dangerous character of the goods intrusted to it for transportation, is bound to exercise that degree of care in carrying the same which is proportionate to the danger assumed, and that appellant failed, in handling this car, to discharge the duty so imposed upon it; wherefore it was guilty of negligence in law, and was responsible to the plaintiff for the consequences of such negligence. The court further found,

as a conclusion of law, that the railway company did not use ordinary care for the protection of others in the handling of this shipment of acid, which was a dangerous agency, and that the injuries resulting to plaintiff's mare were directly caused by such want of ordinary care upon the part of said company; wherefore it was liable in damages to plaintiff. The court further found, as matter of law, that the appellant was guilty of maintaining a nuisance by allowing the leaking car thus to stand on its side track near the street, thereby rendering it liable for damages to any citizen whose property might receive special injury therefrom while in the lawful use of the street.

Appellant, by its first assignment of error, complains of the court's finding to the effect that the car containing the acid, after being left on the side track for the delivery of the goods to the drug company, was in possession of appellant. We think it is clearly shown by the evidence that the car in question belonged to appellant, and was upon its side track, and at the time of the accident had not been received by the drug company. In the event of loss or injury to its contents, we think the appellant would have been held liable to the owner therefor (see *Missouri Pacific Ry. Co. v. Haynes*, 72 Tex. 175, 10 S. W. 398); and, of course, therefore in its possession and control. But even if the evidence, as contended by appellant, was sufficient to show that its duty as carrier had ceased, and that of warehouseman had begun, still we do not believe that it would have made any material difference as to its liability to plaintiff for the injury sustained under the peculiar circumstances of this case, because even then it would have been compelled to exercise ordinary care in guarding said shipment, so as to prevent the escape of the acid into the street, from which injury might have resulted to others.

By its second assignment appellant urges that the court erred in its second and third conclusions of fact, in holding that the carboys containing sulphuric acid were broken and in a leaky condition at the time the car was placed by the railway company on the switch, or else that they were broken by the servants of the railway company in placing the car in said position; and, further, in making no effort to prevent the acid's leaking from the car, and in making no effort to warn the public of the presence of the same in the street, that said company was guilty of negligence. While there was no positive evidence that the carboys containing the acid were broken and the car in a leaking condition at the time it was placed on the switch, nor none going to show that it was broken by the acts of its servants while placing the car in said position, still we think that the evidence compelled this finding, because if the carboys containing the acid had

been broken and leaking when the shipment started, or while in transit, it very likely would have emptied itself en route. There was no evidence showing, or tending to show, any trace of the acid on the ground before the car reached this point; nor was there any evidence going to show that anybody had interfered in any way with this car while standing at this point. Neither the drug company nor the drayman had opened the car at the time of the injury, and there was no evidence on the part of the railway company to explain this leakage of the acid from the car, nor anything showing, or tending to show, when it began to leak, or how the carboys containing the acid came to be broken, so that we must conclude from the circumstances, as did the court below, that either the car was leaking at the time it was placed there, or else that the carboys were broken by the servants of the company while placing the car at the point where it was left, and, in either event, the company would have been liable to the owners for the loss of the acid.

But the third and fourth assignments of error present, in our judgment, the most serious questions in this case, and are as follows: By its third assignment appellant insists that the court erred in its findings of fact and conclusions of law, finding, in effect, that, by reason of the fact that the acid leaked from the car and stood in the street, the defendant company was responsible for the creation and maintenance of a nuisance; and by its fourth assignment it is urged on the part of appellant that the court erred in its conclusions of fact and law, which found, in effect, that carboys, such as contained this sulphuric acid, were ordinarily employed for the handling and transportation of strong and dangerous acids, and that from the nature of the receptacles in which the acid was contained and carried the character of the contents was indicated, and that the railway company knew, or ought to have known, at the time it first received said carboys, that they contained acid or some other dangerous liquid, and that the railway company did not use ordinary care in the handling of this shipment, and that the injury to the plaintiff's mare was directly caused by the failure of the railway company to exercise such care.

If the court was correct in finding in favor of appellee against appellant, either on the ground of nuisance or on the ground of failing to exercise ordinary care in receipt and transportation of the car containing the acid, then, in either event, the judgment ought to be sustained. The evidence discloses that the carboys mentioned containing the acid were receptacles made of glass in the shape of large jugs or demijohns, and the court found that these were such as were ordinarily employed for the handling and transportation of strong and dangerous acids. It is possibly true that the evidence did not sus-

tain the latter finding, to the effect that dangerous acids were commonly shipped in carboys of this kind; but it is insisted by appellee that courts will take judicial cognizance of such matters as are of common knowledge, citing Thompson on Negligence, vol. 6, §§ 7629, 7630, and Elliott on Evidence, § 64, and that it is a matter of common knowledge that acids are shipped in such receptacles as the ones described by the evidence. But, without resting our conclusion on this finding, and irrespective of whether the court would take judicial cognizance of what a carboy is, we are inclined to believe that the court's finding against the appellant on the question of negligence is well founded. While it is true that a railroad company, ordinarily, is not required to acquaint itself with the character of its shipments, nor ordinarily has it the right to know or demand from the shipper the character of the article proffered for shipment (see 5 Thompson on Neg. § 6593; 2 Hutch. on Car. § 759), still there are well-established exceptions to this general rule in respect to such goods as are known to be dangerous in transportation to the person or property of others; and, when such goods of this character are so offered to the carrier, it has been held to be the duty of the shipper to make known their dangerous qualities, and it would be an imposition on the carrier not to do so; and in such cases it would seem to be the right on the part of the carrier to refuse to carry goods when their dangerous character is either clearly apparent, or when the same excites the suspicion of the carrier. Hutch. on Car. vol. 2, § 796.

In Elliott on Railways, vol. 4, § 1466, it is said that railways have the right to refuse to carry dangerous goods, or such as they may believe to be so. In Moore on Carriers, § 5, p. 100, it is said: "It may lawfully refuse to receive or carry goods of an explosive or dangerous character, such as dynamite, nitroglycerin, vitriol, etc., or goods which the law prohibits it from carrying, such as intoxicating liquors. It has a right to demand an examination and to be made acquainted with the contents of packages where there is reasonable ground for believing they are of a dangerous character; but, in the absence of reasonable grounds for suspecting them to be of a dangerous character, it cannot compel the owner or person offering them for shipment to disclose their nature." Certainly, ordinary care at least should be taken after the receipt of such dangerous articles by a common carrier, to the end that the same may be safely transported without injury to its employes or others who may come in close proximity to the same, and such care must be proportionate to the danger incident to the handling of the article in question. On this subject it is said in volume 1, § 759, Thompson on Negligence: "One court has reasoned that the danger to be apprehended by the indiscriminate handling of

highly explosive substances—in the particular case detonating caps—is so great and obvious that a high degree of care should be exercised to prevent them from falling into the hands of strangers; but this is only another mode of stating that the care and caution to be applied in guarding dangerous substances is a degree of care and caution proportionate to the danger to others from coming into contact with them. Another court has applied to the same subject the standard of ordinary care and skill, by holding that the owner of premises is liable for damages to the personal property of a bare licensee upon the premises, for an explosion of dynamite stored thereon, due to his want of ordinary care and skill in the management of the same. Another court has correctly expressed the rule by holding that one who handles or carries dangerous explosives, or keeps them on his premises, though not per se answerable for all injurious consequences which may proceed from them, regardless of the degree of care and vigilance he may exercise concerning them, must use such care and prudence in guarding them as prudent and careful persons whose business it is to deal in such articles ordinarily exercise, which is greater than that required with respect to articles not commonly considered dangerous"—citing *Henry v. Cleveland, etc., R. Co.* (C. C.) 67 Fed. 426.

Justice Williams, in the case of *Ft. Worth & D. C. R. R. Co. v. Beauchamp*, 95 Tex. 496, 68 S. W. 502, 58 L. R. A. 716, 93 Am. St. Rep. 864, held, as shown by the syllabus, that: "Where a railroad company, by failing to use ordinary care, allows a car of explosives to be unnecessarily or unreasonably delayed at a station, or fails to use ordinary care in keeping or caring for such car, it creates a nuisance rendering the company liable for damages resulting to adjacent property from an explosion thereof; and further that, where there is evidence in an action against a railroad for damages resulting from explosion of a car of explosives that the company was negligent in allowing the car to be delayed or in failing to properly guard it, the question of the negligence of the company in such respects is for the jury." In the case of *Farmers' Loan & Trust Co. v. Oregon Railway & Navigation Company* (C. C.) 73 Fed. 1003, where, after the plaintiff's goods were in the depot of the railway company, being held as warehouseman, a drayman brought a carboy of sulphuric acid to the depot for shipment, and unloaded it there, all the defendant's employes about the depot at the time it was left by the drayman, being engrossed in other duties, failed to take notice of the fact that the drayman had left said carboy of acid, notwithstanding the company had rules forbidding acids of such character to be placed inside of its depot, said acid being de-

posited upon a floor saturated with oil, in consequence of a leak in the carboy, and an explosion occurred setting fire to the depot and destroying plaintiff's goods, it was held that the company was negligent in failing to exercise a reasonable supervision over the articles in its depot and the care of its building where its patrons' property was stored, and was therefore liable to plaintiff for the value of the goods so destroyed.

We think the evidence in this case justified the court in finding that the appellant, at the time of the receipt of the carboys of acid, had notice of the dangerous character and quality of their contents, and, irrespective of whether it had or did not have the right, on account thereof, to refuse to receive said shipment, it certainly, after receiving the same, became charged with the duty of exercising reasonable care in transporting the same, and that the degree of care so exercised would necessarily increase in proportion to the dangerous character of the shipment, and that this duty did not cease until after its delivery to the consignee, and that the court was also justified in finding from the evidence that appellant was guilty of the want of such ordinary care in such transportation, by reason of which failure said carboys were broken and the acid allowed to escape from its cars and flow into the street, occasioning the damage complained of. We therefore overrule these assignments.

The fifth assignment of error questions the correctness of the ruling of the court in permitting plaintiff's witnesses Fowler, Erwin, and McKinney to testify over its objection as to the result of investigation made and facts ascertained several hours after the injuries are alleged to have occurred, on the ground that said evidence was immaterial and irrelevant, and because there was nothing to show that, at the time said investigation was made, the same conditions existed as when the injury occurred. We think this objection goes more to the weight of the evidence than to its competency, and hence the same is not well taken, and this assignment will be overruled.

Believing no reversible error is shown, the judgment of the court below is in all things affirmed.

Affirmed.

BUCKLEY et al. v. RUNGE et al.

(Court of Civil Appeals of Texas. Nov. 1, 1900.
Rehearing Denied Nov. 24, 1900.)

1. VENDOR AND PURCHASER (§§ 252, 253*)— LIEN FOR PRICE—RESERVATION.

The recital in a note given by a purchaser for the lands "secured by S. E. and S. W. quarter of N. E. Block of out lot 70" is sufficient to constitute a reservation of an express

lien on the property, and the superior title remains in the vendor until the note is paid.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 636, 638; Dec. Dig. §§ 252, 253.*]

2. PAYMENT (§ 66*)—PRESUMPTIONS—LAPSE OF TIME.

A purchase-money note reserving a lien on the property sold is presumptively paid after the lapse of over 30 years, unless the presumption is rebutted by evidence of nonpayment.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 178; Dec. Dig. § 66.*]

3. PAYMENT (§ 76*)—PRESUMPTIONS.

Whether the presumption of payment of a note arising from the lapse of time was overcome by the proof of nonpayment *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 247; Dec. Dig. § 76.*]

4. VENDOR AND PURCHASER (§ 253*)—LIEN FOR PURCHASE PRICE—CONTRACTS.

A lien created by the recital in a purchase-money note is a contract lien, and not a mere implied vendor's lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 638; Dec. Dig. § 253.*]

5. VENDOR AND PURCHASER (§ 265*)—BONA FIDE PURCHASER—NOTICE.

A purchaser for value, and without notice of an express lien, evidenced by his grantor's purchase-money note reserving an express lien for the price, is a bona fide purchaser without notice, and his title is good as against the lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 702; Dec. Dig. § 265.*]

6. VENDOR AND PURCHASER (§ 299*)—BONA FIDE PURCHASER—NOTICE.

Whether a purchaser purchased for value and without notice of an express lien evidenced by his grantor's purchase-money note reserving an express lien *held* for the jury.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 842; Dec. Dig. § 299.*]

7. VENDOR AND PURCHASER (§ 299*)—BONA FIDE PURCHASER—NOTICE.

One asserting a title resulting from the reservation of an express lien on land for the purchase price as against a grantee of the purchaser has the burden of proving that the purchaser had notice of an express lien.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 841; Dec. Dig. § 299.*]

8. TRIAL (§ 194*)—INSTRUCTIONS—REQUESTS.

A charge on the weight of the evidence is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 439-466; Dec. Dig. § 194.*]

9. VENDOR AND PURCHASER (§ 299*)—NONPAYMENT OF PRICE—RECOVERY OF LAND—LACHES.

Where the purchase-money notes reserving an express lien on the land were not paid for nearly 30 years, but there was evidence of continuous demands for payment by the vendor or his heirs and promises to pay on the part of the purchaser, the delay in the assertion of the superior title resulting from the lien was explained, and the heirs of the vendor were not barred of their right to recover the land on such superior title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 840; Dec. Dig. § 299.*]

Appeal from District Court, Galveston County; Lewis Fisher, Judge.

Action by L. H. Runge and others against John Buckley and others. From a judgment

for plaintiffs, defendants appeal. Reversed and remanded.

Stewarts, Geo. T. Burgess, and J. Homer Jones, for appellants. Wm. B. Lockhart and James B. & Charles Stubbs, for appellees.

REESE, J. This suit was instituted in 1906 by appellees, heirs of Henry Runge, against appellants, John, Dan, and Thomas Buckley, Ed. McCarthy, administrator of D. G. Kelley, W. C. Morris, and the unknown heirs of Kelley. As presented by the second amended petition, upon which the case went to trial, the action was one in trespass to try title to recover certain lots in the city of Galveston. The case was tried with a jury, and, upon the conclusion of the evidence, the court instructed a verdict for plaintiffs. From the judgment, all the defendants appeal.

We are of the opinion that it was error to instruct the jury to find for plaintiffs. The recitals in the notes given by D. G. Kelley for the lands "secured by S. E. and S. W. quarter of N. E. Block of out lot 70" was sufficient to constitute a reservation of an express lien upon the property sold, with the consequence that superior title remained in the vendor until the notes were paid. To support the contrary view, appellants cite the case of Baker v. Compton, 52 Tex. 252, in which it was held that a recital in a purchase-money note "to secure the purchase money due" did not amount to an express lien, and Ransom v. Brown, 63 Tex. 188, holding that a recital that the notes were given for the purchase money of the land, was not sufficient. The cases are clearly distinguishable from the present case. It appeared, however, that 30 years or more had elapsed from the time the notes were due until this suit for the recovery of the land was filed. The execution of a deed by Henry Runge to D. G. Kelley in 1874 conveying the property was clearly established, though the deed had been lost, and had not been recorded. It did not appear whether or not a lien had been reserved in the deed. Kelley died in 1900. His estate was administered upon and the property in question partitioned in 1904 between his administrator and the children of Mrs. Kelley, also dead; the property belonging to the community. Kelley's house was destroyed in the storm of 1900, in which he perished, with whatever papers he may have had. After the lapse of so long a time, the notes would be presumed to have been paid, unless such presumption be rebutted by evidence of nonpayment. Weems v. Masterson, 80 Tex. 55, 15 S. W. 590; Morris v. Duncan, 25 S. W. 48. To rebut this presumption, it was shown that appellants were still in possession of the notes, that as late as 1882 they had been reported by the guardian of appellants as unpaid, and had been, in fact, partitioned

between L. H. Runge and Henry Runge, two of the children. Henry Runge, who had conveyed his interest in the notes to L. H. Runge shortly before this suit was filed, testified as to repeated demands for payment made upon D. G. Kelley up to a year or two before his death, and promises of Kelley to pay. He also testified as to similar demands made upon John Buckley after the death of Kelley, which was denied by Buckley. The deed had been recorded by Kelley, and there was some reference in the testimony to an understanding that Kelley was not to have the deed recorded until he paid for the lots. While this evidence was sufficient to rebut the presumption of payment arising from the lapse of time, we do not think that it can be said that there was not an issue which should have been submitted to the jury. It must not be forgotten that Henry Runge, the only witness to the demand upon Kelley, was an interested party. His conveyance of his interest in the notes a month before the suit was filed did not render him in this suit in which his brother and sisters were plaintiffs, an entirely impartial and disinterested witness. Kelley, the only person who could have contradicted him, was dead. John Buckley did contradict him as to demands made upon him for payment. Looking to all the evidence, we think that the presumption of fact as to the payment of the notes, resting upon the great lapse of time before the assertion of the right to recover the land, presented an issue as to such payment, which should have been submitted to the jury. *Washington v. Railway*, 90 Tex. 320, 38 S. W. 764; *Jesson v. Texas Loan Co.*, 3 Tex. Civ. App. 25, 21 S. W. 624; *McGown v. Railway*, 85 Tex. 293, 20 S. W. 80; *I. & G. N. Ry. Co. v. Johnson*, 55 S. W. 491; *Nowlin v. Hall*, 66 S. W. 852.

The first assignment of error must be sustained for the reason stated.

The nineteenth assignment of error, which presents the question more specifically, must also be sustained. We do not sustain appellants' contention that by making demand for payment of the notes appellees elected to affirm the contract of sale, and to rely alone upon the lien. We have held that the lien was a contract lien and not a mere implied vendor's lien. As a proposition under this assignment, it is contended that Morris and John Buckley should have had judgment each for one-third interest purchased from Dan and Thomas Buckley, respectively. Upon this point, we think that the court should also have submitted to the jury the issue as to each of these parties, whether he at the time of his purchase had notice of the express lien upon the land, the sole basis of appellees' right to recover, and whether he paid value. The right to recover rests solely upon the recitals in the notes

that they were secured by the lots in question. The execution of the deed is not disputed. There was no evidence that it contained any reservation of the lien, and, if there were, there is no evidence that John Buckley or Morris had actual or implied notice of such fact. If, in these circumstances, they bought the interest of the other parties for value and without notice of the express lien as shown by the notes, their titles should be protected, and this issue should have been submitted to the jury. If the notes were unpaid, appellants should recover against the administrator as to that part claimed by him, and as to John Buckley the part claimed by him under the partition, but were not entitled to recover of John Buckley and Morris the parts claimed by them by purchase, unless it should appear that they had notice of the express lien reserved in the notes, or of appellees' claim of title and ownership at the time of their respective purchases. Having the legal title and appellants having only an equitable title, although superior title until the notes were paid, the burden would be upon appellees to establish this notice. *Weems v. Masterson*, supra; *Thomason v. Berwick*, 113 S. W. 567, and cases cited. It was not error to refuse to give the charge referred to in the fourteenth assignment, which in the form requested was upon the weight of the evidence. *Stooksbury v. Swan*, 85 Tex. 563, 22 S. W. 963; *Railway v. Johnson*, 92 Tex. 593, 50 S. W. 563. If the notes were not, in fact, paid, continuous demands for payment by appellee, and promises to pay on the part of Kelley up to the time of his death, would explain and excuse the delay in the assertion of the superior title, and plaintiffs would not be thereby barred of their right to recover the land upon such superior title.

It is not necessary to discuss all of the assignments of error and propositions thereunder. Except as disposed of otherwise by what has been said, they are severally overruled.

For the errors indicated, the judgment should be reversed and the cause remanded, and it is so ordered.

Reversed and remanded.

SMITH & SHOLARS v. FOWLER et al.
(Court of Civil Appeals of Texas. Nov. 3, 1909.
Rehearing Denied Dec. 1, 1909.)

1. BROKERS (§ 55*)—COMMISSIONS—PROCURING CAUSE OF SALE.

Where appellants were the only agents authorized to sell a part of the whole of a tract, and did not know that others were authorized to sell the tract, and the purchasers, when they were induced by appellants to inspect the land and purchase the same, did not know that it was a part of the tract about which they had negotiated with other agents, who only attempted to sell the whole tract, and appellants induced

the lessee of the owner to modify the lease as required by the purchasers as a condition to purchasing, appellants were the sole procuring cause of the sale and entitled to commissions.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82-84; Dec. Dig. § 55.*]

2. BROKERS (§ 55*)—COMMISSIONS—EMPLOYMENT OF SEVERAL AGENTS—AGENTS ENTITLED.

The owner, in absence of contract to the contrary, may employ a number of agents to sell land, and the agent who is the procuring cause of the sale is entitled to the commissions, though none of the agents authorized to sell the land knew of the employment of others, and had no notice of the sale, and though the owner or other agents rendered some service, as by finding a purchaser who would not have otherwise been found, etc.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 82-84; Dec. Dig. § 55.*]

3. INTERPLEADER (§ 34*)—REVIEW—OBJECTIONS NOT RAISED BELOW.

Where defendant's right to interplead different claimants to a fund held by him was not raised in the trial court, it cannot be first raised on appeal.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. § 75; Dec. Dig. § 34.*]

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Action by Smith & Sholars, interpleaded with others, against C. S. Fowler. From a judgment in part for plaintiffs named, they appeal. Reversed and rendered as stated.

Dougherty & Dougherty, for appellants. J. C. Scott, G. R. Scott, and Delmas Givens, for appellees.

FLY, J. This is a controversy by appellants and other land agents over a commission of \$4,800 alleged to be due by C. S. Fowler, one of the appellees. The suit was instituted by appellants against Fowler, and he admitted an indebtedness of \$4,800 for the sale of his land, but, being perplexed and bewildered by the number of land agents claiming the money, he deposited it with the clerk, and prayed the court to determine the ownership of the money, and protect him from the demands of the different claimants, who consisted of appellants, the Randle-Gibson Real Estate Company, Fred Roberts, and F. Z. Bishop, each one of whom claimed to be the procuring cause of the sale of 8,000 acres of Fowler's land to Simmons. The cause was heard by the court who gave Fowler \$250 as an attorney's fee out of the money on deposit allotted to appellants, and all costs of suit, and divided the deposit so as to give appellants and the Randle-Gibson Real Estate Company each \$1,098.85 and Fred Roberts \$2,197.70, and it was ordered that F. Z. Bishop take nothing by his suit. Every one seems to have been satisfied with the award of the court, except appellants, who have perfected this appeal, and who will be contented if they are awarded the whole of the money or possibly one-half of it. Roberts and Bishop have not appeared by briefs

in this court, but Fowler and the Randle-Gibson Realty Company have made their appearance.

Fowler owned the William Binton ranch in Nueces county, consisting of 19,231 acres of land, which he bought from J. C. Wood, and which was burdened with a lease to J. J. Welder for five years from April 15, 1903. On April 8, 1907, Fowler conveyed 8,000 acres of the land to H. H. Simmons, J. O. Moore, and O. A. Hearne for the sum of \$12 an acre. The claims for commission arose out of that sale. On January 25, 1907, Fowler authorized the Randle-Gibson Real Estate Company to sell the entire tract of land at \$12 an acre net to the owner. Afterwards, on January 31, 1907, Fowler authorized that company to sell in tracts of 5,000 acres and over for \$12.50 an acre, the 50 cents to be retained as a commission for selling. On or about January 29, 1907, Roberts, at the solicitation of F. Z. Bishop, brought Simmons to Corpus Christi, and, after negotiating with Bishop without results, Roberts and Simmons went to the office of the Randle-Gibson Real Estate Company, where the land belonging to Fowler was described to them, and Simmons was urged to buy it. At the solicitation of the company, Roberts and Simmons agreed to look at the land; it being understood that a man named Riddle was to accompany them. He, however, failed to put in an appearance, and Roberts and Simmons went to Alice with the view of looking at another and different tract of land between that place and San Diego. At Alice they were met by appellants, who took them out and showed them the land belonging to Fowler.

Appellants were the agents of Fowler, and were authorized to sell the land for \$12 an acre, out of which they were to receive 5 per cent. commission, and they were authorized to sell a tract of 7,000 or 8,000 acres of the land, which did not include the improvements. While appellants were showing Simmons the land, he offered to buy 8,000 acres, and it was understood that appellants were to get the matter in shape so that the trade could be closed. Appellants did not know that the Randle-Gibson Real Estate Company was the agent of Fowler, nor knew of the negotiations with that company. Appellants agreed to divide commissions with Roberts on any land listed with them for which he obtained a purchaser. On February 9, 1907, Sholars introduced Simmons to Fowler, but Simmons refused to take the land because of the lease held by Wood, unless there was a modification of that contract. Fowler about a week afterwards visited Simmons at Hillsboro, and sold 8,000 acres of his land to Simmons, Moore, and Hearne at \$12 an acre, as contracted by appellants, on condition that the contract with Wood be modified to meet the views of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vendees. The clause was modified through the efforts of Fowler and appellants. Woods required a bonus, as an inducement to modify his contract, of which appellants agreed to pay \$250. The sale could not have been effected had not the contract with Woods been modified as desired by the vendees. The Randle-Gibson Real Estate Company did not obtain a purchaser for the whole tract of land at \$12 net to Fowler, nor did it sell any part of the land, as authorized to do, for \$12.50 an acre or any other price. When the real estate company was negotiating with Simmons, it had no authority to sell less than the whole tract which Simmons declined to buy, and these were the only negotiations the real estate company had with Simmons and his associates. Roberts and the real estate company agreed to divide commissions on the sale of the whole tract. The Randle-Gibson Real Estate Company does not claim to have effected a sale of the property, except through the efforts of Roberts. But Randle and Gibson both swore that they had no authority to sell 8,000 acres of the land, and did not attempt to confer such authority on Roberts. Randle swore: "We did not at that time, or at any time, have the right to sell this land for \$12 an acre." Fowler reserved the right to sell the land at any time. The evidence plainly shows that Simmons and Roberts did not go to Alice to look at the Fowler land, but went to see the Woodward ranch, and after they had seen that ranch, and did not like it, Sholars suggested that his firm had a tract of land they would like to show Simmons. The latter agreed to stay until the next day, and on that day Sholars took him out to the land and showed him over it, carefully describing its good points. Neither Simmons, Roberts, nor appellants knew at the time that it was the same land about which Simmons and Roberts had talked with Gibson in Corpus Christi. There is no testimony tending to show that the Randle-Gibson Real Estate Company procured, or in any manner assisted in procuring, a purchaser who was willing and able to purchase the land. When Roberts took Simmons to Corpus Christi, it was to meet Bishop, who wished to sell Simmons the Fowler land. Bishop failed to make the sale to Simmons, and the latter in company with Roberts then went to the Randle-Gibson Real Estate Company, which promised to send a man with Roberts and Simmons to see the Fowler land. The real estate company had no authority to sell any less than the whole tract, and sought to sell it at \$14 an acre, and Roberts was told that, if he brought about the sale of the whole tract, he should have one-half the commission. He made no effort to effect that sale, but, when no one came to go with them to show the land, Roberts and Simmons abandoned all thoughts of the Fowler land and went to Alice without having it in view, and with the intention of looking at the Woodward ranch.

When they were induced by appellants to inspect the Fowler land, neither of them knew that it was the land about which they had negotiated with the Randle-Gibson Real Estate Company, and Roberts at no time made any effort to induce Simmons to buy the whole of the tract under his agreement with the Randle-Gibson Real Estate Company. No purchaser was procured under the terms of the agency of the real estate company, and the sale made of the land was one that the company was never empowered to make. The sole procuring cause of the sale was the efforts of appellants.

The owner of real estate, in the absence of an express agreement to the contrary, has the right and power to employ as many different agents to sell his land as he sees fit, and that one of the agents who first procures a purchaser under the terms of his agency is the one entitled to the commission. *Duval v. Moody*, 24 Tex. Civ. App. 627, 60 S. W. 269. Where the principal employs several agents as brokers, the sale of the land by one of the agents or the principal terminates the authority of them all, although notice of the sale may not have been given, and the principal will only be liable for a commission to the agent who was the procuring cause of the sale. If the brokers have no knowledge of the employment of others, the broker who was the procuring cause of the sale is entitled to his commissions, no matter if another broker or the principal takes up the matter and completes the sale. *Clark & Skyles, Agency*, § 779. A number of agents may have rendered service, such as finding a purchaser who otherwise would not have been found, and yet may fail to consummate a sale, and another may take it up and complete it, and the last one would be entitled to the commissions. *Whitcomb v. Bacon*, 170 Mass. 479, 49 N. E. 742, 64 Am. St. Rep. 317; *Reynolds v. Tompkins*, 23 W. Va. 235; *Francis v. Eddy*, 49 Minn. 447, 52 N. W. 43; *Platt v. Johr*, 9 Ind. App. 58, 36 N. E. 294; *Scott v. Floyd*, 19 Colo. 401, 35 Pac. 733; *Ward v. Fletcher*, 124 Mass. 224; *Glascok v. Vanfleet*, 100 Tenn. 603, 46 S. W. 449. In the Massachusetts case of *Ward v. Fletcher*, it was said: "There was no evidence of usage, or that the defendant agreed that the plaintiff should have the exclusive right to sell the land; and no evidence that would warrant the jury in finding that the purchaser either came to an agreement with the plaintiff to take the land at that price, or bought the land upon information received from him. One broker, who is unsuccessful in effecting a sale, does not become entitled to a commission upon the success of another." The cited case of *Francis v. Eddy* is similar in its facts to this. Francis showed the property to Collom and offered it to him for the price stipulated by Eddy, his principal, but no decision was reached, and an appointment was made for another meeting on the following day. The next day,

while on his way to the office Francis, the prospective buyer met another agent, Tabour, and the land was bought for \$9,500. The Supreme Court of Minnesota said: "To entitle a broker to compensation, he must have been the efficient agent or procuring cause of the sale. He must have found and produced a purchaser, and the sale must have proceeded from his efforts as broker; and the burden is on him to prove this affirmatively. In the present case the plaintiff was not even the one who first put Collom on the track of the property, for the latter already knew the property was for sale, and was listed for that purpose with Tabour, with whom he already had some negotiations regarding its purchase. Plaintiff had never made any offer to Collom which he had accepted, or, so far as appears, ever would have accepted." So in the Tennessee case of *Glascok v. Vanfleet*, herein cited, the court said: "It is true that when a broker is employed to sell real estate, and brings the property to the notice of a purchaser, and opens up negotiations with him, the owner cannot step in and complete the sale, and escape liability for commission. * * * But, when a principal employs more than one broker, and the several brokers act independently, and with knowledge of this fact, the one who first completes a sale is entitled to the commissions."

In this case the principal is not contesting the claim for commissions, but merely asks the court to bring before it the different agents who are claiming the money, and let them settle the issue as to who shall bear off the prize. No one attacked or denied his right to interplead the different claimants in the lower court, and, if there was any force or strength in the contention that an interpleader should not have been allowed, the matter cannot be raised for the first time in this court. So far as the testimony discloses, Roberts did nothing to procure the sale of the land after he left Corpus Christi, and he had abandoned any thought of the sale of Fowler's land before he left that place, and, if he had been acting for the Randle-Gibson Real Estate Company, they could not profit because he did nothing, and the only ground upon which he could possibly recover any of the commission is that appellants promised to give him one-half of it.

Appellants were the only agents authorized to sell 8,000 acres of the land, and were the only ones who ever offered the land to Simmons on the terms on which it was sold to him and his associates. Simmons swore positively that his negotiations with the real estate company did not influence his actions, for the good and sufficient reason that he did not know that the land he bought was the same land about which he had talked with the real estate company. The purchase was not made on the same terms offered by

the company, and it earned no commission. *Edwards v. Pike* (Tex. Civ. App.) 107 S. W. 586. The case cited is a well-considered one and directly in point in this case.

The judgment is reversed and judgment here rendered that C. S. Fowler recover \$250 of appellants and Roberts as an attorney's fee, and to recover of appellants and Roberts the sum of \$250 which they agreed to pay towards obtaining a modification of the Woods contract, and all costs of this suit, to be paid out of the money deposited in the registry of the lower court, and that appellants and Fred Roberts recover of C. S. Fowler the sum of \$4,800 less the sum of \$500, aforementioned, and all costs, to be paid out of said sum on deposit, to be divided equally between them, each to receive one-half, that F. Z. Bishop and the Randle-Gibson Real Estate Company take nothing by this suit, and pay all costs in this behalf expended.

Reversed and rendered.

LAKE CHARLES NAT. BANK et al. v.
J. I. CAMPBELL CO.

(Court of Civil Appeals of Texas. Nov. 3, 1909.
Rehearing Denied Dec. 1, 1909.)

1. CORPORATIONS (§ 565*)—RECEIVERS—PARTICIPATION OF CREDITORS IN ASSETS—CONJUNCTION ALLOWANCE OF CLAIMS.

A court of Texas, in which a receiver for a corporation has been appointed, may exclude a creditor of it from sharing in its assets unless he pays into court assets of the corporation, which, after the institution of the receivership proceedings, he obtaining in receivership proceedings in another state, pertaining to the assets of the corporation in that state, and in which only its creditors who had done business with it in that state were allowed to participate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2281; Dec. Dig. § 565.*]

2. CORPORATIONS (§ 565*)—RECEIVERS—PARTICIPATION OF CREDITORS IN ASSETS—ESTOPPEL.

A corporation of Texas having with its assets conducted a business in another state in another name, a receivership of its assets there located was there had, in which only those creditors who had done business with it relative to the business there conducted by it under such other name were allowed to participate. *Held*, that such creditors by having merely succeeded in excluding other creditors of the corporation were not estopped to claim to be creditors of the corporation, with right to share in its assets in receivership proceedings in Texas, relative to its assets there located.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2281, 2282; Dec. Dig. § 565.*]

3. BILLS AND NOTES (§ 340*)—BONA FIDE PURCHASERS—ACCEPTANCE OF DRAFTS BY CORPORATION—NOTICE OF WANT OF POWER.

Though a corporation of Texas, which conducted business in another state under the name of C., had no power to conduct its corporate business in such other state, it might have power to accept drafts drawn by C., so that banks which bought drafts drawn by C. and accepted by the corporation, knowing that they were given for logs purchased by C., were not charged

with notice of the corporation's want of power to make the acceptances.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 845; Dec. Dig. § 340.*]

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Intervention by the Lake Charles National Bank and others, as creditors of the J. I. Campbell Company, for which one Norris had been appointed receiver. From the judgment, interveners appeal. Affirmed.

McKoy, Moss & Knox and S. R. Perryman, for appellants. Spotts & Matthews, for appellee.

JAMES, C. J. This suit arises upon the intervening of the Lake Charles National Bank, the Calcasieu National Bank, and George W. Ford, as creditors of the J. I. Campbell Company, for which the district court of Harris county had appointed appellee Norris the receiver. The decree appealed from is one denying these interveners the right to participate in the funds of this receivership, unless they should pay to the receiver, within a fixed time, what had been received by each of them through a receivership in Louisiana of the J. I. Campbell Company and the Lake Charles Lumber Company, an incorporated concern, and, interveners declining to accede to this, their suits were dismissed.

The report of the master in reference to these claims was as follows. After finding the amounts of the respective claims of these parties, the report proceeds:

"It is admitted that each and all of these drafts were given for the purchase price of logs purchased by the Lake Charles Lumber Company, and were used by this company in operating its sawmill at Lake Charles, and the drafts are what are commonly known as 'log paper.' Each of the drafts was given for logs sold to the Lake Charles Lumber Company in Louisiana, and were accepted by the J. I. Campbell Company, in Houston, Tex. I file herewith as a part of this report the testimony introduced before me as to the organization and ownership of the Lake Charles Lumber Company. Briefly stated, the facts are as follows: The J. I. Campbell Company was incorporated under the laws of the state of Texas, and a copy of its charter is filed as a part of this report. Its power is limited by its charter to the operation of sawmills and planing mills, and the manufacture of lumber and articles made of lumber in certain counties in the state of Texas. It was not authorized to do business in the state of Louisiana, nor authorized to do business under any other name than that of the J. I. Campbell Company. The property of the Lake Charles Lumber Company was formerly owned by L. B. Menefee & Co., located at Lake Charles, La., and early in the year

1904 I. L. Campbell, who is the vice president of the J. I. Campbell Company, leased the sawmill from Menefee & Co. at Lake Charles, and made an agreement with A. F. Sharp to pay him a salary of \$250 a month to move to Lake Charles and take charge of the business as manager, and he was to have 40 per cent. and the J. I. Campbell Lumber Company 60 per cent. of the profits of the Lake Charles Lumber Company. The J. I. Campbell Company furnished all the money to buy this mill, and I find from the evidence that all the property of the Lake Charles Lumber Company was the property of the J. I. Campbell Company, purchased with its money, and that the running of the business in Louisiana under the name of the Lake Charles Lumber Company was done for the purpose of bookkeeping; in other words, that the amount of business at that point might be separately kept, so that it could be easily ascertained, whether that branch of the business was making or losing. I find from the evidence that all the drafts sued on by the said three interveners were acquired by them before maturity, but they all knew that the same were for purchase money of logs sold to the Lake Charles Lumber Company. Shortly after the institution of the receivership proceedings in this cause, I. L. Campbell and Mrs. Sarah Campbell filed receivership proceedings in the Fifteenth judicial district court of Louisiana, in which the J. I. Campbell Company and the Lake Charles Lumber Company were made defendants, and in that cause S. C. Tevis was appointed receiver, and, after hearing, the case was appealed to the Supreme Court of that state, and I file as a part of this report the opinion and judgment of the Supreme Court of the state of Louisiana, and also the judgment of distribution made in the Fifteenth district court of Louisiana. It was held in that case that the Lake Charles Lumber Company was a separate and distinct legal entity from the J. I. Campbell Company, and that the creditors of the J. I. Campbell Company were not entitled to participate in the distribution of the assets in Louisiana, and the court ordered the same paid to the creditors of the Lake Charles Lumber Company for debts which had been created by and for the benefit of the Lake Charles Lumber Company, and excluded all other creditors of the J. I. Campbell Company to intervene in that cause. All the assets of the Lake Charles Lumber Company were paid for with the funds of the J. I. Campbell Company, and it was therefore the equitable owner of the assets of the Lake Charles Lumber Company. The interveners, having each intervened in the Louisiana case, and received part of said assets, must account for the amount so received, and are only entitled to have their claims allowed herein for the amount thereof, less the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

amount they received from the receiver appointed in Louisiana. The proof before me is that each of the above-named interveners received 48.24 per cent. of their respective claims from the receiver in Louisiana, and this amount should be credited against their respective claims herein.

"(2) Should it be held by the court that the Lake Charles Lumber Company was a separate organization, in which the J. I. Campbell Company was not interested, then as its charter did not authorize it to do business in Louisiana, or to accept or guarantee payment of the drafts of the Lake Charles Lumber Company, it would seem to me that the interveners were not entitled to recover against it at all; for, as found, the drafts sued on were all given for logs purchased by the Lake Charles Lumber Company, which interveners knew, and that payment was sought to be made by drafts on the J. I. Campbell Company, and, it being a corporation with limited charter powers, they were on notice that it had no right to accept paper of another company. I find, however, that the Lake Charles Lumber Company was merely a name in which the J. I. Campbell Company was doing business, and that the drafts were given in their own business, and the interveners are entitled to judgment on the same less the amount of 48.24 per cent. of each claim, which was paid to them by the receivership in Louisiana."

The judgment recites that the three interventions had been consolidated, and, the court having considered the pleadings, the master's report and the exceptions of the receiver thereto, together with the evidence, finds that at the time of the institution of this suit and of the appointment of the receiver herein the defendant J. I. Campbell Company, a corporation, was indebted to interveners as alleged by them (stating the respective debts), and that afterwards said interveners received from the assets of the said J. I. Campbell Company found in the state of Louisiana 48.24 per cent. of the amount of their said claims (stating the amount received by each claimant), and thereupon found that interveners "were not entitled to participate in or receive any part of the funds now in or to come into the hands of said receiver until they have paid to said receiver within ten days from this date the said sums by them, respectively, received from and out of said assets found in the state of Louisiana as above stated," and, when the above determination was announced interveners declined to make such payments to the receiver, judgment was rendered against them as aforesaid. The report of the master was not excepted to by interveners, and the matters of fact, as they appear therein, were sustained by the evidence.

The court in its decree overruled the first exception of the receiver to the master's report, and one of the facts determined by the court for all purposes of this appeal was

that the J. I. Campbell Company was in reality the interested party in the business at Lake Charles, using the name of the Lake Charles Lumber Company, and the assets of or in the name of the last-named company were paid for by its funds, and that it was the equitable owner of all the property of the Lake Charles Lumber Company. The use of the name of the Lake Charles Lumber Company by the J. I. Campbell Company was doubtless to facilitate the prosecution of its business in Louisiana; its own charter conferring upon it power to do business only in certain-named counties in Texas. As a matter of fact, its assets consisted in part of this property in Louisiana, although the courts of that state, upon a judicial investigation of its status, and the right of creditors of the J. I. Campbell Company to share therein, have held it to be property of and distributable only to creditors of the Lake Charles Lumber Company because the J. I. Campbell Company had no legal existence in Louisiana and was not to be recognized there, and hence denied the J. I. Campbell Company's existence for any purpose in that state, and denied to the creditors of the J. I. Campbell Company any right of participation in the assets in that jurisdiction. The receiver of the J. I. Campbell Company, the appellee here, was not a party to that proceeding.

These interveners, holding the drafts drawn in the name of the Lake Charles Lumber Company, were by virtue of that fact admitted to share in the assets in Louisiana. The trial court, however, found the same to have been the property of the J. I. Campbell Company. Intervenors realized from that source about one-half of their demands. The receivership in Louisiana was granted after the appointment of the receiver in Texas for the J. I. Campbell Company, and these interveners received in that proceeding payment of part of their claims from what the court below has determined was assets of the J. I. Campbell Company, and which in truth and in fact was the real debtor. They have, therefore, received a payment from assets belonging ratably to all creditors of the J. I. Campbell Company, a preference, which the creditors, for whose benefit the receivership in this case exists, were excluded from in that distribution and have no way of obtaining; and the only way in which their just right to an equal or pro rata distribution of the corporation's assets may be enforced, in view of such preference, is through the court at whose door the interveners are knocking, and, as the trial court had no jurisdiction over the property in the other state, it cannot interfere with the disposition made by the courts of Louisiana of property there; but, while it has no such power and no power to compel these interveners to turn over to its receiver what of the assets they have secured in Louisiana, it can say to them: "Unless you are willing to come in on the same

footing as other creditors and submit to the extent of your ability to an equal sharing of the assets among all creditors, which is the purpose and soul of this receivership, you will not be recognized in the distribution of property under its control." The court in this state has the undoubted right, as it is its duty, to distribute the assets under its control to all creditors who appear pro rata. The question presented is: Can it deny admission to a claimant who has since the receivership received assets of the insolvent corporation the retention of which would, if he be admitted unconditionally, yield him more than an equal sharing of the assets. We think the court has the right to exclude him no matter where or how such part of the corporation's assets has been acquired since the receivership, if he is unwilling to do that which will have the effect of procuring that just equality for which the receivership exists. *Ward v. Connecticut Pipe Manufacturing Co.*, 71 Conn. 345, 41 Atl. 1057, 42 L. R. A. 706, 71 Am. St. Rep. 207.

One of appellants' contentions is that the J. I. Campbell Company was the primary debtor and the Lake Charles Lumber Company the secondary one, and that, as it has made part of the debts out of the latter, it has a right to credit what it so received and be allowed as a creditor of the primary debtor in this receivership for the balance. This presupposes that the assets received by them belonged to the Lake Charles Lumber Company, which the findings below distinctively negative. Of course, they could not possibly be admitted for more than the balance, in any event, and this is all they are asking. They would have this right if the J. I. Campbell Company were the defendant. But the case is obviously different where other creditors are the real defendants. They have come to a court of equity, and, as creditors seeking to share with other creditors a fund, they must do what equity dictates under all the circumstances surrounding their coming. The credit, or rather the advantage, they have secured over the others, they may retain, but they cannot do so and at the same time require the court to vouchsafe to them a preference, which the court would have done had it granted their applications. So far as the findings and the evidence are concerned, the interveners appear as bona fide purchasers of the paper, and, as such, they could look to both the J. I. Campbell Company, the acceptor, and the Lake Charles Lumber Company, the drawer. But the question here is not concerned with their bona fides. Their right to resort to the J. I. Campbell Company and to this receivership is not questioned. It is simply a question of their being allowed to share in this receivership fund on terms of unfair inequality with other general creditors. The appellee's independent propositions are overruled. The first of these is that assuming that, as claimed by appellants, the J. I. Campbell Com-

pany and the Lake Charles Lumber Company were separate legal entities, the acceptances sued on having (upon that theory) been made for the benefit and accommodation of the Lake Charles Lumber Company, the acts of acceptance were ultra vires, and not binding on the J. I. Campbell Company. The assumption is not sustained by the facts.

The third is that appellants having intervened in the cause in the district court of Louisiana, and having there opposed the allowances by that court of the claims of the various creditors of the J. I. Campbell Company who intervened in that cause, alleging that these were only entitled to participate in the proceeds of the property in Louisiana remaining after the payment of all debts of the Lake Charles Lumber Company and having succeeded in such contentions, they are now estopped from claiming to be creditors of the J. I. Campbell Company.

The second is that the testimony shows that the organization known as the Lake Charles Lumber Company was formed for the purpose of enabling the J. I. Campbell Company to use its funds in prosecuting its business in Louisiana in violation of its charter, and the drafts sued on, having been executed and accepted to aid in the accomplishment of such purpose and the interveners being charged with notice of such fact, are not entitled to recover on said instruments.

There are no cross-assignments of error by appellee, and we doubt that they have the right to raise these questions. But, if they present questions of a fundamental nature, they are unsound. What interveners did and accomplished in the Louisiana proceeding was merely to exclude the creditors whose claims were only against the J. I. Campbell Company from participating in the particular assets under the control of that court. The adjudication had no reference to any right of the interveners to proceed against other assets in another jurisdiction for any unsatisfied balance of their claims. The Honorable Supreme Court of Louisiana in the opinion it delivered states that this subject was not involved in this language: "What may be the rights of the creditors of the Lake Charles Company quoad any balance that may be due them after the property of the Company had been exhausted, as against the J. I. Campbell Company (regarding the latter as an undisclosed principal), is a question that need not be here considered." The proposition is that the acceptances of the J. I. Campbell Company were void in the hands of interveners, because given in aid of an unauthorized exercise of its corporate or chartered powers, because the findings were in effect that all interveners knew, when they bought the paper, was that the drafts were given for logs purchased by the Lake Charles Lumber Company, and this fact alone was sufficient to charge them with knowledge that the J. I. Campbell Company

was without power to make the acceptances. Notwithstanding the latter company had no power to conduct its corporate business in Louisiana, it does not follow that it had no power to make these acceptances. Conditions might exist in the proper exercise of its corporate functions which made it obligatory upon it to accept and pay the Lake Charles Lumber Company's drafts, and, this being so, these purchasers are not charged with notice of a want of power. *Bird v. Daggett*, 97 Mass. 494; *Stoney v. Insurance Co.*, 11 Paige (N. Y.) 635; *Farmers' Nat. Bank v. Sutton Mfg. Co.*, 52 Fed. 191, 3 C. C. A. 1, 17 L. R. A. 595.

The judgment is affirmed.

LEWIS v. TEXAS & P. RY. CO.

(Court of Civil Appeals of Texas. Nov. 18, 1909.)

1. MASTER AND SERVANT (§ 262*)—DEATH OF SERVANT — CONTRIBUTORY NEGLIGENCE — PLEADING DEFENSE.

Where, in an action for the death of a servant, neither the pleading nor the evidence of plaintiff, except as shown on the cross-examination of his witness, develops decedent's contributory negligence, it must be pleaded, to be available as a defense.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 869; Dec. Dig. § 262.*]

2. MASTER AND SERVANT (§ 289*)—INJURY TO SERVANT — CONTRIBUTORY NEGLIGENCE — QUESTION FOR JURY.

The selection by a servant of the more dangerous of two or more ways of doing an act does not, as a matter of law, constitute contributory negligence, unless the facts show the selection of a method obviously more hazardous, justifying the court in concluding, as a matter of law, that no person of ordinary prudence would have adopted it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

3. MASTER AND SERVANT (§ 265*)—DEATH OF SERVANT — ASSUMPTION OF RISK — BURDEN OF PROOF.

A master, sued for the negligent death of a servant, has the burden of proving the knowledge of the servant of the conditions on which to predicate assumption of risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 877-908; Dec. Dig. § 265.*]

4. TRIAL (§ 251*)—DEATH OF SERVANT — ASSUMPTION OF RISK—PLEADING.

Where the defense of assumption of risk is not pleaded, the court should not submit the issue of assumed risk.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 537-565; Dec. Dig. § 251.*]

Appeal from District Court, Harrison County; W. C. Buford, Judge.

Action by Georgia Ann Lewis against the Texas & Pacific Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

M. B. Parchman and C. E. Carter, for appellant. F. H. Prendergast, for appellee.

HODGES, J. The appellant is the widow of Charles Lewis, who is alleged to have been killed while in the employ of the appellee railway company by reason of the negligence of the company in not furnishing him a safe place in which to perform his labors. She sues for damages in the sum of \$1,900. The testimony shows that Lewis was employed about the shops of the railway company in the city of Marshall; that it was a part of his duty to carry engine pilots from a place in the yard into the shops, where they were put upon engines. He was furnished for that purpose a two-wheeled vehicle, the wheels of which were about two or three feet high. The pilots were placed upon this vehicle, and were by the men carried into the shop, and were unloaded at places where they were to be used. On the occasion of the injury complained of, Lewis was working with two other employes, James Love and Will Jackson. According to the testimony of these witnesses, they had carried a pilot from the yard into the shop, and when they got to the place where it was to be unloaded the deceased got up on the vehicle and attempted to pull the pilot over. His first effort resulted in failure. The second, however, caused the pilot to come over toward him, and as he stepped back one of his feet landed upon an iron bolt about seven-eighths of an inch in diameter and about two feet long, which was lying on the floor near the trucks. This bolt, it seems, rolled or slipped, and caused Lewis to lose his balance and fall, and the pilot fell over on top of him, causing the injuries from which he died. Both witnesses testified that this was the usual method of unloading the pilots. On cross-examination they stated that they did at times unload by raising the tongue and permitting the pilot to fall off; but it seems that they regarded the method adopted on this occasion as being easier and preferable. They also on cross-examination testified that there was a crane provided by the railway company for such purposes, which was some little distance away—eight feet, as stated by one of them. Why they did not use this crane does not clearly appear in the record. The case was tried before a jury, and a verdict rendered in favor of the railway company.

Complaint is made at the giving of charges on contributory negligence. The first of these charges is as follows: "Again, if you believe from the evidence that there were several ways to remove the pilot from the wagon or trucks, some of which were safer or less hazardous than others, and that Lewis knew of these ways, and he voluntarily took the more dangerous or hazardous way in which to remove the pilot from the trucks, then you will find for the defendant." It is claimed that this submits an issue not raised by the pleadings, and is also on the

weight of the evidence. We think the charge is subject to both objections. The defendant pleaded only a general demurrer and a general denial. Neither the pleadings nor the evidence of the plaintiff suggested any conduct that exposed the deceased to the charge of contributory negligence, so as to make this defense available to the defendant without having pleaded it. It is true there was some testimony tending to show that there were other ways by which the pilot might have been unloaded, and which were probably safer than the one adopted on this occasion; but this evidence was elicited on cross-examination, and did not appear from the testimony offered by the plaintiff in the case. The fact that it was given on cross-examination by witnesses who had testified for her did not make it her evidence. Where neither the pleadings nor the evidence of the plaintiff develops contributory negligence, it must be pleaded to become available as a defense. *Mo. P. Ry. Co. v. Watson*, 72 Tex. 633, 10 S. W. 731; *Murray v. Railway Co.*, 73 Tex. 6, 11 S. W. 125; *Perez v. S. A. & A. P. Ry. Co.*, 28 Tex. Civ. App. 255, 67 S. W. 137. We are also of the opinion that this charge invaded the province of the jury. The mere fact of selecting the more dangerous of two or more ways of doing a given act does not as a matter of law constitute contributory negligence. It is still a question for the jury, unless the facts proved show the selection of a method obviously more hazardous and under circumstances such as would justify the court in concluding as a matter of law that no person of ordinary prudence would have adopted it.

The court also gave the following charge which is complained of: "Again, a person cannot recover damages from another on account of injuries occasioned by his own negligence or want of care, to which his own negligence contributed, and it is the duty of every person to use his senses of sight, hearing, and other senses to protect himself from danger, and to exercise in doing this such a degree of care as an ordinary person would exercise under the same circumstances; and if you believe from the evidence in this case that the deceased knew of the bolt lying upon the floor, if you find it was on the floor, or could have known of the same by the exercise of ordinary care, and have avoided stepping upon same, and the injury which might result therefrom, and failed to do so, and that said failure, if any, caused or contributed to cause his injury and death, then you will find for the defendant, and this although you should believe the defendant was negligent in the first instance in permitting the bolt to remain upon the floor where it might cause injury." This presented the issue of assumed risk from a knowledge of the conditions which caused the injury. The burden of proving such knowledge rested upon the appellee. The appellee not having

pleaded this defense, the court should not have given this charge. *Railway Co. v. Harris*, 95 Tex. 346, 67 S. W. 315; *M. & T. Ry. Co. v. Jones*, 35 Tex. Civ. App. 584, 80 S. W. 852.

For the errors discussed, the judgment of the district court is reversed, and the cause remanded.

LIGHTFOOT et al. v. HORST et al.

(Court of Civil Appeals of Texas. Nov. 3, 1909.
On Motions to Find Additional Facts and
for Rehearing, Dec. 1, 1909.)

1. EXECUTION (§ 273*)—SALE—PURCHASE BY JUDGMENT CREDITOR—PRESUMPTION AS TO PAYMENT OF BID.

The judgment creditor who bought at the execution sale will be presumed not to have paid cash, but to have credited the amount of his bid on the judgment.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 789; Dec. Dig. § 273.*]

2. EXECUTION (§ 273*)—SALE—BONA FIDE PURCHASER.

A judgment creditor, who, buying at the execution sale, does not pay cash, but credits the amount of his bid on the judgment, is not an innocent purchaser.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 789; Dec. Dig. § 273.*]

3. JUDGMENT (§ 707*)—PERSONS BOUND.

One is not bound by a judgment to which he is not a party or privy.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1230; Dec. Dig. § 707.*]

4. PRINCIPAL AND AGENT (§ 103*)—POWER OF ATTORNEY—CONSTRUCTION—SALE FOR CASH.

A power of attorney to sell land for not less than a certain amount per acre authorizes a sale for cash only.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 289, 355; Dec. Dig. § 103.*]

5. PRINCIPAL AND AGENT (§ 103*)—UNAUTHORIZED ACT OF AGENT—RIGHTS OF THIRD PERSON.

A power of attorney being only to sell for cash and for not less than a certain amount per acre, the conveyance of the attorney in fact, showing that it is for a less amount per acre and for part cash, conveys no title.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 289, 355; Dec. Dig. § 103.*]

6. PRINCIPAL AND AGENT (§ 170*)—RATIFICATION OF UNAUTHORIZED ACT—SILENCE.

Mere silence does not generally prove ratification by a principal of his agent's unauthorized act; but is a mere circumstance to be considered with others.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 638; Dec. Dig. § 170.*]

7. PRINCIPAL AND AGENT (§ 166*)—RATIFICATION OF UNAUTHORIZED ACT—KNOWLEDGE.

Knowledge by the principal of the unauthorized acts of his agent is essential to ratification; and he is under no obligation to make inquiries about such acts, nor will not be presumed to have knowledge thereof because of opportunity to acquire it.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 627; Dec. Dig. § 166.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter-Indexes

8. PRINCIPAL AND AGENT (§ 173*)—RATIFICATION OF UNAUTHORIZED ACT — BURDEN OF PROOF.

One relying on a ratification by a principal of his agent's unauthorized acts has the burden of proving ratification.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 659; Dec. Dig. § 173.*]

9. PRINCIPAL AND AGENT (§ 173*)—RATIFICATION—SUFFICIENCY OF EVIDENCE.

Evidence in an action for land held insufficient to show a ratification of an agent's act in selling for less and on different terms than authorized in the power of attorney.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 661; Dec. Dig. § 173.*]

10. VENDOR AND PURCHASER (§ 231*)—BONA FIDE PURCHASER—NOTICE.

One is not a bona fide purchaser of land; the records of the county showing a sale to a predecessor in title by an attorney in fact for less and on different terms than authorized by the power of attorney.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 515; Dec. Dig. § 231.*]

Appeal from District Court, Grimes County; S. W. Dean, Judge.

Action by Fannie E. Lightfoot and others against A. Horst, who impleaded Margaret Meuly and others. From an adverse judgment, plaintiffs appeal. Reversed, and judgment rendered.

Hefley & Watson, W. W. Meachum, and L. C. McBride, for appellants. Buffington & Bowen and Geo. D. Neal, for appellees.

FLY, J. This is an action of trespass to try title to the Valentine Snider 1,280-acre survey, in Grimes county, instituted by appellants, Fannie E. Lightfoot, joined by her husband, J. W. Lightfoot, Horace Resley, Cora E. Marler, and her husband, W. J. Marler, Blanche Barton, and her husband, A. M. Barton, and G. E. Resley, against A. Horst, who pleaded not guilty, and set up a claim to 812 acres of the land, disclaiming as to the balance, and impleaded his warrantors, Margaret Meuly, Herman Meuly, Charly A. Meuly, A. H. Meuly, Maggie Meuly, Amelia Meuly, and Mary E. Blucher, and husband, C. F. H. von Blucher, and prayed for judgment over against them on their warranty in case of a recovery against him. They pleaded general denial, and not guilty. The cause was tried without a jury, and judgment was rendered in favor of Horst for the 812 acres of land claimed by him, and that appellants recover the 468 acres as to which the disclaimer had been entered by Horst. The warrantors were dismissed, with their costs. The 1,280-acre survey was granted by the state of Texas to Valentine Snider on October 1, 1841, and on September 7, 1842, he conveyed the same to Abraham McMillan, and the deed was duly recorded in Grimes county on July 11, 1853. On November 7, 1854, Abraham McMillan conveyed the 1,280 acres to George Resley, through whom appellants claim, as his heirs, and the deed was filed for record

on December 18, 1854, in Grimes county. The above constituted appellants' chain of title, and appellees showed that on September 6, 1850, a judgment was rendered in Nueces county against V. Schneider, who it appears was the same as Valentine Snider, in favor of Conrad Meuly, for \$1,957.25, and that an execution was levied in Grimes county on the 1,280 acres patented to Valentine Snider and the same was sold by the sheriff of Grimes county on July 5, 1853, to Conrad Meuly as appeared from a deed which was filed for record in Grimes county on August 13, 1853. Conrad Meuly died in 1864, and left as his heirs appellees and Mrs. Ursula Daimwood, deceased. Appellees conveyed $1\frac{1}{4}$ of the 812 acres to Horst, and the executor of the will of Ursula Daimwood sold the remaining $1\frac{1}{4}$ to him; the deeds being dated, respectively, March 5, 1900, and July 6, 1900.

It was shown: That on August 4, 1855, George Resley executed two powers of attorney, one to Lemuel G. Clepper, authorizing him to sell the 1,280 acres of land for not less than \$1 an acre, and the other to Samuel G. Clepper, authorizing him to sell the land at not less than \$3 an acre. Both were acknowledged on the same day before the same officer. The first named was filed for record August 20, 1855, in Milam county, and the other in Grimes county on October 20, 1855. Lemuel G. Clepper and Samuel G. Clepper were described as being residents of Montgomery county. On September 28, 1855, Lem. G. Clepper, as agent for George Resley, conveyed the 1,280 acres to James Mitchell for \$615 in cash and \$615 "secured to be paid." That deed was filed for record in Grimes county on October 20, 1855, the same day and same hour on which the power of attorney to Samuel G. Clepper was filed for record. The power of attorney to Lem. G. Clepper was filed for record in Grimes county on July 25, 1904. On March 23, 1860, Conrad Meuly recovered judgment against James Mitchell, in Grimes county, for the 1,280 acres of land, and that judgment was affirmed on March 17, 1870, by the then Supreme Court of Texas. George Resley died on March 2, 1890. The judgment in favor of Meuly against Snider was for \$1,957.25, and the land was sold by the sheriff of Grimes county to Conrad Meuly for \$204.80, which it must be presumed was credited on the judgment owned by the vendee at the execution sale. Such being the case, Conrad Meuly did not occupy the position of an innocent purchaser towards Abraham McMillan, who bought the land from Valentine Snider in 1842, but whose deed was not filed for record until after the sale under execution in 1853. It is well-settled law that a bona fide purchaser is not constituted by the sale of land to the judgment creditor whose bid is applied on his judgment. *Ayers v. Du-*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

prey, 27 Tex. 594, 86 Am. Dec. 657; *McKamey v. Thorp*, 61 Tex. 648; *Stoker v. Bailey*, 62 Tex. 299; *Overstreet v. Manning*, 67 Tex. 657, 4 S. W. 248. In the cited case of *Stoker v. Bailey*, the court said: "The purchase of the property by the appellees was made under an execution in their own favor, and it is not shown that they paid for the property otherwise than by crediting the amount of their bid on their judgment"; and held that they were not innocent purchasers. It follows that appellees have no title to the land through the execution sale made by the sheriff of Grimes county to Conrad Meuly, and that the title remained in Abraham McMillan, who sold to George Resley, through whom appellants claim, as his heirs.

The only other question presented is as to whether the title of Resley was conveyed by the deed of his agent, Lemuel G. Clepper, to James Mitchell, either by virtue of the deed itself or by its ratification by Resley; for, unless that deed conveyed Resley's title, it becomes unnecessary to discuss the judgment of Conrad Meuly against James Mitchell, as Resley was not a party to that suit, and consequently was not affected by it. It is elementary that no one is bound by a judgment to which he is not a party or with which he is not in privity. In the discussion of the question, it may be assumed that Lemuel and Samuel Clepper were one and the same person, and it would be immaterial under which power of attorney the deed was executed, although it may be inferred that the lower court assumed that the deed to Mitchell was made by virtue of the power of attorney to Lemuel G. Clepper, which fixed the minimum price at \$1 an acre. That assumption is most favorable to appellees; for, if the authority to execute the deed executed by Lemuel G. Clepper cannot be maintained under that power of attorney, it cannot be maintained under one given to Samuel G. Clepper and fixing the minimum price of the land at \$3 an acre. Where an agent is authorized to sell land, it is incumbent on him to sell it in the manner, upon the terms, and for the price named in his power of attorney. If authorized to sell for cash, a sale on credit, either for the whole or a part of the purchase money, is not binding on his principal. Authority to sell for a minimum price does not give the power to sell for any amount less than that price. Powers of attorney must be strictly construed, and the authority delegated is limited by the terms in which it is expressed. *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611; *Gouldy v. Metcalf*, 75 Tex. 455, 12 S. W. 830, 16 Am. St. Rep. 912; *Fitzhugh v. Land Co.*, 81 Tex. 306, 16 S. W. 1078; *Frost v. Cattle Co.*, 81 Tex. 505, 17 S. W. 52, 26 Am. St. Rep. 831; *Clark & Skyles, Law of Agency*, §§ 229, 232; *Bush v. Cole*, 28 N. Y. 261, 84 Am. Dec. 343; *Mech. Agency*, § 325. Both of the powers of attorney authorized Clepper "to sell and dispose of absolutely in fee simple, or otherwise,

the above-described land at not less than" \$1 in the one instance and \$3 in the other, and these terms would import a sale for cash. The land was sold partly for cash and partly on time and for \$50 less than the minimum price allowed in the one instrument and \$1,610 less than was authorized in the other. The sale was not authorized by the powers of attorney. *Morton v. Morris*, 27 Tex. Civ. App. 262, 66 S. W. 94; *Skirvin v. O'Brien*, 43 Tex. Civ. App. 1, 95 S. W. 696.

In the case of *De Sollar v. Hanscome*, 158 U. S. 216, 15 Sup. Ct. 816, 39 L. Ed. 956, the Supreme Court of the United States, speaking of a contract of sale made by an agent, said: "Obviously the agreement signed by Henry as agent was not within the scope of the authority given. Authority to sell for \$5,000, one-half cash, is not satisfied by an agreement to sell for \$5,000, \$200 cash, \$2,300 in three weeks, and the balance on time; further, the agreement was not in fact for \$5,000, but only for \$4,950, the agent calling it \$5,000, and claiming only \$100 as his commission instead of \$150." So in this case the agent was authorized in one power of attorney to sell at a minimum cash price of \$1,280, and in the other at a cash price of \$2,840, and, instead, he sold for \$1,230, one half cash and the other half on time. He exceeded his authority and his principal was not bound by it. Although Clepper acted without authority in making the sale to James Mitchell, still, if Resley had been shown to ratify the sale, he would be as firmly bound as though he had originally authorized it. Ratification by a principal is the acceptance by words or conduct of an act or contract previously done or made in his behalf by an agent, and, of course, must be premised upon full knowledge of all material facts and circumstances surrounding the transaction to be ratified. There may be an express or implied ratification; the latter being evidenced by acts and conduct of the principal after full knowledge of the material facts, such as receiving and retaining the benefits of the unauthorized acts of the agent. Mere silence, as a general rule, does not prove ratification, but it is merely a circumstance to be considered with others in arriving at a conclusion as to whether a transaction has been ratified or not. But, as a foundation and basis for the ratification, there must exist knowledge upon the part of the principal of the acts of the agent. Ratification is a voluntary act upon the part of the principal, and he is under no legal obligation to make inquiries about the unauthorized acts of his agent, and knowledge will not be presumed because of the opportunity to acquire it. The burden of proving the ratification of the acts of an agent rests on him who desires benefit from it, and, as a basis for his proof, he must first show knowledge upon the part of the principal. Of course, that may be done by direct or circumstantial evidence, but it must be done.

Sterling v. De Laune (Tex. Civ. App.) 105 S. W. 1169.

Speaking on this subject, it was held by the Supreme Judicial Court of Massachusetts, in *Combs v. Scott*, 12 Allen, 493: "Ratification of a past and completed transaction, into which an agent has entered without authority, is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it. * * * Whoever, therefore, seeks to procure and rely on a ratification, is bound to show that it was made under such circumstances as, in law, to be binding on the principal, especially to see to it that all material facts were made known to him. The burden of making inquiries and of ascertaining the truth is not cast on him who is under no legal obligation to assume a responsibility, but rests on the party who is endeavoring to obtain a benefit or advantage for himself." There might doubtless be circumstances under which a principal would not be permitted to shut his eyes to facts that would reveal the acts of his agent, for such conduct would amount to a fraud, and he would be estopped from claiming ignorance of the situation. The facts in this case, however, do not show any circumstances that would evidence a ratification of the act of Clepper, except silence for many years. It was not shown that the money ever came into the hands of Resley, or that he had any knowledge of the transaction. He lived in Milam county and the land was in Grimes county; the deed to James Mitchell having been filed in that county. The land was not in the possession of any one, and taxes were not paid on it until paid by Horst in 1900. It is true the trial judge found that there was evidence of the payment of taxes in 1892 and 1893, but the finding is not supported by the statement of facts. There is no evidence that Resley paid taxes on the land until the time it was conveyed by his agent and then that he ceased to pay taxes, or that he changed his position towards the land in any way whatever. Appellee Horst cannot claim to be an innocent purchaser, because, when he bought from the heirs of Meuly, the records of Grimes county placed him upon notice that the land had been sold to Mitchell under a power of attorney which authorized a sale for not less than \$3 in cash an acre and the deed to Mitchell indicated a sale for less than \$1, and that partly on credit. In the case of *Reese v. Medlock*, hereinbefore cited, the agent had full authority under a written power of attorney to sell land, and he sold it for \$900 according to a recital in the deed, but the real consideration was a negro conveyed to the agent by the vendee. It was held that the power of attorney only authorized a sale for money, and not to ex-

change it for other property. A charge which made delay of the principal in disaffirming the sale for such a time as the jury might deem reasonably sufficient conclusive evidence of ratification, regardless of whether the principal had knowledge of the sale or not, was held to be erroneous. The court also said: "Nor is the fact of the record of the deed from the agent, as insisted by counsel, constructive notice to the principal of its contents." The decision in the case of *Mitchell v. Meuley*, 32 Tex. 460, which was introduced in evidence by appellees, adjudicated but one matter and that was that the judgment in the case of *Meuly v. Snider* was not void. It did not adjudicate anything in regard to the sale made under the judgment, nor as to the deed made by Clepper to Mitchell. It is not res adjudicata of any issue in this case, and Resley was not a party to it.

We conclude that the judgment of the trial court should be reversed, and judgment here rendered that appellants recover of appellee Horst the 1,280 acres of land sued for, together with all costs in this behalf expended, and that Horst recover of the other appellees on their warranties the sum of \$2,639, with 6 per cent. interest thereon from July 5, 1900, and all costs of this suit.

On Motions to Find Additional Facts and for Rehearing.

The statement of facts does not support the contention that only 1,230 acres were conveyed by Clepper to Mitchell. In the copy of the deed the number of acres and description have not been copied, but it is stated in parenthesis that the land described in the deed is that described in the petition. In the first clause of the statement of facts we find that the patent to Valentine Snider conveyed the 1,280 acres of land described in plaintiff's petition. In both of the powers of attorney to Clepper the land is described as containing 1,280 acres of land. There is nothing in the statement of facts that sustains the finding of the trial judge that Clepper conveyed only 1,230 acres out of the tract to Mitchell. It would have made no difference if he had, because the land was not sold for cash as prescribed in the power of attorney authorizing the sale at \$1 an acre. The other findings suggested by appellee are unnecessary to the proper decision of the cause.

Conrad Meuly had a personal judgment against Snider for \$1,957.25, said judgment in no way involving, or having any connection with, the land in controversy. Execution was levied on the land at a time when it was no longer the property of Snider, and it was sold to Meuly for \$204.80, and it would be flying in the very face of reason and common sense to suppose that Meuly paid cash for the land, instead of crediting the amount on his judgment. Sane men do not act in that way. The natural and rea-

sonable inference would be that the amount of the bid was credited on the judgment. This matter is authoritatively settled by the case of *Stoker v. Bailey*, 62 Tex. 299, as stated in our former opinion. See, also, *Evans v. Mellborn*, 74 Tex. 530, 12 S. W. 230, 15 Am. St. Rep. 858, *Hirsch v. Howell* (Tex. Civ. App.) 60 S. W. 887, and *Masterson v. Burnett*, 27 Tex. Civ. App. 370, 66 S. W. 90, on the question of innocent purchaser.

There was no judgment lien held by Meuly against the land of Snider. Appellees seem to labor under the impression that because Meuly had obtained a personal judgment in Nueces county against Valentine Snider that judgment became a lien against the land of Snider in Grimes county. The case of *Wallace v. Campbell*, 54 Tex. 87, has no application whatever to this case.

The motions are overruled.

BEAUMONT TRACTION CO. v. HAPP.
(Court of Civil Appeals of Texas. Nov. 8, 1909.
Rehearing Denied Dec. 2, 1909.)

1. **APPEAL AND ERROR (§ 987*)—REVIEW—CONFLICTING EVIDENCE—FINDINGS OF FACT.**
Where the evidence is conflicting, the Court of Civil Appeals will find the facts in support of the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3893—3896; Dec. Dig. § 987.*]

2. **CARRIERS (§ 244*)—WHO ARE PASSENGERS—PERSON RIDING ON BUMPER OF CROWDED STREET CAR.**

One riding on the bumper of a crowded street car, according to the usual practice allowed by the company, whose conductor does not try to prevent it, but takes his fare and warns him to be careful, is a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1115, 1116; Dec. Dig. § 244.*]

3. **CARRIERS (§ 295*)—PASSENGER ON BUMPER OF CROWDED STREET CAR—INJURY RESULTING FROM CARRIER'S NEGLIGENCE.**

Where a passenger was allowed to ride with others on the bumper of a crowded street car as he had done before, and without knowing that it had been prohibited on the day in question, and he was injured by the negligence of the company in managing the car, and the passenger, aside from his occupying the dangerous position, was not negligent, the street railroad company was liable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1199; Dec. Dig. § 295.*]

4. **CARRIERS (§ 336*)—PASSENGER ON BUMPER OF CROWDED STREET CAR—CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK.**

Where a passenger is permitted to ride on the bumper of a crowded street car, he is not guilty of contributory negligence in so riding which will relieve the carrier of liability for his injury resulting from the negligent management of the car, and in so riding he does not assume the risk of such injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1359, 1360; Dec. Dig. § 336.*]

5. **CARRIERS (§ 314*)—PASSENGER ON BUMPER OF CROWDED STREET CAR—ACTION FOR INJURIES—SUFFICIENCY OF PETITION.**

A petition in an action for injuries to a passenger while riding on the bumper of a crowded street car with the permission of the conductor,

owing to the negligent management of the car by which a collision was caused, held not demurrable as raising an inference of contributory negligence and assumption of risk.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1278; Dec. Dig. § 314.*]

6. **TRIAL (§ 256*)—INSTRUCTIONS—SUBMISSION OF ISSUES—CHARGE CORRECT AS FAR AS IT GOES.**

Where a charge is correct as far as it goes and submits an issue raised by the pleading and proof, defendant cannot complain thereof because it is based on one state of facts presented by the evidence, when there are other facts in evidence presenting another theory and making up a part of the defense, but, if not satisfied therewith, should request a charge covering the point.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628—641; Dec. Dig. § 256.*]

7. **TRIAL (§ 260*)—REQUEST FOR INSTRUCTIONS—INSTRUCTION ALREADY GIVEN.**

An instruction, as to the burden of proof as to contributory negligence, that the jury, in determining whether defendant had "discharged such burden," should look to all the evidence, whether introduced by either party, or both, is not materially different from a charge requested by defendant, to the effect that the jury should look to all such evidence in determining, not whether defendant had "discharged the burden," but whether plaintiff was guilty of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 657; Dec. Dig. § 260.*]

8. **TRIAL (§ 296*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.**

A charge as to the burden of proof as to contributory negligence of a passenger in a collision held not calculated to mislead the jury, when taken in connection with other portions of the main charge and special charges given at defendant's request.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. § 296.*]

9. **NEGLIGENCE (§ 122*)—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.**

Defendant, pleading contributory negligence, has the burden of proving it.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 231; Dec. Dig. § 122.*]

10. **APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—PROPOSITIONS AND STATEMENTS.**

Assignments of error, with their propositions, not followed by any statements sufficient to explain and support the propositions, as required by rule 31 for the Court of Civil Appeals (67 S. W. xvi), are not entitled to consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

Appeal from District Court, Jefferson County; L. B. Hightower, Jr., Judge.

Suit by J. L. Happ against the Beaumont Traction Company From a judgment for plaintiff, defendant appeals. Affirmed.

Crook, Lord & Lawhon and J. S. Wheless, for appellant. V. A. Collins and Smith, Crawford & Sonfield, for appellee.

McMEANS, J. Appellee, J. L. Happ, brought this suit against the appellant, Beaumont Traction Company, a corporation operating a system of electric street cars in the city of Beaumont, to recover damages for personal injuries sustained by him in a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

collision between cars of said company. The case was tried before a jury and resulted in a verdict and judgment for plaintiff in the sum of \$12,200. From an order overruling appellant's motion for a new trial, this appeal is prosecuted.

The evidence adduced at the trial justifies the following conclusions of fact: On November 7, 1906, about 7:30 o'clock in the evening, it being then dark, a car of appellant, operated by its servants, and on its way to the circus grounds, stopped at the post office in Beaumont, and several persons boarded the car. The car was overcrowded so that room could not be found for other passengers inside, and the platform and steps were full of people. Appellee, knowing that the car was crowded, and not being able to get on the steps or platform, and desiring to go to the circus grounds, took his position on the bumper or buffer of the car, which is a rim protruding around the rear platform of the car, and which is about six inches wide and four inches thick and is not designed for the accommodation of passengers, but placed on the car to meet the impact of collision, and, placing his feet on the rim, leaned his body through an open window in the rear vestibule of the car, so that, while a portion of his body was on the outside, his head and the upper portion of his body were on the inside. When appellee got upon the bumper, others were riding there, and others afterwards got upon it, crowding plaintiff to such a degree as to prevent his turning around or looking behind him. In this condition the car was started down Calder avenue toward the show grounds. Before the car reached Magnolia street, appellant's servant, the conductor, went through the car taking up fares and collected fare from appellee and the others riding on the bumper, but made no objection to appellee and others riding in that position, but told them "to be careful." There were other cars ahead of the one on which appellee was riding, and others following it, all headed for the circus grounds; but the evidence justifies the conclusion that appellee could see in neither direction and did not in fact know of the proximity of the other cars. When Magnolia street was reached, the cars were halted, and in order to let empty cars, returning from the circus, pass, it became necessary to move back the car upon which appellee was, as well as the one just in front of it and the one just behind it. Appellant's general manager, F. J. Duffy, was, at this point, personally supervising the movement of the cars, and gave orders to the motormen to back up their cars so that the empties could pass. There was testimony tending to show that he gave notice to the persons riding on the bumper that the cars were to be backed, and that he directed them to get off the bumper on that account; but the evidence justifies the conclusion that such notice and

direction were not heard by appellee, and that he did not in fact know that the car was to be moved backward, or that another car was standing a short distance behind him, and, if the notice was in fact given it was not given in sufficient time to permit appellee to get off the bumper and to a place of safety before the car upon which he was riding backed against and collided with the one which had stopped a short distance behind it. There was a conflict in the evidence as to whether the car upon which plaintiff was riding was moved backward by its own power, applied by the motorman, or by the car just in front of it backing and coming in collision with it; but the evidence justifies the finding that the motorman set the car in motion in obedience to the orders of the general manager, Duffy, and, in support of the verdict, we so find. The testimony was also conflicting as to whether passengers were allowed to ride on the bumper of cars, and on this point the general manager testified that he had given orders to conductors to not permit passengers to ride there, and that on that day he had tried to prevent it, and in this he was corroborated by several conductors and an ex-employé, and perhaps by other persons; but, on the other hand, it was shown that if there was any such prohibition appellee had no knowledge of it, and that he had ridden there and had seen others ride there many times on the occasion of fairs, baseball games, and circuses, when large crowds were in town, such as on the day of the circus when he was injured. On this point it was shown that the appellant had issued a book of rules, copies of which it furnished to its conductors and motormen, and that one of the rules is as follows: "(10) Riding on Outside of Car. Passengers must not be permitted to ride on the steps or rear buffer of a car unless overcrowded so that room cannot be found for them inside; and under no circumstances will women or small children be permitted to ride there."

Again, it was shown that about a year before plaintiff was hurt, on the occasion of a visit of a circus to Beaumont, appellant's general manager, Duffy, issued a written order governing the running of cars on that day, in which he directed that "trainmen must not permit passengers to ride in the window or the roof or bumper of cars," and that, on the occasion of the circus on the day plaintiff was hurt, he also issued a written order governing the management of cars on that day, but omitted any mention of a prohibition against riding on the bumpers. It was shown by the conductor of the car that on the day of plaintiff's injury the cars going out to the circus grounds were usually crowded, and that when this was so passengers rode on the bumpers, and that he did not try to prevent it, but would take their fares and warn them to be careful. In deference to the verdict, we conclude that

on the day in question appellee was permitted by appellant to ride on the bumper of the crowded car upon which he took passage, and that in riding there as he did he was a passenger, and entitled to the care and protection due by a common carrier to its passengers. When the car on which appellee was riding backed into the car behind it, his leg was caught between the bumpers and so badly injured as to require amputation. The car was backed suddenly, and appellee did not know that it was to be moved backward until it was in motion, and he did not know that a collision with another car was imminent until it was too late to avoid injury. While it was safer to ride on the inside of a car, or upon the platform or steps, the bumper was not an unsafe place to ride when the car was being operated with proper care in the usual and ordinary way; nor was riding there obviously dangerous. There was also a conflict in the testimony as to whether appellee, at the time of and just before the injury, was in an intoxicated condition; but, in support of the verdict, we find that he was not intoxicated. We conclude that appellee's injury was the result of negligence of appellant, and that he was not guilty of contributory negligence, and that his injury did not result from any risk assumed by him in riding on the bumper.

Plaintiff in his petition made the following allegations: "First. That on or about the 7th day of November, 1906, the plaintiff became a passenger on one of the defendant's cars some time about dark in the evening, for the purpose of going out on its Calder avenue line. That defendant's car was bound for the circus grounds, where a circus was giving, or going to give, a performance, and that said car was very crowded with people, and, notwithstanding the crowded condition of said car, the defendant and its agent and employes in charge of said car would stop at the usual places and permit and invite other passengers to board same. That, with the knowledge, consent, and at the invitation of the defendant, this plaintiff got on one of the cars of defendant, as above stated; but, on account of its crowded condition, the only place he found where he could ride was on the back end and on the outside of the back platform of said car, where he could stand on the rim around said platform, where a number of other passengers were standing. That while in this position the car passed up on Calder avenue en route to the circus grounds. That when said car had passed over, or was about to pass over and across, Magnolia avenue, said car was stopped by defendant's employes in charge of the same, and was caused by the said defendant's employes to be run backward so that it collided with one of defendant's cars, which was following along behind it. That plaintiff believed, and had reason to believe, that the cars would stop

before they collided, he, as defendant knew, not being in a position to know of the collision, and the collision took place so suddenly that plaintiff was unable to get out of the way quick enough to avoid being caught between the cars, so that his leg and foot were caught between the two cars and mashed and crushed so that it was necessary, in order to save his life, that his leg be amputated. Second. That plaintiff's injury was caused by the negligence and carelessness of defendant and its agents and employes, in this, to wit: In causing the car which plaintiff was riding on to move backward so as to collide with the car following it, knowing, as defendant's employes did, that plaintiff and others were riding where he was, and in not allowing the plaintiff to get off the car before running it backward into the other car, and in not giving him warning in time to clear himself from the impact caused by the collision. Third. Plaintiff further shows that he did not know that the car following the one on which he was a passenger was approaching or was coming close enough for a collision until just before the cars collided, for, he says, there were other passengers crowded on the rim or railing around the platform where he was, and prevented him from seeing behind him, all of which was known to defendant's agents, or could have been known by the exercise of reasonable care, and he did not know or have warning of the coming together of the said cars until there begun a general scramble on the part of the other passengers crowding around and over him to get out of the way, and he did attempt to get out of the way as soon as he had any intimation that there was likelihood of a collision; but by the utmost effort he was not able to clear himself in time, so that he was hurt seriously on account of the negligence and carelessness, as aforesaid, of the defendant, while he himself was in the exercise of due care, and while occupying a place of safety, where he would have remained unharmed, except for the negligence of the defendant, as aforesaid."

A general demurrer was urged to the petition and overruled, and this ruling of the court is made the basis of appellant's first assignment of error. The assignment is without merit. There were no allegations in the petition which, in legal effect, showed prima facie negligence upon the part of appellee as a matter of law, nor from which it can be said that his injuries resulted from risks which he assumed in riding where he did. On the other hand, the petition expressly negatives such negligence and assumption of risk. The assignment is overruled.

The eighth assignment of error complains of the third paragraph of the court's general charge, which is as follows: "If you shall believe, from a preponderance of the evidence before you, that on or about the 7th day of November, 1906, the plaintiff, J. L.

Happ, was a passenger upon one of the defendant's street cars in the city of Beaumont, and you further believe from the evidence that, when such car approached the crossing of Calder and Magnolia streets in said city, the same was caused by the defendant's agents or employes in charge of such car to be stopped, and thereupon another car of defendant's said Calder line approached from the rear of the car on which plaintiff was riding, and came up in close proximity to plaintiff's said car, and that thereupon the defendant's manager, F. J. Duffy, was present and caused the car on which plaintiff was riding to be backed and come in contact with said car, which had approached from the rear, and at the time the said F. J. Duffy did so he knew that the plaintiff or other persons were standing on the bumper or the rear end of said car, which he (the said Duffy) caused to be backed, as aforesaid; and if you further believe from the evidence that said car was caused to be backed suddenly and to come in contact with said car from the rear before plaintiff had time to alight from said position after he knew, or ought to have known, that said car would be so backed; and if you further believe from the evidence that the said F. J. Duffy, in so causing said car on which plaintiff was riding to be so backed in the manner and under the circumstances which he did, failed to use that degree of care which a very prudent and cautious person would have used under the same or similar circumstances, and that plaintiff's leg was thereby caught between said cars so caused to come in contact, and was thereby injured, and if you further believe from the evidence that the act of the said F. J. Duffy in so causing said cars to be so backed and come in contact with said car from the rear was the proximate cause of said injury, as above defined—then you are instructed to return a verdict in favor of the plaintiff, unless you shall find in favor of the defendant under other instructions given you."

The first proposition under this assignment is that it was error for the court to base the charge alone upon one state of facts as presented by the evidence, when there are other facts in evidence presenting another theory and making up a part of the defense to this suit. Upon this proposition appellant contends that, inasmuch as there was evidence tending to prove that the backward movement of the car upon which plaintiff was riding was due to the acts of the appellant's foreman in causing the motorman to back the car, whereby the collision and injury occurred, and inasmuch as there was other evidence tending to prove that the backward movement of the car was due to another car in front of it backing up against it and knocking it back such a distance as to cause the collision and injury, the court should not have based his charge upon the cause first stated without also charging upon the

second. The charge was correct as far as it went, and submitted an issue raised by the pleadings and proof. If not satisfied with it, appellant should have requested a charge covering the point.

By its second proposition under this assignment, appellant contends that, as the evidence shows that appellee at the time he was hurt was not a passenger, that part of the charge which imposed upon appellant the necessity of proving that it exercised the degree of care that a carrier owes to passengers was erroneous. Our conclusion of fact that the appellee was shown by the evidence to have been a passenger disposes of this contention adversely to appellant. The assignment cannot be sustained.

The tenth assignment complains of the following paragraph of the court's charge: "But the burden of proof to establish contributory negligence, as pleaded by defendant, rests upon the defendant; but, in determining whether defendant had discharged such burden, you will look to all the facts and circumstances introduced in evidence before you, regardless of whether the same was introduced by the plaintiff or the defendant or both." Appellant contends that the vice in this charge consists in the statement that the jury, in determining whether defendant had "discharged such burden," should look to all the evidence, whether introduced by either party, or both, instead of instructing them that they should look to all such evidence in determining not whether defendant had "discharged the burden," but whether plaintiff had been guilty of contributory negligence. We think the legal effect of the charge as given is not materially different from the charge which appellant contends should have been given. Certainly the jury understood from it that they had the right, in determining the issue of contributory negligence, to look to all the evidence adduced, and were not limited to a consideration of that only which was offered by appellant. The charge sufficiently met the requirements of the law.

But if we are mistaken in this, then we hold that the charge in question, when taken in connection with other portions of the main charge and special charges given at the request of defendant, was not calculated to mislead the jury. In the general charge the court instructed the jury: "Now, if you shall believe from the evidence that the plaintiff, in riding and being upon the 'bumper' of defendant's car, where he was at the time he was injured, was guilty of 'contributory negligence,' as above defined, in other words, if you believe from the evidence that an ordinarily prudent person would not have assumed the position on defendant's car that was assumed by the plaintiff, that is, on the 'bumper' of said car, under all the circumstances existing at the time he did so, then I instruct you that the plaintiff cannot recover, even though you shall believe that the

defendant was guilty of negligence, as above submitted for your consideration; or if you shall believe from the evidence that at the time the plaintiff was injured he was under the influence of intoxicating liquor, as alleged by defendant, to the extent that he was thereby deprived of the capacity to use care for his own safety and protection as an ordinarily prudent person, if sober, would have used while situated as plaintiff was at the time, and that but for such intoxication the plaintiff would never have been injured, then you are instructed that the plaintiff cannot recover; or if you shall believe from the evidence that, before or at the time that the car on which he was riding was caused to be backed as aforesaid, the defendant's manager, F. J. Duffy, warned the plaintiff, and persons on the 'bumper' of said car at said time, to get off of said car, and that such warning was in time to have enabled the plaintiff to heed the same and comply therewith before being injured as he was, and that the plaintiff failed to heed such warning, after hearing same, then you are instructed that the plaintiff cannot recover—because, in either of such events, the plaintiff would be guilty of contributory negligence which would bar his recovery, even if you should believe that the defendant was guilty of negligence as above submitted for your consideration, and this would be so, although you may believe, from the evidence, that the plaintiff was riding upon the 'bumper' with the knowledge and consent of the defendant's conductor in charge of such car and had paid his fare as a passenger thereon. You are further instructed that if you shall believe from the evidence that the position in which plaintiff was riding at the time he was injured, that is to say, the 'bumper' of the car on which he was standing, was a place of obvious and apparent danger for a passenger on a street car to ride while such cars are being operated in the usual and natural and proper way, then you are instructed that the plaintiff cannot recover, even if you should believe from the evidence that the defendant's conductor in charge of said car knew that plaintiff had assumed such position, and even though the said conductor permitted plaintiff to remain in such position and collected his fare as a passenger on such car; and this would be so whether or not there was room inside of such car for plaintiff to ride at the time, and, in which event, if you so find the facts to be, your verdict must be for the defendant."

The court also gave defendant's special charges Nos. 7, 11, and 13, which are as follows:

"(7) You are charged that the evidence shows that plaintiff assumed and remained in a position on the rear bumper of the car between other persons standing on either side of him. Now, if you believe from the evidence that the presence of such persons on

either side of plaintiff prevented him from seeing the approach of the other car, and prevented him from learning the danger of the collision in time to leave his place on the 'bumper,' or that the presence of such persons interfered with plaintiff's leaving the car in time, and that in assuming this position, and remaining there, he was guilty of contributory negligence which was the proximate cause of the injuries (as those terms have been defined in other instructions), then you will find for defendant, notwithstanding you may believe from the evidence that the defendant was guilty of negligence on its part."

"(11) At the request of the defendant, you are instructed that it was the duty of the plaintiff, Happ, to use ordinary care in keeping a lookout for danger and accidents, taking into consideration his position on the rear bumper or buffer of defendant's street car, and if you believe that the plaintiff could have, by the use of ordinary care, seen the car behind him in time to have removed to a place of safety and have averted the accident, you will find for the defendant."

"(13) It was plaintiff's duty to exercise ordinary care, as defined in the main charge, for his own safety, and the failure to use such care will bar a recovery where it is the proximate cause of the injury. You are further instructed that voluntary intoxication is not an excuse for the failure to use ordinary care. Therefore, if you believe from the evidence that plaintiff was under the influence of intoxicants at the time he was injured, so that he did not and could not heed the warning given him, if any, or did not and could not realize the danger to which he was exposed by the backing of the car, and that in either of these respects he was negligent, and that such negligence, if any, contributed to the injury as a proximate cause thereof, you will find for defendant, notwithstanding you may also believe that the defendant was guilty of negligence." *Railway Co. v. Howard*, 96 Tex. 582, 75 S. W. 805; *Railway Co. v. Anglin*, 99 Tex. 354, 89 S. W. 966, 2 L. R. A. (N. S.) 386; *Railway Co. v. Groves*, 44 Tex. Civ. App. 63, 97 S. W. 1085.

By its second proposition under this assignment, appellant contends that the petition and evidence established prima facie contributory negligence on the part of appellee, and, under the circumstances, it was error for the court to place the burden of proving contributory negligence upon appellant. Our conclusion of fact disposes of this proposition adversely to appellant's contention. At most, the evidence only raised the issue of contributory negligence, and, defendant having pleaded this issue as a defense, the burden was upon it to prove it, and the court properly so instructed the jury. *Railway Co. v. Shieder*, 88 Tex. 162, 30 S. W. 902, 28 L. R. A. 538; *Railway Co. v. Anglin*, 99 Tex. 355, 89 S. W. 966, 2 L. R. A.

(N. S.) 386. The assignment is overruled.

There is no merit in the contention that the special charge requested by the plaintiff and given by the court, on the issue of assumed risk, is contradictory and conflicting with the main charge, and misleading and confusing, as complained of in appellant's eleventh assignment. The special charge embodied the law as applicable to the facts, and the assignment and the several propositions thereunder are overruled.

Appellant's twelfth, thirteenth, fourteenth, fifteenth, nineteenth, twentieth, twenty-second, twenty-third, twenty-fourth, twenty-seventh, and twenty-eighth assignments, with their propositions, are not followed by any statements sufficient to explain and support the propositions, as required by rule 31 (67 S. W. xvi), and are not therefore entitled to consideration. However, we have examined the assignments, and have concluded that, were we required to pass upon them, we would hold that no reversible error is pointed out in any of them.

There was no error in refusing to instruct the jury as requested by appellant in its seventeenth special charge. By it appellant sought to have the jury instructed that the bumper of a car was a dangerous place for persons to attempt to ride, and that plaintiff assumed the risk of danger of such position when he attempted to ride upon the bumper of the car in question, although he was there by invitation of the defendant. The evidence did not disclose that the bumper was a place of obvious and certain danger in any event; but, on the contrary, was sufficient to authorize a finding that it was not a place of danger in the ordinary and proper operation of the car. The issue was properly submitted to the jury by the court in its charge. The assignment is overruled.

The twenty-sixth assignment, complaining that the verdict and judgment are contrary to the law and the evidence, in that plaintiff's own testimony showed that he was guilty of contributory negligence as a matter of law, is likewise without merit, and is overruled.

Our findings of fact dispose of appellant's thirtieth, thirty-first, thirty-second, and thirty-third assignments of error, which complain of the action of the trial court in overruling its motion for a new trial for the several reasons stated in the assignments and propositions, adversely to appellant's contention, and they are severally overruled.

The other assignments presented for a reversal, which have not been specifically alluded to, have been examined by us, and we are of the opinion that no reversible error has been shown in any of them.

We are of the opinion that the judgment of the court below should be affirmed, and it has been so ordered.

Affirmed.

BEAUMONT TRACTION CO. v. STATE.

(Court of Civil Appeals of Texas. Nov. 20, 1909.)

1. MASTER AND SERVANT (§ 14*)—STATUTORY REGULATIONS—VESTIBULE ON CARS—CONSTRUCTION—PENAL STATUTE.

Acts 28th Leg. p. 178, c. 112, § 1, approved April 3, 1903, making it unlawful for any electric railway corporation to permit the operation of cars during certain months unless the forward end is screened for the protection of motormen, is a penal statute and will not be extended beyond the plain import of its terms.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 14.*]

2. CONSTITUTIONAL LAW (§ 210*)—EQUAL PROTECTION OF LAW—PERSONS ENTITLED—CORPORATIONS—"PERSON."

The word "person," as used in Const. Tex. art. 1, § 3, and Const. U. S. Amend. 14, § 1, prohibiting states from denying to any person the equal protection of the law, includes corporations.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 680; Dec. Dig. § 210.*]

For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

3. CONSTITUTIONAL LAW (§ 241*)—EQUAL PROTECTION OF LAW—STATUTES APPLICABLE TO CORPORATIONS.

Acts 28th Leg. p. 178, c. 112, § 1, approved April 3, 1903, making it unlawful for any corporation or receiver operating any electric street railway to require or permit the operation of cars during certain months unless the forward end is provided with a screen for the protection of motormen, being applicable only to corporations, and not to natural persons, joint-stock companies, etc., operating electric railroads, contravenes Const. Tex. art. 1, § 3, and Const. U. S. Amend. 14, § 1, prohibiting the states from denying to any person the equal protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 700, 701; Dec. Dig. § 241.*]

4. MASTER AND SERVANT (§ 14*)—SCREENS ON STREET CARS—PROTECTION OF EMPLOYEES.

Acts 28th Leg. p. 178, c. 112, § 1, approved April 3, 1903, making it unlawful for any corporation, etc., operating electric railways to permit the operation of its cars during certain winter months unless the forward end be provided with a screen for the protection of motormen from wind, etc., is valid as a police regulation, if otherwise valid.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 14.*]

5. CONSTITUTIONAL LAW (§ 211*)—EQUAL PROTECTION OF LAW.

Const. Tex. art. 1, § 3, and Const. U. S. Amend. 14, § 1, prohibiting the states from denying to any person the equal protection of the law, do not prohibit the imposition of burdens upon one class of persons which are not imposed upon all classes, but only require that the law operate equally upon all persons in similar circumstances, and that the burdens rest impartially upon all members of a class.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 211.*]

6. STREET RAILROADS (§ 1*)—RIGHT TO OPERATE RAILROAD—NATURAL PERSON.

A natural person, a firm, or a joint-stock association can engage in the business of operating an electric street railway as well as a corporation.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 1; Dec. Dig. § 1.*]

7. EVIDENCE (§ 20*) — JUDICIAL NOTICE — FACTS OF COMMON KNOWLEDGE — OWNERSHIP OF STREET RAILROADS.

Though it is a matter of common knowledge that the business of operating electric street railways is generally carried on by corporations, it cannot be judicially known that no others than corporations are carrying on such business in the state.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.*]

8. MASTER AND SERVANT (§ 14*)—STATUTE REQUIRING SCREENS ON STREET CARS—VALIDITY—CERTAINTY.

Acts 28th Leg. p. 178, c. 112, § 1, approved April 3, 1903, makes it unlawful for any corporation, etc., operating an electric street railway to permit the operation of cars without providing screens for the protection of motormen, and section 2 makes any corporation violating the act liable to the state for a certain penalty for each offense. *Held*, that the statute was so uncertain as to what should constitute an offense thereunder, whether each trip of each car or each day's operation, that it could not be enforced.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 14.*]

9. STATUTES (§ 47*)—VALIDITY—CERTAINTY.

Courts should not make a mere guess at the legislative intention in order to uphold and enforce a statute, where it is so uncertain as not to be susceptible of reasonable interpretation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 47; Dec. Dig. § 47.*]

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by the State of Texas against the Beaumont Traction Company. From a judgment for plaintiff, defendant appeals. Reversed, and judgment rendered for defendant.

Crook, Lord & Lawhon, for appellant.

REESE, J. This is a suit instituted by the county attorney of Jefferson county, in the name of the state of Texas, against the Beaumont Traction Company, a corporation engaged in operating a line of electric street railway in the city of Beaumont, to recover penalties in the sum of \$2,000 for violation of the provisions of section 1, c. 112, p. 178, Acts 28th Leg., approved April 3, 1903, making it unlawful for any corporation or receiver operating a line of electric railway to require or permit (with certain exceptions named in the act) the operation upon its line of any electric car, during the period beginning November 15th and ending March 15th of each year, unless the forward end be provided with a screen or vestibule for the protection of the motorman from wind and storm. A trial without assistance of a jury resulted in a judgment against defendant for \$100, from which this appeal is prosecuted.

By appropriate pleadings in the trial court, and assignments of error here, the question of the validity of the statute referred to is presented. Appellant's contention is that the provisions of the act are in violation of article 1, § 3, of the Constitution of this state and of section 1 of the fourteenth amend-

ment of the Constitution of the United States, providing that the state shall not deny to any person within its jurisdiction the equal protection of the laws. The ground of the objection urged by appellant is that the statute in question imposes duties and restrictions upon corporations operating electric street cars that are not required of persons (not corporations), firms, or associations of such persons, engaged in the same business. The act in question is a penal statute, and, according to the well-settled rule of construction of such statutes, must be strictly construed according to the plain import of the terms thereof. It is well settled that a corporation is a "person" within the meaning of section 3, art. 1, of the Constitution of this state and of section 1 of the fourteenth amendment of the Constitution of the United States. *G., C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 154, 17 Sup. Ct. 255, 41 L. Ed. 660. Looking to the terms of the act in question, we think it clear that it must be limited in its application to "corporations"; that is, to associations of persons operating under a charter from the state, and that, according to the plain import of the terms used, natural persons, and partnerships, either of the ordinary kind or composed of persons associated together as joint-stock associations, do not come under the provisions of the act. The restrictions imposed by the act upon the business of operating a line of electric street railway do not apply to such business if carried on by natural persons, firms, or associations. Such would necessarily be the construction of the act without involving the doctrine of strict construction of penal statutes, but that, under such principle, it must be so construed, is beyond question.

We think it cannot reasonably be questioned that the restrictions upon the business of operating electric cars imposed by the act are entirely proper and well within the recognized police power of the state, and would not be subject to the constitutional objection that any person is thereby deprived of the equal protection of the law guaranteed by the federal Constitution or that equity of legal rights protected by the Constitution of this state, if the act operated equally upon all engaged in such business; but to single out corporations engaged in such business and impose upon them, as a class, restrictions from which all persons or associations of persons other than corporations, engaged in the same business, under the same conditions, are exempt, is a violation of the provisions of both the fourteenth amendment of the federal Constitution and of article 1, § 3, of the Constitution of this state. A classification of corporations engaged in this business, resting alone upon the amount of their capital stock, could be just as logically sustained, and would have

quite as such relation to the subject-matter of the act in question as the classification which the Legislature has in fact made. The constitutional provisions referred to do not require that no burdens shall be imposed upon one class of persons that are not imposed upon all classes, but only that such burdens so imposed "shall be applied impartially to all constituents of a class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." *Kentucky R. R. Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57, 29 L. Ed. 414; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145; *Railroad Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *G., C. & S. F. Ry. Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Juniata Limestone Co. v. Fagley*, 187 Pa. 193, 40 Atl. 977, 42 L. R. A. 442, 67 Am. St. Rep. 579. This claim of equality before the law protects not only natural persons, but also artificial persons called "corporations," who are regarded as persons under it. *Railway Co. v. Ellis*, supra.

It is not necessary to multiply authorities upon the general question here involved. Is it an answer to the objection here urged to the act in question that the Legislature acts upon existing or probable, and not upon conceivable, conditions, and that the operation of electric street railways by any person except a corporation is not an existing condition; no other person being in fact so engaged in this state? If under the operation of our law no person other than a corporation could engage in such business, passing by the question of the constitutionality of any law imposing such limitations upon the rights of persons generally, it might be said that the act in question applied equally, in fact, to all persons engaged in that business, and therefore did not operate to deprive such corporations of the equal protection of the law; but we know of nothing in the law, nor in the character of the business, that would prevent any person or association of persons, such as a firm or a joint-stock association, from engaging in the business. Such joint-stock association would not be a "corporation" within the meaning of that term as used in this act. *Allen v. Long*, 80 Tex. 265, 16 S. W. 43, 26 Am. St. Rep. 735. There is nothing either in the law or the character of the business to prevent other persons from engaging therein, and while it may possibly be a fact, of which we may take judicial notice, that the business of operating electric street railways is generally carried on by corporations, we cannot, we think, take judicial notice of the fact, if it be a fact, that no other persons than corporations are so engaged in this state, and, no matter what may be the present condition in this regard, it could not affect our judgment, if in fact there existed no reason, in the law nor in the character

of the business, that would prevent other persons from engaging in the business whenever they should see fit to do so. We conclude our opinion upon this question by the following quotation from the opinion of the Supreme Court of the United States in *G., C. & S. F. Ry. Co. v. Ellis*, supra: "While good faith and a knowledge of existing conditions on the part of a Legislature are to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the fourteenth amendment a mere rope of sand, in no manner restraining state action." Our conclusion is that the act in question is unconstitutional, and that the penalties imposed thereon cannot be enforced.

If we consider only the language of the opinion of the Court of Civil Appeals of the Fourth District in *Beaumont Traction Co. v. State*, 46 Tex. Civ. App. 576, 103 S. W. 238, it would seem that this opinion is in conflict with the opinion of that court. It does not appear, however, from the opinion, that the question here decided was before the court in that case. Upon what grounds the constitutionality of the act was challenged does not appear from the very meager opinion. The court refers to the case of *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1069, which the court says "involves the construction of a similar statute, and decides, as we have, the questions involved in this case after fully discussing them." If this be true, then neither of the questions here involved were decided in the case referred to. The statute under discussion in the *Whitaker Case*, supra, applied by its terms to "persons, associations and corporations owning or operating street cars," and, as to the penalty, imposed a fine of from \$25 to \$100 for every day that an electric street car is operated during the winter time without the screens for protection of the motorman. It will be seen that the objections here made to the act in question could not have been urged in the *Missouri* statute, and a reading of the opinion in that case shows that its constitutionality was attacked upon quite other grounds than those here urged. We must conclude therefore that the questions here presented were not decided by the Court of Civil Appeals of the Fourth District in the case referred to, and that our opinion in no way conflicts therewith.

The further objection is made to the act that in the matter of penalties imposed the act cannot be enforced on account of the doubt and uncertainty, arising from the language of the act, as to what constitutes an offense rendering appellant liable to such penalty. Section 1 of the act provides that "it shall be unlawful for any corporation or receiver operating a line of electric street railway in the state of Texas to require or

permit the operation upon its lines of any electric cars," etc. Section 2 provides that "any corporation * * * who shall violate any of the provisions of this act shall be liable to the state of Texas for a penalty of not less than \$100.00 nor more than \$1,000.00 for each offense." We must confess that we feel like we are groping in the dark when we endeavor to determine what shall constitute "each offense" for which a separate penalty is imposed. Shall it be each trip of each car, or each day's operation, or may the officers of the state make as many or few offenses as they may choose, to be determined by the frequency of suits filed for the recovery of such penalties? Courts ought not to be required to make a blind guess at the intention of the Legislature, which would be merely "to allow conjectural interpretation to usurp the place of judicial exposition." *Suth. Stat. Cons.* § 261: M., K. & T. Ry. Co. v. State, 100 Tex. 420. 100 S. W. 768; L. & N. Ry. Co. v. Com. (C. C.) 19 Fed. 679; *Crow v. Westside St. Ry. Co.*, 146 Mo. 155, 47 S. W. 959. We are inclined to the opinion that this objection to the act ought also to be sustained.

The general demurrer to the petition should have been sustained. This disposes of the case.

The judgment of the trial court is reversed, and judgment here rendered for appellant.

Reversed and rendered.

BEAUMONT TRACTION CO. v. STATE.
(Court of Civil Appeals of Texas. Nov. 20, 1909.)

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by the State of Texas against the Beaumont Traction Company. From a judgment for plaintiff, defendant appeals. Reversed, and judgment rendered for defendant.

Crook, Lord & Lawhon, for appellant.

REESE, J. This case is identical, so far as concerns the questions involved, as cause No. 5,165, having the same style, this day decided, 122 S. W. 615. The facts are the same, except that a penalty of \$100 was recovered for violation of the act of the Legislature, referred to in the opinion in that case, upon another occasion. For the reasons stated in the opinion in that case, the judgment of the district court is reversed, and judgment rendered for appellant. Reversed and rendered.

WESTERN UNION TELEGRAPH CO. v. McDONALD.†

(Court of Civil Appeals of Texas. Nov. 12, 1909. Rehearing Denied Dec. 8, 1909.)

TELEGRAPHS AND TELEPHONES (§ 38*)—DELAY IN DELIVERY OF MESSAGES—LIABILITY.

Where, in an action against a telegraph company for negligently delaying the delivery of a message requesting a postponement of the fu-

neral of the father of the sender, there was evidence that the funeral could and would have been postponed had the message been promptly delivered, the sender could recover damages as against the objection that those in charge of the funeral knew that it was impossible for him under the circumstances to arrive until several hours after the funeral.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 33; Dec. Dig. § 38.*]

Appeal from District Court, Grimes County; S. W. Dean, Judge.

Action by W. L. McDonald against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 42 Tex. Civ. App. 229, 95 S. W. 691.

N. L. Lindsley, J. W. Lewis, and Dean, Humphrey & Powell, for appellant. Gordon Boone, John M. King, and Geo. D. Neal, for appellee.

JAMES, C. J. This action is based on this telegram: "Logansport, La., Mar. 13, 1903. Judge J. G. McDonald, via Navasota, Anderson, Texas. Missed connection; postpone funeral until to-morrow; will arrive to-night, midnight. Rush. W. L. McDonald." The petition alleged that, at the time the message was delivered to defendant's agent, plaintiff informed him that the funeral the telegram referred to was that of his father; that he paid the agent for transmitting it to Navasota, and for the telephone charges from there to Anderson where his father died; that defendant failed to transmit the message via Navasota to Anderson as aforesaid; that, if it had been promptly transmitted and delivered, the burial, which took place at 3 p. m. of March 13th, could and would have been postponed until March 14th, when he could and would have been present, etc., but by reason of said failure to transmit same plaintiff was deprived of being at the funeral and burial, and of seeing his father before he was buried, by reason of which he has suffered great mental distress, etc. The answer was a general denial, also: (1) That at the time the message was delivered at Logansport defendant's lines and appliances were disabled, blown down, and burnt out by violent winds, rains, and electrical disturbances; that part of the lines over which the message must have gone out of Logansport remained so, without fault of defendant, until after 6 o'clock p. m. of that day, which was as soon as defendant could restore same and transmit the message in the exercise of reasonable care and diligence. (2) That said agent advised plaintiff that the message could not be then sent for the above reason, and requested him to withhold it and send it from some point on his route, where it might be safely and expeditiously transmitted; and, when said agent received the message at Logansport, he did so with the distinct understanding

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

that it was subject to such delay as might arise from said conditions. (3) That the message was by direction and agreement of plaintiff to be transmitted to defendant's office at Plantersville, Tex., and from thence by telephone to Anderson, and that the telephone line from said place to Anderson, which was not in defendant's control, was during the whole day of March 13th down, and communication over it was impossible, and that, if defendant had been able to transmit the message to Plantersville, its agent there could not have possibly communicated it to Anderson on that day. (4) That it was wholly impracticable for said funeral to have been postponed later than 3 p. m. of the 13th, at which time it was impossible for plaintiff to have been at Anderson. The verdict was for plaintiff.

The only proposition advanced by appellant in connection with its first and second assignments of error, which proposition is all we can consider, is as follows: "The fact that the funeral of plaintiff's father took place in his absence will not entitle the plaintiff to recover against the defendant for a delay in delivering a message to those in charge of the funeral requesting a postponement of the funeral, where those in charge knew that it was impossible for plaintiff under any circumstances to arrive until several hours after the time of the burial." As there was testimony showing that the funeral could and would have been postponed, we see no force in the proposition.

In reference to the third assignment, we conclude that when the entire charge is read and considered the error in a certain paragraph of which appellant complains does not exist.

The fourth and fifth assignments are overruled for the reason that we find testimony showing that defendant's wires were disabled by certain electric light wires having fallen across them. The proposition, asserting the contrary of this, is not well founded.

The sixth, seventh, and eighth assignments are overruled, for we find there was evidence which fairly and amply supports the verdict.

Affirmed.

JONES et al. v. WEAVER et al.

(Court of Civil Appeals of Texas. Oct. 30, 1909. Rehearing Denied Nov. 24, 1909.)

1. ADVERSE POSSESSION (§ 13*)—SUFFICIENCY OF POSSESSION.

Possession to vest title must be actual, continuing, visible, notorious, distinct, hostile, full, and open.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65-76; Dec. Dig. § 13.*]

For other definitions, see Words and Phrases, vol. 1, pp. 227-236; vol. 8, p. 7563.]

2. ADVERSE POSSESSION (§ 31*)—EXTENT OF TITLE—AMOUNT OF LAND.

A purchaser of 160 acres, forming a part of a survey, from one having no title, subsequently purchased land in an adjacent survey. He cultivated 10 or 12 acres of land in the adjacent survey, and about an acre on the 160 acres. He occupied a house on the land between the two surveys, the larger part of which was on the 160 acres. Other improvements, consisting of a smokehouse and crib, were on the 160 acres. Held, that the possession of the purchaser was not so visible and notorious that it could be notice to the owner, and could ripen into title to the 160 acres by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 128-133; Dec. Dig. § 31.*]

3. ADVERSE POSSESSION (§ 65*)—ELEMENTS.

One entering and holding land under the belief that it is vacant public land, with the intention of acquiring title from the state, is not holding adversely to the true owner, and such possession will not entitle the possessor to prescribe under the statute of limitations.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 365; Dec. Dig. § 65.*]

Appeal from District Court, Newton County; W. B. Powell, Judge.

Trespass to try title by Jesse H. Jones and others, as executors of M. T. Jones, deceased, against J. W. Weaver, W. H. Smith, and others. From judgment granting insufficient relief on a trial between plaintiffs and defendant W. H. Smith, plaintiffs appeal. Reversed and rendered.

T. C. Ford and Baker, Botts, Parker & Garwood, for appellants. W. W. Blake, for appellees.

PLEASANTS, C. J. This is an action of trespass to try title, brought by Jesse H. Jones and others as executors of the will of M. T. Jones, deceased, against J. W. Weaver and W. H. Smith and others to recover the title and possession of the Stephen Williams survey of 640 acres of land in Newton county. There was a severance in the court below on motion of the defendant W. H. Smith, and the trial and judgment from which this appeal is prosecuted was between the plaintiffs and said defendant alone. The defendant answered by general denial and plea of not guilty and a plea of limitation of 10 years as to 160 acres of land described in his answer by metes and bounds, and alleged to be a part of the Williams survey claimed by plaintiffs. The trial in the court below was without a jury, and resulted in a judgment in favor of plaintiffs for all of the land sued for, except that described in defendant's plea of limitation and in favor of the defendant for the 160 acres claimed by him in said plea.

The evidence shows that plaintiffs have a record title which entitled them to recover all of the land sued for, unless defendant's plea of limitation is sustained by the evidence. Upon this issue the defendant testified that he bought the 160 acres claimed by him from his brother in 1874, that his brother had the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

land surveyed and the lines and corners marked before the conveyance to him, and that the deed executed by his brother to him contained field notes describing the land as now claimed by him. The evidence shows that the land in controversy is in the northeast corner of the Stephen Williams survey and joins the Enoch Smith survey, which was patented to and owned by defendant's father at the time the 160-acre survey was made. Prior to the making of this survey defendant's brother, C. C. Smith, who had the survey made, was cultivating land in his father's survey adjoining the Williams, and was living in the house subsequently occupied by the defendant, and which was situated on the line between the two surveys; one corner of the house being on the Enoch Smith, but the larger portion being on the Williams. The field which was subsequently cultivated by the defendant contained 10 or 12 acres on the Smith and about an acre on the Williams. The other improvements, consisting of a smoke-house and crib, were on the Williams. Some time after defendant moved to the property purchased from his brother, he bought 60 acres on the Smith survey from his father, which included the field before mentioned. Prior to his purchase from his father, he cultivated this field as a tenant of his father.

The defendant testified as to his possession and occupancy of the 160 acres as follows: "I was married in 1875, January 6th, and I moved my wife and our effects there on the place on the 8th of January, 1875. I cultivated the land on my father's place in 1875. I did not cultivate the land on my father's place in 1874, as my brother was cultivating it then—my brother, C. C. Smith. When I bought this tract of land from him down on the Williams survey, he moved out, and I took possession both of that and what he had cultivated on my father's place. I know why my brother come to have that survey made. He wasn't intending to steal a tract of land out of the Stephen Williams. I don't think he had any such idea. His idea was he was going to hold the land under the homestead law, and he was having it surveyed out for that purpose, and he was supposing it was vacant land. The reason I know that was his idea was because that was the reason why he had it surveyed. I don't know as he told me that, but then I knew that was his object in view, was to hold the land by right of the law, or, in other words, to get it from the state. He thought it was vacant land. He purposed to have it surveyed out as a homestead on public vacant land, and get it from the state. There was no scheme on my part, when I bought the land from him, to make an appropriation of the land dishonestly or unlawfully. It was my idea to get it from the state when I bought it from him, and I took this deed from him with that idea—that I would live there and perfect my claim, and get it from the state. It was afterwards that I found out that I couldn't

get the land from the state, and I moved off, and got a pre-emption somewhere else. The place I went to was down the creek about half a mile. I went on another survey there of vacant land, and pre-empted it, and got the patent to it. I could not say how long after I moved off of the Stephen Williams land before I got a patent to this tract up here, but it was somewhere inside of five years. I am still owning a part of that land there. I moved on this pre-emption survey about 1890. I built a house there and cleared up a field there. I expect that I opened up about 20 or 25 acres there. I took all that I had up there from the other place. I took my household goods and kitchen furniture and stock, but did not take my fencing. I took the buildings away, but I did not take the fence away. I took all the buildings I had on the place—the barn and smokehouse. I went in possession, down on the creek, by purchase from my brother, with the idea of getting, or perfecting, a pre-emption claim, and getting title from the state, and afterwards, when I found out that I couldn't do that, that it wasn't vacant land, I moved my house and improvements up there on this pre-emption claim, which I did afterwards patent, and I lived there from 1890 until I moved to Jasper, which was last January. I lived right there on that pre-emption claim until that time. I did not cultivate the land on the Stephen Williams land that I bought from my brother after that, not unless it was about one or two years after. I did not renew my improvements down there after that at all. I didn't keep on improving it after that, of course. I put all of my improvements up on my pre-emption claim, and I did not pay the taxes after that until here recently, just the last two or three years back. The deed that my brother made to me was not acknowledged, nor was it ever placed on record, and it was afterwards lost. I don't think that that house was there on the land at the time Mr. Nations made the survey for my brother. I am quite sure that it was not. I stated that my brother had been living on the place two or three years before he sold it to me, but I don't know just when the survey was made. I am not positive that there was no improvements there when the survey was made, but I don't think there was. I would not like to state right positive, but that is my best recollection. The survey was made for my brother before I bought it. I don't think that he had gone on the land at the time the survey was made. He was living up just off of the survey on the south side of it, and he built the house he then owned and was living there at the time that the survey was made, but I will not be real sure about that. I claimed that land during the 15 years I lived on it. I claimed it against everybody. I did not know that any one else claimed it. I cultivated the land during all those years I lived there on the place."

C. C. Smith, for the defendant, testified

as follows: "I am a brother of W. H. Smith, the defendant in this suit. I have lived on the E. C. Smith survey in this county, was partly raised there. I remember having a survey made there 'long about the 1870's by Mr. Nations. When I had it surveyed, my purpose was to get a homestead. I had it made for pre-emption on the state land. I sold my homestead claim to my brother. I transferred the improvements I had on it at that time, but I could not tell you what kind of a transfer it was. To the best of my recollection, I told him that I was transferring to him my claim against the state as a homestead, and the improvements I had also. These improvements were there when I had the survey made, to the best that I remember about it now. I think that I had already put the house there. I was there on the land, and had a crop on it, and had made crop. I didn't know just how much of the improvements there was that developed afterwards was not on the land, but very little, I think. These improvements are not there now like they were when I turned it over to him. I suppose that my brother moved them off; that is what I have been told. I stated that I went on this land to establish a homestead, or pre-empt it as state land, and had the survey made, and I transferred my claim to my brother, and he was to carry my rights and acquire a pre-emption. My improvements consisted of a dwelling house and a corncrib, and I had some land cleared over on the Williams land, what afterwards proved to be the Williams land. I do not remember how much my brother paid me. I executed a deed to him; that is, I gave him a transfer to my claim. I do not remember who wrote the transfer, or I do not remember whether the deed had the field notes of the land in it or not. I do not recollect about that now. I think it described the land that I located on, but I will not say positive whether it did that, though."

This testimony as to the character and extent of defendant's possession and occupancy is not only uncontradicted, but is corroborated by all the testimony in the case.

Under appropriate assignments of error the appellants assail the judgment upon the grounds: First. That the actual possession of the defendant of the land in controversy was only a small encroachment over the line between the survey owned by appellants and the tract on the Enoch Smith survey upon which the greater portion of defendant's inclosure was situated and which was used and occupied by defendant, and therefore his possession of appellants' land was not of that visible, notorious, and distinct character necessary to support the plea of title by limitation. Second. That defendant's possession having been taken and held under the belief that the land was the property of the state and with the intention of acquiring title thereto from the state by pre-emption and his possession having been aban-

doned as soon as defendant ascertained that the land was not vacant state land subject to pre-emption, such possession was at no time adverse and hostile to the owners, and was therefore insufficient to support his plea of limitation. We do not think that the possession of the small portion of appellants' land by defendant, shown by the evidence, in connection with and as a part of his larger holdings on the Enoch Smith survey, was sufficient to put appellants upon notice that defendant was claiming 160 acres of their land. We see no reason for refusing to apply to the facts of this case the rule established by the case of Bracken v. Jones, 63 Tex. 184. In the case cited the encroachment was greater than that shown in the present case, and the Supreme Court held that it was not sufficient possession to entitle the trespasser to recover 640 acres of land (the amount the statute then allowed a trespasser to acquire by limitation), and that recovery should be restricted to the land actually inclosed and occupied by the defendant. In discussing the question, Judge Willie says: "Possession, to be of any value to vest a right or bar a remedy, must be actual, continued, visible, notorious, distinct, and hostile. It must be fair and open, as 'the statute was not made to serve the purpose of artifice and trick.' *Sailor v. Hertzog*, 2 Pa. 185, quoted in *Word v. Drouthett*, 44 Tex. 370; *Satterwhite v. Rosser*, 61 Tex. 166. It can scarcely be said that in such a case as the present the possession is notorious, visible, and distinct so as to fulfill the requirements of the 10 years' section of the statute of limitation. Whilst the true owner is chargeable with a knowledge of the boundaries of his land, he can hardly be affected with notice that a neighbor, who has encroached a few feet upon his tract, is doing so for the purpose of acquiring title to 640 acres of it. He would rather impute it to a mistake on the part of the apparent trespasser as to the division line between them. Whilst this might not excuse the party trespassed upon for not asserting his right to the land actually occupied by the trespasser, it would certainly save him from such consequences as the loss of a section of his land. The party encroaching would be entitled to no more than the land actually occupied by him."

In the case of *Rice v. Goolsbee* (decided by this court at the last term, second appeal) 124 S. W. —, ¹ we held that the extent of the encroachment, and not the character of use to which the land covered thereby is put, should determine its sufficiency as notice of adverse claim by constructive possession of land not actually occupied, and that the fact that the house in which the trespasser lived was partly on one tract and partly on the other, and that his other improvements were similarly situated, did not affect the question. The following quotation from the opinion in that case is directly applicable to

¹ Motion for rehearing pending.

the facts of the instant case: "It seems to us that the owner of land thus held by a trespasser would be more likely misled by the situation shown by the facts of the case than by an encroachment consisting only of inclosure and cultivation of his land. The fact that the dwelling house was partly on one survey and partly on the other, and that the outhouses used in connection with the home were similarly situated, would, we think, naturally lead such owner to suppose that the trespasser was on his land by mistake, because it would be unreasonable to presume that one claiming land and intending to acquire title thereto by limitation should designedly so place his improvements as to render such intention doubtful. If the complainant's improvements are designedly placed in this way, it should be regarded as an attempt to acquire the land of another by trick or artifice, and the statute should not subserve such purpose. * * * *Tucker v. Smith*, 68 Tex. 473, 3 S. W. 671; *Titel v. Garland*, 99 Tex. 201, 87 S. W. 1152; *Downs v. Powell*, 116 S. W. 873." The fact that defendant did not purchase the land on the Enoch Smith survey occupied by him until some time after he purchased the land in controversy from his brother does not affect the question. The date of his purchase is not shown, but it does appear from the uncontroverted evidence that during all of the time he lived on the place the land on the Smith was held and cultivated by him and constituted much the larger portion of his holdings. Appellants would just as likely have been misled by the actual situation shown in this case if defendant had never purchased the Smith land, as before stated; it having at all times constituted the greater portion of his holdings.

The second objection to the judgment above set out presents a question upon which the state of the authorities is confusing and contradictory, due to conflicting opinions by the several courts of Civil Appeals and the refusal of the Supreme Court to grant writs of error in cases the decision of which necessarily involved the decision of this question and in which the decisions of said courts were conflicting. This court prior to the decision in the case of *Village Mills Co. v. Manley*, 42 Tex. Civ. App. 420, 94 S. W. 102, had uniformly held in a number of cases, following the rule announced in *Schleicher v. Gatlin*, 85 Tex. 270, 20 S. W. 120, that one who entered upon and held the land under the belief that it was vacant public land, and with the intention of acquiring title thereto from the state, was not holding adversely to the owner of the land, and such possession and holding would not entitle the possessor to prescribe under the statute of limitation. This was the holding in the case of *Norton v. Collins*, 1 Tex. Civ. App. 272,

20 S. W. 1113; *Beaumont Lumber Co. v. Ballard*, 23 S. W. 920; *Blum Land Co. v. Rogers*, 11 Tex. Civ. App. 184, 32 S. W. 713; *Hartman v. Huntington*, 11 Tex. Civ. App. 130, 32 S. W. 502; *Flewellen v. Randall*, 32 Tex. Civ. App. 361, 74 S. W. 49—all decided by this court. In the *Manley Case*, above mentioned, this court, in an opinion by Chief Justice Gill, after citing the cases of *Converse v. Ringer*, 6 Tex. Civ. App. 51, 24 S. W. 705, and *Longley v. Warren*, 11 Tex. Civ. App. 269, 33 S. W. 304, which were in conflict with the decisions by this court above cited, followed the case of *Price v. Eardley*, 34 Tex. Civ. App. 60, 77 S. W. 416, in which the Court of Civil Appeals for the Fourth District, in an opinion by Justice Fly, following the decision in the case of *Converse v. Ringer*, held that, when one entered upon land supposing it to be vacant and with the intention of acquiring it from the state and did attempt to so acquire it, his possession under such circumstances was adverse to the owner of the land and, if continued for the time prescribed by limitation, would ripen into title. The decision of this question was necessary to the decision of the case, and, a writ of error having been denied by the Supreme Court, we felt constrained to follow it, and have in several cases decided by us since the *Manley Case* announced the rule to be as stated in the case of *Converse v. Ringer*. In the case of *Hoencke v. Lomax*, 119 S. W. 842, the Supreme Court in refusing a writ of error from the judgment of this court rendered in said case takes occasion to say that that court does not consider the question of whether a settler upon land believing it to be vacant public land and intending to acquire it from the state can by such possession acquire title as precluded by the refusal of writs of error in cases in which that question was decided.

Such being the attitude of the Supreme Court on the subject, we no longer feel constrained to follow the case of *Converse v. Ringer* and return to the doctrine announced by this court in the case of *Blum Land Co. v. Rogers*, supra, which fully supports appellants' contention. Under that decision and the others to the same effect before cited, the assignment complaining of the judgment upon the ground before indicated must be sustained, and the judgment of the court below reversed, and judgment here rendered for appellants.

This disposition of the appeal renders it unnecessary for us to pass upon the other assignments.

For the reason stated, the judgment of the court below is reversed, and judgment here rendered for appellants for all of the land claimed by them.

Reversed and rendered.

MCABEE v. WILEY.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. LIMITATION OF ACTIONS (§ 197*)—EVIDENCE.—WEIGHT—PART PAYMENT.

Proof of payment on an indebtedness so as to toll the statute of limitations may be shown by direct or circumstantial evidence, or by the debtor's admissions, the fact of payment, and not its indorsement on the instrument, which at most is only evidence of payment, which is effectual, and the debtor's admission of a payment, he being the only witness at trial to deny the payment, is proof of the strongest kind.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 726; Dec. Dig. § 197.*]

2. LIMITATION OF ACTIONS (§ 155*)—PART PAYMENT—PAYMENT BY AGENT.

Part payment made by an agent of the debtor tolls the statute of limitations as effectually as payment by the debtor.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 623; Dec. Dig. § 155.*]

3. LIMITATION OF ACTIONS (§ 197*)—EVIDENCE.—SUFFICIENCY—PART PAYMENT.

In an action on a note, on which was indorsed a partial payment made within the period of limitations, in which defendant pleaded limitations and denied making the payment, evidence held to sustain a finding that defendant made the payment as of the date of the indorsement, so as to justify a verdict for plaintiff.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 197.*]

4. APPEAL AND ERROR (§ 928*)—PRESUMPTIONS—SUFFICIENCY OF INSTRUCTIONS.

The presumption is that the trial court fully and correctly instructed on the issues involved, in absence of a contrary showing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.*]

Appeal from Circuit Court, Sharp County; John W. Meeks, Judge.

Action by William M. Wiley against H. D. McAbee. From a judgment for plaintiff, defendant appeals. Affirmed.

Sam H. Davidson, for appellant. David L. King, for appellee.

FRAUENTHAL, J. This was an action instituted by Wm. Wiley, the plaintiff below, against H. D. McAbee, the defendant below, for the recovery of the amount due upon a note. The defendant pleaded the statute of limitation against a recovery. The note sued on was for \$33, with interest from date until paid, dated November 15, 1893, and payable one day after date. Upon the note were the following indorsements: "H. D. McAbee. Note \$33.05." "Recd. on the within note \$6.50 dollars, it being for 22 gallons of sorghum molasses. Nov. the first, 1898." "Recd. on the within note 4 dollars it being for 8 bus, turnips, Sept. 30, 1902." "Recd. on the within note \$1.50 dollars May 10th, 1904. By R. C. Meade." "S. J. Walker, 4, 2, 1908 without recourse." "Amount due Apr. 15, 1907, \$49.00." The suit was instituted on September 28, 1908. The defendant admitted the execution of the note, but denied that he had made the payment of \$1.50 on

May 10, 1904, as indorsed on the note, or that he authorized any one to make said payment. He did not deny any of the other payments which are indorsed upon the note. A witness on the part of the plaintiff testified: That in 1906 he presented the note to the defendant for payment, and at that time all of the above indorsements of payments were upon the note. "That the defendant took the note and read all the credits on it. When he read them over he said they were all right," and further said he could not pay the note just then. Another witness testified that he presented the note to defendant in 1906 or 1907, and that all of the above credits were then indorsed upon the note. "I read them all over to Mr. McAbee, and he said they were all right, except that he ought to have more credits for some turnips that was not on it." The issue was passed upon by a jury, which returned a verdict in favor of the plaintiff.

It is contended by counsel for the defendant that, when the statute of limitation is pleaded, the burden of proof is upon the plaintiff to show that payment was made before the statute bar attached, and that the testimony does not show when the last indorsement of payment was made upon the note. The proof of a payment on indebtedness and of the indorsement of same upon the written evidence of that indebtedness may be made in the same manner as the proof of any other fact. It may be made directly, or by circumstances, or by the admissions of the defendant. It is actually the fact of the payment that tolls the statute, and not the indorsement. The indorsement is only a memorandum, or at most an evidence of such payment, and there can be no stronger proof of such payment than the admission of the defendant himself, who at the trial is then the only person controverting it. 25 Cyc. 1374. And "the indorsements of payments admitted by the debtor himself or assented to by him even impliedly will toll the statute." 25 Cyc. 1377; State Bank v. Woody, 10 Ark. 638; Wood v. Wyls, 11 Ark. 754; Ruddell v. Folsom, 14 Ark. 213. In the case of Wilson v. Pryor, 44 Ark. 535, Judge Cockrill, in delivering the opinion of the court, said: "In this case the indorsement was made with the express consent of the debtor, and his admission that the payment had been actually made was proved. These were matters for the consideration of a jury, and the court acting in that capacity was certainly warranted in the inference that the payment was actually made." A payment made by an agent is as effectual to suspend the statute as when made by the party himself. 25 Cyc. 1384.

In the case at bar it was peculiarly a question of fact for a jury to determine as to whether the payments were made, and as to whether they were made as of the dates of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the indorsements. That could be proved by the admissions of the debtor. There was testimony tending to prove that the defendant saw these indorsements on the note, with their dates, and actually read them himself, and after having thus read them he admitted their correctness and assented to their actual indorsement on the note. There was therefore sufficient evidence to sustain the verdict of the jury. The defendant does not claim that any error was committed by the court in the giving or refusing to give instructions. In fact, he does not abstract or refer to them. The presumption is that the court fully and correctly instructed the jury on the issues involved in this case.

Judgment affirmed.

OZARK & C. C. RY. CO. et al. v. FERGUSON.
(Supreme Court of Arkansas. Nov. 8, 1909.)

1. APPEAL AND ERROR (§ 1009*)—FINDING ON CONFLICTING EVIDENCE.

A finding of the chancellor on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3972; Dec. Dig. § 1009.*]

2. RAILROADS (§ 72*)—GRANTS—RIGHT OF WAY.

Plaintiff agreed to donate to a construction company \$500, giving a note therefor, to secure the construction of a railroad within a stated time on condition that the road should not be transferred to the S. Railroad within two years. Later the time for the construction was extended on consideration that the road should not pass into the hands of the S. Road within three years and six months. Thereafter plaintiff executed to a trustee a donation deed of a right of way over his lands, and subsequently gave an option deed to the railroad agreeing to convey to it a right of way on which the railroad was already located, and also depot ground, yard room, etc., the purchase price being the \$500 represented by plaintiff's note and the further sum of \$200 per acre for land taken for yard room. *Held*, that the new agreement took up the subject-matter of the prior agreements, and no mention being made of the condition attached to the original contract regarding the note, and its refundment if the road passed into the control of the S. Road, such condition was discharged.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 168-178; Dec. Dig. § 72.*]

Appeal from Circuit Court, Washington County; T. H. Humphreys, Judge.

Action by James A. Ferguson against the Ozark & Cherokee Central Railway Company and another. From the decree, defendants appeal, and plaintiff cross-appeals. Reversed and remanded, with directions.

W. F. Evans and B. R. Davidson, for appellants. Walker & Walker, for appellee.

HART, J. The plaintiff, James A. Ferguson, instituted this action for damages as provided by the statute against the Ozark & Cherokee Central Railway Company and St. Louis & San Francisco Railroad Company, alleging that said railroad companies

had wrongfully appropriated for their use for railroad purposes certain of his lands in Washington county, Ark. The railroad companies filed separate answers, in which they admitted that the Ozark & Cherokee Central Railway Company had entered upon the lands described in plaintiff's complaint and constructed its line of railroad over the same. The defendants asked that the cause be transferred to the chancery court, and for grounds therefor allege facts, which, briefly stated, are as follows: They say that in the month of August, 1899, W. A. Bright and others, who constituted the Arkansas Construction Company, were promoting and endeavoring to build a railroad from Fayetteville, Ark., to a connection with the Kansas City, Pittsburg & Gulf Railroad Company, and were soliciting from the property owners rights of way and donations of money, and that the plaintiff James A. Ferguson, being a large landowner, and presumably to receive great benefits from the construction of such road, on the 29th of August, 1899, gave what is called by the parties hereto a "subsidy note" to said Arkansas Construction Company, its successors and assigns, for the sum of \$500. The consideration of the note was the benefit which would accrue to Ferguson in the construction and operation of a railroad, commencing at Fayetteville, Ark., and extending to and connected with the Kansas City, Pittsburg & Gulf Railroad, within the period of 18 months from October 1, 1899, and the erection and maintenance of a depot within the corporate limits of the city of Fayetteville by said Arkansas Construction Company, its successors or assigns. The note was made payable as the work of construction progressed, and the whole was to be paid when the road was complete and in operation within the specified time. On the 26th day of September, 1899, the time within which to construct the road was extended in writing until October 1, 1902, upon condition that the railroad to be constructed should not pass into the control of the St. Louis & San Francisco Railroad Company within three years and six months from October 1, 1899. That on the 8th day of November, 1899, said James A. Ferguson, in consideration of the benefits to be derived from the construction of said railroad in the county of Washington and state of Arkansas, conveyed to said railroad company a right of way over his lands, 100 feet wide, and depot grounds to be selected and located by the engineers of the railroad company. The conveyance was made upon condition that the railroad be built and in operation within said county of Washington within one year. On the 13th day of January, 1902, said James A. Ferguson gave an option deed to the Ozark & Cherokee Central Railway Company, assignee to the Arkansas Construction Company, in which he obligated himself at any

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

time within 60 days to convey to said railway company a strip of ground 100 feet in width for a right of way over his lands, upon which the railroad was already located; also depot grounds 100 feet wide and 600 feet long, terminal facilities, and right of way over Ferguson's addition to the town of Fayetteville; and also, in section 5 of said contract, such lands of specified dimensions as the railroad company might select over certain other of his lands for yard room and grounds. The purchase price to be paid therefor by the railroad company was the sum of \$500, represented by the subsidy note of the said James A. Ferguson then held by said railroad company, and the further sum of \$200 per acre for land taken by said railroad company for yard room. That on the 10th day of March, 1902, the said Ozark & Cherokee Central Railway Company served notice on the said James A. Ferguson that it would take said lands in accordance with the terms of the said contract, and made a demand for a deed to said lands under the terms and conditions of said option contract. That they have been ready and willing to pay the amount due upon presentation of a deed for said land. That the acreage taken under said contract amounts to four acres. That defendants are due plaintiff for it the sum of \$800 and tenders it in court.

The plaintiff answered, alleging: That it was part of the consideration of said option contract that a depot should be constructed and maintained on said lands; that this was omitted from the terms of said contract through fraud or mistake; and that said railroad company has failed and refused to maintain said depot. The cause was transferred to the chancery court. The road was constructed and in operation westward between July and October 1, 1900. A connection was made with the Kansas City, Pittsburg & Gulf Railroad in the spring of 1901. By February, 1903, the St. Louis & San Francisco Railroad Company had acquired all of the stock of the said Ozark & Cherokee Central Railway Company, and in June purchased all of its bonds, on July 1, 1903, assumed control of said railroad, and has since operated it as the owner thereof. The chancellor found that the agreement of January 13, 1902, was binding upon the plaintiff, and that under it the defendant had tendered \$800 in accordance with section 5 of the agreement, but that the plaintiff had refused to comply with the agreement by conveying the lands mentioned in section 5 of said agreement, and refused to assess any damages for right of way claimed by the plaintiff. The chancellor further found that the subsidy note of \$500 was a valid obligation at the time of the execution of the contract of January 13, 1902, and that subsequent to that time, and before the expiration of three years and six months from the 1st day of October, 1899, the St. Louis & San Francisco Railroad Company had obtained control of the Ozark &

Cherokee Central Railway Company by acquiring all of its stock which was contrary to the contract of August 29, 1899, and the extension thereof made September 26, 1899, and that said note thereby became void. The court entered a decree vesting the title to the lands in controversy in the St. Louis & San Francisco Railroad Company upon payment to the plaintiff of the \$800 already tendered and the \$500 adjudged to be due. The defendants prayed on appeal to this court, and the plaintiff has taken a cross-appeal.

It is contended by counsel for the plaintiff that when the contract of January 13, 1902, was executed, it was a part of the consideration for its execution that the railroad company should erect and maintain a depot on his land, and that this was omitted from the contract by mistake. When the contract was made, there were present James A. Ferguson, his son, Wallace Ferguson, H. W. Seeman, general manager of the railway company, J. C. Duffin, his stenographer, and J. H. McIlroy. Both the Fergusons say that a part of the consideration for the contract was the erection and maintenance of a depot on the land. They are contradicted by Seeman, Duffin, and McIlroy. The chancellor found in favor of the defendants on this point, and his finding will not be disturbed.

The chancellor erred in finding in favor of the plaintiff on what is called the \$500 subsidy note. On August 29, 1899, the plaintiff, being a large landowner, in Fayetteville, Ark., agreed to donate to the Arkansas Construction Company the sum of \$500 to secure the construction and operation of a railroad from Fayetteville to a connection with the Kansas City, Pittsburg & Gulf Railroad. The contract was reduced to writing, and by its terms the money was to be paid as the work progressed, and the last installment was to become due when the road was complete and in operation. The road was to be completed within a specified time, and the donation was upon condition that the road should not be transferred to the St. Louis & San Francisco Railroad Company within two years from October 1, 1899. On September 26, 1899, the time for the extension of the road was extended upon consideration that the railroad to be constructed should not pass into the hands of the St. Louis & San Francisco Railroad Company within three years and six months from October 1, 1899. On the 8th of November, 1899, Ferguson executed a donation deed conveying the right of way over his lands in Washington county to W. A. Bright, trustee, to secure the construction of said railroad. When the agreement in writing of January 13, 1902, was executed, the railroad was completed and in operation from Fayetteville to a connection with the Kansas City, Pittsburg & Gulf Railroad. The new agreement took up the subject-matter of all the prior agreements. The purpose of the new contract was to give the railroad company a 60-day option to purchase certain

lands from the plaintiff for its right of way, depot and yard grounds. What is called the "\$500 subsidy note" was recited as part of the purchase price, and no mention is made of the condition attached to the original contract for the subsidy note. The subsidy note was due; but the original contract provided that the amount of it should be refunded if the railroad should pass into the control of the St. Louis & San Francisco Railroad Company within three years and six months from October 1, 1899. That time had not expired when the option contract of January 13, 1902, was executed. The time limit of the option contract was 60 days from its date. The new contract does not expressly abrogate the prior agreements; but the scope of the latter takes up all matters of the earlier contracts, and covers the same subject-matter. It is inconsistent with the terms of the earlier agreements, and we are of the opinion that the condition imposed in regard to the railroad passing into the hands of the St. Louis & San Francisco Railroad Company was discharged by the execution of the new agreement of January 13, 1902. "The discharge may take the form either of a total obliteration of all contractual relations between the parties in regard to the subject-matter of the contract, or it may be effected by the substitution of a new agreement in place of the old one. In such case the new agreement takes the place of the old and consists of the new terms and as much of the old agreement as the parties have agreed shall remain unchanged; in other words, a contract may be rescinded in part and stand as to the residue. 9 Cyc. 595. To the same effect, see Page on Contracts, vol. 3, §§ 1339, 1340. The railroad company, in compliance with the terms of the option contract of January 13, 1902, tendered to the plaintiff the purchase price and demanded a deed for the right of way, depot and yard grounds. It was entitled to this.

For the error in finding for the plaintiff for the amount of the \$500 subsidy note, the decree is reversed, and the cause remanded with directions to enter a decree in accordance with this opinion.

ROWE v. STATE.

(Supreme Court of Arkansas. Nov. 1, 1909.)

1. CRIMINAL LAW (§ 1208*)—STATUTORY OFFENSE—PENALTY.

Where a statute creates a new offense and prescribes a particular penalty and mode of procedure, that penalty is exclusive.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3282; Dec. Dig. § 1208.*]

2. ANIMALS (§ 57*)—STOCK LAW—VIOLATION—PENALTY.

The stock law of May 23, 1901 (Acts 1901, p. 305), prohibiting stock from running at large in certain counties, provides for the impounding of stock found trespassing, and for the recovery

of damages from the owner and for costs and expenses arbitrarily fixed by the statute to be enforced by a summary sale of the stock. *Held*, that the act provided a penalty for its violation which was exclusive, and hence an owner of stock violating the law was not subject to indictment therefor.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 57.*]

3. ANIMALS (§ 51*)—STOCK LAW—PENALTY.

The penalty imposed by the stock law of May 23, 1901 (Acts 1901, p. 305), by impounding, etc., to be enforced by a summary sale of the stock, is applicable only where stock is found trespassing on the cultivated or meadow fields of another, and does not apply to stock merely running at large.

[Ed. Note.—For other cases, see Animals, Dec. Dig. § 51.*]

Appeal from Circuit Court, Sebastian County; Daniel Hon, Judge.

R. A. Rowe was convicted of violating stock law, enacted May 23, 1901 (Acts 1901, p. 305), and he appeals. Reversed and dismissed.

Rowe & Rowe, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. Appellant, R. A. Rowe, appeals from a judgment of conviction under an indictment charging him with a violation of the terms of a special stock law approved May 23, 1901, which is applicable to certain counties. The statute provides for an election to be held, either at the next succeeding general election or at a special election in any of the counties therein named, for the purpose of determining whether or not the provisions of the statute should be put in force in the particular counties. It further provides that if, at said election, a majority of the votes cast on the question should be in favor of the law, it shall be the duty of the county court, or the judge thereof in vacation, to make an order prohibiting the running at large of hogs, sheep, geese, and goats within such territory, that a copy of said order shall be published, and that, after the adoption of the law in the given territory, "it shall be unlawful to permit any hog, sheep, goose, or goat to run at large in said territory; provided, the prohibition of such stock running at large apply only to those living in such territory." Then follow other sections, viz.:

"Sec. 3. If any hog, sheep, goose or goat shall enter the cultivated or meadow lands of another in said counties, the owner, lessee or person in lawful possession of such land may impound such animals and detain them until his fee, and all damages caused by such animals, are paid. Provided, such stock be the property of, or in control of any resident of any territory adopting said fence law.

"Sec. 4. Whenever any stock is impounded under the provisions of this act, notice in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

writing shall be given to the owner thereof if known, upon payment or tender of the fees, costs or damages.

"Sec. 5. Any person impounding stock under the provisions of this act shall be entitled to ten cents a day for hogs, and five cents a day for each sheep, goose or goat. The damages done by such stock may be ascertained by any three disinterested householders in the territory chosen by the person interested, or by some justice of the peace, who shall take an oath to assess such damages fairly and honestly, and their assessment shall be final.

"Sec. 6. If the owner or agent of such impounded stock, after having received notice, shall neglect to pay fees and damages, the person impounding such stock may sell the same at public auction to the highest bidder for cash, after first giving five days' notice of the time, place and terms of said sale, by written or printed notices, posted in three public places in the territory, and by delivering a copy to the owner of such stock if known, and apply the proceeds, after deducting the cost of sale, to the satisfaction of his fees, and damages, and pay the remainder to the owner of the stock, if known. If the owner cannot be found within ten days, the overplus shall be paid into the county treasury, and be disbursed as in cases of estrays, but the county court may make an order directing the same to be returned to the owner of said stock within six months on satisfactory proof." Acts 1901, pp. 305-309.

It will be noticed that the act in question provides no penalty except that prescribed in the sections quoted above. The question then arises whether or not the appellant could be indicted for a violation of any of the terms of the statute. It is insisted on behalf of the state that the following statutes of this state authorize the indictment and conviction of appellant:

"Where the performance of any act is prohibited, or the performance of any act is required by any statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition or requiring such act or duty, or in any other section or statute, the doing of such prohibited act or the neglect of such required act by duty, shall be deemed a misdemeanor.

"Every person who shall be convicted of any misdemeanor, the punishment of which is not defined in this or some other statute, shall be punished by imprisonment not exceeding one year, or by fine not exceeding two hundred and fifty dollars, or by fine and imprisonment both." Sections 2447, 2448, Kirby's Dig.

Now, the first inquiry is whether or not the special statute in question prescribes a penalty for the violation of its terms; for,

if it does, the sections of the digest quoted above have no application. The authorities sustain the rule that when an act "creates a new offense and makes that unlawful which was lawful before, and prescribes a particular penalty and mode of procedure, that penalty alone can be enforced." McClain on Criminal Law, § 8; People v. Hislop, 77 N. Y. 331; Commonwealth v. Evan, 13 Serg. & R. (Pa.) 426; McElhiney v. Commonwealth, 22 Pa. 365. It is really unnecessary to invoke that rule here, though it is undoubtedly applicable, as the general statute quoted above by its express terms limits its application to prohibited acts for the doing of which no penalty is prescribed. Therefore, if it can be said that the special statute in question prescribes a penalty at all, then the general statute is not applicable. We are of the opinion that the special stock law does prescribe a penalty. It authorizes the impounding of stock found trespassing upon the cultivated or meadow land of another, and mulcts the owner of the stock in damages caused by the depredation of the stock, and for the costs and expenses arbitrarily fixed by the statute, and provides for the sale of the stock in a summary manner for the purpose of paying same. This arbitrary provision can only be justified as a penalty imposed upon the owner for allowing his stock to run at large in violation of the terms of the statute. It is confiscatory, unless justifiable as a penalty.

It is insisted by the Attorney General in argument that, if this be regarded as a penalty at all, it has no application to the mere running at large of the stock, and is only applicable where the stock is found trespassing upon the cultivated or meadow lands of another person. This is true. But the Legislature deemed that to be sufficient penalty, and the courts are not justified in reading anything else into the act, and thereby impose a penalty which the lawmakers did not intend to inflict.

We are therefore of the opinion that the Legislature has not imposed a fine for the violation of the special statute, and the indictment of the appellant was therefore unauthorized.

Judgment is reversed, and cause dismissed.

STATE v. ST. LOUIS & S. F. R. CO.
(Supreme Court of Arkansas. Nov. 1, 1909.)
1. RAILROADS (§ 253*)—PASSENGER ACCOMMODATIONS—WAITING ROOMS—DRINKING WATER—INDICTMENT.

An indictment that defendant, a railroad corporation, maintaining a station with waiting rooms for passengers at B., unlawfully failed to supply such waiting rooms with wholesome drinking water, and refused to provide and keep provided and supplied such waiting rooms with any drinking water whatever, stated a violation of Kirby's Dig. § 6634, requiring all persons

operating railroads within the state to keep waiting rooms at all times supplied with wholesome drinking water, etc.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 775; Dec. Dig. § 255.*]

2. RAILROADS (§ 255*)—STATION REGULATIONS—DRINKING WATER—STATUTES—CONSTRUCTION.

Kirby's Dig. § 6634, requires all railroads to keep waiting rooms supplied with drinking water, and section 6636 declares that railway companies neglecting to comply shall be guilty of a misdemeanor, and, on conviction, shall be fined for each day's failure, and that any agent of the railway company at such depot neglecting to comply shall on conviction be fined. *Held*, that the statute expressly makes both the railroad and the particular agent guilty of a misdemeanor and subject to a fine for failure to comply with section 6634; the duties imposed thereby not being entirely personal with the agent.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 255.*]

3. CONSTITUTIONAL LAW (§ 241*) — EQUAL PROTECTION OF THE LAWS—STATION REGULATIONS—PENALTY.

Kirby's Dig. §§ 6634, 6636, imposing a penalty on railroad companies and their station agents for failure to provide waiting rooms with wholesome drinking water, and fixing a more onerous penalty for violation on the corporation than on the agent, was not for that reason unconstitutional as depriving the railroad companies of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 700, 701; Dec. Dig. § 241.*]

4. APPEAL AND ERROR (§ 338*)—WRIT OF ERROR—TIME—STATUTES.

Act May 5, 1909, prescribing the time within which a writ of error may be sued out, does not apply to writs to review judgments rendered prior to its enactment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1882; Dec. Dig. § 338.*]

Appeal from Circuit Court, Lawrence County; Charles Coffin, Judge.

The St. Louis & San Francisco Railroad Company was indicted for failure to provide drinking water in its station, and, from an order sustaining a demurrer to the indictment, the state appeals. Reversed and remanded.

Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State. W. F. Evans and W. J. Orr, for appellee.

McGULLOCH, C. J. The grand jury of the Western district of Lawrence county returned against appellee the following indictment (omitting caption): "On the 13th day of August, 1908, the St. Louis & San Francisco Railroad Company, being a railroad corporation, operating a line of railroad in this state, said company operating a line of railroad in and through the Western district of said county, and passing through and by the town of Black Rock, in said district and county, and said company then and there having and maintaining a station and depot at said place of Black Rock, and maintaining and having waiting rooms for passengers at said station and depot, and a waiting

room for persons of the white race being situated in the said depot building near the ticket office of said defendant company, and being then and there used by the defendant company as a waiting room for white passengers, and such passengers being then and there in said waiting room, the said defendant, the St. Louis & San Francisco Railroad Company, in said county, district, and state, did then and there unlawfully fail, neglect, and refuse to supply said waiting room with wholesome drinking water, and did then and there fail, neglect, and refuse to provide and supply, and to have and keep provided and supplied said waiting room with any drinking water whatever, against the peace and dignity of the state of Arkansas."

The court sustained a demurrer on the following grounds:

"(1) That said indictment does not charge any offense under the laws of the state of Arkansas against this defendant.

"(2) That the acts complained of are acts personal to the agent, and not to this defendant, and the duties herein imposed rest upon the said agent, and not upon this defendant."

It will be seen that the indictment charges appellee, a railroad corporation, with having refused and neglected to supply with drinking water one of the waiting rooms in the station at Black Rock, Ark. The indictment follows closely the language of the statute, and we think that it fully states facts constituting a violation of the statute, which reads as follows: "All persons who own or operate any line or lines of railroad in this state shall keep separate waiting rooms now provided for in section 6622 in all depot buildings now erected or that may hereafter be erected, for the accommodation of their passengers, open both day and night for the free and unrestricted use of their said passengers. And that said waiting rooms shall at all proper times and seasons be comfortably heated and at all times supplied with wholesome drinking water, and shall in all other respects be kept and maintained in a sanitary and clean manner." Section 6634, Kirby's Dig.

The second ground of the demurrer is equally untenable. The statute in express terms makes both the railway company and the particular agent who neglects or refuses to perform the required acts guilty of a misdemeanor, and subject to a fine. A railroad corporation can act only through agents, and it is within the power of the Legislature to inflict penalties upon corporations for the conduct of their agents in failing to perform statutory duties. In *State v. St. L. & S. F. R. R. Co.*, 83 Ark. 254, 103 S. W. 625, this court held that the statute in question is not violative of the fourteenth amendment to the Constitution of the United

States. It is now pointed out by counsel for appellee in their brief that the court in the opinion in that case did not state the reasons for the decision, and they insist that the reasons must have been that the court deemed that part of the statute which requires that waiting rooms be comfortably heated, and at all times supplied with drinking water, to be applicable only to the particular agent of the railway company who fails to comply with its provisions. Such a conclusion cannot be drawn from the opinion in that case, for it involves an indictment against the company itself for failure to keep the waiting room comfortably heated and supplied with drinking water. The court decided that the indictment was void for uncertainty and duplicity, but that the statute was valid in its application to railroad corporations for failure to perform the specified acts. That is the only reasonable conclusion to be drawn from the decision.

It is argued that, if these provisions of the statute be construed to apply both to the railroad corporation and the particular agent who is guilty of the negligent omission, it is void on the ground of its discriminatory effect in imposing a larger fine upon the railroad corporation than upon the offending agent. It does not at all follow that this is an improper discrimination. The aim of the statute is to punish both the principal and the agent, visiting the greater punishment upon the principal. We are clearly of the opinion that this is permissible, and that it does not constitute an unjust and unreasonable discrimination. The two classes of offenders occupy different attitudes. It is within the province of the lawmakers to determine which class shall suffer the greater punishment. In other words, neither the railroad corporation nor any other class of employers is denied the equal protection of the laws by a statute inflicting a severer punishment upon the principal than upon the agent. In *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, 30 L. Ed. 578, Mr. Justice Field, delivering the opinion of the court, said: "The fourteenth amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed." And in *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650, the same learned judge said: "The inhibition of the amendment that no state shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hos-

tile legislation." Mr. Justice Bradley, in *Missouri v. Lewis*, 101 U. S. 22, 25 L. Ed. 989, in referring to this provision of the fourteenth amendment, said: "It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or class of persons in the same class or under like circumstances."

Counsel insist that the writ of error should be dismissed because it was not sued out within the time prescribed by the act of May 5, 1909. The judgment in this case was rendered prior to the passage of that act, and it is not applicable. *Rankin v. Schofield*, 70 Ark. 83, 66 S. W. 197.

The judgment is reversed and the cause remanded, with directions to overrule the demurrer and to proceed further.

CARUTHERS et al. v. GREER.

(Supreme Court of Arkansas. Nov. 1, 1900.)

1. TAXATION (§ 829*)—TAX SALES—INVALIDITY—RECOVERY OF TAXES—"PURCHASER."

The word "purchaser" in Revenue Act July 23, 1868 (Acts 1868, p. 281) § 72, and in Acts 1883, p. 275, § 152 (Kirby's Dig. § 7112), authorizing the purchaser under an invalid tax sale to recover the taxes assessed against the land for which it was sold and taxes subsequently paid up to the time of adjudication of invalidity, does not limit such right to the person actually purchasing at the sale, but extends to his subsequent grantees.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1643, 1644; Dec. Dig. § 829.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5858-5860; vol. 8, p. 7775.]

2. TAXATION (§ 833*)—SALE—INVALIDITY—RECOVERY OF TAXES.

An adjudication of the invalidity of a tax sale is a condition precedent to the right of the purchaser or his grantees to recover the taxes paid on the land, as authorized by Kirby's Dig. § 7112.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 833.*]

3. TAXATION (§ 827*)—TAX SALES—INVALIDITY—ADJUDICATION—RECOVERY OF TAXES.

Kirby's Dig. § 7112, authorizes a recovery of taxes by the purchaser on an adjudication that the sale is invalid for irregularity. Plaintiff sued to foreclose a lien for taxes on land in controversy, alleging that the tax sale had been held void by the Supreme Court. This was not denied, and at the trial plaintiff admitted that the sale was invalid. Held, that such admission was equivalent to an allegation that the sale was void, and, not being denied, the chancellor was warranted in considering the complaint as amended to embrace such allegation, so as to sustain a finding that the sale was void, required to support a decree enforcing plaintiff's lien for the taxes.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 827.*]

4. TAXATION (§ 827*)—INVALID SALE—TAX LIEN—ENFORCEMENT—ESTOPPEL.

Where, in a suit by the assignee of a purchaser at a tax sale to enforce a lien on the land for the taxes, on the theory that the sale was void, plaintiff did not seek a personal decree against defendants for the taxes paid, they

were not entitled to object that it was not alleged or proved that the sale was void; its invalidity being immaterial to the relief demanded.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 827.*]

Appeal from White Chancery Court; John E. Martineau, Chancellor.

Suit by A. B. Greer against J. A. Caruthers and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Jno. M. Rose and Murphy, Coleman & Lewis, for appellants. Brundidge & Neelly, for appellee.

MCCULLOCH, C. J. Appellee instituted this action in the chancery court of White county against appellants to enforce a lien claimed on a certain tract of land for the amount of taxes paid thereon. He alleges in his complaint that the land in question was sold for taxes of the year 1868 duly assessed against it; that one Jno. A. Cole purchased at the sale and received a deed therefor; that appellee holds under mesne conveyances from Cole; and that he and those under whom he claims have paid the taxes on the land regularly for each year, with the exception of a few years when he failed to pay by inadvertence, since the said date of sale. The complaint contains the further statement that "the tax sale, under which other lands were sold and bought by Jno. A. Cole at the same time of the purchase of these, has been held by the Supreme Court of Arkansas to be irregular and void, and the plaintiff does not claim title to the lands herein mentioned by reason of said irregularity." The prayer of the complaint is that a lien be declared on the land in favor of the plaintiff for the amount of taxes, aggregating \$165, paid as aforesaid by him and those under whom he claims. The answer of appellants contains a denial of each of the allegations of the complaint, except that concerning the adjudication by the Supreme Court of the invalidity of the other tax sales to Cole. Appellants also pleaded the statute of limitations. During the progress of the trial, appellee orally admitted in open court "that the tax sale pursuant to which the tax deed was made was void, and that the plaintiff claims no title to the land, and only seeks to recover taxes paid on said land, and to have same declared a lien thereon." This admission was recited in the final decree. Proof was adduced as to the tax sale to Cole, the mesne conveyances from Cole to appellee, and the various payments of taxes made by appellee and those under whom he claims; but no proof was adduced as to the invalidity of the tax sale further than the admission of the appellee, as aforesaid, made in open court. The court decreed the relief prayed for in the complaint, and an appeal was taken to this court.

Section 72 of the general revenue act, approved July 23, 1868 (Acts 1868, p. 281), under which the tax sale in question was made, reads as follows: "Upon the sale of any land or town lot for delinquent taxes, the lien which the state has thereon for taxes then due is transferred to the purchaser at such sale, and, if such sale proves to be invalid on account of any irregularity in the proceedings of any officer having any duty to perform in relation thereto, the purchaser at such sale is entitled to receive from the proprietor of such land or lot the amount of taxes, penalty and interest legally due thereon, and the amount of taxes paid thereon by the purchaser subsequent to such sale; and such land or lot is bound for the payment thereof." Similar provisions were embraced in the revenue act of 1871 (Acts 1871, p. 184, § 178) and 1883 (Acts 1883, p. 275, § 152 [Kirby's Dig. § 7112]), except that the later acts omitted the provision for the recovery of "interest, penalty and cost of advertising" from the specified amounts to be recovered by the purchaser from the proprietor. In *Railway Co. v. Alexander*, 49 Ark. 190, 4 S. W. 753, this court held that under the act of 1871 the purchaser at a tax sale adjudged to be invalid could in an action instituted for that purpose recover a personal judgment against the owner of the land at the time of the sale for the amount of the taxes, penalty, etc., for which the land was sold, and for taxes subsequently paid, and that he was also entitled to a decree against subsequent purchasers condemning the land for the enforcement of the lien. The court said that it was unnecessary to determine whether or not the act of 1883 was retroactive in its operation, inasmuch as the plaintiff's right to recover all that was adjudged to him had vested before the act of 1883 was passed. It is unimportant to determine that question in the present case, for the reason that if the appellee is entitled, under the act of 1868 which was in force at the time of the sale, to recover the amount of taxes paid prior to the passage of the later acts of 1871 and 1883, he is also entitled to recover under the later statutes the amount of taxes paid since the dates of their respective enactments. The three statutes are similar except as to the recovery of interest, penalty, and costs.

It is insisted, however, that these statutes apply only to purchasers at tax sales, and not to vendees of such purchasers. We do not think that the operation of the statute was intended to be so circumscribed, for that interpretation would, to a considerable extent, defeat their wholesome effect. The word "purchaser" in the statute was used in a broad sense, meaning, any one claiming under a purchase at a tax sale. In *Hunt v. Curry*, 37 Ark. 100, Chief Justice English,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

speaking of one of these statutes, said that by the word "proprietor," as used therein, was meant the defaulting owner or person under obligation to pay the taxes. "It would be a narrow view of the statute, and not warranted by its language, so to construe it as to confine the lien to the time the land or lot remains in the hands of him who was its proprietor at the time of the tax sale, and to hold that the lien may be defeated by a change of owners." He also declared that "the policy of the state is to favor those who pay taxes upon lands for defaulting owners." We conclude that, under a fair construction of the statute, those who claim under a purchaser at a tax sale are entitled to recover the taxes assessed against the land for which it was sold, and the taxes subsequently paid thereon up to the time of adjudication of the invalidity of the tax sale. The purchaser's right of action passes under his deed to his vendee and to subsequent vendees.

It is also contended that there were neither allegations nor proof that the tax sale in question was invalid, and that for this reason the appellee failed to make out his claim under the statute for reimbursement. In *Railway Co. v. Alexander*, supra, the court held, in effect, that an adjudication of the invalidity of a tax sale is a condition precedent to the right to recover the amount of taxes paid on the land. It is there said: "Our statute does not undertake to confer upon the tax purchaser any remedy for reimbursement until the sale at which he has purchased shall 'prove invalid.' The only method known to the law of proving the invalidity of a sale is by a judicial investigation, and it follows that his cause of action does not accrue until a court of competent jurisdiction has adjudged that the title is bad." In that case there had been a prior adjudication as to the invalidity of the tax sale, and the court, when using the above quoted language, was discussing the question of the statute of limitations, which had been pleaded. The adjudication as to the invalidity of a tax sale may be made in an action brought by the purchaser to recover the amount of taxes paid on the land, for two actions between the same parties concerning the same subject-matter are not required where a single one in which all of the rights of the parties may be adjudicated will suffice.

Now, we think that the decree in this case was in effect an adjudication of the invalidity of the tax sale. Appellee's oral admission was of no force as an admission, but was equivalent to an allegation that the sale was invalid; and the chancellor was warranted in so considering it, and in treating the complaint as amended so as to embrace this allegation. Appellants did not attempt to enter a denial of this alle-

gation, but held to their contention that the appellee, not being the purchaser of the land at the tax sale, was a mere volunteer, and not entitled to reimbursement in any event. Moreover, we are of the opinion that appellants cannot complain, even if the court had adjudged the invalidity of the sale without either allegation or proof. The appellee neither sought nor obtained a personal decree against them for a recovery of the taxes paid; but he asked only for an enforcement of his lien on the land, which the court granted. Now, if the tax sale was valid, appellee was the owner of the land and was entitled to more relief than he obtained; that is to say, he should have recovered the land itself, instead of merely enforcing a lien on it for the amount of taxes paid. So the appellants could not possibly be injured by an adjudication, without sufficient proof, that the tax sale was invalid. *Railway Co. v. Alexander*, supra, is decisive of the contention of appellants as to the statute of limitations. The statute, it is held in that case, begins to run from the date of adjudication of the invalidity of the tax sale. As there was no such adjudication prior to the institution of the present case, the statute never began to run against appellee's claim.

Decree affirmed.

CARR v. STATE.

(Supreme Court of Arkansas. Nov. 1, 1909.)

1. COURTS (§ 207*)—APPELLATE JURISDICTION — SUPERVISORY JURISDICTION — AUTHORITY OF JUDGE.

Const. art. 7, § 4, giving the Supreme Court general superintending control over inferior courts, and, in aid of its appellate and supervisory jurisdiction, power to issue writs of certiorari, mandamus, and other remedial writs, and giving its judges severally power to issue any of the aforesaid writs, only authorizes the judges of the Supreme Court to issue such writs in aid of its appellate or supervisory jurisdiction, such as to preserve the status quo pending appeal, etc., but not to reverse or affirm the judgment of the inferior court, and a judge of the Supreme Court could not issue certiorari to review the denial of bail by the trial court, so that his order granting bail was unauthorized.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 207.*]

2. BAIL (§ 49*)—CRIMINAL PROSECUTION—PROCEEDINGS.

Since, under the constitutional provision making all persons bailable before conviction, except for capital offenses, where the proof is evident or the presumption is great, bail should be denied where it will not in all probability procure the attendance of the prisoner, the Supreme Court in reviewing a denial of bail, should consider that fact as well as all the evidence and the presumption of innocence, and, if the evidence is clear that an offense has been committed and that accused is guilty and will probably be punished capitally, the order denying bail should be affirmed.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 49.*]

Wood, J., dissenting.

Certiorari to Circuit Court, Pulaski County; Robert J. Lea, Judge.

George Carr was arrested and imprisoned under a charge of first-degree murder, and brings certiorari to review an order denying bail. Order affirmed.

W. H. Pemberton, F. T. Vaughan, and Palmer Danaher, for appellant. Roy D. Campbell, Pros. Atty., and Lewis Rhoton, for the State.

BATTLE, J. George Carr was accused of, and arrested and imprisoned for, murder in the first degree, committed by the killing of Adolph Topf in Pulaski county, in this state, on the 5th day of June, 1909. He applied to Robert J. Lea, judge of the Pulaski circuit court, to be admitted to bail, which was refused. On the 2d day of September, 1909, he applied to Carroll D. Wood, an associate justice of this court, for a writ of certiorari to bring up for revision a transcript of all the proceedings before the circuit judge, Robert J. Lea, including the evidence heard by him, to the end that he might be admitted to bail if he be entitled to it. Upon examination of a transcript of such proceedings and evidence, which was admitted by the parties to be a true and correct record, and upon waiver of the writ of certiorari, Justice Wood allowed him bail in the sum of \$7,500. This record is now before us to determine whether the circuit judge erred in refusing to grant bail.

The first question we shall consider is: What is the force and effect of the order of Justice Wood admitting the prisoner to bail?

Section 4 of article 7 of the Constitution provides: "The Supreme Court, except in cases otherwise provided by this constitution, shall have appellate jurisdiction only; which shall be co-extensive with the state, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error, and supersedeas, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and other remedial writs; and to hear and determine the same. Its judges shall be conservators of the peace throughout the state, and shall severally have power to issue any of the aforesaid writs."

"In *Good et al., Ex parte*, 19 Ark. 410, this court held that, in the exercise of its constitutional power of superintending control over inferior tribunals, it could review, on certiorari, the decision of a circuit judge refusing bail, and indicated the proper mode of practice of bringing the decision before it for review. This decision was approved in *Kittrell, Ex parte*, 20 Ark. 500," and *Harbour, Ex parte*, 39 Ark. 126.

The circuit judge had the power in this case to admit the prisoner to bail or refuse

it. The authority to review his order or judgment refusing it or set it aside is supervisory, and is vested exclusively in the Supreme Court. No appellate or supervisory jurisdiction is invested in any of its judges. They have the authority to issue certain writs in aid of the appellate and supervisory jurisdiction of the Supreme Court; and for that purpose, and subject to the restrictions prescribed by law, can issue them to stay temporarily proceedings on the judgment appealed from for its enforcement, to preserve the status in quo of the parties pending the determination of the appeal, and for the purpose of protecting its jurisdiction and making the judgment of the court effective when rendered, but not to reverse, modify, or affirm the judgment of the inferior tribunal. In the exercise of the jurisdiction of this court, no less than three of its judges can make an order affecting an order or judgment appealed from. It is obvious that one judge has not the power of three, or in the vacation of the court can exercise its jurisdiction.

The Legislature once attempted to vest a judge of this court with the power to compel a judge of the circuit court, or any circuit court, by a writ of mandamus, to grant an injunction after he or it has refused an application for such relief. This was the effect of an act entitled "An act to regulate the practice in suits for injunction and for the appointment of receivers," approved March 23, 1881 (Acts 1881, p. 185). In *Batesville & Brinkley Railroad Company, Ex parte*, 39 Ark. 82, this court held that the Legislature could not vest a judge of this court with such power. Judge Smith, delivering the opinion of the court, said: "So far as it (act of March 23, 1881) authorizes a single judge of this court to review the chancellor's decision, the act is certainly unconstitutional, because the concurrence of two judges is in every case necessary to a decision; and it is the court, and not the individual members thereof, that is empowered to hear and determine mandamus and other remedial writs." Mandamus is one of the writs the Constitution authorizes the judges of the Supreme Court to issue. What is said of it is true as to the other writs mentioned in the Constitution in the same connection.

The order of Justice Wood granting bail is without authority and of no effect.

Did the circuit judge commit a reversible error in refusing to grant bail? The Constitution provides: "All persons shall, before conviction, be bailable by sufficient sureties, except for capital offenses, when the proof is evident or the presumption is great." Article 2, § 8. In *Good, Ex parte*, 19 Ark. 410, 416, this court held that the power of revising the action of a court or judge refusing bail should be cautiously exercised, and that the decision of the court or judge "should not be overturned except in cases of manifest error," etc. In *Jones, Ex parte*, 20 Ark.

9, and Bird and Bailey, Ex parte, 24 Ark. 275, Good, Ex parte, was approved, but the court said we should "not lose sight of the humane principle of the law that requires every reasonable doubt to go to the benefit of the prisoner." We should also not lose sight of the provision of the Constitution which declares that persons shall not be ballable in capital cases "when the proof is evident or the presumption great," and the object of bail, which is to secure the attendance of the prisoner.

In cases where it will not in all probability be sufficient for that purpose, it should be denied, and that is in capital cases where the proof is evident or the presumption great. In such cases the temptation to forfeit the bail in preference to endangering life by a trial might be beyond resistance. Hence in cases like this we should consider the evidence heard by the circuit judge as a whole, and the reasonable doubt that the prisoner will be entitled to on a trial, and, if so considering, we find that "the evidence is clear and strong, leading a well-guarded and dispassionate judgment to the conclusion that the offense has been committed; that the accused is the guilty agent, and that he will probably be punished capitally if the law is administered," the judgment or order of the circuit judge or court denying bail shall be affirmed, and, if otherwise, should be reversed.

Guided by the foregoing test and the fact that the circuit judge was present when the witnesses in the case were examined, and was more competent to judge of the credit that should be given to their statements than this court can be upon the record before it, we affirm the judgment or order of the judge denying bail. A warrant for the arrest and imprisonment of the accused, if at large, may be issued and executed.

WOOD, J., dissents.

BECKETT v. WHITTINGTON.

(Supreme Court of Arkansas. Oct. 18, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 513*)—FINAL SETTLEMENT—JUDGMENT OF CONFIRMATION—CONCLUSIVENESS.

Under the Constitution, giving the probate court jurisdiction as to the estates of decedents, and Kirby's Dig. § 140, providing that an administrator's account, when confirmed, shall not be subject to investigation except in a court of chancery, on a judgment of the probate court confirming the final settlement of an administrator and closing the administration, the jurisdiction of the probate court over the estate ceases, but the court of chancery may on a proper showing of fraud or mistake set aside the judgment, but until the judgment is so set aside the probate court has no further jurisdiction, notwithstanding Kirby's Dig. § 48, authorizing the appointment of an administrator in succe-

sion before the estate has been fully administered.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 513.*]

2. EXECUTORS AND ADMINISTRATORS (§ 516*)—FINAL SETTLEMENT—JUDGMENT OF CONFIRMATION—CONCLUSIVENESS.

Where, after the final settlement of an administrator, assets remain unadministered, and debts against the estate are unpaid, a court of chancery in a suit by any heir, distributee, or creditor and on a proper showing may uncover the assets and set aside the confirmation of the final settlement, and, where there is no indebtedness against the estate unpaid, the heir or distributee of decedent may institute such a suit for the recovery of unadministered assets.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 516.*]

Appeal from Columbia Chancery Court; E. O. Mahoney, Chancellor.

Suit by S. C. Beckett, as administrator of J. S. Dawson, deceased, against D. C. Whittington. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

Stevens & Stevens, for appellant. McKay & Lile, for appellee.

FRAUENTHAL, J. On the 3d day of October, 1907, S. C. Beckett, as administrator of the estate of J. S. Dawson, deceased, instituted this suit in the Columbia chancery court against the defendant below, D. C. Whittington, and in his complaint alleged that the decedent and defendant were prior to decedent's death equal partners in the ownership and operation of a mill and gin, and, upon the death of Dawson in 1902, the defendant, as surviving partner, retained possession of all the partnership property and continued to carry on the partnership business, and he asked for an accounting and settlement of said partnership. The defendant in his answer alleged that, upon the death of said J. S. Dawson, the probate court of Columbia county duly appointed one O. H. V. Dawson administrator of his said estate, and that he had duly administered on said estate and had duly filed his final settlement as such administrator in 1905, and that said final settlement was duly confirmed by the Columbia probate court, and by the judgment of said probate court made in 1905 said administration of said estate was fully and finally closed and said administrator discharged; that thereafter, and in 1907, S. C. Beckett was appointed administrator of the said estate of J. S. Dawson, and that such appointment was without authority of law, and without the jurisdiction of said probate court; and that, on this account, the said Beckett had not the legal capacity to represent said estate or to institute this suit. He further alleged that, as surviving partner of J. S. Dawson, he had made a full settlement of said partnership in 1903 with the said O. H. V. Dawson as administrator of said estate.

It appears from the evidence adduced in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the case that on or about January 1, 1901, J. S. Dawson and D. C. Whittington became equal partners in the ownership and operation of a mill and gin, and that the partnership business continued until the death of Dawson on August 28, 1902, and that thereafter the defendant as surviving partner retained the partnership property. On October 20, 1902, O. H. V. Dawson was by the probate court of Columbia county duly appointed administrator of the estate of J. S. Dawson, deceased, and duly qualified as such administrator. As such administrator he duly filed inventory of said estate, and made settlements thereof in said probate court. Immediately after his appointment as such administrator, and in 1902, he investigated the affairs, business, and properties of said partnership, and in 1903 he had negotiations with the defendant for the purpose of making a settlement of the said partnership. The defendant testified that a full settlement of all the assets and affairs of said partnership was made, and, in pursuance thereof, the said administrator by bill of sale transferred to defendant all the title and interest of said estate in said partnership properties and business. Upon the part of the plaintiff, the testimony tended to show that, while such negotiations for a settlement were made and a bill of sale for certain properties of the partnership executed by said former administrator, the settlement did not include all the properties of the partnership and was not fully consummated. Thereafter, on March 31, 1905, the said O. H. V. Dawson, as administrator of the estate of J. S. Dawson, filed in said probate court his second and final settlement. This settlement was at the following term duly confirmed by the judgment of said probate court, and the administration of said estate adjudged closed by the following order: "Second and final settlement confirmed. This settlement, having been filed at the last term of this court, as required by law, is this day submitted, and the court, upon examination, finding that said settlement has been duly advertised according to law, and that proper vouchers have been filed for the credits asked, and the court finds, further, that said administrator has faithfully discharged his duties as such administrator, and has turned over all moneys and other property belonging to said estate, and now asks the court to discharge him and his bondsmen from any further responsibilities as such administrator and bondsmen, and the court is of the opinion that said settlement should be approved and the administrator and his bondsmen discharged. It is therefore considered, ordered, and adjudged by the court that the settlement herein be and is hereby approved and confirmed and ordered recorded as the law directs, and it is further ordered by the court that the administrator and bondsmen herein be, and the same are hereby, discharged."

On October 3, 1907, S. O. Beckett was appointed administrator of the estate of J. S. Dawson, deceased, by the Columbia probate court, and on the same day instituted this suit. Upon the trial of this cause by the chancery court, that court found that the plaintiff had no legal capacity to maintain this action and entered a decree dismissing the complaint. From that decree, the plaintiff prosecutes this appeal.

The merits of this appeal are determined by the nature and effect of an order of the probate court confirming the final settlement of an administrator and closing the administration of the estate of the decedent, and discharging the administrator because of the full and final accounting of the estate. It has been uniformly held by this court that the probate courts are superior courts, and that the orders of those courts are judgments, and are final and conclusive like the judgments of any superior court. By the Constitution the courts of probate have original jurisdiction in all matters relating to the estates of deceased persons and administrators. In the administration of the estates of decedents, settlements are made by the administrator of such estates, and the probate court has the exclusive original right to pass on such settlement with administrators; and, when these settlements are confirmed and no appeal taken therefrom, they cannot thereafter be investigated except in a court of chancery for fraud or some other recognized ground of equitable jurisdiction. Section 140, Kirby's Dig., provides that: "Any person interested as heir, legatee or creditor may file exceptions to such account * * * and such account when confirmed shall never thereafter be subject to investigation unless in a court of chancery." *Borden v. State*, 11 Ark. 519, 44 Am. Dec. 217; *Dooley v. Dooley*, 14 Ark. 122; *Reinhardt v. Gartrell*, 33 Ark. 727; *Mock v. Pleasants*, 34 Ark. 63; *Jones v. Graham*, 36 Ark. 383; *Trimble v. James*, 40 Ark. 393; *Currie v. Franklin*, 51 Ark. 338, 11 S. W. 477; *Washington v. Govan*, 73 Ark. 612, 84 S. W. 792; *Hare v. Shaw*, 84 Ark. 32, 104 S. W. 931, 120 Am. St. Rep. 17; *Nelson v. Cowling*, 89 Ark. 334, 116 S. W. 890; 18 Cyc. 1119, 1188. The settlements are an accounting of the assets of the estate and of the disbursements and disposition of those assets. Provision is made for the giving of notice of the pendency of such settlements, and thereby all persons interested therein are given their day in court in the examination of and the passing upon said settlements by the court. The orders of the probate court confirming the settlements thereby become binding upon all persons interested in the estate, and are judgments, and as such judgments they are conclusive of all matters embraced in the settlements, and of all matters belonging to and within the scope of such proceedings. The final settlement is the last accounting of the as-

sets of the estate, and in conjunction with the annual settlement filed and acted upon by the court prior thereto presents the issues that are to be determined by the probate court when it renders its judgment thereon. Those issues presented by such final settlement in conjunction with the previous settlements are that all assets of the estate have been duly reported and accounted for; that all the assets of the estate have been duly administered. And, when the probate court confirms the final settlement and closes the administration, it is a finding that all the assets of the estate have been reported and administered, and that all matters of the accounting have been fully and finally made, and that the jurisdiction of the probate court over the estate is at an end. And such judgment is conclusive of these findings. If through fraud, accident, or mistake any property of said estate has not been actually reported, accounted for, or actually administered, a chancery court has jurisdiction to investigate such charge, and to set aside such judgment confirming the final settlement and closing the administration. When that is done, the chancery court will remand the administration, if deemed necessary, to the probate court to be proceeded with. *Reinhardt, Adm'r, v. Gartrell*, 33 Ark. 727; *Shegogg v. Perkins*, 34 Ark. 117.

But, until such judgment confirming the final settlement is set aside by the chancery court, the probate court has no further jurisdiction over the estate. And it cannot, therefore, after confirmation of the final settlement and the judgment closing the administration, appoint an administrator in succession, unless the same shall be set aside by the chancery court. Under such circumstances, the order of the probate court appointing an administrator in succession would be a nullity. As is said in the case of *Collins v. Paepcke-Leicht Lumber Co.*, 74 Ark. 81, 84 S. W. 1044: "The probate court is a court of superior jurisdiction, and within its jurisdictional limits its judgments import absolute verity, the same as other superior courts. But, where its judgment shows affirmatively on the face that the court was proceeding in a matter over which it had no jurisdiction, or acting beyond its jurisdictional limits, such judgment is void." *Myrick v. Jacks*, 33 Ark. 428; *Meyer v. Rousseau*, 47 Ark. 462, 2 S. W. 112; *Wallace v. Turner* (Tex. Civ. App.) 89 S. W. 432.

It is urged by counsel for appellant that the probate court is authorized to appoint an administrator in succession after confirmation of final settlement by virtue of section 46, Kirby's Dig. That section was enacted by the act of the General Assembly approved March 13, 1889 (Acts 1889, p. 49), and in that act it is a part of one section of which the following section 47, Kirby's Dig., is the other part. Prior to the passage of that act,

the administrator de bonis non, or, as he is here denominated, in succession, could not sue the former administrator and the sureties on his bond for property of the estate wrongfully converted by his predecessor who had died, resigned, or been removed. *State v. Rottaken*, 34 Ark. 144; *Brice v. Taylor*, 51 Ark. 75, 9 S. W. 854. And this enactment was for the purpose of giving such succeeding administrator that power and authority. Section 46, Kirby's Dig., provides that the administrator in succession can only be appointed "before the estate has been fully administered and settled." But, when the final settlement is confirmed, it is conclusively determined that the estate has been fully administered and settled; and therefore, after such confirmation of the final settlement and while it is in full force and effect, such administrator in succession cannot be appointed. 18 Cyc. 1119. After the confirmation of the final settlement of an administrator, if there still remain assets unadministered and indebtedness against the estate still unpaid, then, upon a suit brought by any heir, distributee, or creditor of said decedent, a court of chancery upon a proper and sufficient showing for equitable relief would have jurisdiction to uncover such assets and set aside such order of confirmation of the final settlement. See cases above cited. If, however, there was no indebtedness against the estate unpaid, then the heirs and distributees of the decedent would have the right to institute a suit in the proper court for the recovery of such assets. *Crane v. Crane*, 51 Ark. 287, 11 S. W. 1; *Winnigham v. Holloway*, 51 Ark. 385, 11 S. W. 579; *Sanders v. Moore*, 52 Ark. 376, 12 S. W. 783; *Jordan v. Hunnel*, 96 Iowa, 334, 65 N. W. 302.

It follows that the appointment of the appellant as administrator in succession of the estate of J. S. Dawson after the order of the probate court confirming the final settlement of the former administrator and the closing of the administration of the estate and while said order and judgment was in full force was beyond the power and jurisdiction of the probate court; and therefore the appellant had no legal capacity to institute this action.

The decree is affirmed.

BYRNE v. LESS et al.

(Supreme Court of Arkansas. Nov. 8, 1909.)

1. TAXATION (§ 630*)—TAX SALE—NOTICE—PUBLICATION—SUFFICIENCY—"WEEKLY FOR TWO WEEKS."

Under Kirby's Dig. § 7085, requiring the delinquent tax list to be published weekly for two weeks between the second Monday in May and the second Monday in June in each year, "weekly for two weeks" means two weeks in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

succession, and a biweekly publication did not comply with the statute.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1283; Dec. Dig. § 630.* For other definitions, see *Words and Phrases*, vol. 8, p. 7428.]

2. TAXATION (§ 630*)—TAX SALE—INSUFFICIENT NOTICE—EFFECT.

Failure to publish the delinquent tax list weekly for two weeks, as required by Kirby's Dig. § 7085, rendered the tax sale void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1283; Dec. Dig. § 630.*]

Appeal from Miller Chancery Court; Jas. D. Shaver, Chancellor.

Action by L. A. Byrne against Gus Less and another. Judgment for defendants, and plaintiff appeals. Affirmed.

L. A. Byrne, for appellant. Jas. D. Head, for appellees.

BATTLE, J. L. A. Byrne brought this action against Gus Less and another in the Miller circuit court to recover a certain tract of land. He bases his right to recover upon a purchase at a sale of the land on the 13th day of June, 1904, for the taxes of 1903. Less denied his right to recover, alleging that the sale was void for several reasons, one of which was the notice of the sale was not given in the manner prescribed by law. Notice was given by a publication of the lands returned delinquent, of which the land in controversy was a part, "in the Weekly Texarkanian, a weekly newspaper published in Miller county, for two weeks between the second Monday in May and the second Monday in June, 1904, the first insertion being dated May 11, 1904, and the second insertion being dated May 25, 1904," 13 days intervening between the dates of the two insertions. Was the notice in compliance with the statute?

The statute provides that the delinquent list shall be published "weekly for two weeks between the second Monday in May and the second Monday in June in each year." Kirby's Dig. § 7085. "Weekly for two weeks" means two weeks in succession; for the two weeks it must be weekly. It would not have been weekly if a month had intervened between the two insertions. A newspaper published every two weeks would not be weekly, but a biweekly. In this case the publication was biweekly, and was not in compliance with the statute. Did the failure to comply with the statute render the sale void?

Judge Cooley, in his work on *Taxation*, says: "The first proceeding usually required of the officer who is to make sale is that he shall give public notice of his intention to do so. Under different statutes, notices in various forms are required, as may be thought most suitable to the case. * * * Whatever the provision is, it must be complied with strictly. This is one of the most

important of all the safeguards that have been deemed necessary to protect the interests of persons taxed, and nothing can be substituted for it or excuse the failure to give it. The notice being a prerequisite to the officer's authority, the fact that in the particular case it can be shown that the party concerned was fully aware of the proceedings will be of no avail in supporting them. He is under no obligation to take notice of the proceedings unless notified." 2 Cooley on *Taxation* (3d Ed.) pp. 928-930. To the same effect, see *Black on Tax Titles*, §§ 82, 84, and *Blackwell on Tax Titles*, § 215.

In *Townsend v. Martin*, 55 Ark. 192, 17 S. W. 875, this court said: "The notice for the sale upon which the forfeiture to the state is based was not published for the full time prescribed by the statute by three days. It is conceded that that fact is established by the record. The previous decisions of this court upon the subject of tax titles are uniform to the effect that failure on the part of an officer engaged in the proceedings devised for raising the revenue to observe a requirement of the statute, the nonobservance of which tends to deprive the landowner of a substantial right, will avoid the deed. * * * The failure therefore to give notice in the manner or for the length of time prescribed by statute is prejudicial to the owner's interest and will avoid the sale."

In this case the notice required by the statute was not given. The owner of the land was not legally notified, and the sale is void.

There are other questions in the case which we have considered; but it is unnecessary to notice them in this opinion.

Judgment affirmed.

MURPHY v. ST. LOUIS, I. M. & S. R. CO.
(Supreme Court of Arkansas. Nov. 1, 1909.)

1. WITNESSES (§ 388*)—CONTRADICTORY STATEMENTS—FOUNDATION.

The admission of evidence of contradictory statements alleged to have been made by a witness without first laying a foundation therefor, as required by Kirby's Dig. § 3139, is error.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1233-1242; Dec. Dig. § 388.*]

2. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR.

Where plaintiffs' right to recover for death of a switchman depended on testimony that he was knocked from the side of a car by a yard carpenter's trestle, as testified by one of his fellow workmen, the erroneous admission of evidence of contradictory statements by such witness that he did not know whether deceased fell or was knocked from the car, over plaintiff's objection that no foundation had been laid, was prejudicial.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4140-4160; Dec. Dig. § 1048.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. DEATH (§ 32*)—SEPARATE ACTIONS—NATURE AND SCOPE.

Two causes of action arise for wrongful death—one in favor of the administrator for the benefit of decedent's estate, and the other for the benefit of the next of kin; the latter being based on the theory that the next of kin have a pecuniary interest in the life of the person killed, the administrator suing in such right being regarded as their trustee.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 47; Dec. Dig. § 32.*]

4. EVIDENCE (§ 236*)—ADMISSION OF DECEDENT.

In an action for wrongful death for the benefit of the next of kin, admissions of decedent that his mother was dead, and that he did not contribute to the support of any one, were inadmissible, there being no privity between decedent and his next of kin as to their substantive right to recover for his wrongful death.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 236.*]

5. APPEAL AND ERROR (§ 1050*)—ADMISSION OF EVIDENCE—PREJUDICE.

Where the sole ground on which plaintiff could recover for decedent's wrongful death consisted in the fact that his next of kin had suffered pecuniary loss, the erroneous admission of an antemortem statement of deceased that he was not contributing to the support of any person was prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1050.*]

6. EVIDENCE (§ 246*)—ADMISSIONS—ABANDONED INTERROGATORIES.

Interrogatories prepared by plaintiff's attorney not shown to have been inspired by plaintiff intended to be asked of a witness in connection with the taking of the witness' deposition, but afterwards abandoned, were inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 945-949; Dec. Dig. § 246.*]

Appeal from Circuit Court, Pulaski County; Edwin W. Winfield, Judge.

Action by F. B. Murphy, as administrator of John H. Downey, deceased, against the St. Louis, Iron Mountain & Southern Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

T. G. Malloy and Palmer Danaher, for appellant. Kinsworthy & Rhoton, J. E. Williams, and Jas. H. Stevenson, for appellee.

FRAUENTHAL, J. John H. Downey was a switchman in the employ of the St. Louis Iron Mountain & Southern Railway Company, the defendant below, and on the night of November 18, 1907, he was killed in the yards of the defendant at Baring Cross, Ark., while engaged in the performance of the duties as such switchman. The administrator of his estate instituted this suit for the benefit of the next of kin of said decedent, who was his mother, Mrs. Katherine Downey and in the complaint alleged that the death was due to the negligence of the defendant. The defendant denied each allegation of the complaint and claimed that the injury was due to deceased's contributory negligence, and

that same was a part of the assumed risk of his employment.

The testimony on the part of the plaintiff tended to prove the following facts: A crew of four switchmen were engaged in pulling out of the track called "Rip 4" 18 cars, and deceased was one of this crew. The engine was pulling the cars towards the switch where a number of tracks converged. The deceased was at the time on a box car, which was the third car from the end, and a switchman named Sangster was on the rear car, and a switchman named Barnett was on the car next the rear car of the train. Between the track called "Rip 4" and the track next to it, called "Rip 5," there was a trestle about seven or eight feet high which was used in this yard by carpenters in the performance of their duties in repairing cars. This trestle was located in close proximity to this track 4. The deceased was on the top rounds of a ladder attached to the side of the box car in readiness to go down this ladder to leave the car in performing his duties. On account of the proximity of the trestle to this track, the deceased was struck by the trestle in the back as the train of cars was thus pulling out of the track, and was knocked down and run over by the cars. The trestle and defendant were dragged along by the train of cars for a distance of 70 to 75 feet before the train was stopped. The plaintiff introduced as witnesses in his behalf the switchmen, Sangster and Barnett, who testified in substance to the above as the manner in which Downey was injured. The testimony on behalf of the defendant tended to prove that the said two switchmen and the deceased were drinking on this night of the injury, and that the two switchmen showed signs of drunkenness immediately after the occurrence. A number of witnesses testified to circumstances and the condition of the ground next this track 4, indicating that no trestle was dragged along near this track and that the deceased fell off the car at the place where he was found, that the only trestle at this portion of the yard was between tracks Nos. 5 and 6, and that there was no trestle next or near the track No. 4 upon which the deceased was working at the time of the injury; and the defendant contended that the deceased fell from the car without any fault or negligence on its part. The jury returned a verdict in favor of the defendant, and, from the judgment entered thereon, the plaintiff prosecutes this appeal.

Upon the trial of the cause the defendant introduced as a witness one W. T. Edwards, who testified in answer to questions propounded by defendant's attorney that he had had a conversation some time after the injury with the above witness of plaintiff, Sangster, and that said Sangster had stated that he did not know whether the deceased,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Downey, fell off or was knocked off the car. The witness Sangster had not been asked whether he had had the above conversation with said Edwards, and no foundation was laid for the introduction of said testimony. The plaintiff duly objected to the introduction of this testimony, and duly saved his exceptions thereto. The purpose of the introduction of this testimony was to impeach the witness Sangster by these alleged contradictory statements. Section 3139, Kirby's Dig., provides: "Before other evidence can be offered of the witness having made at another time a different statement he must be inquired of concerning the same with the circumstances of time and persons present, as correctly as the examining party can present them and, if it is in writing, it must be shown to the witness and he be allowed to explain it." The direct tendency of the testimony of alleged contradictory statements made by the witness is to impeach his veracity; and it is but just to the witness and fair to the side introducing him that his attention be first called to these alleged statements, and the witness given an opportunity to recollect the facts and to explain the nature of what it is claimed he said, and the meaning and design of the statements it is alleged he made. It may be that a word may have been imperfectly heard by the contradicting witness, or a word omitted or forgotten which might change the entire meaning of the alleged statement, or that an explanation might be made by him of the circumstances which would remove all seeming inconsistency in the statements; so that the witness would not be discredited by the jury. This rule of what is called laying a foundation by inquiring of the witness concerning the different statements alleged to have been made by him before introducing testimony as to such alleged contradictory statements is recognized in all but a few jurisdictions, and is enforced as an inflexible one. *Drennen v. Lindsey*, 15 Ark. 359; *Collins v. Mack*, 31 Ark. 684; *Griffith v. State*, 37 Ark. 324; *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900; *Ayers v. Watson*, 132 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1098; 2 *Wigmore on Evidence*, § 1028; 1 *Greenleaf on Evidence* (16th Ed.) § 462. It was therefore erroneous to permit the introduction of this testimony; and, under the circumstances of this case, the error was prejudicial. The manner in which the deceased received the injury was the material issue in the case. The plaintiff contended that he was knocked off the ladder of the car by this trestle. The defendant claimed that he fell off the car. The witness Sangster was an eyewitness, as he claimed, of the occurrence, and he was therefore a very important witness upon whose credibility rested the strength of plaintiff's cause. If, therefore, there was error in permitting the introduction of this testimony which tended to impeach his veracity, that error was prejudicial to the cause

of the plaintiff. The plaintiff objected to the introduction of this testimony. The only ground of his objection was this failure to lay the foundation for the impeaching testimony, and therefore the objection was duly made and saved.

Upon the trial of the cause the defendant introduced in evidence a written application for employment signed by deceased, which contained certain questions and answers, among which were the following: "Name of mother (if dead, so state). Dead. Name and address of all persons to whose support I am contributing are as follows: None." This was permitted to be introduced in evidence over the objection of plaintiff duly saved. The only theory upon which this written statement could have been introduced was that it was an admission made by the deceased; but an admission made by the deceased could not affect the rights of the plaintiff in this case. Where an administrator claims property involved in a suit in the right of the decedent, the admissions of such decedent as to the title of such property are admissible because there is a mutual and successive relationship to the same rights of the property which constitutes a privity. But there can be no such privity in the relationship between the plaintiff and the deceased to the cause of action in this case. Upon the death of a person by a wrongful act of the railroad company, two causes of action arise, one in favor of the administrator for the benefit of the estate, the other for the benefit of the next of kin; and the actions are prosecuted in different rights, and the damages are given upon different principles to compensate different injuries. The action in favor of the next of kin is based on the theory that such next of kin has a pecuniary interest in the life of the person killed, and the amount of the recovery is limited to the value of that interest, and the administrator is but the trustee of such next of kin. *Davis v. Railway*, 53 Ark. 117, 13 S. W. 801, 7 L. R. A. 283; *Railway v. Sweet*, 63 Ark. 563, 40 S. W. 463; 4 *Sutherland on Damages*, § 1264. The action for the benefit of the next of kin is therefore an action for an injury to the rights of the next of kin, and there could be no privity existing in those substantive rights of the next of kin between the deceased and the next of kin; so that the admissions of the deceased would not be admissible in an action by the next of kin in such case. 1 *Greenleaf on Evidence* (16th Ed.) § 189; 2 *Wigmore on Evidence*, § 1081. It was therefore error to permit the introduction of the written application signed by deceased. And the introduction of that statement was prejudicial to the rights of the plaintiff. The sole ground upon which the plaintiff could recover in this case was the fact that the next of kin had suffered a pecuniary loss. But that pecuniary loss was based solely on the contributions which the

deceased would make to the next of kin, and therefore founded on the contributions which he was making before his death. This statement tended to prove that he was making no contributions whatever to the next of kin for whose benefit this action was solely brought; and on that account it tended to prove that the plaintiff was not entitled to recover anything in this action, even if the death of decedent had been caused by the wrongful or negligent act of the defendant.

We are also of the opinion that the court committed an error in permitting the introduction in evidence of certain interrogatories which had been prepared by the attorney of the plaintiff to be propounded to Mrs. Braker. These interrogatories were turned over to the attorney of the defendant for the purpose of permitting him to append thereto cross interrogatories. Subsequently the taking of the deposition of this witness upon these interrogatories was abandoned. The interrogatories were therefore never used in the case or filed. There is no testimony that they were inspired by the plaintiff. They were solely prepared by the attorney who, if he did not ask for their return entirely abandoned them, and thus withdrew them. They could not be admissible on the theory that they were depositions taken by consent, or that they were admissions of an attorney in the course of the progress of the cause; and there is no theory, in our opinion, upon which they were competent as testimony in the case. *Holland v. Rogers*, 33 Ark. 251; *Railway v. Clark*, 58 Ark. 493, 25 S. W. 504; *Ong Chair Co. v. Cook*, 85 Ark. 390, 108 S. W. 203; 1 *Greenleaf on Evidence* (16th Ed.) § 186.

On account of the errors committed by the lower court in admitting the introduction of the above testimony, the judgment is reversed, and this cause is remanded for a new trial.

BOULDIN et al. v. JENNINGS.

(Supreme Court of Arkansas. Nov. 1, 1900.)

1. PLEADING (§ 310*)—USE OF EXHIBITS.

Exhibits which form no part of the complaint may be referred to for an explanation of the allegations of the complaint.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 947; Dec. Dig. § 310.*]

2. COURTS (§ 116*)—RECORD—AMENDMENT BY NUNC PRO TUNC ORDER.

A court may amend its record by a nunc pro tunc order so as to make it speak the truth, but not to make it speak what it did not speak, but ought to have spoken.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 369; Dec. Dig. § 116.*]

3. JUDGMENT (§ 290*)—TIME FOR AMENDMENT.

As a rule a court is without authority to amend a final judgment after the expiration of the term at which it was rendered.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 583; Dec. Dig. § 290.*]

4. EXECUTORS AND ADMINISTRATORS (§ 375*)—SALES—ORDER APPROVING SALE—AMENDMENT.

An order of the probate court directing the sale of land belonging to the estate of a decedent described the land to be sold as a "part of N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 34, township 17, R. 1 E.," and the order approving the report of the sale described the land in the same term. *Held*, that the order did not describe any land, and the court was without authority to amend the order approving the sale nunc pro tunc by inserting an accurate description of the land sold.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 375.*]

Appeal from Circuit Court, Lawrence County; Frederick D. Fulkerson, Judge.

Action by Annie Bouldin and others against W. S. Jennings. A verdict was directed for defendant, and plaintiffs appeal. Reversed and remanded.

Beloate & Lomax, for appellants. W. A. Cunningham and J. M. Beakley, for appellee.

BATTLE, J. On the 5th of October, 1906, Annie Bouldin and others brought an action against W. S. Jennings to recover the possession of "all that part of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 34 in township 17 north, and in range 1 E, lying east of Village creek, the bed or channel of which being the west boundary line." They state in their complaint substantially as follows: James Tillman died on the 26th day of May, 1895, leaving Annie Bouldin his widow, and Dolly Bagley, then of the age of 17, Oscar Tillman, then of the age of 15, and Effie Tillman, then of the age of 3, his only heirs; they being his children. He died seised and possessed of the land described, occupying the same as his homestead. B. A. Morris was appointed administrator of his estate, and prior to the 18th day of July, 1899, paid all the probated claims against the same, and thereafter presented a petition to the Lawrence probate court for the sale of certain lands, describing them as follows: "Part of the southwest fourth of the northeast fourth sec. 34, Tp. 17 N., R. 1 E.,"—alleging that debts probated against the estate remained unpaid. On the 18th day of July, 1899, the probate court made the order of sale, describing the lands as described in the petition. A copy of the order is made an exhibit to the complaint. The land as described was sold by the administrator, and he made report of the sale to the probate court, which was approved. The order approving is made an exhibit to the complaint. Plaintiffs further stated "that said defendant, realizing that his said deed was void for uncertainty in the description, and that same created no color of title, attempted to get the Lawrence probate court for the Eastern district to grant him an order nunc pro tunc correcting the description in said order of sale in his deed, and obtained another order." A copy of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

order is filed as exhibit to the complaint.

They asked for "judgment against the defendant for the possession of the land, for cost, and all other relief."

The first exhibit shows that the court ordered "part of N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 34, township 17, R. 1 E." to be sold.

The second exhibit shows that the administrator reported to the court that he had sold "part of N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 34, township 17 North, Range 1 East."

The third exhibit is as follows:

"In the Matter of the Estate of James C. Tillman, Deceased.

"Comes W. S. Jennings, and, petitioning the court, would respectfully state: That at the July, 1899, term of this court, an order was made upon the petition of B. A. Morris, administrator of the estate of James C. Tillman, deceased, for the sale of certain lands belonging to said estate for the purpose of paying debts probated against said estate. That on the 19th day of August, 1899, said B. A. Morris, as such administrator, in accordance with the order of said court, offered said lands for sale, and this petitioner became the purchaser of the same for the price and sum of \$450, which was more than two-thirds of the appraised value of same. That at the January term, 1901, of this court, the said administrator reported the said sale to this court, and the same was approved and in all things confirmed, and the said administrator directed to make a deed to this petitioner upon the payment of the purchase money.

"That on the 26th day of January, 1901, the said administrator in obedience to said order executed to this petitioner his deed, which is exhibited herewith. That, in the order of sale, the sale report of the same and the deed made to this petitioner the said land was described as part of the Northwest $\frac{1}{4}$ of section 34 in township 17 N. range 1 E., when the proper description of said tract of land intended to be conveyed was as follows, to wit:

"Beginning at a point on the north boundary line of Sec. 34, Tp. 17 N., R. 1 E., where the channel of Village creek crosses the said line; thence down said channel to within 15 feet of the upper side of the old bridge; thence west, parallel with said bridge, to a point where said line crosses the north boundary line of section 34; thence east to the place of beginning; and all that part of the N. W. $\frac{1}{4}$ of the N. E. of Sec. 34, Tp. 17 N., R. 1 E., lying east of Village creek excepting the following: Beginning at a point S. 88 degrees E., 2.40 chains, from the quarter section corner and the N. line of Sec. 34, 17, 1 E.; thence S. 45 $\frac{1}{2}$ degrees E., 12 $\frac{1}{4}$ chains; thence N. 29 degrees E., 9.15 chains; thence S 88 degrees W., 13.30 chains to place of beginning, said except tract having been deeded to the town of Walnut Ridge, Ark.

"That since making the said deed B. A. Morris has been discharged as administrator of the estate of James C. Tillman, deceased, and on the 10th of February, 1903, J. N. Beakley was appointed administrator of the same by the clerk of this court, which appointment was by the court, at its present term, approved and in all things confirmed wherefore the premises being seen, your petitioner respectfully asks that an order be made approving the sale of the land above described to this petitioner, and that the said J. N. Beakley be directed to make deed to this petitioner for the said land as properly described and for all other proper relief.

"The within petition being this day examined, and the court being satisfied from the papers filed and the former orders of this court and from the testimony of witnesses produced that the sale of the property was regularly made, according to the law and the order of this court, but that the description of said land was not full enough.

"It is therefore considered and ordered by the court that the sale of the said lands, as set out in the correct description, be and the same is hereby approved and in all things confirmed, and J. N. Beakley, as administrator in succession, is directed to make a deed to said purchaser with proper recitals and containing proper description as herein contained."

The defendant answered in part as follows:

"That he admits that James Tillman departed this life about the date set out in said complaint, and that plaintiff Annie Bouldin was his widow, and that the other plaintiffs were his heirs at law, but states that he is not sufficiently advised as to their respective ages at the time of their father's death to either admit or deny the same.

"Defendant admits that at the death of said James Tillman he was seised and in the actual possession of the lands described in plaintiff's complaint, but denies that the description given is the correct description of the same. And he denies that said lands were at the time of his death the homestead of the said James Tillman, deceased.

"Defendant admits that the estate of the said James Tillman was administered on by B. A. Morris, but he denies that on the 18th day of July, 1899, or any other time before the sale of the lands mentioned, the said administrator paid off or satisfied all the debts probated against said estate, and he denies that at the time mentioned as the date of the order of the probate court that there was no probated debts against the said estate, but states that, when said order was made, there were debts probated against said estate which at that time remained unpaid.

"Defendant admits that on or about the 18th of July, 1899, said administrator ap-

plied to the probate court of Lawrence county for its Eastern district for an order to sell the lands described for the purpose of paying the debts probated against said estate, and that an order of said court was duly made and entered directing the said administrator to sell said lands for that purpose. In obedience to said order the lands described in plaintiff's amended complaint were, after due advertisement and appraisal, as required by law, duly offered for sale to the highest bidder on the 19th of August, 1899, at which sale this defendant became the purchaser thereof at and for the sum of \$450.

"Defendant admits that at the January term of the said court, 1901, said administrator reported the said sale, and that the same was approved and in all things confirmed, and the said administrator was directed to make a deed to the defendant.

"Defendant admits that in said report of sale the lands were not fully described, but were described as part of the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 34, belonging to said estate.

"Defendant further admits that he afterwards filed a petition in the probate court of Lawrence county for its Eastern district asking that an order be made correcting said order of court, and confirming said sale by the correct description, and that an order was duly made which plaintiff refers to and purports to exhibit to his complaint, but does not attach the same. * * *

"Defendant for his further and separate defense to plaintiff's purported cause of action states that the plaintiffs, after being fully advised of the facts and circumstances in and about the sale, filed a suit in the circuit court of Lawrence county for its Eastern district against B. A. Morris for the purchase money paid for the land sued for in this case. And defendant pleads such act as an estoppel against plaintiff in this suit."

The record in this case is, in part, as follows:

"On this day, this cause coming on to be heard, comes the plaintiffs Effie Tillman, Oscar Tillman, Annie Bouldin, and Dolly Bagley in person and by attorney, and comes W. S. Jennings in person and by attorney, and all parties coming ready for trial, comes a full jury of the regular panel to try same. After paneling the same, the plaintiff asked and obtained leave to amend his complaint by inserting 'occupying same as his homestead,' and the defendant amended his answer, and at the same time making an additional answer, setting up the cause wherein Oscar Tillman et al. was plaintiff and B. A. Morris was defendant as an estoppel, and the plaintiff thereupon interposed a demurrer to said answer, which upon being overruled and to the overruling of which at the time excepted, and asked that their exceptions be noted of record, which was done,

and plaintiff thereupon refused to proceed further, but stood upon his demurrer. Whereupon the court directed the jury to return a verdict for the defendant, which they did in words and figures as follows:

"We, the jury, find for the defendant, Frank F. Sloan, Foreman.' After the verdict was signed, but before it was read by the clerk, plaintiff asked to be allowed to take a nonsuit, but was refused by the court, which refusal was excepted to by the plaintiffs and duly noted of record, which was done, and the verdict read:

"It is therefore ordered and adjudged that plaintiffs take nothing by this suit; that the defendant have and recover of and from said plaintiffs all his cost laid out and expended."

While the exhibits in this case form no part of the complaint, they may be referred to for an explanation of its allegations. *Abbott v. Rowan*, 33 Ark. 506. Using them in this manner, we find it alleged, and not denied, that the Lawrence probate court ordered part of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 34, township 17 N., range 1 E., to be sold by the administrator of Tillman's estate; that the administrator sold the land as described and reported the sale to the court as so made, and it was approved in the same manner; and that the probate court at a term held subsequently to the time when the sale was made undertook to correct the order approving the sale by the administrator by an order nunc pro tunc by describing the land alleged to be sold by metes and bounds without evidence showing that a sale of such land was ordered, made, reported, or approved, virtually making a new order as a substitute for the order actually made.

"The authority of a court to amend its record by a nunc pro tunc order is to make it speak the truth, but not to make it speak what it did not speak, but ought to have spoken." *Tucker v. Hawkins*, 72 Ark. 21, 77 S. W. 902; *Liddell v. Landau*, 87 Ark. 438, 112 S. W. 1085. Further than this a court rendering a final judgment, as a general rule, is absolutely without authority to amend it in substance or merit after the expiration of the term at which it was rendered. 17 *American and English Ency. of Law* (2d Ed.) 816, and cases cited.

In the case at bar the order directing the sale made described no land; the description in it not being sufficient to designate any. The order approving the report of the administrator was equally defective. The order amending the latter was a new order, and was of no effect.

The court erred in directing the jury to return a verdict in favor of the defendant when the pleadings showed that he had no title to the land in controversy, but, on the contrary, it belonged to the plaintiff, and there was no evidence to the contrary.

Reversed and remanded for a new trial.

MARYLAND CASUALTY CO. v. CHEW.

(Supreme Court of Arkansas. Nov. 15, 1906.)

1. DEPOSITIONS (§ 101*)—USE AS EVIDENCE—BY ADVERSE PARTY.

A party may not read a deposition taken by the adverse party to be used as evidence without the consent of the adverse party; the deposition not having been taken under an agreement.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. § 238; Dec. Dig. § 101.*]

2. INSURANCE (§ 124*)—CONTRACTS—NATURE.

An insurance company may fix the terms upon which it will insure persons, and, a person having accepted insurance on such terms, they constitute a contract between the company and the insured, which courts may not vary.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172, 178; Dec. Dig. 124.*]

3. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

Where a person was insured by an indemnity policy, giving his occupation as a cotton factor and paying the premium for that occupation, and the policy provided that, if he was injured in an occupation classified by the insurer as more hazardous, the insurer's liability should be only for such proportion of the principal sum, or other indemnity provided for, as the premium paid would purchase at the rates fixed for such increased hazard, and, in an action to recover on the policy for total disability, there was evidence that insured was a supervising farmer at the time of the accident which was classified as a more hazardous occupation than cotton factor, a charge that "total disability" within the policy means that insured was disabled from prosecuting his business as a cotton factor, and that he was not able to prosecute such business unless he was able to perform all of the substantial acts necessary, that, if the business of cotton factor required as one of its duties the sampling of cotton, and it was necessary in doing so to use both arms and hands, and that the right arm and hand of insured had been totally paralyzed from the date of the accident so that he could not sample cotton, such paralysis was a total disability under the policy and insured should recover, was erroneous, as assuming that insured was a cotton factor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 423; Dec. Dig. § 191.*]

4. TRIAL (§ 191*)—INSTRUCTIONS—ASSUMPTION OF FACTS.

There being evidence to show that there were many other duties besides sampling cotton in the vocation of cotton factor, the charge was erroneous as assuming that insured was totally disabled by reason of his inability to sample cotton.

[Ed. Note.—For other cases, see Trial, Cent. Dig. 423; Dec. Dig. § 191.*]

5. INSURANCE (§ 450*)—ACCIDENT INSURANCE—NEGLECT TO OBSERVE PHYSICIAN'S DIRECTIONS.

No indemnity should be allowed an insured under an accident policy on account of an extension of the injury occasioned by his negligence to observe directions of his physician.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1163; Dec. Dig. § 450.*]

Appeal from Circuit Court, Phillips County; Hance N. Hutton, Judge.

Action by Frank H. Chew against the Maryland Casualty Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial.

M. L. Stephenson and R. B. Campbell, for appellant. R. W. Nichols and Moore & Vineyard, for appellee.

BATTLE, J. Frank H. Chew brought an action against the Maryland Casualty Company. Complaining he alleges in his complaint substantially as follows:

On the 29th day of May, 1906, the defendant, in consideration of \$25 received by it, did issue and deliver to him a certain policy of insurance and thereby insured him in the principal sum of \$5,000, and for a weekly indemnity of \$25, for a period of 12 months from May, 28, 1906, against bodily injuries not intentionally self-inflicted, sustained by the assured, while sane and effected directly and independently of all other causes through external, violent, and accidental means.

Among other provisions in the policy is the following:

"If such injuries shall not result in any of the disabilities mentioned in section 1, and shall immediately, continuously, and wholly disable the assured from performing any and every kind of duty pertaining to his occupation, the company will pay him for the period of such total disability the weekly indemnity above specified, but to an amount not exceeding the principal sum."

On the 8th day of April, 1907, while the policy was in full force and effect, plaintiff, Chew, was injured by the accidental discharge of a pistol, the bullet entering his right breast, and causing total, complete, and permanent paralysis of his right arm, thereby immediately, continuously, and wholly disabling him from performing any and every kind of duty pertaining to his occupation.

He alleged that he was entitled to recover \$550 on the policy for indemnity against loss on account of the accident, and asked for judgment for that amount.

The defendant, the Maryland Casualty Company, denied the foregoing allegations. It stated the facts to be substantially as follows: On the 29th of May, 1906, plaintiff made an application to it for a policy of insurance, making certain warranties. In consideration of the sum of \$25 and of the application and warranties, it issued the policy sued on. He represented himself to be engaged in the occupation of a cotton factor, but at the time he made this application and warranties he was not so engaged, but in another and additional and more hazardous occupation, and by reason thereof the policy is void, and was of no force and effect on the 8th day of April, 1907, when the alleged accident occurred.

One of the provisions of the policy is as follows: "If the assured is injured fatally or otherwise in any occupation classified by this company, as more dangerous than that

stated in the schedule of warranties, indorsed hereon, the company's liability shall be only for such proportion of the principal sum or other indemnity provided for herein as the premium paid by him will purchase at the rates fixed by the company for such increased hazard."

At the time of and prior to the accident plaintiff was engaged in the occupation of "supervising farmer" in addition to that of cotton factor and as a separate business, which is classified by the defendant as more hazardous than that of cotton factor and under the policy he is not entitled to the indemnity he claims as cotton factor, but as before stated.

Plaintiff, Chew, did not use due diligence to secure the recovery of his arm.

In the trial of the issues in the case the policy sued on was adduced and read as evidence. It contained the provisions set out in the pleadings and the following in addition to others:

"No. 2. Or, if such injuries shall not result in any of the disabilities mentioned in section 1 and shall immediately, continuously, and wholly disable and prevent the assured from performing any and every kind of duty pertaining to his occupation, the company will pay him for the period of such total disability the weekly indemnity above specified, but to an amount not exceeding the principal sum; or, if such injuries shall not wholly disable the assured as above, but shall immediately, continuously, and wholly disable and prevent him from performing one or more important daily duties pertaining to his occupation, the company will pay one-half the weekly indemnity above specified for the period of such partial disability, not exceeding twenty-six consecutive weeks from the date of injury; or, if such partial disability shall follow a period of total disability, the indemnity provided for partial disability shall be paid, but not for more than twenty-six weeks; nor shall the company be liable under the provisions of sections 1 and 2 for a sum greater than the principal sum."

Contained in the policy is a schedule of warranties, which, in part, are as follows: "I am F. H. Chew, of Helena, Ark., whose business is that of cotton factor. The duties of my occupation are fully described as follows: office work; classified as select."

The deposition of Dr. F. D. Smythe, which was taken by the defendant to be used as evidence in his behalf in the trial of this cause, was read as evidence by plaintiff in the trial over the objection of the defendant.

The following extracts were parts of the deposition:

"A. The patient's general condition was bad when he reached the hospital, and the idea of operating at once was not entertained, owing to the location of the injury, also its recent occurrence. I felt that life would be jeopardized by operating at that time, and

so advised him. He left the hospital for his home, and I informed him that the only chance for restoration of function of the arm was by a performance of the operation for deuteropathy or nerve suffering; that the operation in this case was not without risk, and at the same time I could not assure him of success attending my efforts, but, as it offered him the only hope of regaining the use of his arm, I advised him to take the chance. Some months later he called to see me, his arm being in about the same condition, except the atrophy advanced somewhat. He had slight use of some of his fingers and thumb, but not sufficient to be of any possible use. I talked with Mr. Chew, and advised him of the importance of having the operation performed. I told him I did not think he should delay having it done. He asked me concerning Dr. Murphy of Chicago, and I stated to him that Dr. Murphy had perhaps had more experience in nerve surgery than any surgeon in America, and that he could not go to a better man. My experience in this particular line of work has been limited. The operation can be performed successfully many months and even years after the injury without injury, though it requires a longer time to restore function in case it has been long delayed. He will remain permanently injured unless a successful operation should be performed upon him. There is no assurance that the operation will be followed by a successful result, but the chances are sufficiently promising to justify the operation.

"The patient was advised to report occasionally for examination in order that the operation might be performed at the earliest possible moment with safety. I did not see or hear from him for some time after he left the hospital. There was no treatment that could influence his case, except surgical treatment, and all that could be done was to advise his physician to look after him in a general way. The patient was informed that the operation was associated with danger in his case, due to the location of the injury and the large and important blood vessels so closely related to the injured nerves. The patient was advised of such danger.

"A. I advised the patient, if I remember correctly, that an attempt to suture the nerve should be made as soon as he could be gotten in condition for its safe undertaking, and that, if we failed to succeed, his arm would be in no worse condition than if left unmolested, and that, inasmuch as there was a reasonably fair chance of success following the operation, I thought that the proper course. I do not remember whether or not I urged the operation. I know I did not urge him to have it performed by myself. I merely told him that I would do the operation if he was willing to have same performed."

The following instruction was given at the

instance of plaintiff over the objection of the defendant:

"The jury is further instructed that the words 'total disability' mean that the plaintiff was disabled from prosecuting his business as a cotton factor, that he was not able to prosecute his business as such unless he was able to do and perform all of the substantial acts necessary to be done in its prosecution, that, if the prosecution of the business of cotton factor required him to do several acts and perform several kinds of labor, and that he was able to do and perform only one, he was as effectually disabled from performing his business as much as if he could do nothing required to be done. Therefore, if you find from the testimony that the business of cotton factor required as one of its duties the sampling of cotton, and that it was necessary in order to perform that duty to use both arms and hands, and that the right arm and hand of plaintiff have been totally paralyzed from the date of the accident to the 8th day of January, 1908, and that by reason thereof he has not been able to sample cotton, then that such total paralysis of said arm and hand is a total disability under the terms of the contract in the policy, and you will find for the plaintiff for the time and amount fixed by said policy."

And the court gave the following at the request of the defendant: "No. 5. You are instructed that, to entitle the plaintiff to recover damages for total disability under the terms of the policy in evidence, it is necessary for him to show by a preponderance of the evidence that he was continuously and wholly prevented by reason of the accidental injury from performing any and every kind of duty pertaining to his occupation, and, if you believe from the evidence plaintiff was able during any of the period from April 8, 1907, to July 8, 1908, to perform any of the duties pertaining to his occupation, then you should in your verdict allow him only for partial disability for such time, if any, you believe from the evidence he was able to perform any of such duties."

"You are instructed that it is not sufficient for the plaintiff to show a substantial disability to transact his business, but he must show by a preponderance of the evidence that he was unable to perform any and every kind of duty pertaining to his occupation."

And refused to give the following at the request of the defendant: "No. 2. You are instructed that it is incumbent upon the plaintiff to observe reasonable care to avoid unnecessary disability or the unnecessary continuance of disability, and, if you believe from the evidence that the plaintiff, Chew, did not observe reasonable care in following the advice of his physician, Dr. F. D. Smythe, and if you further believe from the evidence that, because of his failure to observe such reasonable care, he was disabled to a greater

extent or for a greater length of time than he would have been by the exercise of such reasonable care, then you should find for the plaintiff only to the extent and for the length of time he would have been disabled if he had exercised such reasonable care."

Plaintiff recovered judgment, and the defendant appealed.

Plaintiff had no right to read the deposition of Dr. Smythe as evidence without the consent of the defendant; the same not having been taken under an agreement. *Sexton v. Brock*, 15 Ark. 345; *Ong Chair Co. v. Cook*, 85 Ark. 390, 108 S. W. 203.

The court erred in giving the instruction at the instance of the plaintiff. It is in violation of the terms and conditions of the policy sued on. The parties had the right to make their own contract, and the courts are powerless to make another or a new contract for them. As said in *Standard Life & Accident Insurance Co. v. Ward*, 65 Ark. 295, 45 S. W. 1063: "The insurance company had the right to fix the terms and conditions upon which it would insure appellee, and the latter had the right to accept or reject the insurance in these terms and conditions; but, having accepted the same, it was a contract between them, and, being in violation of no principle of law, nor in contravention of the policy of the law, must be enforced according to its terms and meaning; and the courts have the right neither to make contracts for parties, nor to vary their contracts to meet and fulfill some notion of abstract justice, and still less of moral obligation."

The instruction assumes that plaintiff had the right to recover the indemnity as a cotton factor, if at all, when there was evidence tending to prove that he was a "supervising farmer" at the time of the accident, and, if he was such, he was not entitled to recover as great an indemnity as he would have been entitled to had he been only a cotton factor, and also assumes that he is totally disabled by reason of his inability to "sample" cotton, when the evidence shows that there are many other duties he has to perform in pursuing his vocation of cotton factor. Then the instruction is in conflict with that given upon the same subject at the request of the defendant.

The instruction asked by the defendant and refused by the court is not entirely correct. The failure of the plaintiff to observe reasonable care in following the advice of his physician could not affect the defendant unless it increased the indemnity and defendant would have no right to complain, but this fact is not mentioned in the request. It has been held in cases of personal injury that no damages should be allowed the injured party for any impairment of health or physical condition occasioned by his neglect to observe the directions of his physician. *Keyes v. City of Cedar Falls*, 107 Iowa, 509, 78 N. W. 227, 229. Upon the same principle, no indemnity should be allowed to an assured

in actions like this on account of an extension of the injury where such extension is occasioned by his neglect to observe such directions.

Appellant lays stress upon the evidence tending to prove that appellee was a "super-vising farmer" at the time the policy was issued and at the time the accident occurred; but this evidence was submitted to the jury upon proper instructions given at the request of appellant. As a new trial will be granted, comments are unnecessary.

Reverse and remand for a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. REED.
(Supreme Court of Arkansas. Nov. 15, 1909.)

1. MASTER AND SERVANT (§ 124*)—INJURIES TO SERVANT—DUTY OF MASTER—SAFE MACHINERY—INSPECTION.

A master's duty to exercise reasonable care to furnish suitable and safe machinery, and to keep the same in repair, involves the affirmative and continuous duty of reasonable inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.*]

2. MASTER AND SERVANT (§ 265*)—INJURIES TO SERVANT—DEFECTIVE MACHINERY—RESPONSE LOQUITUR.

While a master's failure to use reasonable care to provide reasonably safe machinery and appliances cannot be presumed from the mere occurrence of an accident in which a servant is injured, the master's negligence may be shown by proof that the defect which caused the injury was discoverable by the exercise of ordinary care, so that the master was either negligent in failing to exercise reasonable care in making an inspection to discover it, or was negligent in failing to repair it after discovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 881, 898; Dec. Dig. § 265.*]

3. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—DEFECTIVE APPLIANCE—QUESTION FOR JURY.

Where there is evidence that the appliance broke or gave way in consequence of a visible defect, or defect which could have been discovered by the master by the exercise of ordinary care, the question of the master's negligence is for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001-1010; Dec. Dig. § 286.*]

4. MASTER AND SERVANT (§ 278*)—INJURIES TO SERVANT—NEGLIGENCE—INSPECTION—EVIDENCE.

In an action for injuries to a servant by the breaking of the crank lever of a railroad hand car due to a defect in the cast iron of which it was made, evidence held to sustain a finding that there was a visible defect in the lever, and that defendant company was negligent in failing to discover it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 968; Dec. Dig. § 278.*]

5. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCE—INSTRUCTIONS—"COMPETENT INSPECTORS."

An instruction that it was not a servant's duty to inspect appliances for latent defects rendering them more than ordinarily dangerous, but that the servant was only required to take notice of such defects or hazards as were obvi-

ous to the senses; that the fact that a servant had the means of knowledge of defects would not preclude a recovery, unless he did, in fact, know of them or by the exercise of ordinary care ought to have known of them, it being the master's duty to use ordinary care in making reasonably careful inspection at reasonable times by competent inspectors for defects in appliances furnished to employes which can be discovered by the proper inspection of a competent inspector—was not objectionable as requiring inspection of the cast-iron hand car lever which broke and caused the injury by an expert in cast iron, the court having further charged that competent inspectors were such as other prudently conducted and operated railroads used in inspecting hand cars on their roads.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1153; Dec. Dig. § 293.*
For other definitions, see Words and Phrases, vol. 2, p. 1360.]

6. MASTER AND SERVANT (§ 168*)—INJURIES TO SERVANT—INSPECTION.

Though the master owes to his servant the duty of a proper and reasonable inspection of appliances, reasonable care in the selection of men fit to make such inspection, and not men of the highest efficiency, skill, and ability, is the measure of the master's duty to the servant in that regard.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 337; Dec. Dig. § 168.*]

7. DAMAGES (§ 132*)—EXCESSIVENESS—PERSONAL INJURIES.

Plaintiff, a railway trackman, 26 years old, and fitted only for manual labor, earning before the injury \$1.12½ to \$1.25 a day, was thrown from a hand car by the breaking of the lever due to a defect in the material, and was run over by the car. His head above the ear was injured to such an extent that his hearing, though slightly defective, had become greatly impaired, his shoulder was bruised, and his collarbone broken; his injuries being such that he would never be able to do railroad or heavy work again. He was confined to his bed for several weeks, suffered great pain, which he also suffered thereafter whenever he attempted to do any heavy work. Held, that a verdict awarding him \$1,500 was not excessive.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 383; Dec. Dig. § 132.*]

Appeal from Circuit Court, Marion County; Brice B. Hudgins, Judge.

Action by Thomas C. Reed against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 88 Ark. 458, 115 S. W. 150.

Kinsworthy & Rhoton, Horton & South, G. D. Henderson, and Jas. H. Stevenson, for appellant. Jones & Seawell and Hamlin & Seawell, for appellee.

FRAUMENTHAL, J. The appellee, Thomas C. Reed, who was the plaintiff below, instituted this suit against the St. Louis, Iron Mountain & Southern Railway Company to recover for personal injuries caused by the breaking of the lever bar of a hand car. In November, 1907, he was in the employ of the defendant as a section hand, and, in company with a number of the section crew, was returning from work on a hand car furnished by the defendant. Upon the hand car

was an upright bar, called a "lever bar," with a handle at each end, by pumping which the car was propelled. The plaintiff and the other men of the crew were engaged in pumping the car when the lever bar broke about midway, and threw the plaintiff off backwards. He fell across the rail and on the ground between the rails. The car ran over him, and he was injured on his head, and his collarbone was broken, and he was otherwise severely hurt. He alleged that the defendant was negligent in failing to exercise ordinary care and prudence in furnishing him with a reasonably safe hand car, and in failing to use ordinary care and diligence in keeping same in a reasonably safe condition; that the lever bar was defective, and was known to the defendant to be defective, or could have been known by it to have been defective by the exercise of ordinary care; and that its defective condition was unknown to the plaintiff. The defendant denied the allegations of the complaint, and alleged that, if there was any defect in the lever bar, it was as patent to the plaintiff as to the defendant, and denied that defendant was negligent in any particular. There was a former trial of this cause in the circuit court, and a verdict was returned upon that trial in favor of the plaintiff. From the judgment rendered upon that verdict the defendant prosecuted an appeal to this court. Upon the hearing of said appeal this court reversed the said judgment and remanded the cause for a new trial. The opinion of this court upon that appeal is reported in 88 Ark. 458, 115 S. W. 150. In that opinion there is set out a synopsis of the material evidence given upon the first trial and also the instructions which upon that trial were given to the jury.

Upon the second trial of this cause in the circuit court, all the witnesses who had appeared in the first trial testified, and their evidence is substantially the same as that given on the former trial. In addition to those witnesses, other witnesses gave evidence on this second trial. It appears from the evidence that the lever bar was made of cast iron, and that it broke on account of a structural defect consisting of a blowhole on the interior of the casting. This cavity was not visible from the surface of the bar, but immediately below the broken place there was on the exterior of the bar a place that appeared corroded or rusty. After the bar was broken, a rusty streak was seen running from the cavity to the surface of the bar for about an inch, and showed that the bar was cracked to the surface.

The additional evidence on the part of plaintiff upon the second trial tended to prove that at the place where the bar was broken the rusty streak "extended clear out to the surface," and that, when upon the morning after the injury the two pieces of the bar were put together, the rusty streak showed on the exterior of the bar for about

one-half of an inch, and that a crack could be seen on the surface of the bar, and that this crack "was rusty and looked old." And by witnesses expert in their knowledge of this character of iron casting, and to whom was shown one piece of the broken bar, it was proved that, if the rusty streak that appeared in the piece of the bar running from the cavity to the surface would have shown on the surface when the two pieces of the bar were placed together, then the crack could have been discovered by close inspection by the natural eye. There was also evidence tending to show that there was a depression on the surface of the bar near the blowhole; and one of the witnesses testified that this would denote a defect on the inside of the iron.

At the request of the plaintiff, the court gave a number of instructions, all of which are reported in the former opinion, amongst which was the following instruction:

"(2) You are instructed that it was not the duty of an employé to inspect the appliances of the business in which he is engaged to see whether or not there are any latent defects that render their use more than ordinarily dangerous, but is only required to take notice of such defects or hazards as are patent or obvious to the senses. The fact that he might have known of defects or that he had the means and opportunity of knowing them will not prevent him from a recovery unless he did in fact know of them, or, in the exercise of ordinary care, ought to have known of them. It is the duty of the employer to exercise ordinary care and prudence in making reasonably careful examinations, searches, or inspections at reasonable times by a competent inspector for hidden defects in appliances furnished to employées which can be discovered by a proper inspection by a competent inspector."

At the request of the defendant, the court gave a number of instructions, all of which are reported in the said former opinion, and, in addition thereto, gave the following instructions at the request of the defendant:

"(12) I instruct you that by the words 'reasonably careful examination,' as used in these instructions, is meant such examinations as are made by other prudently conducted and operated railroads.

"(13) I instruct you further that by the words 'competent inspectors,' as used in these instructions, is meant such inspections as other prudently conducted and operated railroads use to inspect hand cars on their roads.

"(14) I instruct you that if you find from the evidence in this case that the method of inspection used by defendant railway company as to the time of the inspection of its hand cars, and as to the kind or class of inspectors used in its inspections of hand cars, is such as to times of inspection and class of inspectors as other prudently conducted and operated railroads use for that

character of inspections, then the defendant railroad company would have fully performed its duty owed to the plaintiff in that respect, and defendant would not be liable for a failure to properly inspect the hand car upon which the plaintiff was injured.

"(15) All the instructions are to be considered by you as the law of this case."

Upon this second trial a verdict was returned in favor of the plaintiff for \$1,500; and, from the judgment rendered thereon, the defendant prosecutes this appeal.

The plaintiff was in the service of the defendant as a section hand, and, while engaged in the performance of his duties upon a hand car, he was injured by the breaking of the lever bar. There was a structural defect in this bar. As is said by Chief Justice Hill in the former opinion in this cause, the right of a recovery by the plaintiff "turns upon whether a proper inspection would have disclosed the defect." It is the duty of the master to exercise reasonable care in furnishing suitable and safe machinery and appliances to the servant for doing the work in which he is employed. It is the further duty of the master to exercise the same care in keeping the machinery and appliances in repair; and this necessarily requires of the master the duty of making reasonable inspection, and examination of these appliances and machinery. "The duty of inspection is affirmative, and must be continuously fulfilled and positively performed." *Houston v. Brush*, 66 Vt. 331, 29 Atl. 380. In the case of *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, it is said: "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work or by which he is to be surrounded shall be reasonably safe." And, while the master is not required to guarantee the safety of the machinery and appliances, still he is required to take all reasonable precautions to secure that safety. *Union Pac. Ry. Co. v. Snyder*, 152 U. S. 684, 14 Sup. Ct. 750, 38 L. Ed. 597. And this precaution can only be taken by proper inspection. Where the servant is injured by the defective condition of the machinery or appliances with which he is required to work and without contributory negligence on his part, the employer should be held responsible, except it could not have been known or guarded against by reasonably proper care and vigilance on his part. It is presumed that this care and vigilance has been exercised by the company in this case; and failure to do so cannot be inferred from the occurrence of the accident. But the negligence of the company in its failure to perform its duty in this respect can be shown by the facts and circumstances in the case. It can be shown by proving that the defect that caused the injury was discoverable by the exercise of ordinary care; for, if the defect was discoverable, then the

company was either negligent in failing to exercise reasonable care in making the inspection to discover it, or negligent in failing to make the repair after such discovery.

As is said in 4 Thompson on Negligence, § 3803c: "If there is any substantial evidence tending to show that the appliance which broke gave way in consequence of a visible defect, or of a defect which should have been discovered by the master in the exercise of ordinary care, then the question of his negligence will go to the jury." 1 Labatt on Master and Servant, §§ 155-157. In the case of *St. Louis & San Francisco Rd. Co. v. Wells*, 82 Ark. 372, 101 S. W. 738, a locomotive engineer was injured by the breaking of the drawbar which coupled the engine and tender together, and there was evidence that the drawbar had a crack in it an inch and a quarter deep and had the appearance of being old. It was held that this was sufficient evidence to support a finding that there was an observable defect in the drawbar, and that the defendant was negligent in failing to discover it. In the case of *Momence Stone Co. v. Groves*, 197 Ill. 88, 64 N. E. 335, an employé was injured by the breaking of a hook used in pulling cars. An employé who picked up the hook after the accident testified that there was a visible flaw in it, and that he could see that the break was old and rusty. In that case, it was held that this was sufficient evidence tending to prove that the hook was defective, and that the defect was discoverable, and should have been known by the defendant. See, also, *Ultima Thule A. & M. Ry. Co. v. Calhoun*, 83 Ark. 318, 103 S. W. 726; *Cleveland, Cinn. & St. Louis Ry. v. Ward*, 147 Ind. 256, 45 N. E. 325, 46 N. E. 462; *Railway v. O'Fiel*, 78 Tex. 436, 15 S. W. 33; 1 Labatt on Master & Servant, § 159.

In the case at bar, two witnesses testified that, on the morning following the occurrence, they saw the two pieces of this broken lever bar, and that there was a rusty streak that showed on the surface of the bar at the place of the breaking, and that this rusty streak was one-half inch long, and that a crack was visible upon the surface of the bar, and that the crack looked rusty and old, and that it had the appearance of having been done some time before, and that, when the two parts of the bar were placed together, the rusty streak and the crack were visible upon the surface of the bar, and showed that the streak and crack were visible on the surface before the bar broke. At the trial of the case only one part of the bar was produced. A witness, who from his experience showed expert knowledge of the subject, testified that, if the crack upon the portion then shown to him should have been visible upon the surface when the two parts were put together, then it could be observed by careful inspection, and that the defective condition of the bar would have been dis-

coverable. The character and size of the crack thus shown this witness was of the size and appearance of the crack upon the surface of the bar as testified to by the witnesses who examined the two parts of the bar upon the morning after the accident. The jury were the judges of the credibility of these witnesses. We are of the opinion that this was sufficient evidence to sustain the verdict of the jury finding that there was a visible defect in the bar, and that the defendant was negligent in failing to exercise due care in discovering it.

It is urged by the counsel for defendant that the court erred in giving the above instruction No. 2 on the part of plaintiff, because in the latter clause of that instruction it "in effect tells the jury that the duty of inspection and ordinary care and prudence therein can be discharged only by an inspection by a competent inspector," and that this, in effect, was to say that "to be a competent inspector, * * * a man must have been an expert in cast iron." We do not think that this instruction is reasonably subject to this criticism, because the fair import of the entire instruction, taken together, is only to require the exercise of reasonable care in making a proper inspection. And to emphasize the requirement of only such an inspection as would be made by an ordinarily careful and prudent person the court in instruction No. 13, given on behalf of the defendant, told the jury: "I instruct you, further, that by the words 'competent inspector,' as used in these instructions, is meant such inspectors as other prudently conducted and operated railroads use to inspect hand cars on their roads." Reasonable care in the selection of men that are fit to perform the duties of their respective positions, and not men of the highest efficiency of skill and ability, is the measure of the master's duty to his servant in this regard. But the master owes to his servant the duty of a proper and reasonable inspection of the appliances, and, if he sees fit to have others perform that duty, that does not change the measure of his obligation to the servant, or the right of the servant to insist that reasonable precaution shall be taken to secure safety in the appliances which are furnished to him to do the work. *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273, 30 N. E. 750; *Union Pacific Ry. v. Snyder*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597. Taking the instruction as a whole, and especially in connection with the instruction No. 13 on the part of defendant, we do not think that it required any more efficient or further duty in this respect of the defendant. Furthermore, this court upon the former appeal held that this instruction was correct, and therefore it is the law of this case. *St. L. I. M. & S.-R. Co. v. York*, 123 S. W. 376.

The defendant complains that the verdict

is excessive. We do not think so. The plaintiff was forcibly thrown from the hand car to the ground and run over by the car. He was injured on the head above the ear to such an extent that his hearing, though slightly defective, has become very greatly impaired, his shoulder was badly bruised, and his collarbone was broken, and he is injured to such an extent that he will never be able to do railroad work or heavy labor for which he was best adapted. He was confined to his bed for several weeks, and suffered great pain, and, whenever he does any heavy work, he suffers pain on account of this injury. Before the injury he was able to earn from \$1.12½ to \$1.25 per day. He was unable to do any labor for a number of months after the injury. He is 26 years old; and more than a year after the injury he testified that he was unable to do any hard labor, and, without education, he is dependent upon his manual labor. These damages were the necessary result of this injury, and we do not think that the amount of \$1,500, recovered, is excessive, or that it can be considered excessive by reason of the plaintiff's refusal to accept medical treatment furnished by defendant.

We find no prejudicial error in the trial of this case, and the judgment is therefore affirmed.

STONEMAN-ZEARING LUMBER CO. v. McCOMB.

(Supreme Court of Arkansas. Nov. 15, 1909.)

1. TRESPASS (§ 40*)—ACTION FOR CUTTING AND REMOVING TIMBER—SUFFICIENCY OF COMPLAINT.

In an action for cutting and removing timber from several tracts of land, it is not essential to a statement of the cause of action to set forth a description and value of the timber cut on each tract.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 80-87; Dec. Dig. § 40.*]

2. PLEADING (§ 367*)—MOTION TO MAKE COMPLAINT MORE DEFINITE AND CERTAIN.

If, in an action for cutting and removing timber from several tracts of land, defendant deems it necessary, to prepare a defense, that the complaint should set forth the description and value of the timber cut on each tract, the particular reasons should be set forth in a motion to make the complaint more definite and certain.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1189; Dec. Dig. § 367.*]

3. PLEADING (§ 418*)—ERROR IN OVERRULING DEMURRER WAIVED BY PLEADING OVER.

Error in overruling a demurrer to a complaint is waived by defendant pleading over.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1403-1406; Dec. Dig. § 418.*]

4. TRESPASS (§ 44*)—ACTION FOR CUTTING AND REMOVING TIMBER—EXTENT OF BURDEN OF PROOF.

In an action for cutting and removing timber on plaintiff's land, the burden of proof is on him to show by a preponderance of evidence

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

what defendant cut the timber and the quantity and value of the timber cut.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 112-115; Dec. Dig. § 44.*]

5. TRESPASS (§ 46*)—CUTTING AND REMOVING TIMBER—SUFFICIENCY OF PROOF.

In an action for cutting and removing timber, proof that some of it was cut by defendant was insufficient to charge it with responsibility for all the timber missing from plaintiff's land during an indefinite period of two or three years.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 128-127; Dec. Dig. § 46.*]

6. TRESPASS (§ 30*)—CUTTING TIMBER—PERSONS LIABLE.

The buyer of timber, who goes over the line on adjoining land and cuts timber thereon, is alone responsible therefor, and the seller is not liable, where it does not appear that he was responsible for the buyer mistaking the boundary, or authorized the cutting.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 69; Dec. Dig. § 30.*]

Appeal from Circuit Court, White County; H. N. Hutton, Judge.

Action by A. C. McComb against the Stoneman-Zearing Lumber Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. H. Harrod and J. G. & C. B. Thweatt, for appellant. S. Brundidge, Jr., and Cy-pert & Cypert, for appellee.

MCCULLOCH, C. J. This is an action instituted by appellee in the circuit court of White county against appellant to recover from the latter damages for cutting and removing timber from three tracts of land, aggregating 160 acres. The complaint alleged that the trespass was willfully committed, and prayed for three-fold damages. The jury found in favor of appellee, but awarded only single damages.

Appellant demurred to the complaint, because the kind, quantity, and value of the timber cut on each separate tract was not stated therein. The demurrer was not well taken, and the court properly overruled it. It was not essential to a statement of the cause of action to set forth the description and value of the timber cut on each tract of land. If appellant deemed it necessary, in order to prepare its defense, that these matters should be set out in the complaint, the particular reasons should have been set forth in a motion to make the complaint more definite and certain. Moreover, appellant waived the error of the court in overruling the demurrer, if it had been error, by pleading over. There is no question raised as to appellee's title to the land on which the timber is alleged to have been cut. The points at issue are whether the appellant or its agents cut the timber, and, if so, the quantity and value thereof.

It is insisted that the evidence is not sufficient to sustain the verdict. We are unable to discover in the record any evidence legally sufficient to sustain the verdict. Appellant

owned adjoining lands, and its men were cutting timber there. There is enough evidence to justify a conclusion that appellant's men got over the line and cut some of appellee's timber. But there is no way even to approximate the amount so cut. There is no direct evidence that any of it was cut at all by appellant's men, and it is only inferentially that this much may be gleaned from the testimony. Appellee relied, in order to make out his case, on the testimony of a surveyor, who went on the land after the timber had been cut and made an estimate of the amount of timber which he said appeared to have been cut within two or three years prior to that date. There is no evidence in the record to show how long appellant had been cutting timber in that locality, or whether any one else had been cutting there. It was purely a matter of conjecture, without evidence on which to base it, that appellant had cut all of the timber on the lands which had been cut within two or three years. The burden of proof was on appellee, before he could recover, to show by a preponderance of the testimony that the appellant had cut the timber. Before he can recover anything, he must prove the quantity and value of the timber cut by appellant, if any. Bare proof that some of the timber was cut by appellant's men is not sufficient to charge it with responsibility for all the timber missing from the land during an indefinite period of two or three years.

Appellant sold some of the timber on this land, the persimmon and ash, to other concerns, and the latter cut that timber. In doing so, it appears from the evidence that the men employed to cut the timber got over the line onto appellee's land and cut timber of that kind. It does not appear that appellant was responsible for its vendee mistaking the boundary lines. There is some evidence to the effect that appellant's foreman, or timber boss, directed the men where to cut the timber. But, according to the uncontradicted testimony, this man had no authority, either express or implied, to direct the appellant's vendee or the latter's employes where to cut. The responsibility was on these vendees for getting beyond the line and cutting appellee's timber. There is no evidence at all upon which any amount of appellant's liability can be fixed.

Therefore the judgment must be reversed, and the cause remanded for new trial; and it is so ordered.

RUSSELL v. BROOKS et al.

(Supreme Court of Arkansas. Nov. 15, 1909.)

1. REPLEVIN (§ 88*)—FRAUD—EVIDENCE—QUESTION FOR JURY.

Whether an animal sued for in replevin was procured from plaintiff through fraudulent representations and for the felonious pur-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

pose of depriving plaintiff of his property held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 846; Dec. Dig. § 88.*]

2. REPLEVIN (§ 71*)—FRAUD—EVIDENCE—ADMISSIBILITY.

In replevin for a mule procured from plaintiff by two men through fraudulent representations, and by them transferred to defendants, evidence that on the day the two men left plaintiff's home a witness met two men of the description of the two who had secured the mule from plaintiff, that the mule they were leading answered the description of the mule obtained from plaintiff, and that the men were driving at an unusual speed and were cutting the telephone wires as they went, was admissible to show that the two men were conscious of having fraudulently deprived plaintiff of his property.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. § 290; Dec. Dig. § 71.*]

3. FRAUD (§ 58*)—CIRCUMSTANTIAL EVIDENCE.

Fraud need not be shown by direct evidence, but may be proved by circumstances, though fraud is not presumed, and must be proved by clear and satisfactory evidence.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 55-59; Dec. Dig. § 58.*]

4. REPLEVIN (§ 69*)—PLEADING—ISSUES—TENDER.

Where defendant in replevin set up ownership in his own right in the property in dispute and denied plaintiff's ownership, the issue of tender was not raised.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 257, 264; Dec. Dig. § 69.*]

5. PROPERTY (§ 7*)—OWNERSHIP—INCIDENTS.

Where property has been obtained from the owner by a felonious act, his unqualified ownership is not changed, and he may peaceably take it in whose hands he may find it.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 9; Dec. Dig. § 7.*]

6. REPLEVIN (§ 71*)—FRAUD—EVIDENCE—ADMISSIBILITY.

Where the issue in replevin was whether plaintiff's animal had been procured from him through the fraud of third persons, who had transferred the same to defendants, the contents of a grip in the possession of the third persons were inadmissible, in the absence of a showing that the articles therein tended to show that the third persons had perpetrated a fraud.

[Ed. Note.—For other cases, see Replevin, Cent. Dig. §§ 238, 290; Dec. Dig. § 71.*]

Battle and Hart, JJ., dissenting.

Appeal from Circuit Court, Pope County; Hugh Basham, Judge.

Action by W. H. Russell against John M. Hatley, in which T. D. Brooks and others, on their motion, were made parties in place of defendant Hatley. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

This is a suit by appellant to recover of appellees a certain mule. The complaint was in the usual form in replevin, and was against John M. Hatley. The appellees filed the following motion and answer: "Comes T. D. Brooks, A. S. Hays, and J. M. Martin, and respectfully state that they are interested in the property sued for in this action, in this, that they were the sole owners of said prop-

erty and have possession thereof, and they allege that the defendant has no interest in said property, and they ask to be made parties defendant and substituted in the place of the defendant Hatley, and, being so substituted, they deny that plaintiff owns said mule or is entitled to the possession thereof, and deny that he has been damaged in any sum whatever. Wherefore they pray to be substituted as defendants, that this be taken as their answer, that plaintiff take nothing by his suit, and for other relief."

The testimony of appellant is, substantially, as follows: "I live in Van Buren county. I am the owner of the mule in controversy. On the 24th day of August, 1908, two men drove up to my house in a two-horse buggy about 1 o'clock and called for dinner. The older one of the two introduced himself as Dr. Warner of St. Louis. The younger man introduced himself as Mr. Bush, and spelled his name so I would not misunderstand it, B-u-s-h. While we were putting the team away, the young man proposed to buy a 'nag' I had, and which was running in the yard. I told him I would sell her. They both came in and ate dinner. A few minutes before we went in the house, he (the young man) made mention about my looking so badly. I told him I had been in bad health. While they were eating dinner, the old doctor made mention that I was looking bad. I told him I had been under the weather, and had not worked any this summer at all. He asked what the complaint was. I said, 'Rheumatism.' My wife asked me to have an examination. The doctor said, 'I will give you an examination, if you want me to, and not charge you anything for it.' I told him I had no objection. So he gave me an examination. He pronounced me to be a pretty difficult case, and we talked on some bit, and he asked me about the case. I asked him if he thought he could cure me, and he said he could. He said he could cure me for \$300 if I would go to St. Louis. I told him I did not have that much money. He said, 'That is too bad.' He said that he had four cases in this state to treat, one at Marshall, one at some other place, one on Bear creek, and one at Appleton, and they had paid him big to come over there and be their doctor, and he said he would give me the advantage of this, and that he would cure me here at my own home for \$100. I told him I did not have the money, and he said you have some stock here that you can sell, haven't you? I said, 'Yes, but I have not got any money at this time of the year.' My wife insisted that I take treatment anyway, and he said, 'What is a mule compared with good health?' I said, 'Of course, it is nothing much.' So I consented to take his treatment. The young man (Bush) said he wanted the mule, but did not have the money in his pocket. He said I would have to wait on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

him, or take a check, or something, until he could get to the railroad and get money. So I told the doctor that I would take his treatment if he could make it satisfactory with the young man to buy the nag. He had proposed to buy her (a mare) when he first came up. The doctor said, 'If you can make the deal with the young man, you can get the treatment.' So I went and talked to this young man again, and he looked at the nag and said she was older than he wanted, and asked if I did not have a young mule I could sell. I said I had one, but it was not there, and he said, 'How long will it take to see her?' I told him it would not take a great while. He and I went and looked at her, and he remarked, 'Bring her in, I guess we can trade.' I brought her in, and there was not much more said between us until the next morning. They stayed all night. After breakfast the next morning, the old doctor asked me if we had traded. I told him we had not closed any trade. He said, 'Make up your mind what you are going to do.' The young man and I went out to the lot, and he came in \$3 of the price I had offered to take for the mule. I offered to take \$125, and he offered me \$122, and he said, 'I have not got the cash to pay you the money now, but I can pay you part of it, \$22, and the \$100 you would have to pay the old doctor would make it.' And he said 'I can pay him when I get to the railroad.' He said, 'I will wire and get a check and pay him.' He gave me the \$22 in money, and he and the doctor took the mule. The doctor gave me, in the presence of the young man, Bush, a written guaranty, as follows: 'Scotland, Ark., Aug. 24, 1908. Received of W. H. Russell the sum of one hundred dollars for medical treatment. The same amount to be refunded if patient under treatment is not permanently cured in sixty days from date of this contract. Dr. B. R. Warner, St. Louis, Mo.' They came to my house on Sunday, August 24th. During the same week I heard that they had been arrested. I took steps to get my mule back when I heard of this telephone cutting and their arrest. I heard of this on Wednesday of the same week. I went to Scotland and telephoned to the officers to hold the mule and party until I could get there. I came on to Russellville and found my mule in the possession of John Hatley, sheriff of Pope county. The doctor consented to the trade and said he would take the young man for the \$100. The young man, Bush, told me that he first met up with the doctor at Marshall, who employed him to drive him to see these four patients and to bring him to Russellville. The young man, Bush, furthermore stated that he had taken him to see three of the patients, and had one more to go to see at Appleton, and from there they were coming on to Russellville. It was at Mr. Hatley's request that I brought this replevin suit, as he said he preferred

me taking the mule according to law. I sold the mule to the young man. He gave me \$22 and was to pay the doctor \$100. The doctor agreed to this, and said he would take the young man for the \$100. I do not know whether the doctor got the \$100 or not. Don't think he could get it, as he never got to the railroad. I do not know whether or not the young man paid him. The doctor released me and took Bush for the debt. As the doctor released me, it did not make any difference to me whether the young man paid him or not, if he had cured me. I gave him the mule for \$22 if he would pay the doctor \$100, and I took the receipt read in evidence to show that I had paid the doctor. When I came to Russellville to begin suit, Brooks, Hays, and Martin told me that they had bought the mule from the young man, Bush. They made me a proposition, and said if I would pay back the \$22 and give them \$25 they would get the mule back if the young man would accept it. I don't remember of them ever offering to give up the mule if I would pay back the \$22. I don't think any such offer was ever made. I have never paid back, or offered to pay back, the \$22."

H. W. Russell testified, in part, as follows: "I was at the house of my son about the 24th of August, on Sunday, when the young man and the doctor were there. The old doctor talked about medicine with me almost all of the time, and said that doctoring had advanced to that stage that he did not have to doctor by symptoms any more, that he could tell what was the matter. He talked with the young man and advised with him about medicine, but said the young man did not actually help him with the doctoring. When they went to go to feed, the old doctor asked my son if they had traded, meaning the young man, Bush, and my son. The young man answered and said that they had, provided that he (the old doctor) would wait until he got to Russellville, and the old doctor remarked that would be all right. The young man, Bush, told me that he was running a livery stable in Marshall, and that he was hauling him (the doctor) for \$6.50 per day, and that he had a patient at Appleton that he was going to operate on for abscess on the liver, and that the old doctor had the money in the bank to insure a sure cure guaranteed. The young man told me what the doctor had done and was going to do with the other cases. Said he had one on 'Big Flat' and another on 'Bear creek,' and I believe he did tell me that he took three ribs out of one of them. I asked the young man, 'What if he does go in to cure my son and don't do it?' And he says that, 'He gives a written guaranty to cure you.' He says, 'He does that all of the time.' I asked him what it was, and he said, 'He is rich,' and I asked him what that amounted to if a man is here and he in St. Louis? The young man said that the doctor is a millionaire.

The trade between the young man and my son was not made in my presence. The night these people stayed all night at my son's, they had a buggy which I cannot describe, and their team consisted of a sorrel and a bay horse."

Appellant offered the testimony of one P. H. Brandt, as follows: "I live at Appleton, Pope county. On Monday, August 25th of this year, I saw two men in a two-horse buggy driving a bay horse, and I did not see the other horse good, and one of the horses was leading a mule. They were traveling so fast that I took both of them to be boys. They were traveling northwest as the road runs there. The mule was tied and was leading abreast the off horse. Before we met, I suppose I was 75 yards in front of them. I was walking going home, and I heard a wire 'cling' as it broke, and I noticed the wire dangling a short distance ahead of me, and in a short distance I met this team and buggy coming meeting me. They came on and met me, and when they passed me I noticed where the wire was cut. It was fresh cut. They were traveling so fast I can hardly describe them. One was a young fellow, and he was driving. The other was an older man, well dressed, and had black mustache, looked to be 45 or 50 years old. The mule looked to be a sorrel or bay, or a kind of a mouse color. This was between the 20th and 25th day of August, on Monday. They were driving very fast, at an unusual rate. I heard the wire 'cling' and dingle and drop just before I saw them coming, but saw them immediately afterwards. I saw the young man they put in jail, but could not say that I recognized him to be the same young man. They were driving at an unusual rate of speed for a two-horse buggy." The court excluded the above testimony of Brandt, and to the ruling of the court in excluding it the appellant excepted.

Witness Hatley testified as follows: "I live in Russellville, Ark. During the month of August, 1908, my deputy arrested two parties near Dover. They were in possession of the mule here in controversy. They were arrested on one day, and I took possession of the buggy, horses, and mule the next day. I got to Dover the next morning after they were arrested. They were arrested in the night about 11 o'clock. The mule was two years old, worth about \$100 or \$125. I had been informed that Brooks, Hays & Martin claimed the mule. I was holding the mule as sheriff of the county, and had put the boy in jail, and, not being satisfied with his conduct, I detained him for further investigation, and about that time a replevin suit was brought for the mule. This is a friendly suit, as far as I am concerned. I brought the buggy, team, mule, and the young man all from Dover myself. I took charge of the mule believing it to be stolen property. In

fact, I thought the two horses, buggy, and mule was all stolen property. There was no agreement between me and the boy whom I had in custody as to how long I would keep the property. Something was said by the boy about the price he was to pay; but I do not remember just what was said. I wanted to catch the other man (the old doctor). I never did part with possession of the mule before suit was brought. After suit was brought, I turned the mule over to Brooks, Hays & Martin, but it is understood between us that I am still in possession of the mule, but in order to save expense to them I let them take it and put it in their pasture. They are to hold me harmless for any damage that might arise out of a wrongful delivery of the mule to them." During the examination of the above witness, he was asked: "What kind of baggage or property did you find in the buggy?" He answered: "I found a grip." He was asked: "What did it contain?" Counsel for appellees suggested that the question was immaterial. The court thereupon instructed the witness not to answer, and to this ruling of the court appellant excepted.

During the examination of the witness H. W. Russell he was asked: "Now you came to Russellville and saw this young man in jail. Tell the jury what statements he made to you." Appellees objected. The court sustained the objection, and appellant excepted to the court's ruling.

At the conclusion of the evidence, the appellees moved the court to instruct the jury to return a verdict for them, which motion the court granted. To this ruling appellant duly excepted. The jury returned a verdict for appellees. Judgment was rendered for them. Appellant moved for new trial, alleging as grounds the rulings of the court to which he had excepted. The motion was overruled, and this appeal was taken.

U. L. Meade, for appellant. H. M. Jacobway and Sellers & Sellers, for appellees.

WOOD, J. (after stating the facts as above). Under our statute, one who obtains personal property from another by any false pretense intending to defraud, upon conviction thereof, shall be deemed guilty of larceny. Section 1689, Kirby's Dig. See, also, 1 Whar. Cr. Law, 916; 1 Bish. Cr. Law. We are of the opinion that, when all the facts and circumstances disclosed by the evidence in this record are considered, it was a question of fact for a jury to say, under proper instructions, as to whether the two men mentioned had not entered into a conspiracy to defraud appellant by falsely pretending that the younger was a livery man and driver for the elder, and that the elder was a doctor who could and would, for the consideration named, cure the appellant of the malady with which he was afflicted. It was a question for the jury as to whether these

two men were making such fraudulent representations of existing or past facts, knowing same to be false, as were calculated to induce appellant to deliver to them his mule. The facts are set out in detail, and they speak for themselves. The younger man represented that the elder was a doctor whom he had first met at Marshall, and that he was employed by the doctor to furnish him conveyance to the four patients he had in this state. He represented the doctor as a millionaire who had the money in bank to insure a cure, that he had taken the doctor to see three of his patients, that he had taken three ribs out of one, was going to operate on another for abscess of the liver, and that all the time he gave a written guaranty. The elder man "talked about medicine all the time," and said "That doctoring had advanced to that stage that he did not have to doctor by symptoms any more, that he could tell what was the matter." The appellant was so badly afflicted with rheumatism that he had not been able to work at all during the summer. The two men mentioned went to appellant's home, and through the above and other representations, as detailed in the statement, induced appellant to deliver to them his property upon the assurance that unless he was completely cured within 60 days the amount he had paid, the balance of the price of the mule surrendered, should be returned to him. After they had thus obtained his property, they left his home Monday morning, August 25th, and were soon thereafter arrested. The sheriff believed that not only the mule they had procured from appellant was stolen property, but also the two horses and the buggy in their possession. The young man was lodged in jail. The elder escaped. The sheriff "wanted to catch him," thus showing he had gone.

The testimony of Brandt should have gone to the jury for its consideration. It tended to show that, on the day the two men left appellant's home, Brandt met two men of the description of the two who had secured the mule from appellant. The mule they were leading answered the description of the mule taken. This testimony tended to show that these men were driving at an unusual speed, and were cutting the telephone wire as they went. If the men seen by Brandt were the men who had obtained appellant's mule, as this testimony tended to prove, the fact that they were cutting the telephone wire, and were driving at an unusual speed, after doing so, were circumstances to be considered by the jury. Such circumstances, in connection with the other facts in proof, tended to show that the men were conscious of having committed the crime and were endeavoring to make their escape. The testimony, because of a lack of more complete identity, was not of a very strong criminatory nature; but it was a circumstance nevertheless tending to identify

them and to show that they were conscious of having fraudulently deprived appellant of his mule, and were trying to cut off telephone connection, so as to enable them the more successfully to make their escape.

Without commenting more at length upon the testimony, it suffices to say that it was for the jury to say, from the nature of the representations themselves and the other circumstances in proof, as to whether such representations were made in good faith and for an honest purpose, or whether they were made to defraud appellant of his mule. While fraud will not be presumed, and while the burden is on him who alleges it to prove same by clear and satisfactory evidence, still it need not be shown by direct or positive evidence, but may be proved by circumstances. *Phelan v. Dalson*, 14 Ark. 79. We do not consider the circumstances in this case so slight, and of such equivocal and unsatisfactory character, as to warrant the court in taking the question of fraudulent pretenses from the jury. *Bank of Little Rock v. Frank*, 63 Ark. 16, 37 S. W. 400, 58 Am. St. Rep. 65. It was for the jury to say whether an itinerant millionaire doctor of the "all cure, or no pay" variety really existed in this case, and whether the representations which he and his boosting companion made, of present and past facts, were known by them at the time they made them to be false, and whether they made them for the felonious purpose of depriving appellant of his property.

The question of tender was not raised in the pleadings, and does not arise in a case like this. Here the party who obtained possession of the mule from appellant had transferred same to third parties. These parties are being sued for the possession, and they set up ownership in their own right as innocent purchasers. They do not concede, but deny, that appellant is the owner. The only evidence in the record concerning this is by appellant, who says: "They made me a proposition, and said if I would pay back the \$22, and give them \$25, they would get the mule back if the young man would accept it." Under such circumstances, tender to appellees was not a condition precedent to the right to maintain the suit.

If "property has been obtained from the owner by a felonious act, his unqualified ownership is not in the least changed, and he may peaceably take it in whose hands soever he may find it." *Phelan v. Dalson*, supra. The appellant did not offer to prove that the grip, found in possession of the two men when arrested, contained articles that would tend to show that the men had perpetrated a fraud on appellant in getting from him the mule. In the absence of such offer by appellant, the ruling of the court in refusing to allow witness Hatley to testify as to the contents of the grip was not error.

The ruling of the court in excluding the

declarations of the young man in jail was, for the same reason, correct.

For the error of the court in directing a verdict for the appellees, the judgment is reversed, and the cause is remanded for new trial.

BATTLE and **HART, JJ.**, dissenting, on the ground that the court did not err in its ruling on the facts.

COOK v. COLLINS et al.

(Supreme Court of Arkansas. Nov. 15, 1909.)
CHattel MORTGAGES (§ 265*)—FORECLOSURE—APPLICATION OF PROCEEDS.

Where personality was conveyed under a trust deed to secure payment of two notes, payable to different persons, one dated April 8, 1905, and the other May 8, 1905, and the deed provided that, if the notes were not paid before May 8, 1905, the trustee should sell the property and appropriate the proceeds first, to the cost of executing the trust, and then to the notes, and any balance to go to the debtor, the proceeds of the sale, which were insufficient to pay both notes, should be applied first to the costs of the trust, and the remainder appropriated pro rata in part payment of both notes.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Dec. Dig. § 265.*]

Appeal from Cross Chancery Court; Edward D. Robertson, Chancellor.

Action by J. W. Cook against M. Collins and others. From a decree in part for plaintiff, he appeals. Reversed and remanded, for decree as directed.

J. C. Brookfield, for appellant. Smith & Smith, for appellees.

BATTLE, J. On the 8th day of April, 1905, J. C. Crabtree executed a deed of trust, and thereby conveyed certain personal property in trust to W. W. Shaver to secure the payment of two promissory notes one for the sum of \$840, dated the 8th day of April, 1905, payable to M. Collins, J. B. Hamilton, and J. W. Cook, and the other for \$122, payable to the order of J. W. Cook, and due May 8, 1905, and provided, if the notes were not paid on or before the 8th day of May, 1905, the trustee should be authorized to sell the property at public sale to the highest bidder for cash, and appropriate the proceeds of the sale, first, to the cost of executing the trust, and, second, the aforesaid notes, and the balance, if any, pay to Crabtree. Shaver failing to act, J. C. Harrell became trustee by the terms of the deed, and sold the property according to the terms of the deed for \$787.50, which is insufficient to pay both notes. Parties differ as to how it shall be divided, and appeal to the court to decide. The chancery court decreed that it shall be appropriated to the payment of the note for \$840, and any remaining thereafter to the other note; and Cook appealed.

The proceeds of the sale should be applied first to the payment of the cost of executing the trust, and the remainder should be appropriated pro rata in part payment of the two notes. *Penzel v. Brookmire*, 51 Ark. 105, 10 S. W. 15, 14 Am. St. Rep. 23.

The decree of the chancery court is reversed, and the cause is remanded, with directions to the court to render a decree in accordance with this opinion.

HARDY et al. v. SAMUELS et al.

(Supreme Court of Arkansas. Nov. 15, 1909.)

1. PUBLIC LANDS (§ 139*)—HOMESTEADS—AGREEMENTS.

An agreement by one to enter under the laws of the United States lands for a homestead for the benefit of another is a violation of the statute, and is void.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. §§ 369-376; Dec. Dig. § 139.*]

2. ADVERSE POSSESSION (§ 13*)—ACQUISITION OF TITLE.

One holding open adverse possession of land without color of title, but by actual possession within an inclosure, for more than 30 years, acquires thereby title to the land, and is entitled to a decree quieting the title as against one claiming under an agreement whereby another agreed to enter under the laws of the United States the land for a homestead for his benefit.

[Ed. Note.—For other cases, see *Adverse Possession*, Dec. Dig. § 13.*]

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by Mary Hardy and another against Richard Samuels and another. From a judgment dismissing the complaint for want of equity, plaintiffs appeal. Reversed in part, and affirmed in part.

O. T. Lindsey, for appellants. Vaughan & Vaughan, for appellees.

BATTLE, J. Mary Hardy and Ellen Hardy brought suit in the Pulaski chancery court against Richard Samuels and S. N. Tanner to recover a certain tract of land. They allege in their complaint that they are the owners of the land, but that the legal title is vested in Richard Samuels. They ask that the title be divested out of Samuels and vested in them.

Upon a final hearing the court dismissed their complaint for want of equity, and plaintiffs appealed.

The cause was heard by the chancery court upon an agreed statement of facts, of which the following is a part:

"(2) That the father of the plaintiff, Mary Hardy, and the defendant, Richard Samuels, immigrated from Georgia to Arkansas in 1883, donated this same land and set apart this 5-acre homestead for himself and family, and he lived there until it was agreed between him and his family, on account of his old age, to give up the land and let his youngest son, the defendant, donate the

same land as a homestead for the benefit of the whole family in 1889, which was done, and the defendant obtained his patent for said land in 1896, which the defendant has now, by which he claims title to said whole tract of land, including said 5-acre homestead. That the defendant has sold the east 40 acres, and told the plaintiff that he owned the west 40."

"(4) That plaintiff says she has had and lived in open adverse possession on said land, especially the 5-acre homestead described in her complaint, inclosed with a rail fence, with the two houses built thereon, for about 30 years next prior to this suit, and she is corroborated by all her witnesses in their evidence, namely, Ellen Hardy, Wesley Collier, Mary Collier, Jane Means, and Alex Samuels, as well as all the witnesses for the defendant and himself, in their testimony."

The lands were entered under the laws of the United States as a homestead. The agreement of Samuels to enter the land for a homestead for the benefit of others was a violation of the statute, and is illegal and void. *Cox v. Donnelly*, 34 Ark. 762; *Marshall v. Cowles*, 48 Ark. 362, 3 S. W. 188; *Nichols v. Council*, 51 Ark. 26, 9 S. W. 305, 14 Am. St. Rep. 20.

Plaintiffs have held open adverse possession of five acres of the land, without color of title, but by actual possession within an inclosure, and have thereby acquired title to the same, and are entitled to a decree quieting their title to the same as against the defendants.

The decree of the court as to the five acres is reversed, and as to the remainder it is affirmed, and the cause is remanded, with directions to the court to enter a decree in accordance with this opinion.

PINE BLUFF AERIE NO. 209, FRATERNAL ORDER OF EAGLES, v. DREYFUS.

(Supreme Court of Arkansas. Nov. 15, 1909.)

EXECUTORS AND ADMINISTRATORS (§ 150*)—LEASES—PERSONAL OR REPRESENTATIVE CAPACITY.

A widow and executrix of a deceased owner of property and his only legatee and devisee, except as to \$2 left to his children, executed a lease to certain of the property, styling herself "administratrix and executrix" of the estate, without any order of court. *Held*, that as the property had become hers under the will, and the lease thus became her individual contract, she could elect to treat the words "administratrix and executrix" as words of personal description, so that the lease should be good as her individual lease.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 150.*]

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by Mrs. Leon Dreyfus against the Pine Bluff Aerie No. 209, Fraternal Order of

Eagles. Judgment for plaintiff, and defendant appeals. Affirmed.

S. A. Miller and T. M. Hooker, for appellant. Irving Reinberger, for appellee.

HART, J. This suit was begun in a justice of the peace court by appellee to recover the sum of \$140 alleged to be due her by appellant on a lease contract. From the judgment rendered in her favor, an appeal was taken to the circuit court, where there was a trial de novo upon the following agreed statement of facts: "That prior to the 21st day of September, 1904, Leon Dreyfus was the owner of a building situated at 208 West Baroque street; the same being situated on a part of lot 2, block 20, original town of Pine Bluff, Ark. That prior to the said date aforesaid the said Leon Dreyfus departed this life, leaving a will making his wife, Mrs. Leon Dreyfus, executrix under said will and only legatee and devisee, excepting he left \$1 each to his two children, which has been paid by her, one of which died, and the other one is married. That on the 21st day of September, 1904, the plaintiff and the defendant entered into a contract with each other, by which the entire second story of the property hereinbefore described was leased by the plaintiff to the defendant for a period of five years from that date at a rate of \$20 per month, which rent was due and payable on the 15th day of each month in advance. Said lease was entered into without any order of court. A copy of said lease is hereto attached and made a part of this statement of facts. That the defendant had quiet and peaceable possession of the same, and that on the 15th day of March, 1907, the defendant tendered to the plaintiff the leased premises and keys thereto, which the plaintiff refused, and defendant at the same time gave plaintiff a written notice that it would no longer be responsible for the rent, and that said building was subject to plaintiff's order and control. That the defendant had paid rent up to and including March 14, 1907 (same being the term which defendants occupied the building), and at the time of the trying of this suit seven months had passed since the 14th of March, 1907." The circuit court, sitting as a jury, found in favor of appellee, and an appeal has been taken to this court from the judgment rendered.

The lease contract shows that it was executed by Mrs. Leon Dreyfus, administratrix and executrix of the estate of Leon Dreyfus, deceased; but the property had become her property under the will of Leon Dreyfus, deceased, and the contract thus became her individual contract. The words "administratrix," etc., were words of personal description, and the appellee might elect to treat them as such. *Bailey, Adm'r, v. Gatton*, 14 Ark. 180. See, also, 18 Cyc. 980, and cases cited in note 21. The record in the present

case shows that appellee treated the lease as her individual contract, and that she has prosecuted this suit in her individual name and for her own benefit. The judgment, both in the justice court and in the circuit court, was rendered in favor of Mrs. Leon Dreyfus.

There is no error in the record, and the judgment will be affirmed.

JOHNSON v. JOHNSON.

(Supreme Court of Arkansas. Nov. 15, 1909.)

1. APPEAL AND ERROR (§ 987*)—REVIEW—EVIDENCE.

In proceedings for the assignment of dower, where the decree recites that the case was heard on the pleadings, depositions of certain witnesses, records of the probate court in the matter of the guardianship of minor heirs, and the admission of counsel and oral testimony that the lands described in the complaint were a correct list of the lands belonging to the estate, thus showing that the admission of counsel and oral testimony related entirely to a verification of the list of lands owned by the estate and described in the complaint, about which there was no controversy, and the only issue of fact is whether or not the lands are susceptible of division for the purpose of assigning dower, without prejudice to the widow or heirs, as to which issue the only testimony was found in the record, the evidence must be reviewed by the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3896; Dec. Dig. § 987.*]

2. DOWER (§ 79*)—ASSIGNMENT—DIVISIBILITY OF LAND.

In proceedings in the chancery court for assignment of dower evidence *held* not to support a finding that the land could not be divided without prejudice to the widow and heirs.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 303; Dec. Dig. § 79.*]

3. DOWER (§ 101*)—ASSIGNMENT—SPECIFIC PROPERTY—SALE.

A widow's dower is to be carved out of the specific property of which her husband was possessed, and not out of the proceeds of its sale.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 348; Dec. Dig. § 101.*]

4. DOWER (§ 101*)—ALLOTMENT IN LIEU OF DOWER—SALE OF LAND—CONSTRUCTION OF STATUTE.

Kirby's Dig. § 2707, provides that in proceedings to allot dower, where it appears that dower cannot be allotted out of the real estate without great prejudice to the widow or heirs, and that it will be most to the interest of such parties that the real estate be sold, the court may decree a sale thereof, free from such dower, and that such portion of the proceeds may be paid to the widow in lieu thereof, or her interest therein, secured as the court may deem equitable. *Held*, that the design of the statute is to prevent a denial of the widow's enjoyment of her dower because it cannot be set aside to her, and authorizes a sale where the estate cannot be divided without prejudice, but does not authorize the sale of a part of the estate for the purpose of paying to the widow the value of her dower interest, ascertained without reference to the amount of the proceeds of the sale.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 348; Dec. Dig. § 101.*]

5. DOWER (§ 101*)—ALLOTMENT IN LIEU OF DOWER—SALE OF LAND.

The mere fact that it would be to the best interest of the widow and heirs to sell the land and divide the proceeds instead of dividing the land itself, and allotting to the widow her proportionate share, would be no ground for the sale of the land and division of the proceeds under the statute.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 348; Dec. Dig. § 101.*]

Appeal from Lonoke Chancery Court; Jno. E. Martineau, Chancellor.

Proceedings by Fannie Louise Johnson against Carl Victor Johnson for the assignment of dower. From the decree, defendant appeals. Reversed and remanded, with directions.

George Sibly, for appellant. T. C. Trimble, Joe T. Robinson, and T. C. Trimble, Jr., for appellee.

McCULLOCH, C. J. A. V. Johnson, a resident of Lonoke county, Ark., died intestate leaving a widow, the plaintiff, Fannie L. Johnson, and several children, who are minors. He owned 1,000 acres of land in the counties of Lonoke and Prairie, and said widow instituted this proceeding in the chancery court of Lonoke county seeking an assignment of her dower. She alleged in her complaint that "the greater portion of said lands are wild, uncleared, and not in cultivation, and that it will be difficult to allot dower out of said estate without great prejudice to said petitioner or said heirs," and that it will be to the best interest of all parties that the said real estate be sold free from such dower, and "that such portion of the proceeds may be paid to her in lieu of dower as the court may deem equitable and just." She prayed that dower be allotted, and that, if the land could not be allotted in kind without prejudice, the same be sold and her share of the proceeds of such sale be paid to her. The court rendered a decree directing the lands to be sold for the purpose of allotting to Mrs. Johnson a share of the proceeds as her dower; but an appeal was taken to this court, and the decree was reversed, because two of the infant defendants had not been served with process. *Johnson v. Johnson*, 84 Ark. 307, 105 S. W. 869. After the case was remanded, these defendants were properly brought in by service of process, and answers were filed for all of the defendants by their guardian. The court heard the case anew and found that the widow's dower could not be allotted to her in kind without great prejudice to her and to the heirs. The court further found the total value of said real estate to be \$15,000, that the present value of the widow's dower interest is \$3,154.32, and directed that 520 acres of the land, describing it, be sold in order to raise funds to

pay said sum to her. The heirs have again appealed.

The statute (Kirby's Dig.) which it is claimed authorizes the sale of the decedent's land for the purpose of allotting dower out of the proceeds reads as follows: "Sec. 2707: In proceedings had in circuit court, for the allotment of dower, when it shall appear to the court that dower cannot be allotted out of the real estate without great prejudice to the widow or heirs, and that it will be most to the interest of such parties that said real estate may be sold, the court may decree a sale of the real estate free from such dower, and that such portion of the proceeds may be paid to the widow in lieu thereof, or her interest therein secured, as to the court may seem equitable and just." It is contended by learned counsel for appellee that we should not attempt to review the evidence, for the reason that the recitals of the decree show that the action was heard on oral evidence, and that the same is not brought into the record. The decree recites that the case was heard on the pleadings, depositions of certain witnesses, "records of the probate court in the matter of the guardianship of said minors, the admission of counsel, and oral testimony that the lands described in the complaint are a correct list of the lands belonging to the estate of A. V. Johnson." The above recital shows that the admission of counsel and oral testimony related entirely to a verification of the list of lands owned by the decedent described in the complaint. There was, and is, no controversy about this. The only issue of fact is whether or not the lands are susceptible of division for the purpose of assigning dower without prejudice to the widow or heirs. The only testimony bearing on this issue is found in the record, and it is our duty to review it for the purpose of ascertaining whether the decree appealed from is correct.

After a careful review of all the testimony, we have reached the conclusion that there is none at all to support the finding that the land cannot be divided without prejudice to the widow and heirs. The several tracts contain in the aggregate 1,000 acres, only a small portion of which is in cultivation, and this is on the homestead. The lands are partly timbered lands and partly prairie lands; the latter being shown to be especially adapted to rice culture. Much of the land, however, is of poor quality, and not very fertile. Nothing is shown in the evidence which renders the land incapable of division. Not a witness gives a reason why it cannot be divided without impairing its value. The case seems to have been tried below on the theory that it was sufficient to show that it would be to the best interests of the widow and heirs to sell the land and divide the proceeds, instead of dividing the land itself and allotting to the widow her proportionate share. In support of this theory it was shown that much of

the land is covered by timber, and that it would involve considerable expense, beyond the ability of the widow, to put the rice lands in cultivation. But this affords no reason for selling the land. The statute above quoted, authorizing the sale of real estate for allotment of the widow's dower out of the proceeds, does not mean this. The decree is inconsistent with itself in finding that the lands could not be divided without prejudice to the widow and heirs, and at the same time ascertaining the present value of the widow's dower and segregating a portion of the land for sale for the purpose of raising funds to pay the widow's dower. If the lands could not be fairly divided, it was certainly unfair to the heirs to segregate a portion of them for the satisfaction of her claim, either with or without reference to the relative value of that portion. The effect of this would be to declare a lien on the lands of the decedent in favor of the widow for the value of her dower claim, and, if this method of assigning dower should be pursued, it might result in selling the whole of the decedent's estate in order to satisfy the dower claims of the widow; thus depriving the heirs of their inheritance. Such is not the design of our statute. The widow's dower is to be carved out of the specific property of which her husband was possessed. *Hill's Adm'r v. Mitchell*, 5 Ark. 608; *Pike v. Underhill's Adm'r*, 24 Ark. 124; *Tiner v. Christian*, 27 Ark. 306; *Hoback v. Miller*, 44 W. Va. 635, 29 S. E. 1014. The design of the statute hereinbefore quoted is to prevent a denial of the widow's enjoyment of her dower because it cannot be set apart to her, and to authorize a sale where the estate cannot be divided without prejudice, so that the widow can be awarded a proportionate share in lieu of dower, or her interest therein secured.

It is unnecessary to a decision of the present case for us to say whether the operation of the statute is limited to sales of separate indivisible pieces of real estate. But we do hold that the statute does not authorize the sale of a part of the estate for the purpose of paying over to the widow the value of her dower interest ascertained without reference to the amount of the proceeds of the sale. Our statutes on the subject of dower, when read together, clearly contemplate that the widow's dower shall either be carved out of the specific property possessed by her deceased husband or be allotted out of the proceeds of a sale thereof when it cannot be divided without prejudice, and that "such portion of the proceeds may be paid to the widow in lieu thereof, or her interest therein secured, as to the court may seem equitable and just."

The decree of the chancellor is erroneous, and it is therefore reversed and the cause remanded, with directions to assign dower to the plaintiff out of said lands by allotment

in kind, and for further proceedings not, inconsistent with this opinion.

HART, J., not participating.

COTTON PLANT OIL CO. v. BUCKEYE COTTON OIL CO.

(Supreme Court of Arkansas. Nov. 15, 1906.)

1. PARTNERSHIP (§ 15*)—"TRADING PARTNERSHIP."

Partners whose business is to buy and sell cotton seed are a trading partnership.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 2; Dec. Dig. § 15.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7054-7055.]

2. PARTNERSHIP (§ 141*)—SALES BY ONE PARTNER—VALIDITY.

Where the members of a firm had delegated to one partner exclusive authority to buy and sell cotton seed, and a majority of them were dissatisfied with the way the seed was being sold, and executed a bill of sale of a shipment of seed to another company in good faith and within the scope of the partnership business, but on the next day the partner previously possessing the power to sell refused to permit its shipment to that company, but had it shipped to the concern to which he had been selling, the bill of lading being issued on that date, there was a completed sale to the first company, and the other company was not entitled to the seed.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 141.*]

Appeal from Circuit Court, Jackson County; Chas. Coffin, Judge.

Replevin by the Cotton Plant Oil Company against G. W. Neeley and others, in which the Buckeye Cotton Oil Company intervened. Judgment for intervener, and plaintiff appeals. Reversed and remanded.

J. F. Summers and J. W. & Joseph M. Stayton, for appellant. Gustave Jones and J. W. & M. House, for appellee.

HART, J. This is an appeal from a judgment rendered in the Jackson circuit court in favor of the Buckeye Cotton Oil Company against the Cotton Plant Oil Mill Company for two cars of cotton seed. In the summer of 1906 a local lodge of the Farmers' Union wished to rent a cotton gin near Tupelo, Ark., for the benefit of its members, and a committee for that purpose was appointed. Without going into details, it is sufficient to say that Dr. W. N. Pearce, G. W. Neeley, J. A. Wilson, Thomas Hurst, T. J. Looney, and M. F. Massey agreed to rent the gin with the understanding that the members of the union should haul them their cotton. The above-named parties were to share the profits and bear all the losses of the business. The business was to be conducted in the name of Farmers' Union Gin Company of Tupelo. They rented a gin from the Tupelo Gin Company, and made and entered into a written contract with it, whereby they agreed to sell to the Cotton Plant Oil Mill

Company all of their cotton seed, provided that the company would pay the customary price for the seed. The same persons owned the Cotton Plant Oil Mill Company and the Tupelo Gin Company. G. W. Neeley was elected president and Dr. W. N. Pearce was elected secretary and treasurer of the Farmers' Union Gin Company of Tupelo. It was understood that Dr. Pearce should handle all the money, and buy and sell all the cotton seed handled by the company. There is testimony tending to show that this fact was known to the Cotton Plant Oil Mill Company. Pursuant to their agreement, they began to ship seed to the Cotton Plant Oil Company; Dr. Pearce handling the business for the gin company. Some time in the latter part of October or the first part of November a controversy arose between Dr. Pearce and the manager of the Cotton Plant Oil Company, and Dr. Pearce began shipping seed to the Buckeye Cotton Oil Company. On the 15th day of November, 1906, the gin company had a quantity of seed in a house near the railroad track, and Dr. Pearce was loading the seed in the cars preparatory to shipping them to the Buckeye Cotton Oil Company at Little Rock, Ark. On the same day G. W. Neeley and M. F. Massey executed a bill of sale of these seed to the Cotton Plant Oil Mill Company, which is as follows: "\$1,117.62. Tupelo, Ark., Nov. 15, 1906. Received of the Cotton Plant Oil Mill Company eleven hundred and seventeen 62/100 dollars, as an advance payment on (100) one hundred tons of cotton seed now in seed house of Tupelo Gin Company, and being loaded in (2) two I. C. Refrigerator Cars, to wit: one car No. 54053 and one car No. 54853. These seed to be shipped out as soon as said cars can be loaded and sufficient others furnished us on side track at said gin, and to be billed to the Cotton Plant Oil Mill Company at Cotton Plant, Ark., the price being twelve dollars per ton on cars at Tupelo. Farmers' Union Gin Co. of Tupelo, by G. W. Neeley, President. M. F. Massey." G. W. Neeley, J. A. Wilson, M. F. Massey, and T. J. Looney were present when the bill of sale was drawn up and approved of its execution. The cars of seed in controversy are the ones mentioned in the bill of sale. On the 16th day of November, 1906, after the cars had been loaded, Massey got the numbers of the cars, and went to the agent of the railroad company for a bill of lading. While there Dr. Pearce came up and forbade the agent to issue a bill of lading to the Cotton Plant Oil Mill Company and demanded one for the Buckeye Cotton Oil Company, which was done. On the 19th day of November, 1906, the Cotton Plant Oil Mill Company instituted a suit in replevin against G. W. Neeley and others for the possession of the two cars of seed and also the seed in the house. The

seed were taken charge of by the sheriff, and afterwards the Buckeye Cotton Oil Company intervened, claiming to own the two cars of seed, and, upon giving bond, was allowed to retain possession pending the litigation. The value of the seed was \$445.03. Dr. Pearce, for the intervener, testified that on the 15th day of November, 1906, he had the two cars set on the side track and commenced to load them; that he finished loading one of them on the evening of the 15th, and the other the next morning; that he got a bill of lading on the 16th and sent it to the Buckeye Cotton Oil Company. He says that he does not think that the bill of sale to the Cotton Plant Oil Company bears its true date, but does not state any fact or circumstance upon which his belief is founded. The other witnesses testify that the bill of sale bears the date that it was executed, and that the consideration named therein was a balance due the Cotton Plant Oil Mill Company by the Farmers' Union Gin Company of Tupelo. There was a trial before a jury, and a verdict for the intervener for the two cars of seed. This statement places the testimony in its most favorable light to appellee. We do not think it entitles appellee to recover. It is conceded that the agreement of Pearce, Neeley, Massey, Looney, Wilson, and Hurst constituted a partnership. A part of their business was to buy and sell cotton seed, and this made it a trading partnership. *George on Partnership*, p. 91.

It is earnestly insisted by counsel for appellee that there was no complete contract by virtue of the bill of sale of November 15, 1906, because by the terms of the original agreement Dr. Pearce had exclusive authority to buy and sell seed, and this fact was known to appellant. The record in this case discloses that a majority of the partners became dissatisfied with the way Dr. Pearce was conducting the selling of seed, and that in good faith for the interest of the partnership they directed the bill of sale in question to be executed. This they had a right to do. Ordinarily each partner is the general agent for the firm for the transaction of its business in the ordinary way. In this case the other partners delegated this power to Dr. Pearce. The power to grant the exclusive agency carries with it the right to revoke it. The rights of Dr. Pearce are not involved in this suit; and for this reason the authorities relied upon by counsel for appellee are not applicable to the issue raised by the appeal. There was here a diversity of opinion between the partners as to the conduct of its affairs; and a majority of them, acting in the scope of the partnership business, directed a sale of the seed in controversy, and the partners to whom this authority was given executed a bill of sale to the two cars of seed in con-

troversy. The act of the majority of the partners governs in such cases. *George on Partnership*, p. 158; *Story on Partnership*, § 123; 30 Cyc. p. 480, and cases cited in note 57.

Again, it is objected that the bill of sale does not bear its true date. It bears the date of November 15, 1906. All the witnesses except Dr. Pearce say that was the date of its execution. Dr. Pearce only says he does not think so. He does not attempt to give its date or to detail any fact or circumstance which leads him to believe that it was not executed on that day. This was not sufficient to impeach it. From the conclusions we have reached, it necessarily follows that it was a completed sale to appellant on the 15th inst., and that, as the bill of lading to appellee was not issued until the 16th inst., the jury was not warranted in finding for appellee.

Because there was no evidence to support the verdict, the judgment will be reversed, and the cause remanded.

CARR et al. v. FAIR et al.

(Supreme Court of Arkansas. Nov. 15, 1909.)

1. REFERENCE (§ 47*)—APPOINTMENT OF MASTER.

A court has authority, either on its own motion or by request of the parties, to appoint a master, and, when appointed by the request of the parties, he is known as a consent referee or master, but, however appointed, the master derives authority from the order appointing him.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 74, 76, 78; Dec. Dig. § 47.*]

2. REFERENCE (§ 103*)—EFFECT OF REPORT—SETTING ASIDE.

When a master is appointed by consent of parties, his findings have the weight of a verdict, and, when he is appointed by the court on its own motion, his report upon the evidence taken is largely advisory, but the court's discretion in passing on the report must be exercised under and controlled by the rules of law and the evidence of the case, and it cannot arbitrarily set aside the findings; *Kirby's Dig.* § 6337, providing that the report shall stand good except such parts as are excepted to unless it shall appear on the face of the report or from the evidence in the case that it is erroneous, and the report is presumed to be accurate, and, if the findings and report are based on conflicting evidence, they are entitled to great weight.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. §§ 188-203; Dec. Dig. § 103.*]

3. REFERENCE (§ 99*)—FINDINGS OF MASTER—RULINGS OF COURT.

The failure of a court to give to the findings of a master the weight which the evidence shows they are entitled to is error.

[Ed. Note.—For other cases, see *Reference*, Cent. Dig. § 133; Dec. Dig. § 99.*]

4. APPEAL AND ERROR (§ 1009*)—REVIEW—FINDING OF COURT.

The finding of a chancellor, where the evidence is conflicting, is not conclusive on appeal, but, if it is against the decided preponderance of the evidence, it will be set aside.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3972, 3974; Dec. Dig. § 1009.*]

**5. EVIDENCE (§ 1*)—JUDICIAL NOTICE—CON-
TROVERTED QUESTIONS OF FACT.**

Controverted questions of fact must be established by testimony, and judicial notice cannot be taken of those facts.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1; Dec. Dig. § 1.*]

**6. EVIDENCE (§ 18*)—JUDICIAL NOTICE—VAL-
UES.**

Where the value of timber taken by defendants is a controverted question, the matter cannot be settled by the judicial notice of the chancellor as to the value of the timber taken.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 22; Dec. Dig. § 18.*]

Appeal from Mississippi Chancery Court, Chickasawba District; Edw. D. Robertson, Chancellor.

Action by J. H. Carr and others against George and S. S. Fair. A report by a master found that the plaintiffs were entitled to recover a stated amount, which amount the trial court reduced, and plaintiffs appeal. Decree reversed, and cause remanded, with directions to enter a decree for the amount found due by the master.

J. T. Coston, for appellants. W. J. Driver and Block & Kirsch, for appellees.

FRAUENTHAL, J. The appellants instituted this suit against the appellees in the circuit court of Mississippi county for the recovery of the value of the timber which they alleged the appellees had wrongfully cut and removed from a large body of land in that county owned by the appellants. The appellees alleged in their answer that they had entered into a contract with the mother of appellants for the purchase of the timber, believing that she had a right to sell same, and had made payments thereon to her. They denied that they had cut and removed the amount of timber claimed by appellants; and, in order to obtain an accounting of the amount of said timber and the right to have the payments so made by them credited on the value thereof, they asked that the cause be transferred to the chancery court. This was done. Thereupon the parties entered into the following agreed stipulation of facts: "It is agreed and stipulated in this case that the defendants cut and removed from the lands of the plaintiffs ash, oak, cypress, elm, gum, sycamore, and cottonwood timber as follows: Ash, 2,934 feet; elm, 40,184 feet; cypress, 105,528 feet; sycamore, 222,007 feet; gum, 1,070,725 feet; oak, 477,343 feet; cottonwood, 3,499,412 feet. It is further agreed and stipulated that said timber was cut by the defendants and removed from said land each in equal quantities each year for the years 1898, 1899, 1900, 1901, 1902, and 1903. Said land was inherited by the plaintiffs from their father, J. J. Carr, who died intestate in the year 1897, and in the year 1898 Susie Carr, the mother of the plaintiffs, entered into a contract with the defendants, in which she attempted to authorize the de-

fendants to cut and remove said timber from said land without any order of the probate court therefor; that afterwards the defendants paid the administrator of her estate and the estate of J. J. Carr the contract price agreed on by her for said timber as follows: Elm and sycamore 25 cents per 1,000 feet; cypress, gum, and cottonwood 50 cents per 1,000 feet; ash and oak \$1 per 1,000 feet. And it is expressly agreed that said sums may be deducted from the actual value of said timber." Thereafter the chancery court, in order to determine the value of the timber and amount of the payments made thereon, appointed a special master to whom the matter was referred for the purpose of taking proof and stating the account between the parties. The master took the testimony of nine witnesses by depositions which were filed with his report. In his report he gave an abstract of the testimony of these witnesses; the interest of each in the litigation; the qualification of each of them to testify as experts on the subject of the market value of the timber. He gave in detail the market values placed by each witness on the various kinds of timber for each of the years during which the same was cut, and the values thereof as determined by him from this testimony. He made out a detailed statement showing the value of each kind of timber cut during each of the above years and the amount of each payment made thereon, together with interest calculated on the same to the date of his report. He found that, after allowing all payments so made, there was due to appellants the sum of \$9,088.38. The appellees filed exceptions to the report on the ground that the master erred in charging "the appellees with the various values of the timber as found by him for the various years." The court thereupon heard and passed upon the report of the master upon the depositions that had been taken and filed with his report and the report itself. The court thereupon made the following findings and order upon said report and entered its decree in accordance therewith: "The court further finds that the finding of the master as to the value of the timber cut is without evidence to support it, and the first, second, third, fourth, fifth, and sixth exceptions to the master's report are therefore sustained, and the master's findings as to value set aside. The court finds, however, upon consideration of said report, that the plaintiffs are entitled to recover from the defendants principal and interest at this date \$6,210.40," etc.

From the decree thus setting aside the findings of the master and entering a judgment in favor of appellants for only the above amount, and not for the amount found by the master, the appellants present this appeal. The questions presented by this ap-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

peal involve the weight that should be given to the findings of fact by a master in chancery, and to the findings of the chancellor relative thereto. In order to assist it in the proceedings pending before it—as for example to take testimony, to make findings of facts, or to state accounts, etc.—the court has the power within its sound discretion to appoint a master. When such master is appointed at the request and with the consent of the parties, and with their consent that he shall determine certain matters that shall be referred to him, he is known as a consent referee or master; and his findings have the weight of the verdict of a jury. A master may and is usually appointed by order of the court of its own motion. In either event, the master derives his authority from the order thus appointing him. When he is appointed by order of the court of its own motion, the report which he presents upon the evidence taken is to a great extent advisory, and the court may accept such report and approve it or disregard it either in whole or in part according to its own judgment as to the weight of the evidence. Its discretion in passing on such report should be exercised under and controlled by the rules of law, and the evidence in the case. The court cannot arbitrarily set aside the findings of such report. Kirby's Dig. § 6337, provides: "The report shall stand good, except such parts as are excepted to, unless it shall appear on the face of the report or from the evidence in the cause that it is erroneous." It is generally held that the report of a master is presumptively correct; and there is a strong presumption of the correctness of the findings of fact of the master, and, where there is conflicting evidence upon questions of fact, the findings will rarely be disturbed. In speaking of the weight that should be accorded to the report of a master, the Supreme Court of the United States in the case of *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664, says: "In dealing with these exceptions the conclusions of the master depending upon the weighing of conflicting testimony have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part." The findings of the master appointed by the court of its own motion should not be lightly disregarded by the court. They should be highly persuasive; and, when the findings are based upon conflicting evidence, they should be accorded the great weight to which they are entitled. And, if the court does not give to the findings of such master that weight which the evidence shows they are entitled to, its action will be reversed upon appeal. 17 Ency. Plead. & Prac. 1056; 16 Cyc. 453.

In this case the master was appointed by the order of the court, and his findings were subject to the review of the court. The

court had the power, and it was its duty, to pass its own judgment upon the findings in the light of the evidence adduced. These findings related to disputed questions of fact, and were based upon conflicting evidence. The findings of the master should not have been disturbed by the chancellor unless they were clearly against the preponderance of the evidence. At the hearing of the exceptions to the report of the master there was no additional evidence taken, but the court passed upon the matter upon the evidence presented by the depositions which were taken before the master and which are all before this court. It has been uniformly held by this court that "the finding of the chancellor concerning a disputed question of fact, where the evidence is conflicting, is not conclusive upon appeal"; but that, if it is against the decided preponderance of the evidence, it will be set aside. *Chapman v. Liggett*, 41 Ark. 292; *Gist v. Barrow*, 42 Ark. 521; *Nolen v. Harden*, 43 Ark. 307, 51 Am. Rep. 563; *Kelly v. Carter*, 55 Ark. 112, 17 S. W. 706; *Goerke v. Rodgers*, 75 Ark. 72, 86 S. W. 837; *George v. Norwood*, 77 Ark. 216, 91 S. W. 557, 113 Am. St. Rep. 143.

In the case at bar the question of fact to be determined was the value of the timber during the several years above named. This was a disputed matter, and there was conflicting evidence taken relative thereto. Upon this question the depositions of nine witnesses were taken. Five of these witnesses were experts upon the subject of the market value of these various kinds of timber during the above years in the locality of this land. They had been engaged in the said mill and timber business for a great number of years, and they had actually bought and sold this character of timber during those years, and were familiar with the market value of such timber in that locality. They were men of intelligence and good business ability, and wholly disinterested in this case. They went into details in their evidence, and showed a great familiarity with actual prices paid for this character of timber involved in this case during the above years as well as its market value. They showed such an intelligence, experience, and actual knowledge of these values that their testimony should carry great weight. The average of the values of the timber for the various years under the evidence of these five witnesses is greater than that found by the master; and in some instances is greater to a considerable extent. Of the other four witnesses whose depositions were taken two were the appellees, and one was according to his own testimony a close friend of the appellees. But none of these four witnesses give any clear statement of the market value of the timber during these years. Their testimony is largely composed of statements of what they paid for large bodies of land on which timber was standing, or at what prices such

lands were purchased by others. They give no values at all during several of the years, but only state generally that the prices of the timber advanced or declined during such years. Their testimony is not satisfactory; and, after careful examination of their evidence, we are of the opinion that it is not clear or convincing. We have carefully examined the testimony of all the witnesses in this case, and we are of the opinion that the findings of the master are sustained by that testimony, and that the findings of the chancellor are against the decided preponderance of the testimony in the case.

Counsel for appellees say in their brief that the approximate value of timber throughout the chancery district in which the chancellor who decided this case presides is a matter of common knowledge, and that the chancellor should be presumed to have that information. But this is a cause pending in a court, and the controverted questions of fact must be established by the testimony of witnesses duly sworn, and judicial knowledge cannot be taken of those facts. As is said in the case of *Pierce v. Scott*, 37 Ark. 308: "Values of work and of material should be proved as other facts, and not collected by the master from his own experience, * * * or from consultation with others. This would be dangerous in the first instance, and preclude a party injured from the proper mode of correction. * * * He must act upon some proof, the best under the circumstances that can be adduced." And this applies equally to the chancellor. His findings can only be based upon, and must be based upon, the evidence actually adduced in the case. In our opinion the findings of the chancellor are against the weight of the evidence in this case; and its preponderance sustains the findings of the master.

The decree of the chancery court herein is reversed, and this cause is remanded, with directions to enter a decree in favor of the appellants for the amount found due by the master, and in accordance with this opinion.

NAYLOR v. McNAIR.

(Supreme Court of Arkansas. Nov. 15, 1909.)

1. COURTS (§ 124*)—JURISDICTION—CIRCUIT COURT—ACTIONS INVOLVING LIENS.

Where the issue was involved whether the amount paid by plaintiff was a lien on a lot when it was conveyed to him by defendant, the circuit court had jurisdiction of the case, though the amount involved was less than \$100.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. § 384; Dec. Dig. § 124.*]

2. APPEAL AND ERROR (§ 302*)—MOTION—SUFFICIENCY.

A motion for a new trial, on the ground that the verdict was contrary to the evidence, raised the question whether the verdict was sustained by sufficient evidence.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1744-1752; Dec. Dig. § 302.*]

3. COVENANTS (§ 42*)—AGAINST LIENS—SCOPE.

Defendant, who sold land agreeing to convey on payment of purchase-money notes and to covenant against incumbrances, by so conveying to a remote assignee of the contract, did not covenant against liens created by intermediate parties interested; his covenant being limited to the title which he agreed to convey.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 43; Dec. Dig. § 42.*]

Appeal from Circuit Court, Pulaski County, Second Division; J. W. Blackwood, Special Judge.

Action by J. M. McNair against J. O. Naylor. From a judgment for plaintiff upon directed verdict, defendant appeals. Reversed, and action dismissed.

Carmichael, Brooks & Powers, for appellant. Wiley & Clayton, for appellee.

BATTLE, J. On the 15th day of September, 1903, J. C. Naylor, being the owner of a certain town lot in the city of Little Rock, in this state, sold the same to H. S. Kissinger for \$1,250, of which Kissinger paid \$50, and for the remainder thereof executed 96 notes, each for the sum of \$12.50 and 8 per cent, per annum interest from date until paid, each dated September 15, 1903, one payable on the 19th day of September, 1903, and one payable on the 15th day of each month thereafter until paid in full. When these notes shall be paid, Naylor covenanted with Kissinger to convey to him the lot by a good and sufficient deed, with usual covenants of warranty; the said agreement being evidenced by his bond for title.

On the 5th day of September, 1904, Kissinger bargained and sold the lot to Mrs. K. M. Crisman for \$1,400, of which Mrs. Crisman paid \$100.33, and executed six notes, each for the sum of \$30 and 8 per cent, per annum interest from date, and assumed the payment of the notes executed by Kissinger to Naylor, which remained unpaid, and when all the said notes are paid Kissinger covenanted with Mrs. Crisman to convey to her the lot, by a good and sufficient deed, containing the usual covenants of warranty. This agreement was evidenced by a bond for title. Mrs. Crisman sold her interest in the lot to J. M. McNair, and he agreed to pay, and did pay, the notes executed by Kissinger to Naylor, remaining unpaid, and on the 30th day of January, 1907, Naylor and wife conveyed the lot by deed to McNair and covenanted therein with McNair to warrant and defend the title to the lot against all claims whatever and that it is free from all liens and incumbrances.

The six notes executed by Crisman to Kissinger for the lot were paid, except the last one, which was transferred for value, before maturity, on or about the 27th day of September, 1904, to Maggie E. Green. It is as follows:

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

"\$30.00. Little Rock, Ark. Sept. 5, 1904.

"Eighteen months after date I promise to pay to the order of H. S. Kissinger, thirty dollars, at Little Rock, Ark., for value received, with interest from date until maturity at the rate of 8 per cent. per annum, and thereafter until paid, at 10 per cent. per annum, payable annually. This note is one of six (6) given under my agreement of even date to purchase the following property in C. & P. Johnson's addition to the city of Little Rock, Ark.: Lot eight (8), block four (4).

"[Signed] Mrs. K. M. Crisman."

Indorsements on back as follows:

"Endorsed over to Maggie E. Green, for value received, September 27, 1904.

"[Signed] H. S. Kissinger."

"The time for payment of this note is extended to May 20, 1906. Filed October 17, 1907.

"[Signed] F. A. Garrett, Clerk."

On or about the 4th day of November, 1907, Maggie E. Green commenced a suit against Mrs. K. M. Crisman and J. M. McNair, in the Pulaski chancery court, to foreclose an alleged vendor's lien, alleging in her complaint, substantially, all the foregoing facts, and, by virtue thereof, claiming a lien on the lot for the payment of the note, and asked that the lot be sold to pay the lien. McNair failed to answer, and a decree pro confesso was rendered, and a commissioner was appointed and directed to sell the lot.

McNair, having paid and satisfied the decree recovered by Mrs. Green, brought an action in the Pulaski circuit court against Naylor on his covenant against liens and incumbrances, contained in his deed for the lot to McNair, to recover \$49.20, the amount paid by him to satisfy the decree, and for \$5 paid counsel for services in and about the suit instituted by Green, making in all \$54.20.

Naylor demurred to the complaint in the last action, because the court had no jurisdiction, which demurrer the court overruled, and Naylor thereupon answered, and alleged that the lot was free from all liens and incumbrances at the time he conveyed it to McNair.

Plaintiff, McNair, alleged in his complaint that he notified the defendant, Naylor, in writing, of the pendency of the suit instituted in the Pulaski chancery court by Green against Crisman and McNair, and called upon him to defend the same, and notified him that he would rely upon his covenant and warranty, and that he wholly failed to defend against the suit. The defendant failed to deny these allegations in his answer.

All the foregoing facts were proved in the trial in this action. McNair testified, in his own behalf, in part, as follows: "That he had a written contract from Mrs. Crisman, but that he had misplaced it. That he told the defendant about it, and the defendant told him that he held the notes, and would make a deed when they were all paid.

* * * That he got a notice from Mr. Wi-

ley that they were going to sue on the note, or had already sued on it. That he then went to see the defendant and told the defendant that it might be best to settle it up, as it might cause some trouble, and defendant said: 'No, that will not hurt us. There is no lien on the place. Nobody but me holds any papers on that place, and whenever you pay up the rest of the notes I will make you a warranty deed to the place, and it will then devolve on me to defend the place.'"

After the close of the evidence, the court instructed the jury to return a verdict in favor of the plaintiff for \$49.20, which they did. The defendant moved for a new trial because the verdict is contrary to the evidence. The court overruled the motion for a new trial, and defendant excepted. Judgment was rendered according to the verdict, and the defendant appealed.

The circuit court had jurisdiction to hear and determine this cause, notwithstanding the amount involved is less than \$100. The issues in the case involve the determination of the question whether or not the amount paid by McNair was a lien on the lot when Naylor conveyed it to McNair, and for that reason the circuit court had jurisdiction. *Sanders v. Brown*, 65 Ark. 498, 47 S. W. 461.

The motion for a new trial was sufficient to raise the question as to whether the verdict was sustained by sufficient evidence. *White v. Beal & Fletcher Grocer Co.*, 65 Ark. 278, 45 S. W. 1060.

When Naylor executed a deed to McNair, he thereby conveyed all his right, title, claim, and interest in and to the lot that he had when he bargained and sold it to Kissinger. His covenants bound him only to warrant and defend such interest and estate as he undertook to convey, and no other, against all liens and incumbrances. He did not covenant against liens thereon created by subsequent purchasers. His title was paramount to all the liens created by such purchasers. He is not affected by any notice to defend against such liens, because he did not covenant against them. The record in *Green v. Crisman and McNair*, instituted in the Pulaski chancery court (the complaint on file), showed that the plaintiff in that suit was seeking to enforce a lien for a note given in part for the purchase money of a sale of the lot made by the vendee, Kissinger, of Naylor, to Crisman, after Naylor sold to him. The record itself gave notice to Naylor that he had not covenanted against such lien, and that he was not bound to defend against it. *Rawle on Covenants for Title* (5th Ed.) §§ 121, 122. The decree in the suit instituted by Green was pro confesso and rests entirely upon the complaint, which shows the facts before stated.

Appellee attaches importance to the testimony of McNair, in which he stated that Naylor said to him that he held all "the notes and would make a deed when they were all paid," and that the suit instituted by Green "will not hurt us. There is no lien

on the place. Nobody but me holds any papers on that place, and whenever you pay the rest of the notes I will make you a warranty deed to the place, and it will then devolve on me to defend the place." He evidently referred to the notes executed to him by Klesinger, and designates them as the notes held by him, and meant to say the note sued on by Mrs. Green could not affect any title he might convey as "he holds all the papers on the place." That was substantially true. He did hold all that could affect the title he subsequently conveyed to McNair.

The verdict of the jury was against the undisputed facts in the case and unsupported by the evidence.

Judgment reversed, and action dismissed.

AMERICAN JOBBING ASS'N v. WESSON. (Supreme Court of Arkansas. Nov. 15, 1909.)

1. SALES (§§ 161, 181*)—CONTRACT—EXECUTED CONTRACT.

Delivery of goods to a responsible carrier for transportation consigned to the buyer would be a delivery of the goods to the buyer, but, where it does not appear that goods shipped were not consigned to shipper's order, nor that the buyer received the goods from the carrier, an executed contract is not shown.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 377-380, 486; Dec. Dig. §§ 161, 181.*]

2. SALES (§ 347*)—EXECUTORY CONTRACT—DISCHARGE.

If a contract for sale of goods and a credit for part of the price for goods exchanged, was executory, the seller's refusal to give the credit upon the ground that the exchanged goods were worthless would amount to a refusal to abide by the contract, and relieve the buyer from obligation thereunder.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 347.*]

Appeal from Circuit Court, Mississippi County, Osceola District; Frank Smith, Judge.

Action by the American Jobbing Association against Mrs. E. V. Wesson. Judgment of dismissal, and plaintiff appeals. Affirmed.

J. T. Coston, for appellant.

HART, J. This suit was instituted by the American Jobbing Association against Mrs. E. V. Wesson, doing business under the name of the Evadale Grocery Company, to recover the sum of \$115.92, alleged to be due on a contract for the sale of jewelry. The court sitting as a jury made the following finding of fact: "In this case the court finds the fact to be that the plaintiff failed to comply with the terms and conditions of contract and sale upon which it sued, and that the defendant, by reason of such breach upon the part of plaintiff, was released from liability thereunder." Accordingly judgment was rendered by the court dismissing the action. The plaintiff has appealed to this court.

The abstract of plaintiff shows the facts to be as follows: Plaintiff entered into a written contract to sell defendant certain jewelry. It was claimed by defendant that

the agent of the plaintiff who made the sale agreed that plaintiff would take certain old jewelry of defendant's and credit her account with the sum of \$99.22. After exchanging a few letters, plaintiff on February 2, 1906, wrote defendant, agreeing to accept the old jewelry according to her contention. Upon receipt of this letter, defendant wrote the plaintiff February 16, 1906, as follows: "Since you agreed to abide by the arrangement made here by your Mr. Hargis, we will take the case and jewelry out of the office and open up the first of March." February 19, 1906, defendant wrote plaintiff as follows: "We ship today the jewelry taken up by your Mr. Hargis. Give us credit for \$99.22. We will now take the goods out of the office." February 22, 1906, plaintiff wrote defendant as follows: "We are in receipt of your esteemed favor of the 19th, and beg to state that we will accept the goods you have returned to us. We have already given your account credit for \$99.22, which leaves a balance of \$116.37." On the 12th day of March, 1906, plaintiff wrote defendant that the old jewelry had been received, examined, and found worthless, that the same had been returned to defendant, and said: "We supposed that you were acting in good faith with us when you made your claim as to an alleged agreement with Mr. Hargis, and when you made your statement as to the amount of goods to be sent to us for credit on account under this alleged agreement, but you know yourself that the goods you shipped to us did not at the original invoice price begin to figure up to the amount of credit that you insisted upon." The defendant then repudiated the whole contract.

The theory upon which plaintiff seeks to recover is that the contract was executed before the letter of March 12, 1906, was written; but this contention is not borne out by plaintiff's abstract of the record. It is not shown that the jewelry was ever delivered to defendant. In her letter of February 19th defendant states that she would take the goods out of the office, but it does not appear that she did so. It is true that a delivery to a responsible carrier for transportation consigned to the defendant would have been a delivery to her. *Gottlieb v. Rinaldo*, 78 Ark. 123, 93 S. W. 750, 6 L. R. A. (N. S.) 273. But from aught that appears from the abstract of the record the goods may have been consigned to shipper's order. In which event there was no delivery, and the contract would be executory. It is well settled that an executory contract may be discharged by one party renouncing his liabilities under it. Plaintiff's letter of March 12th amounted to a refusal to abide by its contract as made, and so relieved the defendant from the obligation on her part. *Cochran v. Chetopa Mill & Elevator Co.*, 88 Ark. 343, 114 S. W. 711.

The judgment is therefore affirmed.

STATE v. CLARK.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

LARCENY (§ 32*)—SUFFICIENCY OF INFORMATION—OWNERSHIP OF PROPERTY.

An information charging accused "certain property, the goods and chattels of the C. Ry. Co., then and there being, feloniously did steal," etc., is insufficient to charge larceny, as failing to allege that the stated owner was a corporation or a partnership, and, if a partnership, the members thereof; the question of the ownership of the property being an essential element of the offense, and the defect not being curable by proof.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 84, 86; Dec. Dig. § 32.* *Indictment and Information*, Cent. Dig. §§ 277, 281, 282.]

Appeal from Circuit Court, Livingston County; Francis H. Trimble, Judge.

William Clark was convicted of larceny, and he appeals. Reversed and remanded.

Scott J. Miller and Fred S. Hudson, for appellant. E. W. Major, Atty. Gen., and John M. Dawson, Asst. Atty. Gen., for the State.

BURGESS, J. Upon a criminal charge hereinafter set out by a count of the information to be quoted, the defendant was found guilty, and his punishment fixed at two years in the penitentiary. Going to the statement and brief for the state, it appears that the prosecuting attorney of Livingston county filed an information against the defendant, charging in the first count as follows: "Comes now John H. Taylor, prosecuting attorney within and for Livingston county, Missouri, and informs the court, on his oath of office, on his own knowledge, information, and belief, that Wallace Roland and Wm. Clark, on or about the 27th day of November, 1906, at Livingston county, Missouri, twenty-four pairs of shoes, of the value of fifty-six dollars and forty cents, of the goods and chattels of the Chicago, Burlington & Quincy Railway Company, then and there being, feloniously did steal, take, and carry away, against the peace and dignity of the state." The second count was not submitted by the trial court to the jury, and further mention thereof is not necessary. To this information a proper motion to quash was filed, raising the question hereinafter to be discussed. This motion was overruled, and the defendant forced to trial, with the result aforesaid. Motions for new trial and in arrest of judgment were likewise filed and overruled. From the judgment of conviction the defendant has appealed.

The chief point is the sufficiency of the first count of the information, upon which the conviction was had. Counsel for the defendant couch their chief objection in this language: "The information in this case is faulty. In fact, there is no information at all. The

information fails to allege that the Chicago, Burlington & Quincy Railway Company is either a natural or artificial person, and it has been held by the Supreme Court, in a direct case, that this of itself is an insufficient information, in failing to allege the ownership of the property." It will not be necessary to go further than this proposition. There is no allegation that the alleged party owning the property said to have been stolen is an individual, a copartnership, or a corporation. This court cannot, at least, take cognizance of the fact that the alleged owner is a corporation or a copartnership, however we might view the name in the information as indicative of an individual. In this case the name given of the alleged owner of the alleged stolen property is such that we know it is not that of a single natural individual, and it must, therefore, be the name of either a corporation or a copartnership. The information does not charge whether it is one or the other, and, if a copartnership, the respective members thereof. Not only should the information properly charge the facts in this regard, when designating the ownership of property, but the proof must accord with this required allegation. If the allegation is absent from the information, the mere matter of proof would not cure this fatal defect in the pleading.

The precise question in this case was discussed in the case of *State v. Jones*, 168 Mo., loc. cit. 402, 68 S. W. 567, where we then said: "This brings us to the last objection to the information, which is that it fails to aver the ownership of the burglarized property and stolen goods, in that it merely charges the store to have been the property of the Drysdale-Ulen Hardware Company, and the stolen goods to be the personal property of said hardware company, and fails to state that it was a firm composed of certain natural persons, or that it was a corporation. It has always been necessary to allege and prove the ownership of the house charged to have been burglarized and the ownership of chattels alleged to have been stolen. 2 East, P. C. 650. Where ownership is laid in a corporation, the fact of the incorporation should be alleged; and this is not affected by the fact that proof of the existence of the corporation de facto will sustain the charge. As nothing is to be left to intentment, the defendant is entitled to know whether the state intends to show ownership in a firm composed of individuals or in a corporation. In this case he raised the objection in his motion in arrest; but it has often been ruled that he may take advantage of the defect in the indictment in this court for the first time. *State v. Patterson*, 159 Mo. 98, 59 S. W. 1104; *Wharton's Crim. Law*, §§ 1828, 1833; 2 *Russell on Crimes*, p. 100; *Wallace v. People*, 63 Ill. 451; 1 *Bishop's Crim. Prac.* (3d Ed.) § 682; *State v. Mead*, 27 Vt. 722; *Cohen v.*

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

People, 5 Parker, Cr. R. (N. Y.) 330; 2 Archbald's Crim. Pl. 359; White v. State, 24 Tex. App. 231, 5 S. W. 857, 5 Am. St. Rep. 879; Thurmond v. State, 30 Tex. App. 539, 17 S. W. 1098; McCowan v. State, 58 Ark. 17, 22 S. W. 955. There are cases to the contrary in other states; but in the absence of a statute we are relegated to the common law, and we hold the information bad in substance in failing to allege the names of the copartners, if the Drysdale-Ulen Hardware Company was a firm, and, if a corporation, in not alleging it was a corporation."

This rule has been consistently followed by this court. In the very late case of State v. Kelley, 206 Mo., loc. cit. 693, 694, 105 S. W. 608, we said: "In State v. Jones, 168 Mo., loc. cit. 402, 68 S. W. 566, it was ruled by this court that it was necessary to allege and prove the ownership of the house charged to have been burglarized and the ownership of chattels alleged to have been stolen (2 East, P. C. 650), and that, where ownership is laid in a corporation, the fact of the incorporation should be alleged; and this is not affected by the fact that proof of the existence of the corporation de facto will sustain the charge. As nothing is to be left to intentment, the defendant is entitled to know whether the state intends to show ownership in a firm composed of individuals or in a corporation. In State v. Horned, 178 Mo. 59, 76 S. W. 953, the doctrine announced in the Jones Case was approved. In that case there was an attempt to charge burglary of the Mississippi & Bonne' Terre Railway; but the Attorney General admitted that the information was bad, because the information failed to show whether the said railroad company was a corporation or a copartnership, and the judgment was reversed on that ground. The doctrine of the foregoing two cases was reaffirmed in State v. James, 194 Mo. 268, 92 S. W. 679. Adhering to those two cases, it must be held that the information in this case is fatally defective, for the reason that it is nowhere alleged that the said railroad company was a corporation or a copartnership; and the same is true as to the larceny count. It does not appear whether Wells-Fargo is a corporation or a firm of individuals."

Whatever may be the rulings elsewhere, it follows that under the rulings of this court the first count of the information, upon which the defendant was convicted, is fatally defective, in not charging whether the alleged owner of the property was a corporation or a copartnership, and, if a copartnership, in not giving the individual members thereof. Defendants in criminal cases are entitled to be informed by the pleadings of the charges against them, and the question of the ownership of property in burglary or larceny is an essential element in the charge.

Further questions raised by the briefs need not be noted. This case will be reversed and

remanded, to be hereafter dealt with in accordance with the views hereinabove expressed. All concur.

Ex parte CORNWALL.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. PARDON (§ 7*)—JUDGMENT OF CONVICTION—GRANTING PAROLE.

A judgment of conviction sentencing defendant to pay the costs and to be imprisoned in jail a certain time, and then providing that the court grants defendant a stay of execution on condition that she remove from the place she now occupies, and does not return thereto, and does not again violate the law, does not grant a parole; it reciting none of the essential requirements under the law regulating the granting thereof.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. §§ 8, 9; Dec. Dig. § 7.*]

2. CRIMINAL LAW (§ 993*)—REVISING JUDGMENT.

Even though a judgment of conviction, imposing as a penalty payment of costs and imprisonment for a certain time, and staying execution on condition of defendant doing certain things and not doing others, be erroneous, yet it having been partly complied with by the costs being paid, and some of the conditions being complied with, the court has no power, at least at a subsequent term, to revise it, and substitute therefor an entirely new judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2529, 2531; Dec. Dig. § 993.*]

3. HABEAS CORPUS (§ 109*)—POWER TO ENTER NEW SENTENCE IN SUCH PROCEEDINGS.

Rev. St. 1899, §§ 2720, 3615 (Ann. St. 1906, pp. 1596, 2033), providing that one shall not be discharged on habeas corpus because of the judgment under which he is confined being erroneous "as to time or place of imprisonment," but that the court, before whom the relief is sought, shall sentence him to the proper place of confinement, and for the correct length of time, give the court no power, in habeas corpus proceedings, to enter, in place of the original judgment imposing imprisonment, a new judgment imposing a fine; and, without statutory authority at least, it has no such power.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 97, 98; Dec. Dig. § 109.*]

Original habeas corpus proceedings by Florence Cornwall. Relator discharged.

This is an original proceeding pending in this court. On the 25th day of August, 1909, relator presented her petition to the Honorable Henry Lamm, one of the judges of the Supreme Court of this state, in chambers at Sedalia, Pettis county, Mo., praying for the issuance of a writ of habeas corpus. The writ was issued and the prisoner brought before the judge forthwith in accordance with the commands of the writ. Subsequently it was ordered that the return to this writ be set over until the October term, 1909, of the Supreme Court of Missouri; it being agreed that the petitioner should be released on bond. The bond was presented, approved, and the prisoner released. Upon the meeting of court in banc at the October

term, 1909, this proceeding was assigned to Division No. 2. The return was duly made by the sheriff and jailer of Pettis county, Mo. Upon the return as made, the relator moved the court to discharge her from imprisonment for the reason that no legal cause is shown for her imprisonment and restraint by the return made by the respondents to the writ of habeas corpus issued herein. We deem it unnecessary to burden the statement and opinion with a reproduction of the petition or the return of the sheriff and jailer of Pettis county to the writ issued upon the petition. There is no dispute about the facts, and a statement of them will fully disclose the controverted questions involved in the record before us.

At the November term, 1908, of the criminal court of Pettis county, Mo., the petitioner was indicted by the grand jury for keeping a bawdyhouse. She employed counsel, Messrs. C. C. Kelly and E. C. White. It was first agreed between her counsel and the prosecuting attorney that petitioner should plead guilty to the charge and a fine should be imposed upon her for \$250, then a stay of execution should be granted her on condition that she should leave her home and should not return thereto, and that she should not again violate the law. The question was then raised that this fine would be a lien on her real property, and she refused to plead guilty under the arrangement. It was then agreed between her counsel and the prosecuting attorney that she should enter a plea of guilty to the indictment and a jail sentence should be imposed upon her of 90 days and a stay of execution granted on condition that she should leave her home, and not again violate the law, which was concurred in by the court. With this understanding, she entered a plea of guilty on the 1st day of December, 1908, in the criminal court of Pettis county, Mo.; the same being the November term, 1908, of said court. The judge of said court, in pursuance of said understanding had between her counsel and the prosecuting attorney, imposed a jail sentence of 90 days upon her, but granted her a stay of execution on condition that she remove from the place she then occupied and did not return thereto, and that she did not again violate the law. The petitioner then paid all the costs of the suit, abandoned her then home, and did not return thereto until after the writ herein was granted. At the January and April terms of the criminal court of Pettis county, 1909, no steps were taken by the court in the cause. At the June term, 1909, of said court, to wit, on the 10th day of July, 1909, the court, on the suggestion of the prosecuting attorney, made an entry of record in which it was recited that the petitioner had violated the terms of her parole by keeping a disorderly house. The court thereupon, as the record recites, revoked her parole, and ordered an execution issued. On the 20th

day of August, 1909, petitioner was arrested and committed to the Pettis county jail. On the same day she sued out a writ of habeas corpus before the Honorable Louis Hoffman, judge of the criminal court of Pettis county, returnable August 23, 1909. Upon the hearing on said writ, said court set aside the jail sentence imposed upon the petitioner upon the 1st day of December, 1908, and assessed against her a fine of \$200 in lieu thereof, and ordered her in the custody of the jailer of said county until said fine was paid. She refused to pay said fine, and was thereupon committed to jail. On the same day she again presented her petition to the Honorable Louis Hoffman, judge of the circuit and criminal court of Pettis county, Mo., for her release from jail. Her petition was denied, whereupon she applied by a similar writ to the Honorable Henry Lamm, judge of this court, where her petition was granted and writ issued and made returnable on the 1st day of the October term, 1909, of this court.

Among the exhibits filed with the petition we find Exhibit A, which discloses the rendition of the original judgment against the petitioner by the circuit court of Pettis county. This exhibit is as follows: "Be it remembered that on the 1st day of December, 1908, the same being the 21st day of the regular term of the Pettis county circuit court, A. D. 1908, the following among other proceedings of the same day were had, made and entered of record, to wit: Keeping a Bawdyhouse. State of Missouri, Plaintiff, vs. Florence Cornwall, Defendant. No. 10,744. Now at this day comes the prosecuting attorney, on the part of the state, and also comes the defendant in person, attended by her counsel, and the said defendant withdraws her plea of not guilty heretofore entered herein, and enters a plea of guilty to the crime of keeping a bawdyhouse charged in the indictment herein; and the court fixes her punishment for said offense at imprisonment in the county jail for ninety (90) days. It is therefore sentenced, ordered, and adjudged by the court that said defendant be remanded to the custody of the sheriff of this county, and by him be imprisoned in the county jail for a period of ninety (90) days, and that the state have and recover of said defendant the costs of this prosecution, and that execution issue accordingly. And now the court grants the defendant a stay of execution upon condition that she remove from the place she now occupies, and does not return thereto, and that she does not again violate the law."

Exhibit B discloses the order revoking what the prosecuting attorney and the court construed to be a parole to the petitioner. This exhibit is as follows: "Be it remembered that on the 10th day of July, 1909, the same being the 15th day of the regular June term of the Pettis county circuit court, A. D. 1909, the following, among other pro-

ceedings of the same day were had, made and entered of record, to wit: State of Missouri, Plaintiff, v. Florence Cornwall, Defendant. No. 10,744. Keeping a Bawdy-house. Now at this day comes the prosecuting attorney, on the part of the state, and informs the court that the defendant, Florence Cornwall, is violating the terms of her parole by keeping a disorderly house whereupon the court revokes her parole, and orders execution issued."

Exhibit C discloses the action of the circuit court of Pettis county at the special August term, 1909, in the matter of the application of Florence Cornwall for a writ of habeas corpus. This exhibit is as follows: "Be it remembered that on the 23d day of August, 1909, the same being the 1st day of the special August term of the Pettis county circuit court, A. D. 1909, the following, among other proceedings of the same day were had, made and entered of record, to wit: In the Matter of Application of Florence Cornwall for Writ of Habeas Corpus. 9,833. Now this day this cause coming on to be heard and the court having seen the pleadings and heard the evidence doth find that the defendant on December 1st, 1908, entered a plea of guilty to this court upon a proper indictment preferred by the grand jurors of Pettis county, against this defendant for keeping a bawdyhouse, and by agreement of the prosecuting attorney of Pettis county, and attorneys for the defendant in lieu of a fine, this court then and there sentenced defendant to imprisonment in the county jail for ninety days. It is ordered that said judgment so far as it relates to the punishment at jail imprisonment, be set aside, and that the defendant pay a fine on her said plea of guilty, of two hundred dollars. It is therefore ordered and adjudged by the court that the state of Missouri, to the use of the school fund of Pettis county, have and recover of the defendant, the sum of two hundred dollars, and that she be remanded to the care and custody of the jailer of Pettis county until said fine of two hundred dollars be paid, or until she is otherwise discharged according to law, also that the defendant pay the costs of this proceeding."

The return of the sheriff and jailer shows that their custody and detention of the petitioner is predicated upon the last recited judgment of the court, marked "Exhibit C." This sufficiently indicates the nature and character of this proceeding to enable us to determine the legal propositions disclosed by the record.

Sangree & Bohling, for petitioner. Harvey D. Dow, Pros. Atty., for respondent.

FOX, J. (after stating the facts as above). The record, as heretofore indicated, which is now before us presents but one general legal proposition; that is, as to whether or not the sheriff and jailer have the legal custody

of the petitioner by reason of the judgments of the circuit court of Pettis county as heretofore indicated and disclosed by the record before us. After a most careful consideration of the proposition with which we are confronted respecting the restraint of the petitioner, we are clearly of the opinion that upon the disclosures of the record the petitioner is being held illegally without any authority of law, and is entitled to be relieved from such restraint and to a full discharge from the custody of the sheriff and jailer. While it is true that the original judgment as rendered in this cause, fixing a jail sentence to be served by the petitioner, was erroneous and in fact void, and that the stay of execution as recited in such judgment was equally without force or vitality, yet it must not be overlooked that the petitioner at least partly complied with the conditions upon which the court predicated its stay of the execution of that judgment. It will be noted that the judgment recites that the defendant should be imprisoned in the county jail for a period of 90 days, and that the state have and recover of the defendant the costs of this prosecution, and that execution issue accordingly. Then follows the granting of the stay of execution upon condition that the petitioner remove from the place she now occupies, and not to return thereto, and will not again violate the law.

The record in this cause discloses that the petitioner partly complied with the requirements of that judgment. She paid the costs of the criminal prosecution, abandoned her home as was required under the conditions of the stay of execution, and did not return until after the writ herein was granted. The prosecuting attorney and the order of the circuit court made at the June term, 1909, of the Pettis county circuit court seems to have recognized that a parole had been granted the petitioner in the original judgment of the November term, 1908. Manifestly this is a misconception of the provisions of what is commonly known as the parole law of this state. There was no parole granted this petitioner in that judgment. There is an entire absence of any reference to any of the requirements embraced in the provisions of the parole law. There was no requirement on the part of the petitioner to appear before the court at any subsequent term with witnesses to make proof of her conduct, and, if the recitations in the judgment at the November term, 1908, are to be construed as a parole, then we confess it would be a parole without the recitation of a single essential requirement under the law regulating the granting of paroles. We are clearly of the opinion that there was no parole in this case, and that the court in its judgment at the November term, 1908, simply sought to grant an ordinary stay of execution, and, while it had no power to grant the stay, yet, by reason of such want of power, it would not authorize

the treatment of the recitals concerning such stay of execution as an ordinary parole under the provisions of the parole law of this state. It follows from this that the order of the court made at the June term, 1909, revoking the parole of the petitioner upon information communicated to the court by the prosecuting attorney, was without any authority of law. As heretofore stated, there was no parole to revoke. However, it is disclosed by the record that upon this pretended revocation there was an execution issued, and the petitioner was taken into custody by the sheriff. Manifestly the matter for the consideration before the court at its special term in August, 1909, upon the habeas corpus proceeding, was the legality or illegality of the custody of the sheriff by reason of the arrest made by the sheriff upon the revocation of what the court denominated a parole. In that proceeding in our opinion it is clear that the petitioner was entitled to her discharge from the custody of the sheriff. However, the circuit court of Pettis county at its special term in August, 1909, in the consideration of the application of the petitioner for a writ of habeas corpus, sought to annul and did in fact embrace in an order, as set out in Exhibit C, setting aside the judgment of the circuit court rendered at its November term, 1908, sentencing the prisoner to imprisonment in the county jail for 90 days, and substituted in lieu thereof the imposition of a fine for \$200, followed by the usual recitation in the judgment for its recovery.

It will be noted that the judgment of the circuit court of Pettis county at its special August term, 1909, rendered while considering an application for a writ of habeas corpus, sought to annul and set aside a judgment in a proceeding which had been rendered eight or nine months previous to the action of the court at its August term, 1909. It is upon the judgment as rendered at the special term in August while the court had under consideration the application of the petitioner for a writ of habeas corpus that the sheriff and jailer in their return predicate their right to retain the custody of the petitioner. We are unwilling to give our assent to or concur to the claim of this right by the respondent, the sheriff and jailer. The judgment of the special August term, 1909, upon which the sheriff and jailer predicate the legality of the custody of the petitioner, cannot be maintained for two reasons: First. Even if it be conceded that the judgment rendered at the November term, 1908, was erroneous, yet, such judgment and the conditions imposed by it having been partly complied with, the circuit court had no power at a subsequent term to revise it and substitute therefor an entirely new judgment. Second. The court had no power upon the hearing of an application under the habeas corpus act to enter an entirely new judgment as was done in this case. Upon

the first proposition, the general rule is well stated in 12 Cyc. p. 784. It is there stated that, "after the term is passed at which the original sentence was imposed, the court has as a general rule no power to modify, amend, or revise it, particularly if the new judgment is in excess of the original sentence. Changes in the sentence, however, which do not alter the punishment but only change the time or place of its infliction, may be made at the subsequent term." It was expressly ruled in *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872, that, where a court imposed both a fine and imprisonment, it was erroneous for the reason that the statute only conferred power to punish by fine or imprisonment, and a part of such judgment—that is, the payment of the fine—has been complied with, such court has no power even during the same term to modify the judgment by imposing imprisonment, instead of the former sentence.

In *Re Johnson* (C. C.) 46 Fed. 477, it seems that the district attorney suggested during the consideration of that case that, should the court come to the conclusion that the sentence was erroneous, the prisoner might be held for a new sentence in the district court. The court responded to such suggestion by saying: "But it was decided by the Supreme Court in *Ex parte Lange*, 18 Wall. 163, 21 L. Ed. 872, that an erroneous sentence, after it has been partly executed, cannot be revised by the court and a new sentence imposed, even at the same term of the court." In this case the circuit court of Pettis county in its judgment at the November term, 1908, embraced a recovery of the costs of the prosecution, and this much of the judgment, about which there is no dispute, was fully satisfied. But, in addition to this, the court sought to stay the execution of the other part of the judgment, that is, the imprisonment in the county jail—and imposed certain conditions which the record in this cause also discloses were partly complied with.

Upon the second proposition in our opinion the court was absolutely without any power to enter the new judgment imposing a fine at its special term in August, 1909. This judgment, as disclosed by the record, was rendered upon the consideration of a proceeding under the habeas corpus act instituted by the petitioner. Learned counsel for the sheriff and jailer predicate the legality and sufficiency of such judgment upon the provisions of section 2720, Rev. St. 1899 (Ann. St. 1906, p. 1596). This section provides that "no person shall be discharged under the provisions of the habeas corpus act, nor shall any judgment be reversed or set aside by the Supreme Court, for the reason that the judgment by virtue of which such person is confined, or from which he has prosecuted an appeal or writ of error, was erroneous as to time or place of imprisonment, but in such case it shall be the du-

ty of the court or officer hearing the case to sentence such person to the proper place of confinement, and for the correct length of time, from and after the date of the original sentence, and to cause the officer or other person having such prisoner in charge to convey him forthwith to such designated place of imprisonment." Section 3615, Rev. St. 1899 (Ann. St. 1906, p. 2033), also provides that "no person shall be entitled to the benefit of the provisions of this chapter (that is the chapter applicable to the writ of habeas corpus), for the reason that the judgment, by virtue of which such person is confined, was erroneous as to time or place of imprisonment; but in such cases it shall be the duty of the court or officer before whom such relief is sought to sentence such person to the proper place of confinement and for the correct length of time from and after the date of the original sentence, and to cause the officer or other person having such prisoner in charge to convey him forthwith to such designated place of confinement." Manifestly these two sections have no application to the case at bar as disclosed by the record before us, and fail to render any aid or support to the maintenance of the contention that the judgment as disclosed in Exhibit C, rendered at the special August term, 1909, is a valid judgment. It is apparent that these sections have application alone to where a judgment of the circuit court is erroneous as to time or place of imprisonment. In other words, if the court should render a judgment sentencing a defendant to the penitentiary, when, in fact, upon the record he ought to be sent to the reform school, this statute would be applicable, because it is an error concerning the place of confinement; or, if the court should sentence a defendant to the penitentiary for a length of time in excess of that authorized by law, that would also be an error concerning the length of time of the imprisonment, and petitioners seeking relief by the writ of habeas corpus would very properly and justly be confronted with the provisions of the sections of the statute to which reference has been made, and the court before whom such proceeding was pending would simply in obedience to the provisions of those sections fix the proper time and place of imprisonment, and order the officer to execute its judgment. But that is not this case. The circuit court of Pettis county in its judgment at the August term, 1909, while considering a proceeding under the habeas corpus act, did not undertake to correct an error in a judgment which was erroneous simply as to time or place, but it entered an entirely new judgment which absolutely had no reference to imprisonment, nor to the correction of an erroneous judgment as to the time and place of such imprisonment. The judgment was entirely a new and different one, and sought to impose a punishment to which no reference had ever

been made in the original judgment in this cause. In the administration of the criminal laws of this state, it is fundamental that one of the substantial rights of a defendant in answering to a criminal charge is to be present, not only during the progress of the trial, but at the time of the imposition of the punishment. This is a right which the petitioner in this cause had the right to demand in the proceeding in the circuit court where the criminal charge was being considered, and in our opinion the law does not contemplate that the courts of this country may upon the hearing of an application for a writ of habeas corpus for the first time assess punishment against the defendant. That was a matter within the province of the jurisdiction of the court which heard and disposed of the criminal charge. While the courts have ample power to correct errors respecting erroneous judgments as to time and place of imprisonment, as provided by the sections of the statute as heretofore indicated, yet we are unwilling to go to the extent of saying that for the first time in a proceeding under the habeas corpus act the court may then assess the punishment that was never contemplated by the original judgment or to which any reference was made by such judgment. Learned counsel for the sheriff and jailer, the respondents in this proceeding, assert that, where there is an erroneous judgment and sentence, the court will, upon the consideration of a proceeding under the habeas corpus act, enter a proper judgment and sentence. In support of that contention counsel directs our attention to numerous cases. We shall not undertake to review the cases to which reference is made, but deem it sufficient to say that we have carefully examined all the cases cited in the brief, and in our opinion they absolutely fail to support such contention. The cases of *Ex parte Kenney*, 105 Mo. 535, 16 S. W. 938, *Ex parte Gray*, 77 Mo. 180, *Ex parte Cohen*, 159 Mo. 682, 60 S. W. 1031, and *State v. Nunley*, 185 Mo. 102, 83 S. W. 1074, in no way conflict with the conclusions as herein indicated upon the proposition under consideration. All of those cases simply recognize the provisions of sections 2720 and 3615 as to the correction of erroneous judgments as to time and place of imprisonment, but none of them deal with the proposition which is now under consideration, and in no way support the contention that the court for the first time in the hearing of an application under the habeas corpus act may impose a punishment and enter an entirely new and different judgment which has no reference whatever to time or place of imprisonment. The record in this cause discloses that there was no contemplation by counsel representing the state or the defendant in the original proceeding where the criminal charge was being considered of entering a judgment imposing as a penalty a fine; in fact, it is emphasized

by the disclosures of the record that counsel, both for the state and the defendant in that proceeding, were willing that the imposition of a fine should be avoided. Upon this state of the record we are unwilling to hold that a judgment is valid rendered in a habeas corpus proceeding without an opportunity of the petitioner to be heard upon the question of punishment in the proceeding where the court had jurisdiction, and was authorized to try and dispose of the criminal charge against the petitioner. The rendition of the judgment in this cause in a habeas corpus proceeding, which for the first time assessed the punishment against the petitioner, in our opinion would be depriving the petitioner of one of her substantial rights; that is, to be heard in the court that had jurisdiction of and authority to dispose of the original charge against her.

We have indicated our views upon the propositions disclosed by this record. In our opinion the relator is entitled to her discharge, and it is so ordered. All concur.

STATE v. WILSON.

(Supreme Court of Missouri, Division No. 2
Nov. 23, 1906.)

1. CRIMINAL LAW (§ 1130*)—REVIEW OF ERRORS AS TO AN ACCUSED NOT REPRESENTED ON APPEAL.

Where accused files no brief, and is not represented on appeal, the Supreme Court can only look to the errors designated in the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2970; Dec. Dig. § 1130.*]

2. CRIMINAL LAW (§ 628*)—INDORSEMENT OF NAMES OF WITNESSES ON INFORMATION—WAIVER OF OBJECTIONS.

Accused cannot complain of the permission to indorse the names of material witnesses on the information after the case has been called for trial, where there is no suggestion of surprise or application for a continuance, with a view of investigating as to such witnesses.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1418, 1419; Dec. Dig. § 628.*]

3. CRIMINAL LAW (§ 519*)—EVIDENCE—ADMISSIBILITY OF CONFESSIONS.

If there is no improper conduct of officers, or any flattery of hope, promise of immunity, or use of threats, to induce confessions, they are voluntary and admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1163; Dec. Dig. § 519.*]

4. WITNESSES (§ 277*)—CROSS-EXAMINATION OF ACCUSED—TESTIMONY AS TO CONFESSIONS.

Defendant's testimony in chief that he made confessions as testified to by different witnesses, and that he signed a written confession, but that the first were obtained by threats and duress, and that he did not know the contents of the written confession, opened a wide field for cross-examination, and it was clearly proper to cross-examine him fully as to the facts stated in the confessions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 979-981; Dec. Dig. § 277.*]

5. CRIMINAL LAW (§ 404*)—DEMONSTRATIVE EVIDENCE—ROPE FOUND AROUND NECK OF DECEASED.

In a murder case, a rope having been fully identified as the one found around the neck of deceased, and a physician having testified that death may have resulted from strangulation, it was clearly admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 891; Dec. Dig. § 404.*]

6. CRIMINAL LAW (§ 1037*)—APPEAL AND ERROR—PRESERVATION OF OBJECTIONS AND EXCEPTIONS—ARGUMENT TO JURY.

An assignment of error as to improper argument to the jury is not before the court for review, in absence of proper preservation of objections and exceptions to the court's action on objections during the argument.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1691, 2645; Dec. Dig. § 1037.*]

7. CRIMINAL LAW (§ 1119*)—TRIAL—IMPROPER ASSISTANCE OF PROSECUTING ATTORNEY.

There is no merit in a complaint that one who was attorney for defendant in his preliminary hearing took a seat at the counsel table for the state at the trial, and began assisting the prosecuting attorney, where no more appears than the fact that defendant interposed an objection to his sitting as counsel for the state, and the court sustained it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2927; Dec. Dig. § 1119.*]

8. CRIMINAL LAW (§ 958*)—NEW TRIAL—AFFIDAVITS AS TO NEWLY DISCOVERED EVIDENCE.

An affidavit on the subject of newly discovered evidence must be supported by oath of the accused, and by affidavits of the proposed witnesses, and an affidavit by counsel is insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2397, 2401; Dec. Dig. § 958.*]

9. CRIMINAL LAW (§ 786*)—TRIAL—INSTRUCTIONS—STATEMENTS MADE BY DEFENDANT.

In a murder case, the jury were properly instructed that if they found and believed from the evidence that defendant made any statement, or statements, in relation to the homicide charged in the information as to how it was committed, they must consider such statement or statements altogether; that defendant was entitled to the benefit of anything he said for himself, if true, and the state was entitled to the benefit of anything he said against himself in any statement or statements proven by it; that what he said against himself the law presumed to be true, because said against himself, and that what he said for himself the jury were not bound to believe, because it was said in a statement or statements proven by the state, but they may believe or disbelieve it as it is shown to be true or false by the evidence in the case, and it was for them to consider, under all the evidence or circumstances, how much of his whole statement or statements, proven by the state, they, from the evidence, might deem worthy of belief.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1896, 1898; Dec. Dig. § 786.*]

10. HOMICIDE (§ 253*)—EVIDENCE—SUFFICIENCY.

Evidence held sufficient to justify a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

William Wilson was convicted of murder, and he appeals. Affirmed.

The defendant in this cause was charged, by information of the prosecuting attorney of Jasper county, which was duly verified, with murder of the first degree. The party charged to have been killed was one Millie Plum, and the offense was alleged to have been committed on July 12, 1908, at Carl Junction, Jasper county, Mo. The information embraces four counts, each of which charges murder of the first degree, and doubtless were embraced in the information to meet the different phases of the testimony which might be introduced upon the trial of the cause. From a judgment of conviction in the Jasper county circuit court of the offense charged the cause is brought to this court, and is now pending here upon appeal from such judgment.

The testimony introduced upon the trial of this cause substantially tended to prove the following state of facts: Defendant, William Wilson, is a negro, was about 24 years old at the date of the trial, and a native of Lafayette, La. In the spring months of 1908 the Miller Carnival Company was showing at Lafayette, and this defendant joined said company at that place, and remained as one of the employes of said company until the date of his arrest at Carl Junction for the murder of deceased. The deceased, Millie Plum, joined said Miller Carnival Company at Weir City, Kan., as an employe in the capacity of a cook, about one week prior to her death. It appears that said Miller Carnival Company had been at Carl Junction for a few days, taking part in a street fair, and closed its engagement late Saturday night, July 11th, and was getting ready to leave on the following day. Said company traveled by railroad. It had one car of its own, divided into compartments, one of which was occupied by the Miller family, one for the private dining room of the Miller family, one for the general dining room of the carnival employes, and an extra car of the railroad company was used in conveying their property from town to town.

The body of the deceased, Millie Plum, was found near an empty box car of the Frisco railroad at about 1:45 Sunday morning, July 12, 1908. When found, a rope was tied around her neck; her face was downward; a bruise was found on her left cheek; a cut around her neck five inches long, but not deep; she had on a thin skirt and a gauze shirt waist. The body had been dragged a distance of about 100 yards from the ground. The distance of the body from the Miller car was something like 200 yards. Her hands and feet showed signs that she had been dragged face downward, and the skin on the hands and feet was broken and worn. Woman's hair was found on the railroad track where

the body had been dragged; a lady's comb was found about 30 feet from the Miller car. Sock-foot tracks of a man with flat insteps were found leading back to the Miller car; the size of the footprints corresponded to defendant's feet. Defendant was arrested in the Miller car soon after the body of the deceased was found, which was near the hour of 2 o'clock in the morning, and when first arrested he denied that he had killed deceased, but while in the city calaboose at Carl Junction, and only a few hours after his arrest, defendant confessed to the crime of killing deceased. After defendant was taken to the county jail at Carthage, and on that Sunday afternoon, he made a sworn, written confession to Judge Bright, who was then assistant prosecuting attorney, telling him how this crime was committed, which written confession is as follows:

"State of Missouri, County of Jasper—ss.:

"William Wilson, being duly sworn, upon his oath states: My name is William Wilson. I am 24 years old. I was born in South Carolina. I joined the J. G. Miller Carnival Company January at Lafayette, La. We showed at Weir City, Kan., last week. My duty was working at the merry-go-round and at the boarding car. At Weir City a white woman, whom they called Millie Plum, joined the carnival company. We went from Weir City to Carl Junction. We showed there last week, and we showed there the last time Saturday night, and expected to leave there Sunday morning. This white woman I mentioned cooked for the members of the company. About midnight Saturday night, July 11, 1908, I went into the car of the carnival company where Millie Plum slept. I took off my shoes. She was lying down. I asked her to let me have sexual intercourse with her. She refused. Then I hit her on the jaw, and knocked her down. I then carried her out of the car and for about 100 yards from the car. I then tied a rope around her neck and dragged her some distance to an empty box car. I tried to put her into the box car, but she was too heavy. I wanted to put her into the box car to hide her. She never hit me or cut me at any time. When first arrested I denied having killed Millie Plum. I make this statement under oath and of my own free will and accord, voluntarily and without any duress or restraint whatever and without any hope or promise of clemency of any kind.

"[Signed.]

Willie Wilson.

"Witness: Wm. Weaver.

"Subscribed and sworn to before me this 12th day of July, 1908.

"Henry L. Bright, Notary Public. [Seal.]

"My commission expires July 23, 1911."

Dr. A. L. Carpenter, a witness for the state, who examined the body of deceased early on the morning it was found, testified as follows: "Q. There was a question I intended to ask you. What was the

condition of the body as to whether or not it was alive or dead? A. It was unquestionably dead. Q. Now, after making an examination, Doctor, of the body, contusions and bruises and the rope around the neck, what, in your opinion, was the cause of death? A. Dragging it up there with the rope; it was strangulation. Q. You say, Doctor, it was caused by strangulation? A. Yes, sir. Q. That was produced by what? A. By dragging her along on her face. Q. That produced death? A. Yes, sir; I think she was struck a blow on the side of the head first. Q. Was the blow on the side of the head sufficient to cause death? A. I don't think so. Q. Then, in your opinion as a medical man, you should say it was caused by strangulation? A. Yes, sir."

H. O. Barnard, witness for the state, and the city marshal of Carl Junction at the date of this crime, and who arrested defendant, testified to defendant's confession to him as follows: "Q. Go ahead, now, Mr. Barnard, tell what he said there—use his language. A. He said she come at him with a butcher knife, and he knocked her down, and did this either two or three times—I wouldn't be positive which—and he knocked her down each time, and he said he thought he had killed her, and taken her on his shoulder; at any rate, he carried her from the car about a hundred yards west up the railroad track, and said he was tired carrying her, and he laid her down and drug her about another hundred yards to an empty box car that was standing on the siding there, and said he intended to put her in that car and close the door, and possibly she would be taken out before it was discovered. Q. What else did he say, if anything, about how he dragged her? A. He drug her with a rope he had around her neck, a rope 8 or 10 feet long. Q. Describe that rope. A. It was a small rope. I don't know just what kind it was; I don't think it would exceed half an inch rope, and possibly 8 or 10 feet long."

Frank R. Ross, a witness for the state, testified to a confession made by defendant to him, as follows: "Q. Do you remember the time Millie Plum was killed over at Carl Junction? A. I remember the circumstances; I don't remember the exact date. Q. How long was it after that time you saw the defendant, William Wilson? A. About 3 o'clock that afternoon. Q. Where did you see the defendant at that time? A. In the county jail of Jasper county. Q. Have any conversation at that time as to how this killing took place? A. I did. Q. State to the jury what the defendant said. A. Well, he said he went to the car where this girl was sleeping, and made a proposition to her and she resented it, and she came at him with a butcher knife, and he struck her in the face or neck, right back here some place, and knocked her down, and after questioning him several times over that, telling him to repeat it, he finally denied the butcher knife.

He said he struck her on the side of the jaw or neck and knocked her down, and, thinking he had killed her, he picked her up and took her out, I believe, the side door to the car, and carried her some 75 or 100 yards. He had a rope that he had been tying some papers together with, and he put that around her neck, and dragged her that much further to put her in a car, thinking he would fasten the car up and possibly she would be shipped out and no one would ever know where she went to, but after he got there he was pretty well out of wind, and, as well as I remember now, he said some two or three tramps were in the car, and that frightened him, and he left her at the side of the car and went back to the car and went to bed. Q. What car did he go back to? A. Where this girl was sleeping, or the car that belonged to the Miller Carnival Company."

J. W. Jackson, a witness for the state, testified to the following confession made to him by defendant: "Q. What did he say? A. He says, 'I can't help it; I never done it.' Q. What else did he say, if anything? A. Mr. Miller, or Mr. Barnard—I wouldn't be positive which—says: 'Well, the girl come to, Bill, and regained consciousness,' and he said 'She admitted to us and told us that you was the one that done it before she died.' Q. What did he say? A. He still denied it again, and he said he couldn't help what she said, he never done it, and Miller spoke up and says, 'Bill, whatever induced you to do that,' he says, 'you must undoubtedly have had some provocation or you wouldn't have done it.' And he says, 'Well, I tell you, Mr. Miller,' he says, 'went back to where she was laying and made a proposal to her, and she jumped out of where she was laying and come at me with a knife, and I struck her in the jaw and knocked her down, and she come at me again, and I run and she followed me out of the car, and she run at me again, and I knocked her down again, and she got up and fought at me and still struck at me with this knife, and I knocked her down again and knocked her senseless,' and I think, if I am not mistaken, Mr. Miller says, 'You knocked her senseless,' and he says, 'Yes, and then I picked her up and put her on my shoulder and carried her as far as I could, and then put this rope around her neck and drug her.' And some of the boys asked him what made him do that, or what was he going to do, and he said he was going to put her in that car, and he said she was too heavy, he couldn't get her in."

William Weaver, deputy sheriff, testified to the following confession as made by defendant to him: "Q. Did you have any conversation with the defendant in regard to the killing of Millie Plum? A. Yes, sir; several conversations with him. Q. Tell the jury what they were—what he said. A. The first conversation I had with the defendant was in the afternoon of July 12th, somewhere about 5 o'clock, probably a little later. It

was in the trusty room in the county jail. After the defendant was brought to the jail on the morning of the 12th, being my Sunday off, I left and went to Carl Junction for the purpose of investigating the murder that had been committed down there, and I came back to the jail in the afternoon. Mr. Bright, the then assistant prosecuting attorney, and Mr. Ross, in charge of the jail on that day, and the defendant were in the trusty room together. Mr. Bright had come down, I suppose, for the purpose of getting a statement from the defendant—what he knew about the matter. They were together when I arrived at the jail, and I immediately went into the room where they were and became interested in the conversation. Being questioned by Mr. Bright, the defendant made a statement; that is, he commenced to make a statement as to what he knew about the matter, and he made the statement, as it was repeated to me by the constable, as he had before that, made it to him, and I spoke up to the defendant and told him, I says: 'You are lying about this; you are not telling the truth. You had better come clean because we have got the evidence.' Then Mr. Bright instructed him to make a statement as to what he knew about the matter. Then he made a statement which was written down by Mr. Bright, and later signed by the defendant, after having been read over twice, and it was read over after he signed it by Mr. Bright. Q. I hand you Exhibit A, Mr. Weaver, and ask you if that is the statement? A. Yes, sir; that is the statement he signed, and my own signature here as a witness. Q. Now, Mr. Weaver, subsequent to that statement, did you have any conversation with the defendant? A. Yes, sir. Q. State to the jury what that was. A. It was on the morning, Tuesday morning following, at about 1 o'clock in the morning. Q. This was Sunday? A. Yes; Sunday afternoon. On the Tuesday morning following at about 1 o'clock in the morning, for certain reasons I went to the cell where the defendant was confined, and he was lying on a bunk, apparently asleep. I touched him on the shoulder and says, 'Billy, get up, put on your clothes and follow me, and don't ask any questions nor speak a word,' and he done so. I took the defendant into the outer room, and left him in charge of Deputy Sheriff Cale and went to the barn and hitched up my rig. Mr. Cale took the colored man out of the jail, and met me at the corner of Fifth and Fulton streets. The defendant got in the buggy with me, and during this ride I had another conversation with the colored man. After we got out in the edge of town, I says, 'Billy, tell me all there is to this thing,' and he went over practically the same statement he made here where he signed. His statement was to the effect that he went into the apartment of the girl— Mr. Saylor: We object to that. The Court: Overruled. Mr. Saylor: We except. He told me he went into the apartment of

the girl where this white woman, Millie Plum, as I understand her to be, was sleeping, for the purpose—he used the term—doing business with her. He made a proposal to her, and she was lying on the bed at the time. She resented the proposition, and jumped out of the bed, and he said he struck her with his fist on the head or neck, and she fell to the floor. He said he thought he had killed her. There was a piece of rope he said lying there, and he tied that around her neck and dragged her to the side door of the car and took her on his shoulder. He said he carried her up the railroad track west until he became exhausted and laid the body down on the ground, and he said at that point he saw the woman breathing. He said he dragged the body from there to an empty box car, which was about 100 yards further west. I asked him what he took her there for. He said he intended to hang the body in the car, so if it was found it would appear the woman had committed suicide. I asked him why he didn't hang the body in the car, and he said he thought he heard something move in the car, and left the body on the ground. He also said he was so exhausted he could not have put the body in the car if he tried. I have had other conversations since then; and, while there has been other statements made, I don't know as any that would throw any further bearing on the case."

The defendant testified in his own behalf, and he was the only witness who testified on the part of the appellant. His examination and cross-examination is quite voluminous. We have examined it very carefully and in detail, and feel that it can serve no good purpose to burden this opinion with a detailed statement of his testimony. It is sufficient to say, after a careful analysis of all his statements, that it amounts to simply this: That he absolutely denies the killing of the deceased, and denies the truth of the confessions, and also makes a denial that the confessions were made at all.

At the close of the evidence the court fully instructed the jury upon all the legal propositions to which there was any testimony applicable. It is not essential to reproduce the instructions, but will, during the course of the opinion, give those the correctness of which are challenged such attention as we deem necessary. The cause was submitted to the jury; and, after due consideration, they returned their verdict finding the defendant guilty of murder in the first degree, and assessed his punishment at death. Timely motions for new trial and in arrest of judgment were filed, and by the court taken up and overruled. Sentence and judgment were entered of record in conformity to the verdict, and from such judgment the defendant prosecuted this appeal, and the record is now before us for consideration.

E. W. Major, Atty. Gen., and John M. Atkinson, Asst. Atty. Gen., for the State.

FOX, J. (after stating the facts as above). It is apparent from the disclosures of the record that this is a very serious case, being one in which the most severe punishment known to the law was imposed by the judgment of the trial court. Upon the part of the appellant we are not favored with any brief or suggestions respecting the complaints urged by the motion for new trial. However, in obedience to the requirements of the statute, we have given the entire record very serious consideration, with the view of determining whether or not there was any reversible error in the trial of this cause. It may not be out of place to say that, even in the absence of any statute requiring us to make this investigation, the importance of this case would dictate a most careful consideration of every detail during the progress of the trial. There being no suggestions on the part of the appellant, he not being represented in this court, we can only look to the errors as designated in the motion for new trial.

1. In the motion for new trial it is insisted that the court erred in permitting the state to indorse the names of material witnesses on the information after the case had been called for trial, over the objections of the defendant, and that the witnesses so indorsed were afterward introduced and examined. In this connection it is asserted in the motion for new trial that the prosecuting attorney knew, from the very time of the homicide, that these witnesses were important and material, and it is further stated that these witnesses were not previously known to the defendant to be witnesses against him. Upon this proposition it is sufficient to say that the record does not disclose that there was any motion to quash the information upon the ground that these witnesses were indorsed upon the information at the time of the trial; nor does it appear that the defendant, through his counsel, made any complaint that he was taken by surprise by reason of the additional indorsement upon the information of these witnesses. An examination of the record discloses simply an objection by counsel for appellant to the indorsement of the witnesses, and an exception to the ruling of the court in permitting such names to be indorsed on the information by the prosecuting attorney. There was no request for a continuance for a sufficient length of time to investigate concerning the additional witnesses so indorsed.

A similar proposition to the one now under consideration was presented to this court in the comparatively recent cases of *State v. Bailey*, 190 Mo., loc. cit. 278, 88 S. W. 733, *State v. Myers*, 198 Mo., loc. cit. 243, 94 S. W. 242, *State v. Barrington*, 198 Mo., loc. cit. 66, 95 S. W. 235, and it was expressly ruled in those cases, upon disclosures of the records very similar to those in the case at bar, that there was no error in permitting the indorsements to be made. Manifestly the defendant

is in no position to complain at the action of the court in the absence of any suggestion of surprise, or an application for a continuance by reason of such surprise, with the view of making an investigation as to the additional witnesses. This proposition was exhaustively treated in the cases of *State v. Myers*, *State v. Barrington*, and *State v. Bailey*, supra, as well as in the case of *State v. Henderson*, 186 Mo., loc. cit. 482, 85 S. W. 576.

2. The appellant complains in his motion for new trial that the court erred in admitting illegal, incompetent, irrelevant, and immaterial testimony. This complaint, at least partly, is directed at the admission of the numerous confessions made by the defendant concerning the commission of this offense. Upon that question it is only necessary to say that the record discloses great care upon the part of the trial court to first ascertain whether or not such confessions were obtained by improper inducements held out to the defendant. The trial court excluded the jury, and made a preliminary examination upon the question as to the inducements held out to this defendant to make the confessions, and upon such examination the court ruled that the confessions were voluntary and admissible. In our opinion the action of the court in admitting the confessions of the defendant was entirely proper. The record does not disclose any improper conduct on the part of the officers, or any flattery of hope, promise of immunity, or use of threats in order to induce the defendant to make such confessions. Hence it follows that the confessions were voluntary, and were admissible in evidence. It is hardly necessary to cite authorities upon this proposition. However it was fully treated of, and the rules clearly announced, in *State v. Brooks* (not yet officially reported) 119 S. W. 353; *State v. Wooley*, 215 Mo., loc. cit. 682, 115 S. W. 417; *State v. Spaugh*, 200 Mo., loc. cit. 596, 98 S. W. 55; *State v. Hottman*, 196 Mo., loc. cit. 127, 94 S. W. 237; *State v. Barrington*, 198 Mo., loc. cit. 109, 95 S. W. 235; *State v. Ruck*, 194 Mo., loc. cit. 437, 92 S. W. 706, and numerous other cases. It must be held that there was no error in the admission of the confessions of the defendant in this cause.

Again, under this assignment of the admission of illegal and incompetent evidence, will be embraced the complaint, lodged in the motion for new trial, that the defendant was "cross-examined about matters not testified to in chief." We have examined the disclosures of the record respecting the cross-examination of the defendant, and have reached the conclusion that there is no merit in this assignment of error. The defendant in his testimony in chief testified that he made the confessions at Carl Junction as testified to by different witnesses, and also that he signed a written confession to Judge Bright, but claimed that the first confessions were

obtained by threats and duress, and that he did not know the contents of the written confession. This statement upon the part of the defendant opened a wide field for cross-examination. It was clearly proper on the part of the state to cross-examine the defendant fully as to the facts stated in the confessions, and this is all that was done. We are unable to find in the disclosures of the record any violation of the statutory rule that the defendant can only be cross-examined upon matters referred to in his examination in chief. *State v. Miller*, 190 Mo., loc. cit. 462, 89 S. W. 377; *State v. Avery*, 113 Mo., loc. cit. 498, 21 S. W. 193; *State v. Wartz*, 191 Mo., loc. cit. 579, 90 S. W. 838, and numerous other cases.

The next complaint embraced in the assignment of errors in the motion for new trial as to the admission of improper and incompetent evidence is that the state was permitted to introduce the rope found around the neck of the deceased upon the discovery of her body. This rope was fully identified by witness Chas. Roney as being the one found tied around the neck of the deceased; and one of the physicians testifying in this cause stated that the death of the deceased may have resulted from strangulation. We are of the opinion, that this rope, after being identified, was clearly admissible in evidence.

3. Another complaint, urged and insisted upon in the motion for new trial, is that the court permitted one of the local attorneys, Mr. Andrews, who was of counsel for the state, to make an improper argument to the jury. Upon this proposition it is sufficient to say that a careful examination of the bill of exceptions fails to disclose a proper preservation of objections and exceptions to the action of the court upon objections during the argument of Mr. Andrews. Therefore, we take it, that assignment of error is not before the court for review.

4. Appellant also lodges the complaint in his motion for new trial that one Geo. W. Crowder, who had been the attorney of the defendant in his preliminary hearing in this cause, took a seat at the counsel table for the state, and began assisting the prosecuting attorney to select a jury in this cause. A careful consideration of the disclosures of the record makes it manifest that there is no merit in this assignment of error. The record discloses simply this: Mr. Sayler, who was representing the defendant, interposed an objection to Mr. Crowder sitting as counsel on behalf of the state in this trial, on account of his being former attorney for the defendant. "By the Court: Objection sustained." This is absolutely all that is embraced in the record concerning Mr. Crowder's participation in this trial. The defendant interposed an objection to his sitting as counsel on behalf of the state in the trial, and the court sustained the objection. In other words, the court upon that proposition did what was requested by counsel for appel-

lant. We are of the opinion that there is no merit in that complaint.

5. It is insisted in the motion for new trial, and is assigned as one of the reasons why a new trial should be granted, that upon the showing made respecting newly discovered evidence the court should have granted a new trial. The record upon this question discloses that an affidavit was filed by Walter B. Sayler in support of the motion for new trial, asserting that other evidence had been discovered since the trial, detailing in his affidavit the substance of the evidence and the names of the witnesses who would give such evidence. It fully answers the assignment of error upon this proposition to simply suggest that the affidavit upon the subject of newly discovered evidence is not supported by the oath of the appellant, or are there any affidavits filed by the witnesses whom it is alleged would give certain evidence upon a new trial of this cause. The uniform rulings of this court upon that proposition are that the affidavit by counsel for appellant upon the subject of newly discovered evidence is insufficient. In order to fully meet the requirements of the law as announced by this court in an unbroken line of decisions, the affidavit detailing the newly discovered evidence must have the support of the appellant himself, as well as the witnesses by whom he expects to establish the facts he alleges have been newly discovered. It really is not necessary to cite authorities upon this question, but the cases of *State v. Fletcher*, 166 Mo., loc. cit. 587, 66 S. W. 429; *State v. Neasby*, 188 Mo., loc. cit. 472, 87 S. W. 468; *State v. Miller*, 144 Mo., loc. cit. 30, 45 S. W. 1104; *State v. Bowman*, 161 Mo., loc. cit. 94, 62 S. W. 996, fully treat of that question, and correctly state the rules of law which have uniformly been applied to it.

6. The motion for new trial by the appellant directs attention to but one instruction of which it complains of the action of the trial court in giving it. The motion refers to this instruction as No. 8, but manifestly it has reference to instruction No. 7, for the reason that, following the number of the instruction, it is recited in the motion for new trial that the instruction "told the jury how they should construe what the defendant is alleged to have said against himself, and how they might construe what he said at the same time in favor of himself." This recitation clearly pointed to what was said to the jury in instruction No. 7, and we shall treat the complaint as referring to that instruction. Instruction No. 7 was as follows: "You are instructed that if you find and believe from the evidence that the defendant made any statement or statements in relation to the homicide charged in the information as to how said homicide was committed, you must consider such statement, or statements, altogether. The defendant is entitled to the benefit of anything he said for himself, if true, and the state is entitled to the benefit

of anything he said against himself in any statement, or statements, proven by the state. What the defendant said against himself the law presumes to be true, because said against himself. What the defendant said for himself the jury are not bound to believe, because it was said in a statement or statements proven by the state, but the jury may believe or disbelieve it as it is shown to be true or false by the evidence in the case. It is for you to consider, under all the evidence or circumstances, how much of the whole statement or statements of the defendant proven by the state you, from the evidence, may deem worthy of belief." In our opinion there is no substantial ground for complaint respecting instruction No. 7. It has substantially, in the same form, met the approval of this court from its earliest history, commencing with the case of *State v. Hays*, 23 Mo. 287, down to the present time. In *State v. Darrah*, 152 Mo., loc. cit. 541, 54 S. W. 226, in discussing a complaint urged against an instruction in that case, in similar form to instruction No. 7 in the case at bar, it was said that the instruction under discussion "has been approved so often in this state that we must decline to enter upon its defense." This court has in a number of cases expressly ruled that there was no error in declaring the law substantially as it is stated in instruction No. 7, and we do not deem it necessary to burden this opinion with the citation of numerous cases supporting the conclusions as herein reached.

7. Finally, the motion for a new trial assigns, as a reason for the granting of a rehearing, that the verdict as returned by the jury is wholly unwarranted, and manifestly rendered in utter disregard of the court's instructions and the evidence before the jury. Upon this proposition it will suffice to say that we have substantially indicated the nature and character of the testimony developed upon the trial of this cause, and in our opinion it cannot be seriously contended that there was not substantial evidence tending to show the guilt of the defendant of the offense of which he was convicted. In fact, after a careful consideration of all the testimony developed upon the trial, we see no escape from the conclusion that the jury could not, with any degree of reason for it, have returned any other verdict than the one returned in this cause. This is a very serious case, and the results of it are quite important to the defendant. His counsel in the lower court presented his side of the case fairly and in a commendable lawyerlike way, and whatever may be the serious results confronting the defendant, at last it must be attributed to his own unlawful acts, which are so clearly disclosed by the record now before us. The defendant is not represented in this court, and we have, as heretofore indicated, fully considered the errors com-

plained of in the motion for new trial, and in the consideration of the complaints of such motion we have made an independent examination of the record, with the view of ascertaining whether or not there was any substantial error by the court in the trial of this cause. With that end in view we have analyzed in detail the entire disclosures of the record, and from this examination we see no escape from the conclusion that the defendant was afforded a fair and impartial trial, and there is nothing left for this court to do except to give expression to its affirmation of the judgment.

Entertaining the views as herein indicated, the judgment of the trial court should be affirmed, and it is so ordered. All concur.

STATE v. VAUGHN.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. CRIMINAL LAW (§ 1104*)—RECORD ON APPEAL.

The transcript on appeal should keep the matters of the record proper distinct from the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1104.*]

2. CRIMINAL LAW (§ 1086*)—ARRAIGNMENT—RECORD—NECESSITY.

The arraignment of accused and the entry of a plea must be shown by the record proper, or the conviction must be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2753, 2754; Dec. Dig. § 1086.*]

3. CRIMINAL LAW (§§ 311, 360*)—EVIDENCE—DECLARATIONS OF INSANE PERSON—ADMISSIBILITY.

One shown to have been insane, and committed to an insane hospital, presumptively continues to be insane while remaining a patient, and a statement made by her is presumptively incompetent, though a part of the *res gestæ*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 744, 806; Dec. Dig. §§ 311, 360.*]

Appeal from Circuit Court, Callaway County; David H. Harris, Special Judge.

Elwood Vaughn was convicted of crime, and he appeals. Reversed and remanded.

I. W. Boulware and D. W. Herring, for appellant. E. W. Major, Atty. Gen., and John M. Dawson, Asst. Atty. Gen., for the State.

GANTT, P. J. Defendant was convicted by a jury in the circuit court of Callaway county of an attempt to commit rape, and his punishment assessed at six years in the penitentiary. On motion his punishment was reduced to three years in the penitentiary, and he was sentenced accordingly. From that judgment he has appealed to this court.

The transcript is in a most unsatisfactory shape, and we must again admonish both counsel and the clerks of the circuit and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

criminal courts to see that the transcript shall show that the matters of record proper are kept distinct from the bill of exceptions, as was pointed out in *Stark v. Zehnder*, 204 Mo. 449, 102 S. W. 992. However, we have gone through the record, and have concluded that there is sufficient therein to indicate what is record proper and that which is in the bill of exceptions.

It appears that on January 9, 1908, an affidavit was made before J. B. Hyde, a justice of the peace, charging the defendant with the crime of burglary, and on January 29, 1908, there was a preliminary hearing of the said charge, which resulted in the justice holding the defendant to answer before the circuit court at its next regular term in May, 1908, to the said charge. The transcript was duly filed with the clerk of the circuit court, and at the said May term, 1908, the grand jury investigated the charge and reported "Not a true bill." Afterwards, on the 18th of September, 1908, the prosecuting attorney filed with the clerk of the circuit court an information, charging the defendant in two counts with the charge of burglary in feloniously breaking into State Hospital No. 1, located at Fulton, Mo.—in the first count with intent to make an assault upon one of the inmates therein, and in the second with the intent to take, steal, and carry away the goods and chattels belonging to the state in said hospital then and there kept. In due time a motion to quash was filed and overruled, and thereupon the defendant was arraigned and entered his plea of not guilty on December 7, 1908. Afterwards, on December 14, 1908, by leave of court, the prosecuting attorney filed a new information, which was also in two counts. On the 7th of January, 1909, and during the said December term, 1908, David H. Harris, Esq., was duly elected and qualified as special judge of the said circuit court, and on the 8th of January, 1909, defendant was put upon trial upon the said amended information, and the jury failed to agree and were discharged, and the cause was continued until the 1st day of February, 1909, on which day it was set down for trial on Wednesday, the 3d day of February, and on the last-mentioned day the jury was impaneled, selected, and sworn, and after hearing the evidence returned their verdict, finding the defendant guilty under the first count in the information and assessing his punishment at six years in the penitentiary. In due time he filed his motions for new trial and in arrest of judgment, which were heard and overruled, and thereupon, on motion, his punishment was reduced to three years in the penitentiary, and he was sentenced accordingly.

1. The first assignment of error is that

the defendant was tried upon the amended information, without having been arraigned, or any plea entered by him, or in his behalf, by order of the court. A careful examination of the record discloses that this is true, and no suggestion has been made on the part of the state that the transcript is defective in that respect. There is in our criminal practice no proposition better settled by a long line of precedents than that a trial cannot proceed against a prisoner for an offense for which he has not been arraigned and to which he has not pleaded guilty. Time and again it has been ruled that, where the record in this court shows no arraignment, the judgment must be reversed. *State v. Saunders*, 53 Mo. 234; *State v. Boatright*, 182 Mo., loc. cit. 52, 81 S. W. 450; *State v. Williams*, 117 Mo. 879, 22 S. W. 1104; *State v. Walker*, 119 Mo. 467, 24 S. W. 1011; *State v. West*, 84 Mo. 440. The arraignment and the entering of a plea is a matter which must be entered upon the record proper, and is not a matter of mere exception. For this error alone, if no other, the judgment must be reversed and the cause remanded.

2. Inasmuch as the judgment must be reversed, and it may be the cause will be tried again, we have concluded we should express our opinion upon the admissibility of the testimony of Mrs. Bruner and Miss Peters as to statements made to them by Mrs. Arnold during the night or early morning of January 4, 1908, and after she was found out of the room she usually occupied. These statements were in no sense a part of the *res gestæ*. They were clearly narrative of a past transaction. They were hearsay. More than this, if Mrs. Arnold, under the showing made in this record, had been offered as a witness, she would have been incompetent, for the reason that she was insane. Having been shown to be insane, and committed to the hospital for the insane, the presumption is that she continued insane at the time she made the statements attributed to her. 30 Am. & Eng. Ency. 935, bb; *Hottle v. Weaver*, 206 Pa. 89, 55 Atl. 838. Without this evidence there was little, if anything, tending to establish the charge of which the defendant was found guilty, and it is apparent that this testimony was hurtful in the extreme.

Other propositions for reversal are advanced by the learned counsel for the defendant; but they are such as can be readily avoided on another trial, if it shall be deemed advisable to prosecute the cause further.

For the errors noted, the judgment is reversed, and the cause remanded.

BURGESS and FOX, JJ., concur.

STATE v. LINN.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. HOMICIDE (§ 185*)—MURDER—SUFFICIENCY OF INFORMATION—MEANS OF INFLECTING WOUND.

An information, charging that accused assaulted decedent, and with a knife, which he held in his hand, struck decedent, giving him, with the knife aforesaid, a fatal wound, of which wound decedent instantly died, sufficiently charged that the mortal wound was given decedent by reason of the assault with the knife.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 217; Dec. Dig. § 135.*]

2. HOMICIDE (§ 341*)—APPEAL—REVIEW—INSTRUCTIONS—MANSLAUGHTER.

Where the court charged fully on murder in the first and second degrees, and that if accused voluntarily brought on the difficulty, or entered into it without any intent of killing or inflicting great personal injury upon decedent, and during the difficulty it became necessary for him to kill decedent to save himself from being killed or receiving great personal injury, he would be guilty of manslaughter in the fourth degree, the last charge being based upon the only evidence which would have reduced the homicide to manslaughter in the fourth degree, failure to more fully define manslaughter was not reversible error, especially where accused was found guilty of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 721; Dec. Dig. § 341.*]

3. CRIMINAL LAW (§ 825*)—INSTRUCTIONS—DUTY TO ASK.

Where accused requested a charge on manslaughter, which was given as asked, and requested no other on that subject, and saved no exceptions to the failure of the court to instruct more fully on that degree of offense, he could not complain because the court declared the law identically as requested by him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2005; Dec. Dig. § 825.*]

4. HOMICIDE (§ 119*)—SELF-DEFENSE—FORCE REQUIRED TO REPEL ATTACK.

If accused had good reason to believe, and did believe, that decedent designed to do him great bodily harm, and that such design was about to be accomplished, he had the right to act on appearances, and cut or stab decedent to prevent the accomplishment of such design, even though such cut or stab resulted in decedent's death, and was not required to nicely gauge the force used, but could use any means that appeared reasonably necessary under the circumstances, nor was it necessary that his danger should have been in fact impending.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 172-174; Dec. Dig. § 119.*]

5. CRIMINAL LAW (§ 829*)—REQUEST FOR INSTRUCTIONS—REQUEST COVERED BY CHARGE GIVEN.

Where the charge given covers the rights of accused, and states the law as fully and favorably to him as he could ask, it is not error to refuse other charges, though correct in law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

6. CRIMINAL LAW (§ 957*)—MISCONDUCT OF JURY—STATEMENTS BY JURORS.

Jurors speak through their verdict, and cannot violate secrets of the jury room and tell of any misconduct that transpired there, nor speak of methods which induced to produce the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2394; Dec. Dig. § 957.*]

7. CRIMINAL LAW (§ 925*)—MISCONDUCT OF JURY—NEW TRIAL.

About half or three-quarters of an hour after the verdict was returned, and the jury discharged, a paper was found in front of the judge's desk and jury box, containing a column of 12 figures, ranging from 10 to 35, which had been added and the sum divided by 12, producing a quotient of 24, which quotient corresponded to the number of years at which the jury assessed accused's imprisonment. No other trial had intervened between the return of the verdict in the case in question and the finding of the paper. There was nothing to indicate that the figures were in the handwriting of any juror, nor to indicate that the jurors agreed in advance to adopt as their verdict the quotient resulting from dividing by 12 the aggregate of the numbers set down on the paper. Held not ground for setting aside the verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2238; Dec. Dig. § 925.*]

Appeal from Circuit Court, Oregon County; J. L. Fort, Judge.

Ed Linn was convicted of murder in the second degree, and he appeals. Affirmed.

Geo. M. Wiley and E. P. Dorris, for appellant. E. W. Major, Atty. Gen., and Jas. T. Blair, Asst. Atty. Gen., for the State.

GANTT, P. J. On the 29th day of June, 1908, the prosecuting attorney of Oregon county filed in the circuit court of said county an information, charging Ed Linn and John Rodman with murder in the first degree. An application for change of venue, based on the alleged prejudice of Judge Evans, was filed by Linn, and sustained. The trial was set for September 1, 1908, and Judge Fort was requested to try the cause. The defendant Linn was duly arraigned, and pleaded not guilty. The jury was impaneled and sworn, and, having heard the evidence, found the defendant guilty of murder in the second degree, and fixed his punishment at 24 years in the penitentiary. Motions for new trial and in arrest of judgment were filed and overruled, and the defendant sentenced in accordance with the verdict.

The evidence for the state tended to show the following state of facts: On February 26th a wedding was in progress at the farmhouse of Ockley Nettles in Oregon county, Mo. The house was occupied by a tenant named Morrow, and was situated about 100 yards from the residence of Ockley Nettles, the deceased, on the same farm. About 2 o'clock in the afternoon that day on which the killing occurred the defendant appeared at his father's house, procured a bottle of whisky, inquired for John Rodman, who was subsequently indicted as accessory, and immediately departed in search of him. On that afternoon defendant and Rodman appeared at the home of Mrs. Mary Nettles in a somewhat intoxicated condition. Learning from Mrs. Nettles that a wedding was to occur at Morrow's, they left the house, and proceeded towards the latter's place. Arriving at Morrow's, the defendant and

Rodman did not enter the house, but went around behind it and drank some whisky that they had brought with them. Seeing the deceased, Nettles, they invited him to drink with them, and he did so. Defendant and Rodman then walked up the road with one Underwood, and returned cursing and blackguarding; the defendant boasting of their ability to whip any one present. In the meantime the deceased had returned to a position near the entrance of the house, and was leaning against a post of a shed adjacent thereto. Defendant and Rodman approached the deceased, and Rodman asked him if he had anything against him. Deceased replied that he had not. Defendant then put the same question, and received a like reply. Deceased then asked Rodman if he (Rodman) had anything against him, and Rodman said he had not. Deceased then asked defendant a like question, and defendant replied: "Yes; you ran over my father, and I am not going to take it"—and then with an oath said that the deceased could not treat him that way. Suing the action to the word, defendant drew his knife and stepped in front of the deceased. He raised his knife, whereupon deceased stooped to pick up a stick, and as he did so the defendant rushed in on him and dealt the fatal blow. At this juncture the deceased either struck, or struck at, the defendant with a stick, but apparently without effect. He then dropped the stick and grappled with the defendant, endeavoring to prevent the defendant cutting him further with the knife. They struggled for a short time until the deceased cried to a bystander "to take him off; he has killed me." Rodman then seized the defendant, and forced him from the deceased, who staggered by and behind the corner of the house. Defendant released himself from Rodman's grasp, and, saying, "I will kill him, G—— d—— him," ran after the deceased. As deceased fell, defendant struck at him again with his knife. Returning from this second assault, defendant said he "had cut him to the heart, G—— d—— him." Defendant and Rodman then left the premises. The wound inflicted by the defendant upon the deceased practically severed the femoral artery in the left thigh, death resulting in a very short time from the loss of blood. There was also evidence that some time prior to the killing the defendant, in talking to one Baker concerning a difference between the deceased and the defendant's father, had said "he was going to get right some of these days, and go down there on him." To the suggestion that the deceased might beat him, defendant answered, "I will knife him," to which Baker replied defendant would be sent to the penitentiary, and defendant answered, "I do not give a d——." On Monday, two days before the killing, defendant, while sharpening his knife, refused to swap it, saying, "I might want to

kill a man with it." On the part of the defendant there was testimony to the effect that when defendant and Rodman returned to the house, just before the killing, they were talking pretty loud and ugly, and the deceased asked defendant to be quiet. Rodman then said to the deceased: "You can say what you please to the Linns and Rodmans behind their backs, but they are the stuff." Deceased said: "You are not throwing that at me are you? I ain't got nothing against you. I always thought a heap of you boys." And defendant retorted: "Yes; but you run over an old man, and by G—— I will take up for him." The defendant had clinched the deceased before the latter struck the former. The defendant's testimony corroborated that of the state as to the deceased's efforts to avoid the knife in the struggle. Some of the defendant's witnesses did not hear defendant and Rodman question the deceased as to whether he had anything against them. They described defendant's knife as a "deerfoot" knife, with a blade about 3½ inches long.

A physician, who examined defendant in the jail some time after he was in prison, testified that defendant's right wrist was swollen as if he had received a blow upon it, and the jailer testified that soon after receiving the defendant at the jail, he observed a scratch on his neck and one on his right wrist. The flesh was not discolored. The defendant testified in his own behalf that on the afternoon of February 26th he went to his father's house to get a note which had been drawn for Rodman to sign; the latter being indebted to him for a small amount. That he procured the note and a bottle of whisky and met Rodman on his way home. Rodman importuned him to go with him to the wedding, suggesting that Rosenbaum and Hornbuckle would be found there. That thereupon they proceeded to Mrs. Mary Nettles, and from there went to the Morrow's. He then detailed the occurrences at Morrow's very much as the state's witnesses had done. His description of the killing was that immediately prior thereto he heard deceased ask Rodman if he had anything against him, and Rodman said no, and Rodman then asked a like question, and deceased slapped him on the shoulder, and said: "I ain't got nothing against old John, and never did have." Deceased then asked the defendant the same question, to which defendant replied: "No, Ockley; not a thing." "You run over an old man once, but you cannot do me that way. If you do me that way, I will whip you fair." Deceased then said, "Don't throw that old thing up to me," and reached for a club, and when he did this defendant rushed on him. He declared that the deceased struck him on the head and left wrist with a stick. That his knife was in his pocket at this time and during the struggle, until deceased began choking him and attempting to "ride him down, and

he seen that there was no show for him." Defendant drew his knife, opened it, and "struck one lick at his body," but did not know whether he hit him or not. That deceased seized his wrist and endeavored to cut him with the knife, which he (defendant) still held. That some one then grabbed defendant and jerked them apart and slung defendant downhill "and when I came to myself, I was standing with the knife in my hand in front of John Rodman." Defendant and Rodman then went to defendant's father's house, and thence to the justice of the peace, to whom defendant surrendered. Defendant identified the knife, which he testified was the one with which he inflicted the fatal wound.

In rebuttal the state introduced evidence tending to show that the knife exhibited by the defendant at the house of the justice of the peace, after his surrender, was not the one identified by him at the trial; that at Johnson's, the justice, defendant displayed his right wrist, and it was green all the way round; that there was no other indication of injury to it. Defendant then said: "He had stabbed the deceased first in the groin, and had 'hacked' him across the throat as they drew him loose." Defendant was cool and collected, laughing and joking until about 8 o'clock, when he went to sleep behind the stove. One witness testified that he attempted to open defendant's knife with one hand, as Rodman stated defendant had done in the struggle with the deceased, but was unsuccessful. This was substantially all the evidence in the cause. The court instructed the jury as to murder in the first degree, murder in the second degree, manslaughter in the fourth, and self-defense, to the giving of all of which instructions the defendant excepted. Defendant requested, and the court refused certain instructions on the subject of self-defense and manslaughter in the fourth degree, to which action of the court the defendant saved his exceptions.

1. Defendant assails the information as insufficient to charge any offense, in that it fails to charge that the mortal wound was given the deceased by reason of the alleged assault with the knife. The language of the information in this connection is: "That one Ed Linn on or about the 26th day of February, 1908, at and in the county of Oregon and state of Missouri, in and upon one O. H. Nettles, then and there being, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought did make an assault, and with a certain knife which he, the said Ed Linn, in his right hand then and there had and held, him, the O. H. Nettles, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought did strike, stab, and thrust in and upon the right side of the left thigh of him, the said O. H. Nettles, giving to the said O. H. Nettles then and there with the knife aforesaid, in and upon the right

side of the left thigh of him, the said O. H. Nettles, one mortal wound of the length of 2 inches, of the breadth of 1 inch and of the depth of 3 inches, of which mortal wound the said O. H. Nettles then and there instantly died." The indictment itself is a sufficient refutation of the charge made against it, and contains the words which were omitted in *State v. Williams*, 184 Mo. 261, 83 S. W. 756, and *State v. Birks*, 190 Mo. 263, 97 S. W. 578, and the absence of which required the reversal of the judgment in those cases.

2. It is also assigned as error that the circuit court failed to define manslaughter in the fourth degree. As already said, the court had fully instructed on murder in the first degree and murder in the second degree, and then gave instruction numbered 6, in these words: "The court instructs the jury that if the defendant brought on the difficulty, or entered into it with the intention of killing or inflicting great personal injury upon said O. H. Nettles, then the danger, if any, in which he found himself during such difficulty would not extenuate his offense, or reduce its grade at all; but, if he voluntarily brought it on, or entered into it without any intent of killing or inflicting great personal injury upon said O. H. Nettles, and during such difficulty it became necessary for him to kill said O. H. Nettles to save himself from being killed or receiving great personal injury, then he cannot be entirely excused on the ground of self-defense, but in that case you should find him guilty of manslaughter in the fourth degree." And in another instruction the court instructed the jury that, if they should convict the defendant of manslaughter in the fourth degree, they would assess his punishment at imprisonment in the penitentiary for 2 years, or be imprisoned in the county jail for not less than six months, or by a fine of not less than \$500, or by both a fine not less than \$100 and imprisonment in the county jail not less than three months. It appears from the record that the defendant requested this identical instruction of the court, and requested no other instruction on the subject of manslaughter in the fourth degree, and saved no exceptions to the failure of the court to instruct more fully on that degree of offense. Under these circumstances the defendant is in no attitude to complain that the court declared the law on the subject of manslaughter in the identical words requested by the defendant. Moreover, this instruction is predicated upon the only state of facts under the evidence in this case which would have reduced the homicide to manslaughter in the fourth degree, and the defendant had the full benefit thereof. We think there was no reversible error because the court failed to define manslaughter any more fully than it did, especially

as the jury did not find the defendant guilty of that grade of offense.

3. On the subject of self-defense the court gave instruction No. 7 in these words: "The court instructs the jury that, if you find and believe from the evidence that defendant had good reason to believe from the words, acts, and conduct of the deceased, O. H. Nettles, that he had a design to do him (Linn) some great personal injury or bodily harm, and that such design was about to be accomplished, then defendant had a right to act on appearances, and to cut or stab said Nettles to prevent the accomplishment of such design, even though such cut or stab resulted in the death of said Nettles; and, in this connection, you are further instructed that defendant was not required to nicely gauge the force used, but that he could use any means that appeared reasonably necessary under the circumstances. Neither is it necessary that his danger should have been real or actual, or that it should have been impending and about to fall, but if he had reasonable cause to believe, and did believe, these facts, and cut and stabbed the deceased to prevent such expected harm, then you must acquit him on the ground of self-defense." The court refused two instructions on the same subject requested by the defendant, but it is evident that the instruction above set out fully covered all the rights of the defendant and states the law as fully and favorably to defendant as he could ask; and, as it has been repeatedly held that, when such is the case, it is not error to refuse other instructions, even though they may be correct announcements of the law.

4. Finally it is insisted that the misconduct of the jurors in the method employed by them in arriving at their verdict is sufficient to justify a reversal of the judgment. In support of this assignment the record shows that one of the defendant's witnesses testified, upon the hearing of a motion for new trial, that about a half or three quarters of an hour after the verdict was returned and the jury discharged, he found in front of the judge's desk and the jury box, a paper which he identified and offered in evidence containing a column of 12 figures, ranging from 10 to 35, and 12 numbers had been added, and the sum divided by 12 producing a quotient of 24; this last number corresponding to the number of years at which the jury assessed the defendant's punishment in the penitentiary. No other trial intervened between the return of the verdict in this case and the finding of this paper by the counsel. There was no other evidence offered on this head. There was nothing to indicate that these figures were in the handwriting of any member of the jury, and absolutely nothing to indicate that they agreed in advance to adopt as their

verdict the quotient resulting from dividing by 12 the aggregate of the numbers set down on said exhibit. The offer to prove by this witness a statement of one of the jurors was properly refused. This court, in *State v. Underwood*, 57 Mo. 40, laid down the rule that jurors speak through their verdict, and cannot be allowed to violate secrets of the jury room and tell of any partiality or misconduct that transpired there, nor speak of methods which induced or operated to produce the verdict, and this has become the settled law of this state. *State v. Branstetter*, 65 Mo., loc. cit. 156; *State v. Coupenhaver*, 39 Mo. 430; *Sawyer v. R. R. Co.*, 37 Mo. 263, 90 Am. Dec. 382. The paper exhibit was utterly insufficient to establish any prior agreement by the jurors to be bound by the quotient verdict. Indeed the paper was not shown to have been an act of any member of the jury, and it is clearly insufficient to overthrow the solemn verdict of the jury.

It results that the judgment and sentence of the circuit court must be, and is, affirmed.

BURGESS and FOX, JJ., concur.

LINDSAY v. BATES.

(Supreme Court of Missouri, Division No. 2. Nov. 23, 1909.)

1. MALICIOUS PROSECUTION (§ 19*)—CRIMINAL PROSECUTION—PROBABLE CAUSE.

In an action for malicious prosecution of plaintiff for arson, the issue is not whether plaintiff was guilty of the charge, but whether defendant had probable cause for commencing the prosecution.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 25; Dec. Dig. § 19.*]

2. MALICIOUS PROSECUTION (§ 72*)—INSTRUCTIONS.

In an action for malicious prosecution, the court instructed that, before the jury can find that defendant was justified, they must find that he had probable cause to believe that the charge made was true, and that by "probable cause" is meant reasonable grounds for believing plaintiff guilty, supported by facts and circumstances sufficiently strong to warrant a prudent or cautious man in believing that plaintiff was guilty, otherwise they must find that the prosecution was without probable cause, and that the information that would justify a criminal complaint must be such that men generally of ordinary care and discretion would have been warranted in acting upon, under similar circumstances. Held, that the instructions were not conflicting as to the information which would justify defendant in making the charge against plaintiff.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 169; Dec. Dig. § 72.*]

3. MALICIOUS PROSECUTION (§ 56*)—BURDEN OF PROOF.

In an action for malicious prosecution, the burden is on plaintiff to establish his case.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. § 112; Dec. Dig. § 56.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. MALICIOUS PROSECUTION (§ 71*)—EVIDENCE—QUESTION FOR JURY.

Evidence, in an action for malicious prosecution, *held* sufficient to make the question of whether defendant had reasonable ground for believing that plaintiff committed the offense, for which defendant instituted the prosecution against him, one for the jury.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 161; Dec. Dig. § 71.*]

5. MALICIOUS PROSECUTION (§ 64*)—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for malicious prosecution, *held* sufficient to sustain a verdict for defendant.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 151-153; Dec. Dig. § 64.*]

6. MALICIOUS PROSECUTION (§ 58*)—ISSUES—ADMISSIBILITY OF EVIDENCE.

In an action for malicious prosecution for arson, instituted by defendant, evidence that defendant offered a specified sum if the building in question should be destroyed is irrelevant to the issue on trial.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 117, 118; Dec. Dig. § 58.*]

7. EVIDENCE (§ 317*)—HEARSAY.

In an action for malicious prosecution for arson, evidence that a person, while intoxicated, told a witness that he had burned the building in question, was inadmissible as hearsay.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1175; Dec. Dig. § 317.*]

8. APPEAL AND ERROR (§ 1048*)—HARMLESS ERROR—IMPEACHMENT OF WITNESS.

The impeachment of a witness whose deposition has been excluded is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4160; Dec. Dig. § 1048.*]

9. WITNESSES (§ 343*)—IMPEACHMENT—EVIDENCE.

The reputation of a witness who has lived nearly all his life in a certain place, until about three years before the trial of the action in question, and who had not established a residence elsewhere, can be impeached by evidence of his reputation in such place.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1124; Dec. Dig. § 343.*]

10. MALICIOUS PROSECUTION (§ 59*)—ADMISSIBILITY OF EVIDENCE.

Evidence, in an action for malicious prosecution for arson, that a witness told defendant he had seen plaintiff and B. talking together on the evening of the fire, and had seen B. give M. some money the evening the fire occurred, telling the latter to give the money to another person named, and such person would know what to do with it, was admissible as bearing on the question whether defendant believed plaintiff was guilty and whether he had reason to so believe.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. § 128; Dec. Dig. § 59.*]

Appeal from Circuit Court, Wayne County; Jos. J. Williams, Judge.

Action by Joseph F. Lindsay against Samuel A. Bates. Judgment for defendant, and plaintiff appeals. Affirmed.

The amended petition, on which the case was tried, alleged that the defendant on the 13th day of October, 1904, appeared before the clerk of the circuit court of said county and maliciously and without probable cause charged the plaintiff with the

commission of the crime of arson, by filing an affidavit charging him with the felonious burning of a certain frame building situated on lot 7 in block 12 in the city of Piedmont. It is further alleged that the information was thereupon filed by the prosecuting attorney, based on said affidavit, and a warrant issued thereon by the clerk, and plaintiff arrested thereunder, and gave his bond to appear before the circuit court of said county for trial. It is then alleged that at the February term, 1905, the prosecuting attorney dismissed said prosecution against plaintiff, being advised that the charge contained in the information was without foundation. It was alleged, further, that plaintiff had incurred expenses to the amount of \$200 in making his defense to the said charge, and he prayed judgment for \$5,000 actual damages, and \$5,000 punitive damages. At the return term, the defendant filed his answer, which was a general denial, and also an allegation that plaintiff's general reputation for honesty and morality in the community in which he lived was bad. There was a trial by jury, and a verdict and judgment for the defendant, from which the plaintiff prosecutes an appeal to this court.

It appears from the evidence that the plaintiff lived at Piedmont in 1903, and had lived there for about 20 years; that he was an attorney at law and president of a bank in the said town. The building which was destroyed in said town was a frame building belonging to the defendant, Bates, and was occupied at the time it was burned, October 19, 1901, by one John Berryman. Some time after the house was burned, the defendant, Dr. Bates, John Berryman, and Ed Daniels were indicted for burning it; but this indictment was subsequently quashed and these parties discharged. Afterwards, on the 13th of October, 1904, the defendant made the affidavit referred to in the plaintiff's petition, charging the plaintiff with having burned the said house. The testimony was substantially as follows:

McGhee, the deputy clerk, identified the affidavit filed by the defendant on which the warrant was issued, and also stated that the defendant said that he had a good case against the plaintiff, and if he did not convict him he would leave the state.

R. H. Davis testified that he was prosecuting attorney at the time the information for arson was filed, and that he filed the same at the request of the defendant. He stated that he advised the defendant to let the matter alone; but defendant said that the statute of limitation was about to run and he must act immediately. Witness told Bates he did not want to file the information because he did not think he could make a case. The warrant issued for plaintiff's arrest and the bond given by him for bail, to-

gether with the judgment discharging him from that charge, were all offered in evidence.

Almon Ing, prosecuting attorney at the time the case was dismissed, testified that he went over the case with the defendant and Mr. Raney, who had been employed to assist in the prosecution, and told Dr. Bates there was not enough testimony to secure a conviction, and for that reason he intended to dismiss it, and did dismiss it, and that Mr. Raney agreed with him. Witness stated: That defendant made the remark that, if the case was dismissed, plaintiff would enter suit for malicious prosecution against defendant; that thereupon the prosecuting attorney went to the plaintiff and requested him not to do it; that plaintiff seemed to get mad and would not make any such agreement, but said, if defendant would sign a statement that he had lied, he would do it.

Mr. Durham, attorney for plaintiff, stated that it was probable that they would show probable cause. This witness testified that it was his understanding, when they quit talking, that plaintiff did agree not to bring suit.

Caleb Ballard testified: That defendant tried to keep his son, John Ballard, from being present at the trial of the case against plaintiff; that this testimony was denied by the defendant in his evidence, and the testimony of John Ballard shows that he was in Piedmont on the day that the prosecution against plaintiff was dismissed.

The deposition of John Berryman was read in evidence. It was taken in Texas, and he was not cross-examined. The witness testified that he lived in Nacogdoches county, Tex., and had lived there four months. He testified that the defendant told him that, if lightning struck those buildings, he would square the account of witness for \$30, another account of \$20 that witness stood good for, and give him \$50 besides. He testified, further, that he told Ed Daniels that Dr. Bates, the defendant, would pay a man to burn the building, and that afterwards Daniels told witness that he had burned the building. Daniels was dead at the time of this trial. There is no other evidence that Daniels burned the building, and none whatever that defendant ever paid anything to any one in connection with the burning of the building, or that he was ever requested to pay anything to any one for doing so. This evidence was afterwards excluded by the court, and the jury was directed not to consider it. Berryman also testified that he owed respondent about \$30, and prior to the burning of the house the defendant pressed him for the payment of it. The witness was charged jointly with the plaintiff with the arson of the building.

Joseph Lindsay, the plaintiff, testified: That he had nothing whatever to do with

the burning of the house; that he was in bed asleep when the alarm was sounded; that he never had any conversation with Daniels or Berryman in reference to burning the house. He testified to his arrest in consequence of the complaint against him by defendant, to his payment of attorneys to defend the case, to his objection to having the case dismissed, and that he made no agreement with the defendant or any one else in regard to the dismissal of the case, and said he would not consent to a dismissal except upon the defendant making a written retraction of what he had sworn to in the affidavit, and that he had nothing whatever to do with the prosecution of the defendant on charge of burning the house. On cross-examination he stated: That he let a man by the name of Wilson, who was in the building, have about \$200 to buy a printing outfit; that the insurance on this printing outfit was in the name of himself and Wilson; that he made the proof of the claim, collected the insurance, and got his part of it. He stated that his purpose for bringing this action was for vindication against these charges. He testified that he tried to get Berryman to attend the court in person, but he refused to come for fear that the defendant would kill him or have him killed.

C. C. Ivy testified to a conversation with the defendant, in which the latter told him he had filed a complaint against plaintiff and "would send the d---n rascal over the road," and that plaintiff had indicted him, or tried to. He testified that plaintiff's reputation was good as far as he knew. On cross-examination he stated that he heard it discussed, and some said it was good, and some said it was bad; "they talked both ways."

J. H. Clore testified substantially the same as Ivy. Other witnesses testified that plaintiff's reputation as a business man for honesty and integrity was good.

On the part of the defendant, the defendant testified denying the statements attributed to him by the witness Caleb Ballard, and stated that at the time he filed the affidavit he believed that the plaintiff and Berryman were guilty of arson, and that plaintiff had caused defendant to be indicted in order to divert suspicion from himself; that the reputation of plaintiff was very bad, as also was that of Berryman. Defendant was in Cape Girardeau the night that the house was burned. He moved back to Piedmont the last part of January, 1902, and began an investigation as to the fire, and he found that it was of incendiary origin by a statement made by Berryman. John Ballard told defendant that Berryman's reputation was bad, and he could be hired to do anything for a little money. John Mell told defendant that: "He saw a man do that. That he was coming

across the Hub yard and going between Lee's warehouse, and that he got something that looked like an oil can back there, and that was about 10 minutes before the fire alarm." That Mell said that it was no one but Joseph Lindsay. The defendant testified: That Harry Bates told defendant that he had seen the plaintiff, Lindsay, and John Berryman together on the evening of the 19th of October, 1901, about 8 o'clock; that they walked up the street and down the alley towards a calaboose, and plaintiff kept John Berryman there for an hour; and that soon thereafter he (Harry Bates) saw John Berryman call one Ezra Morris and hand him some money, with directions to "give it to Ed Daniels, and he would know what it was for." He also testified that Wilson told him that he had owned the printing outfit until just before the fire, but that plaintiff had offered him such an inducement that he turned it over to plaintiff, who told him he could use it as long as he wanted to free of charge. He also testified: That one Alberts told plaintiff that he had sold the printing outfit to Wilson for a woman and received \$50 in full payment for the same. That on investigation he found that the reputation of John Berryman was very bad. That he had a reputation for burning houses and blacksmith shops. That defendant had been arrested himself charged with burning the same building which plaintiff had been charged with burning. In preparing for his defense, most of the evidence given by him was ascertained. That the case against him was dismissed without trial. Several people told him that John Berryman had frequently been seen in consultation with the plaintiff. That prior to and pending this investigation there had been a great number of incendiary fires in Piedmont. That defendant had given to the prosecuting attorney lists of the witnesses and had asked that the matter be investigated by the grand jury; but the witnesses were never called before that body. That the prosecuting attorney, Ing, told defendant that he would dismiss the case against John Berryman so as to get him back to testify against plaintiff, but that was not done. That Ing stated to him that he intended to dismiss the case against plaintiff, but said, "I think you have probable cause, but I will not be able to convict." That Ing further said Mr. Lindsay will not bring a suit if this case is dismissed. Defendant collected insurance on the place that was burned.

Harry Bates testified: That he had told defendant that he had seen plaintiff and John Berryman talking together on the evening of the fire, and also told defendant that he had seen John Berryman give Ezra Morris some money the evening the fire occurred, and told Morris to give Ed Daniels the money and he would know what to do

with it. That plaintiff went to Murphysboro two or three months before the trial of this case and tried to get witness to make certain statements in writing in connection with the case, which witness refused to do because they were not correct.

W. P. Toney testified that he had lived in Piedmont 48 years, and had known plaintiff 20 years, and that plaintiff's reputation for honesty and integrity was bad, but admitted that he was not on good terms with him and did not like him.

Dr. G. W. Toney testified plaintiff's reputation for morality was bad, but admitted that he had a deposit in the Exchange Bank and was the family physician of the family.

A number of witnesses testified that they knew John Berryman's reputation in the neighborhood of Piedmont up to time he lived there in 1901 or 1902, and that his reputation for honesty and integrity was bad.

In rebuttal, the plaintiff offered testimony as follows:

William Carter testified that defendant did not present him, as foreman of the grand jury, a list of the witnesses to be called on the charge against plaintiff as far as he remembered, but that the names were sent to Capt. Leaper, a member of the grand jury, in reference to the burning of the storehouse of Mr. Lindsay. He testified that the reputation of plaintiff from a business standpoint was good, but it had been talked that he burned his store to get the insurance.

R. H. Davis, recalled, testified: That, while he was prosecuting attorney, he told defendant that the testimony of John Berryman would implicate defendant; that Berryman was not put in jail after he had made a statement and sworn to it. He testified that the indictment against defendant was quashed because there was not sufficient testimony to attempt to prosecute the defendant on this charge.

John Mell testified that he did not tell defendant that he saw plaintiff in and about that building with a coal oil can for the purpose of setting fire to it, but he did say to defendant and W. S. Anthony that he had seen a man come out of the alley back of Lee's warehouse and pick up a coal oil can.

Almon Ing, recalled, testified: That, when he told defendant he intended to dismiss the indictment against plaintiff, defendant insisted on having it continued to get John Berryman and S. E. Wilson; that he told defendant Berryman's testimony would not help the state, and defendant insisted Berryman would tell a different story next time; that he had been served with notice to take the deposition of Wilson, and did not know whether he notified defendant of that fact or not.

On behalf of the defendant, John Ballard

testified that he had been subpoenaed in the case for the 15th, and there was a new subpoena for the 9th, and his property was attached, and he had to go to Arkansas, and he borrowed \$18 from defendant and was back in Piedmont on the 15th of February, 1905. He testified he told defendant that John Mell had told him that he was watching the Hub factory at that time, and about 10 minutes before the fire broke out he saw Mr. Lindsay go through there between Lee & Co.'s store and John Berryman's store.

Huff testified that Joe Mell said, "I am going to get all I can out of this case."

W. S. Anthony testified that he went with defendant to investigate the burning of the defendant's house some time in 1902, and they met Joe Mell in Piedmont. Mell said he had seen a man come from behind a building and get some shavings, and described the man, and witness asked if it was Ed Daniels, and Mell said, "No, I have told Dr. Bates who it was, and he knows." The description he gave was a very good one of plaintiff.

John Hall testified that John Ballard told him to tell defendant that he might have some good testimony for him for \$25.

The correctness of the instructions will be considered in connection with the objections thereto.

Green & Green, for appellant. J. B. Daniel, for respondent.

FOX, J. (after stating the facts as above).

1. Counsel correctly assert that the issue was not whether plaintiff was guilty of the charge of arson, which was based upon defendant's affidavit, but did defendant have probable cause for commencing said prosecution? The circuit court instructed the jury, in plaintiff's behalf: "Before you can find defendant was justified or excused in making the affidavit against the plaintiff and causing him to be arrested, you must find that he had probable cause to believe that the charge made against plaintiff was true, and by 'probable cause' is meant a reasonable ground for believing plaintiff guilty, supported by facts and circumstances sufficiently strong of themselves to warrant a prudent or cautious man in the belief that the plaintiff was guilty of the offense with which defendant charged him, and, unless you find that defendant was so justified, then you will find that the prosecution against plaintiff was without probable cause." In this same connection, the court gave the following instruction for defendant: "The jury are instructed that the information that would justify the making of a criminal complaint, against another, for the purpose of having him arrested, must be of such character, and obtained from such sources, that men, generally, of ordinary care, prudence, and discretion, would feel authorized to act upon it under similar

circumstances; and in this case, if the jury believe from the evidence that the defendant made the alleged affidavit for the arrest of plaintiff, and that he was arrested in consequence thereof, then it is a question of fact, to be determined by the jury from the evidence, whether the defendant, when he made the complaint, acted upon such information as men of ordinary care, prudence, and discretion would have been warranted in acting upon under similar circumstances." Error is predicated upon the giving of this last-quoted instruction, on the ground that it conflicts with the instruction given for plaintiff and is an incorrect statement of the law, in that it advised the jury that "information such as men of ordinary care, prudence, and discretion would feel authorized to act upon, under similar circumstances," would justify defendant in making the criminal charge against plaintiff; whereas, plaintiff insists that nothing short of a knowledge of the existence of facts sufficiently strong of themselves to warrant a prudent or cautious man to believe plaintiff was guilty of said offense would justify the institution of a criminal prosecution. We think the contention of plaintiff on this point is hypercritical. When it is said by the court that in these cases the question is not whether there was in fact a sufficient cause for the prosecution (for the acquittal shows that there was not), but whether the prosecutor as a reasonable man believed there was, they do not mean that a prosecuting witness must know of his own knowledge all the facts upon which such prosecution must rest, but that as a reasonable and prudent man he had reasonable grounds to believe the plaintiff was guilty, and in coming to such a conclusion he must have information of such a character and obtained from such sources that men of ordinary care, prudence, and discretion would feel authorized to act upon in similar circumstances. We think the plaintiff has no ground of complaint as to those two instructions. They were as favorable as he had the right to request.

2. Plaintiff complains that the verdict was not justified by the evidence. The burden was on the plaintiff to establish his case. He complains that, while defendant testified that he was the owner of the house that was burned, at the time it was destroyed he was a resident of Cape Girardeau, and when he came back to Piedmont to reside he received information that led him to believe it was burned by an incendiary. He had been charged with burning his own property; but the charge was dismissed as without foundation. He began to investigate, and found that plaintiff had a printing outfit in said building which was insured for \$300, and had collected the insurance; whereas, a witness had told defendant that plaintiff had purchased the

same outfit for \$50 from a woman. He also produced evidence to the effect: That plaintiff's reputation for honesty and integrity was bad; that plaintiff was seen on the evening that the property was burned talking with John Berryman, whose reputation was shown to have been very bad for honesty, integrity, and burning property; that soon after plaintiff and Berryman were seen talking together, and on the same evening Berryman was seen to give Morris some money, and heard to say to him, "Give it to Daniels, and he will know what it is for." Defendant was also told by John Ballard that Joseph Mell had seen plaintiff go towards defendant's building that was burned with some shavings and an oil can about 10 minutes before the fire broke out, and defendant testified that Mell told him the same story. If the jury believed that these things were told defendant, surely the circuit court could not, nor can this court, say as a matter of law that an ordinarily reasonable and cautious man would not have believed plaintiff burned the house and had reasonable grounds for so doing. The circuit court directed the jury this was a question of fact for them to determine, and we think correctly. While Mell denied telling defendant this story, defendant was not precluded by Mell's evidence. The jury saw Dr. Bates and Mell, and it was their province to believe or reject the testimony of either or both. They seemed to have believed defendant, and rejected the testimony of Mell; but there was nothing to show that, up to the time Mell told Dr. Bates he had seen plaintiff in the compromising position near the building just before it was seen on fire, Mell was a man of bad reputation for truth and veracity or morality and integrity, and such that a reasonably prudent man would not believe his statements. We think the court properly submitted to the jury the question whether the defendant, when he made the complaint by filing the affidavit, acted upon such information or circumstances as a man of ordinary care, prudence, and caution would have accepted and believed under similar circumstances, and their verdict is not without sufficient evidence to support it, if they credited the testimony of defendant. *Van Sickle v. Brown*, 68 Mo. 634.

3. As to the exclusion of the deposition of John Berryman: Without reproducing this deposition, it is sufficient to say it was taken in Nacogdoches county, Tex., without any appearance or cross-examination by defendant. In substance, he testified to an offer by Dr. Bates, the defendant, to Berryman, to satisfy a debt of \$30 due Bates from the witness, and another for \$20 for which the witness was surety, and to pay him \$50 in cash, if lightning would strike the building; that he, witness, told one Daniels that defendant would pay a sum to have

the building burned; that Daniels, being drunk, a few days after the fire told witness that he (Daniels) had burned the building. Now Berryman swears he had nothing to do with the fire, nor did he cause Daniels or any one else to burn it. He never made any demand on defendant for the \$50. All of this testimony was objected to when it was offered; but the court admitted it. Subsequently the court withdrew it from the jury. It requires no argument or authority to show that the alleged statements of Daniels were wholly incompetent—hearsay of the most pronounced kind. The statement of Berryman as to what occurred between him and defendant was utterly irrelevant to the issue on trial and was properly excluded. As to the impeachment of Berryman, it cannot be seen how it could have been hurtful, if there was none of his evidence left for the jury to believe or disbelieve. Moreover, the deposition had been admitted once, and the jury had heard it read. As to the proposition that it was not competent to impeach Berryman's reputation at Piedmont, where he had resided nearly all his life until about three years before the trial of this cause: Berryman had only resided at Nacogdoches for about four months, not long enough to have formed a reputation one way or the other. While this court has approved the rejection of proof of reputation after three years, it has not announced an iron-clad rule. Greenleaf, in his work on Evidence (volume 1, § 461d [1]), says: "Character is a continuous quality, not quickly changed or changeable. The character of the witness at the time of testifying is that which affects his truthfulness; but his character at another time may well be considered as evidencing his character at the time of testifying. * * *

One view, and the correct one, is that character at any preceding time is admissible, provided it is not too remote in time to have probative value. A second view is that prior character is not to be resorted to unless for some reason it is difficult or impossible to show present character." While reputation must ordinarily be proven by witnesses residing in the neighborhood in which the witness whose reputation is sought to be impeached resides, this also is subject to exceptions. Thus, in *State v. Miller*, 156 Mo. 76, 56 S. W. 907, a witness was offered to testify to the defendant's general reputation for truth in the neighborhood of Troy, Kan., where he and defendant had lived; but some nine years previous to the trial the witness had moved to St. Joseph, Mo., but had visited Troy from time to time, and when he lived there was sheriff of the county. He testified he knew defendant's reputation from what the people generally said about him when witness was visiting there. It was said: "This court has approved the rejection of testimony that

covered a period of over three years; but the question here presented is whether a witness who has known another witness' reputation for truth for nine years and down to the period of the trial is incompetent to speak of such reputation, which has remained the same all the time. We think not." Now in this case Berryman's reputation was known in Piedmont by the witnesses who resided there up to the time of his removal from that place. Having no established residence elsewhere, we think it was no violation of the rule to permit the witnesses who knew his reputation in that place up to his removal to state what it was.

The testimony of Harry Bates stands on an entirely different footing. This was permitted because it had been communicated to defendant, and was to be considered in determining whether defendant believed plaintiff was guilty, and whether he had reason to so believe.

In our opinion the cause was properly submitted to the jury, and there is no error in the record which would justify a reversal of the judgment.

Judgment affirmed. All concur.

SOUTHERN MISSOURI & A. R. CO. et al. v. WYATT.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. COURTS (§ 231*)—SUPREME COURT—JURISDICTION—TITLE TO REALTY.

An appeal in a railroad condemnation proceeding should be taken direct to the Supreme Court as involving title to realty.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 657; Dec. Dig. § 231.*]

2. APPEAL AND ERROR (§ 511*)—RECORD—BILL OF EXCEPTIONS—FILING.

Where the record proper did not show that the bill of exceptions was filed in proper time, which appeared only from the bill itself, the bill of exceptions was not in the record, as such a bill does not prove itself.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2319, 2320; Dec. Dig. § 511.*]

3. APPEAL AND ERROR (§ 713*)—CONTENTS—MATTERS OF RECORD.

Matters of record proper have no place in the bill of exceptions, and their recital therein adds nothing to the validity of the bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2057; Dec. Dig. § 713.*]

4. APPEAL AND ERROR (§ 554*)—RECORD—REVIEW.

A judgment cannot be affirmed if the abstract shows error in the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2472-2479; Dec. Dig. § 554.*]

5. EMINENT DOMAIN (§ 239*)—COMMISSIONER'S REPORT—VACATION.

An order in a railroad condemnation proceeding confirming the report of commissioners, except as to two defendants, was a sufficient order setting aside the report as to such defend-

ants within Rev. St. 1899, § 1268 (Ann. St. 1906, p. 1040), authorizing review by the court of the report of the commissioners on exceptions, and a new appraisal by jury at the request of either party.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 614; Dec. Dig. § 239.*]

6. EMINENT DOMAIN (§ 239*)—CONDEMNATION PROCEEDINGS—COMMISSIONERS' ORDER—VACATION.

Where a landowner in condemnation proceedings filed exceptions to a commissioners' report and asked for a jury to assess damages, he was entitled to such assessment as a matter of right without the formal vacation of the commissioners' report under Rev. St. 1899, § 1268 (Ann. St. 1906, p. 1040), providing for such reappraisal at the request of either party on the filing of written exceptions to the report.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 239.*]

7. TRIAL (§ 330*)—SEPARATE VERDICT.

Where there are several counts in a petition, each stating separate causes of action, there should be a separate verdict on each, unless the several counts relate to the same transaction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 777; Dec. Dig. § 330.*]

8. JUDGMENT (§ 266*)—ARREST OF JUDGMENT—PURPOSE.

The office of a motion in arrest of judgment is to direct the attention of the court to errors apparent on the face of the record proper.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 467; Dec. Dig. § 266.*]

9. APPEAL AND ERROR (§ 238*)—VERDICT—DEFECTS—MOTION IN ARREST.

A defect in the verdict cannot be considered on appeal, unless there was a motion in arrest assigning the defect as error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1369; Dec. Dig. § 238.*]

10. EMINENT DOMAIN (§ 239*)—PROCEEDINGS—GENERAL VERDICT.

A general verdict, allowing damages for the taking of two separate tracts for a railroad right of way, was not erroneous on its face.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 239.*]

11. EMINENT DOMAIN (§ 262*)—DEFECTIVE VERDICT—REVIEW—QUESTION NOT RAISED AT TRIAL.

Where a verdict awarding damages for the taking of two separate tracts of land for a railroad right of way was not objected to at the trial by motion in arrest of judgment, because it did not make a separate award as to each tract, it could not be presumed on appeal, in the absence of a bill of exceptions, that the evidence did not show a condition which would make the verdict proper.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 262.*]

Appeal from Circuit Court, Ripley County; J. L. Fort, Judge.

Action by the Southern Missouri & Arkansas Railroad Company and another against J. S. Wyatt. Judgment for defendant, and plaintiffs appeal. Affirmed.

E. H. Seneff, Jas. Orchard, and W. F. Evans, for appellants. J. C. Sheppard, for respondent.

BURGESS, J. Plaintiff the Southern Missouri & Arkansas Railroad Company in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

stituted this suit in the circuit court of Ripley county to condemn a right of way for its railroad through the lands of a number of parties, among them the respondent, J. S. Wyatt. The latter owned two tracts of land through which said railroad company attempted to condemn a right of way, one of which, designated as "parcel No. 7," is described in the petition as the south half of the northeast quarter of section 16, township 22, range 4 east; and the other, parcel No. 9, is described as the north half of the southeast quarter and lot 1 of the southwest quarter of section 19, township 22, range 4 east. Upon the petition of the railroad company, commissioners were appointed by the circuit court to view and to assess the damages to the property through which the proposed road was to run. On the 16th day of October, 1901, the commissioners made their report, which was filed in the office of the clerk of said court, in which report they assessed the damages to tract No. 7 at \$75, and assessed the damages to tract No. 9 at \$49. On October 31, 1901, Wyatt filed his exceptions to the report of the commissioners, and asked that said report be set aside, and that a jury trial be awarded him, and that his damages be inquired into and assessed by a jury. After the petition was filed, and before the cause was tried, the St. Louis, Memphis & Southeastern Railroad Company was, on its motion, made a party plaintiff; it having succeeded to all the rights of the plaintiff the Southern Missouri & Arkansas Railroad Company. Wyatt recovered a verdict and judgment for \$800, from which judgment, after unsuccessful motions for a new trial and in arrest, plaintiff appealed. The case for some reason found its way to the St. Louis Court of Appeals, and, after argument and submission there, an opinion was handed down by Bland, P. J., affirming the judgment on the ground that the printed abstract failed to show that the bill of exceptions had ever been made a part of the record. Thereafter a motion for a rehearing was filed, and the opinion was withdrawn, and the cause transferred to this court on the ground that the Court of Appeals had no jurisdiction of the appeal.

1. The cause was properly transferred to this court. It is a suit by a railroad company to condemn land for its right of way, and in such cases it has many times been held that appellate jurisdiction is in the Supreme Court. Title to real estate is involved in such a case. *City of Tarkio v. Clark*, 186 Mo., loc. cit. 294, 85 S. W. 329; *Kansas City v. Railroad*, 187 Mo., loc. cit. 151, 86 S. W. 190; *Bauble v. Ossman*, 142 Mo. 499, 44 S. W. 338; *State ex rel. Railroad v. Rombauer*, 124 Mo. 598, 28 S. W. 75; *State ex rel. v. McCutchan*, 119 Mo. App. 75, 96 S. W. 251; *Railroad v. Eubank*, 55 Mo. App. 335; *Railroad v. McGregor*, 53 Mo. App. 366.

2. We cannot consider the bill of excep-

tions in this case, for the reason that the printed abstract does not show that the bill was ever made a part of the record. The abstract shows that an appeal to this court was ordered on April 11, 1902, and that appellant was "given 90 days in which to perfect and file a bill of exceptions herein." Immediately following this is another record entry, which recites that on July 7, 1902, "for good cause shown, the time for filing bill of exceptions is hereby extended for a period of 60 days from the expiration of the first order." Then follows immediately the evidence of witnesses, and, after about 60 pages of testimony, immediately follow in order the instructions, the verdict, motion for new trial, motion in arrest, the affidavit for an appeal, the order allowing 90 days to file a bill of exceptions, and then a recital that on July 7, 1902, a further time of 60 days was allowed, and then a recital that appellant "presents its bill of exceptions and prays the same may be signed, sealed, and made a part of the record, which is accordingly done on this 16th day of August, 1902." Then follows the signature and approval of the judge, and the certificate of the clerk that the bill was filed on that day. It will be observed that it is only the bill of exceptions that recites that it was filed within the 60 days allowed. The record proper does not so recite. A bill of exceptions does not prove itself. It becomes a part of the record only when the record proper shows it was filed in time. The last record entry proper in this case shows that appellant was, on July 7th, given an extension of 60 days in which to file his bill. Matters of record proper have no place in the bill of exceptions, and a recital thereof therein adds nothing to the validity of the bill. *Milling Company v. St. Louis*, 222 Mo. 306, 121 S. W. 112; *Hogan v. Hinchey*, 195 Mo., loc. cit. 533, 94 S. W. 522; *Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638; *Groves v. Terry*, 219 Mo. 595, 117 S. W. 1167; *Shemwell v. McKinney*, 214 Mo. 692, 114 S. W. 1083; *Stark v. Zehnder*, 204 Mo. 442, 102 S. W. 992; *Walser v. Wear*, 128 Mo. 652, 31 S. W. 87; *Pennowsky v. Coerver*, 205 Mo. 135, 103 S. W. 542; *Coleman v. Roberts*, 214 Mo. 634, 114 S. W. 39. But, though there is no bill of exceptions, the judgment cannot be affirmed, if the abstract shows errors in the record proper, jurisdictional in character or otherwise. *Thomasson v. Merc. Town Mut. Ins. Co.*, 114 Mo. App. 109, 89 S. W. 564, 1135.

Appellant assigns error as to two matters of record proper.

3. Appellant contends that "the verdict of the commissioners was never reviewed by the court, and was never set aside or affirmed." Section 1208, Rev. St. 1899 (Ann. St. 1906, p. 1040), says that: "The report of said commissioners may be reviewed by the court in which the proceedings are had, or written exceptions, filed by either party; * * * and the court shall make such or-

der therein as right and justice may require, and may order a new appraisalment, upon good cause shown. Such new appraisalment shall, at the request of either party, be made by a jury under the supervision of the court as in an ordinary case of inquiry of damages." The record shows that respondent did file his exceptions to the commissioners' report, and asked therein that "said report, as to him, may be set aside, and that a jury trial may be awarded him, and his damages inquired into by a jury and assessed to him by a jury." Appellant contends that, before any jury trial can be had in such case, the record must show affirmatively that the court set aside the commissioners' report, and that until set aside it is still in force, and that the record does not show in this case that the report was set aside. This assignment goes to a jurisdictional record matter, for, if appellant's contention is correct, then, until the report of the commissioners was set aside by a formal order, that report remained in full force and effect, and no jury could be called to assess defendant's damages. The point, going to the jurisdiction of the court to order a jury trial, can therefore be considered, whether or not there was a motion in arrest.

(1) The appellant's abstract shows this record entry: "Now at this day it is ordered by the court that the report of the commissioners in the above-entitled cause be in all things confirmed except as to defendants J. S. Wyatt and C. E. McKinney." This was a sufficient order setting aside the report of the commissioners as to J. S. Wyatt, the respondent. It is a formal record order refusing to confirm that report as to him, so appellant is mistaken as to the fact, and its abstract shows the mistake.

(2) But there was no need of any order formally setting aside the report. When respondent filed his exceptions to the commissioners' report and asked for a jury to assess his damages, he was entitled to a jury as a matter of right. In another branch of this same case (*Railroad v. Woodard*), upon this appellant's appeal from the judgment awarding damages to C. E. McKinney, it was said by Brace, C. J., for the court in banc (193 Mo., loc. cit. 661, 92 S. W. 470): "On filing his exceptions the respondent had the constitutional right to have his damages assessed by a jury, and the court had no discretion in the matter. The calling a jury to assess his damages was such order 'as justice and right required.' Article 12, § 4, Const. 1875; *Railroad v. McGrew*, 113 Mo. 390, 21 S. W. 201; *Railroad v. Story*, 96 Mo. 611, 10 S. W. 203." That decision is conclusive of this assignment in this case.

4. The next assignment is that the verdict is general, and that "there should have been a verdict assessing the amount of damages to each tract." The railroad passes through land in the south half of the northeast quarter of section 16, and in the north half of

the southeast quarter and the southwest quarter of section 19, both in township 22. It will be seen that the land in section 16 is something over a mile from the nearest land in section 19. It will also be seen that land in two quarter sections of section 19 is described. The petition states that appellant "needs and seeks to acquire, for public use and purposes aforesaid, the several tracts of land, * * * described as follows: Parcel 7. One hundred feet in width in a general northeasterly and southwesterly direction, * * * through and upon the south half of the northeast quarter of section 16, township 22, which is owned or claimed by J. S. Wyatt. * * * Parcel 9. One hundred feet in width in a general northeasterly and southwesterly direction, * * * through and upon the north half of the southeast quarter of section 19, and lot 1 of the southwest quarter of section 19, township 22, which is owned or claimed by J. S. Wyatt." The petition nowhere asks for an assessment of damages to each tract separately, nor do respondent's exceptions. The jury returned this verdict, as shown by the record proper: "We, the jury, find the issues for the defendant, J. S. Wyatt, and assess his damages at the sum of eight hundred dollars. J. J. Bradshaw, foreman."

As a general rule, where there are several counts in a petition, each stating a different cause of action, there should be a separate finding on each. *Cramer v. Barmon*, 193 Mo. 329, 91 S. W. 1038; *Brownwell v. Railroad*, 47 Mo. 239; *Clark v. Railroad*, 36 Mo., loc. cit. 212; *Russell v. Railroad*, 154 Mo. 428, 55 S. W. 454. But that is not the rule where the several counts relate to the same transaction. *State v. Pitts*, 58 Mo. 556; *State v. Jennings*, 81 Mo. 185, 51 Am. Rep. 236; *State v. Bean*, 21 Mo. 267; *State v. McCue*, 39 Mo. 112. If the two tracts described in the petition are segregated and are separate and distinct tracts, then there should have been a separate finding of the damages done to each; but, if they were parts of one farm, then a general verdict was not improper, though the two tracts described in the petition are, as described, over a mile apart. Suppose the land in section 16 and that in section 19 are parts of one contiguous farm, owned by respondent, and are used by him in connection therewith; and suppose there is a perennial spring of great value in the northeast quarter of section 16, which, before this railroad was constructed, was used in connection with this farm extending southwesterly to section 19; and suppose that the railroad, as constructed, cuts off this perennial spring from all the rest of the farm—would that be a damage simply to the 80-acre tract in section 16 through which the railroad runs, or would it be a damage to the whole farm of which that 80 is a part? In such a case a general verdict would not be amiss. If it be said that we have no right to make such a sup-

position, by what course of reasoning can appellant have us assume that these tracts are not a part of one farm and used in connection with it? Appellant would have us assume, as a fact, without any evidence we can consider, on appeal, that, as the petition says its railroad runs through two tracts of land belonging to defendant, those tracts are entirely segregated and are not used as a part of one farm, and that therefore a judgment founded on a general verdict cannot stand. We cannot so assume. We do not know whether or not these tracts are a part of one farm and used in connection with it, and cannot know that fact, and therefore we cannot assume that the verdict is wrong. We must consider that the form of the verdict is objected to for the first time on appeal. So much of the record as we can consider does not show any objection was made to it at the trial. The record shows a motion in arrest was timely filed; but that motion is incorporated in what purports to be a bill of exceptions alone, and that bill we have already ruled we cannot consider, and hence we cannot look at the motion in arrest. As this record is presented for our consideration, we are asked to convict the trial court of error on a point that court was given no opportunity to correct. It has been the uniform ruling of this court that the trial court must be given an opportunity, by specific assignment, to correct its own errors, and, if not given that opportunity, they will not be considered on appeal. *Singer Manufacturing Co. v. Stephens*, 169 Mo. 1, 68 S. W. 903; *Coffey v. City of Carthage*, 200 Mo., loc. cit. 629, 98 S. W. 562; *Woody v. Railroad*, 104 Mo. App. 678, 78 S. W. 658; *State v. Lynn*, 169 Mo. 664, 70 S. W. 127. In such case every presumption will be indulged in favor of the proceedings in the trial court.

In *Wells v. Adams*, 88 Mo. App., loc. cit. 228, it is said: "When a petition contains several causes of action in as many counts, and there is a verdict of the jury or a finding of the court sitting as a jury, for plaintiff, every consideration of propriety requires that there should be a verdict or finding on each cause of action or count. * * * A general judgment in such case will, on a proper motion for that purpose, be arrested. * * * But in the present case the record does not show that the defendants filed any motion in arrest of judgment. An imperfect verdict or finding, or a neglect to find on all the issues, can be taken advantage of only by a motion in arrest." To the same effect are *Grier v. Strother*, 111 Mo. App. 386, 85 S. W. 976, and *Railroad v. Iron Works Co.*, 117 Mo. App. 167, 94 S. W. 726. The office of a motion in arrest is to direct the attention of the court to errors apparent on the face of the record proper (*State v. Goehler*, 193 Mo., loc. cit. 181, 91 S. W. 947); and

no defect in the verdict can be considered on appeal unless there was a motion in arrest assigning such defect as error (*Finney v. State*, to Use, 9 Mo. 635; *Stout v. Calver*, 6 Mo. 256, 35 Am. Dec. 438; *Davidson v. Peck*, 4 Mo. 445; *Griffin v. Samuel*, 6 Mo. 50; *State v. De Witt*, 186 Mo., loc. cit. 68, 84 S. W. 956).

Without any knowledge of the facts except such as appear from the petition, verdict, and judgment, we cannot say that the verdict in this case is erroneous on its face. If it were erroneous, under the facts as developed by the evidence, objection should have been made to it upon its return by the jury, and if that had been done the trial court had ample power to require the jury to make a finding of damages as to each tract, and if it had refused to have the verdict corrected, and objection and exception had been made to its ruling, and that ruling made a ground of the motion in arrest, we could consider the ruling on this appeal; but the trial court having been given no opportunity to correct the error, if any there was, we cannot convict it of error.

The judgment is affirmed. All concur.

STATE v. ELSCHINGER.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. CRIMINAL LAW (§ 1092*)—BILL OF EXCEPTIONS—EXTENSION OF TIME FOR FILING.

An order extending the time for filing the bill of exceptions, made in vacation after the expiration of the time fixed by a prior order, is void.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2857-2860; Dec. Dig. § 1092.*]

2. CRIMINAL LAW (§ 1092*)—BILL OF EXCEPTIONS—FAILURE TO FILE IN TIME—EFFECT.

A bill of exceptions not filed within the time fixed cannot be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2847-2856; Dec. Dig. § 1092.*]

3. CRIMINAL LAW (§ 1144*)—APPEAL AND ERROR—AFFIRMANCE.

In the absence of bill of exceptions and of any error in the record proper, it will be presumed that the accused had a fair trial, and the judgment must be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1144.*]

Appeal from St. Louis Circuit Court; Geo. H. Williams, Judge.

Charles Elschinger was convicted of murder, and he appeals. Affirmed.

Harry Walsh, for appellant. E. W. Major, Atty. Gen., and Jas. T. Blair, Asst. Atty. Gen., for the State.

GANTT, P. J. The defendant was indicted on the 19th day of March, 1908, by the grand jury of the city of St. Louis for murder in the first degree of Louisa Elschinger, his

wife. On the 24th of March, 1908, the defendant was duly arraigned and entered his plea of not guilty, and the cause was continued to the next term of court. At the April term, 1908, he was put upon his trial and convicted of murder in the first degree, and his punishment assessed at imprisonment in the penitentiary for life. Motions for new trial and in arrest of judgment were duly filed and overruled, and the defendant sentenced in conformity with the verdict. From that sentence he has appealed to this court. On May 5, 1908, defendant was given 90 days in which to file his bill of exceptions. No bill of exceptions was filed within the time granted, and it appears that on September 5, 1908, the following order was made and entered upon the record of the circuit court: "Saturday, September 5, 1908. State of Missouri, v. Charles Elschinger. Murder in the first degree. Now on this day, it appearing from the affidavit filed by the attorney for the above-named defendant, filed this 5th day of September, 1908, that the clerk of this court inadvertently failed to enter an order of this court made on the 5th day of August, 1908, granting additional time in which to file bill of exceptions in this cause, it is now hereby ordered by the court, subject to the action of the court, upon the application for amendment of record concerning the bill of exceptions herein, that the following order be entered nunc pro tunc and for the said date to conform with the facts and proceedings in this cause, to wit: It is this day ordered by the court that the time heretofore granted defendant to file his bill of exceptions herein, on or before the 5th day of August, 1908, be extended up to the 5th day of October, 1908, in the October term, 1908, of said court, and that when so filed the same to have the same force and effect as if filed on the 5th day of August, 1908." What purports to be the bill of exceptions in the cause was filed on October 5, 1908. If the bill of exceptions shall be considered as a part of the record, it appears that several of the jurors, upon their voir dire examination, stated that under no circumstances would they return a verdict assessing the death penalty. Thereupon, on the challenge of the state, these jurors were excused, and the defendant excepted to the action of the court.

The evidence on behalf of the state tended to show that the defendant, for about three months prior to the 6th of March, 1908, the date of the homicide, had been conducting a saloon at 738 South Broadway, in the city of St. Louis. The defendant and the deceased were married in November, 1907, and at the time of the killing of defendant's wife they were living in rooms above the defendant's saloon. They each had children by former marriages. The defendant had invested \$800 of the money received by his wife from the life insurance of her former husband in his saloon business. For some time before the

date on which the killing occurred, defendant and deceased had not lived harmoniously. Different witnesses testified to assaults which the defendant had made upon his wife. It seems that differences arose between the defendant and the deceased concerning the repayment to her of her money which defendant was using in his saloon business. About two days before the homicide, the defendant's wife, apparently in an effort to recover a portion of her money from her husband, took \$220 from the saloon. This precipitated a quarrel, in which the defendant threatened to put his wife out of the house, but refused to permit her to remove her furniture. There was also evidence that on this occasion the defendant assaulted and beat his wife, and on the following morning another difficulty arose, in which the defendant again assaulted his wife. On the day before the homicide, the defendant and his wife engaged in an altercation in their rooms, in which it appears that the deceased assaulted the defendant with some cooking utensils. They were separated by the bartender, who took the defendant down in the saloon, and they were followed by the deceased, who attempted to attack the defendant with a cleaver. She was disarmed, and the pair engaged in a fight, which resulted in the arrest of both. This was about 9 o'clock of the night of March 5th. The evidence tended to show that the deceased, at this time, bore numerous marks of violence on her person. She gave bond and was released at once; but the authorities held the defendant, despite the fact that bond had been given for him, for fear he would renew the trouble. On the next morning the defendant was released, when he said, "I'll fix her for this." This was about 5:45 on the morning that his wife was killed. At 7:30 on the same morning, defendant secured, and had ready, a moving van, and he and his wife engaged in a heated argument about his right to remove the saloon stock. Advised by the officer that both parties would be arrested if the disturbance did not cease, the defendant left the saloon and proceeded to a pawnshop on Sixth street and attempted to purchase a revolver, but was unsuccessful. He returned to his saloon, drank some more whisky, and he and deceased went upstairs to their apartments. In a few moments thereafter shots were heard in the rooms above the saloon. When the officers, attracted by the shots, reached the apartments, they met defendant coming out of the parlor with pistol in hand. He was at once disarmed, and saying, "Louisa is dead, and I am too," fell to the floor. His wife was lying in the parlor and dead when the officers arrived. The pistol bullet had entered her head just below or behind the left ear. The defendant was entirely uninjured. Three bullet holes in the ceiling were discovered. The defendant made a statement, in which he said that, when he went

upstairs just before the shooting, he went into the front room, and his wife came in and started after him with a butcher knife in her hand, and she took the gun, and he tried to get it from her, and she fired one shot at him, and that is all he remembered.

No other weapon was found in the rooms or on the defendant, except the pistol which was taken from him. All five chambers of the pistol were empty. There was also evidence on the part of the defendant which tended to show that deceased, after being released on bond the night before she was shot and killed, went into the saloon and secured her husband's pistol, which, the evidence tended to show, was, if not the same, like the one with which the shooting was done. Another and different revolver, produced by the defendant's witness Butch, was more positively identified as the one taken by the deceased from the saloon. This witness found this revolver in a stove which he had bought from among deceased's effects. There was also evidence of assaults by the deceased upon the defendant the night before the shooting. Defendant, in his own behalf, testified that the deceased had on the 5th of March taken all his ready money, and, when he asked for it in order to pay his bills, she declared she was going to keep it. At supper time on this day a difference arose as to whether deceased should make tea instead of coffee, and she became very angry. There was a fire in the range, and the defendant insisted that she should utilize it for cooking and turned out the gas stove, which was also burning. Deceased relit the gas, and defendant extinguished it again, whereupon she struck the defendant with a pan and a poker. Immediately thereafter the deceased made an assault upon him with a cleaver in the room below. He testified as to his arrest and detention on the night of the 5th, and on his return to the saloon in the morning he found the money that was in the drawer to be taken, and he asked his wife for change to use that day, and she refused to let him have it; that, on going upstairs to prepare for the trip to the court in the matter of the disturbance of the night before, his wife attempted to assault him with a butcher knife. He declared: That when he then told his wife that she could stay in the rooms, and he would leave, when he turned to get some articles of dress, she struck him in the face with some instrument, and he heard a shot, which passed close to his mouth; that a second shot passed near his head; "that he could not hear nothing more; that he did not know nothing at all, dropped, didn't know nothing, swimming in the head and everything." Defendant denied attempting to purchase the revolver on the morning of the shooting. Defendant also offered some testimony tending to show that his reputation was good.

The gravity of the offense and the char-

acter of the sentence compel the serious consideration of the court of the proposition which meets us at the very threshold, to wit, that no matters of exception are reviewable for the reason that the bill of exception was not filed within the time allowed by the order of the court, and hence, legally considered, are no part of the record. By reference to the statement, it will be observed that on the 5th day of May the court, by its order of record made on the day of the granting of the appeal to this court, allowed the defendant 90 days to file his bill of exceptions. Now excluding the 5th of May, the day on which the order was made, 90 days from that date expired on August 3, 1908. The attempt made on September 5, 1908, to save the lapse of time by the entry of a nunc pro tunc order purporting to have been made on August 5, 1908, extending the time to October 5, 1908, was utterly futile for the reason that the order, even if it had been made originally on August 5th, would have been inoperative and ineffective to extend the time because the time had lapsed on August 3d, and nothing that the court could do on August 5th, the term having lapsed, could have imparted any life whatever to the order. In *State v. Eaton*, 191 Mo., loc. cit. 156, 89 S. W. 949, it was said: "It is a fundamental principle that courts can exercise judicial functions only at such times and places as are fixed by law, and that the judges of courts can enter no orders in vacation except such as are specially authorized by statute. 4 Ency. Pl. & Prac. 337, note 2. * * * It is of grave importance that the records of our courts shall be kept so that all parties interested therein or affected thereby may be able to ascertain, by application to the clerk, when a judgment has become final, or when exceptions have been or will be filed if in vacation." In *State v. Britt*, 117 Mo. 586, 23 S. W. 771, it was said: "When the 40 days given by the court had expired, the judgment of the circuit court became final, and neither the court or the parties had any power, in the absence of an order or stipulation extending the time, to take any other steps in the cause. *State v. Seaton*, 106 Mo. 198, 17 S. W. 169; *State v. Mosley*, 118 Mo. 545, 22 S. W. 804; *State v. Apperson*, 115 Mo. 470, 22 S. W. 375." These cases all concur in holding what it would seem on principle would require no citation of authority to show that when the time granted by the court had elapsed on August 3, 1908, it was entirely out of the power of the court or the parties to invest the court with authority to extend the time for filing the bill of exceptions. This view of the record obviates any necessity for considering the validity of the nunc pro tunc entry of September 5, 1908, on the ground that it was made without any minute of the judge or the clerk or any paper in the cause which would support such an order. The law on this point is too well set-

tled to require more than a mere reference to it. It follows that, however serious the consequences to the defendant, it is plain that we are restricted to the record proper, and that the alleged exceptions are not before us for review. The indictment is but a rescript of the one approved in *State v. Gray*, 172 Mo. 434, 72 S. W. 698; *State v. Wilson*, 172 Mo., loc. cit. 423, 428, 72 S. W. 696. The arraignment and the plea of not guilty were in due and regular form, and so, also, are the entries of the impanelment of the jury, the verdict, and the sentence of the court.

In the absence of any proper exceptions and of any error in the record proper, we have but one duty to perform; that is, to indulge the presumption that the court performed its duty and gave the defendant a fair and impartial trial.

The judgment of the circuit court is therefore affirmed.

BURGESS and FOX, JJ., concur.

STATE v. HUBBARD.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. CRIMINAL LAW (§ 784*)—NECESSITY FOR INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

It is only when conviction is sought on circumstantial evidence alone that it is necessary to charge on the weight of such evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1883-1888; Dec. Dig. § 784.*]

2. WITNESSES (§§ 319, 337*)—IMPEACHMENT OF ACCUSED—ADMISSIBILITY OF EVIDENCE—OTHER CONVICTIONS.

One charged with larceny, having offered herself as a witness, is open to impeachment, and under express provisions of Rev. St. 1899, § 4080 (Ann. St. 1903, p. 2549), records of former convictions may be introduced to affect her credibility.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1092, 1127; Dec. Dig. §§ 319, 337.*]

3. LARCENY (§ 55*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence held to support a conviction of larceny.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 152, 164-169; Dec. Dig. § 55.*]

Appeal from Circuit Court, Pettis County; Louis Hoffman, Judge.

Dora Hubbard was convicted of larceny, and she appeals. Affirmed.

A. L. Shortridge, for appellant. E. W. Major, Atty. Gen., and John M. Atkinson, Asst. Atty. Gen., for the State.

BURGESS, J. The prosecution in this cause was commenced by the filing of an information by the prosecuting attorney of Pettis county in the circuit court of said county, charging the defendant with a lar-

ceny of \$80 from the person of S. E. Scarlatt, in the nighttime in the city of Sedalia, on the 6th day of December, 1907. The defendant was duly arraigned, and pleaded not guilty, and upon a trial for said charge was found guilty, and her punishment assessed at two years in the penitentiary. From the sentence upon this verdict, she has appealed to this court.

The evidence tends to establish the following facts: The prosecuting witness left Higginsville, Mo., about 8 o'clock on the evening of December 6, 1907. He purchased a railroad ticket from Higginsville to Stamps, Ark., over the Missouri Pacific and Iron Mountain System. On leaving Higginsville he had \$80 in paper money and some \$5 in silver. He came to Sedalia on what is known as the Lexington Branch of the Missouri Pacific System, reaching there about 9:45 that night. On his arrival at Sedalia, he went to the Missouri Pacific depot, and remained there a short time, when he discovered that he had lost one of his rubbers from his overcoat pocket, and he started out to buy a rubber. While on the street in search of an open store, he was accosted by the defendant on two different occasions. On the first, she said that she must get away or they would catch her, or something of that kind, and went. He thereupon continued his search for the store, and she met him again, and he detailed the circumstance in this manner: "She came right up in front of me. My vest was open and my overcoat over my shoulder, and I had the money in here [indicating his inside vest pocket]. I had \$80 in paper money in a pocketbook. I also had a railroad ticket. I had the pocketbook in this vest pocket. I had my head down, and she came right up to me and grabbed me, and ran her hands around and said, 'You are a nice fat old fellow,' and made a swipe around me, and I did not think about the money, and it kinda excited me, and she let loose and went on. I did not miss the money until I got into the depot. She had on a red skirt and a big hat and a brown looking coat—I do not know whether it was a coat or not—and she was a yellow woman." Having discovered the loss of his money and railroad ticket, the prosecuting witness immediately notified the police, and the defendant was arrested within a very few minutes in McGurran's restaurant, near the depot, about 11 o'clock, and was taken to the police station, where she was identified by the prosecuting witness as the woman who had robbed him on the street a few minutes prior thereto. When arrested the defendant wore a red skirt and a big hat and a brown looking cloak. She had \$6 in currency and \$4 and 15 cents in silver on her person. The pocketbook and railroad ticket were found about 4 o'clock

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on the following morning in front of Holdner's store, on the south side of Main street, by a negro man. The money had all been taken from the pocketbook, and the railroad ticket alone remained. Between 10 and 11 o'clock on this same night the defendant was seen by the witness Flossie Guy, a negro girl, on the south side of Main street, in front of said Holdner's store, where the pocketbook was afterwards found. Defendant was in a stooping position as if she was hunting something or tying her shoe. She afterwards had a conversation with this witness Guy, in which she said that "The trouble Will and I had I need not say anything about. I did not have to bring it up at court; and about seeing her over at Holdner's, I need not bring that up." When arrested on the night of the robbery, defendant stated to the police officer that she had just come downtown, and had not been on the street that night. After her arrest she was locked up in the city prison, and early on the following morning, she secretly sent from the city prison her hat and cloak by a negro man. She was seen at McGurrien's restaurant a few minutes before the arrival of the Lexington train from Higginsville, at which time she stated that she had no money to buy any drinks for a crowd of negroes, who were then at the restaurant, but that she was going out on the street, and when she came back she would have money to buy drinks for the crowd.

On her return to the restaurant about 11 o'clock she bought three rounds of drinks for the crowd amounting to about \$3.50, and was a free spender with her money. She testified in her own behalf, and stated that she came downtown about 8:15 that evening to go to a show, but that her "dusky buck" was sick, and she then went to Houston's hall for a dance. She did not stay there long, but went from there to McGurrien's and then went back for the second time to the dance hall, and returned for the second time to the restaurant, and remained there but a few minutes, when the police came in and arrested her. She denied paying for any drinks, or exhibiting any money, or making any statement about her buying drinks, when she came back to the restaurant the second time. On the following day, at the preliminary hearing in the justice's court, defendant had a sister there, dressed in red and wearing a cloak and dress very much like the defendant wore the night of the robbery; and her sister, on the advice of one of defendant's counsel, was caused to change positions in the courtroom with the defendant, to see if the prosecuting witness was able to identify the defendant as the one who had robbed him on the previous night. And the prosecuting witness in a very positive manner pointed out defendant as the guilty party on that occasion. Various records of

former convictions of the defendant were offered and read in evidence, from which it appears that she was an habitual criminal of the most pronounced type.

The information is in all respects sufficient. The record is a very voluminous one, and is interlarded with many objections, but we will consider those urged in the brief of the counsel for the defendant first.

1. It is insisted that the court should have instructed the jury on circumstantial evidence, and erred in refusing four instructions designated as "C," "D," "E," and "F," which were requested by the defendant. The court did instruct on alibi, which was the defendant's theory of the case on the trial, and there was direct and positive evidence in this case that the defendant committed the larceny as charged in the information, and she was positively identified by the prosecuting witness as the person who went through his pockets and stole his pocketbook and money. It has again and again been ruled by this court that it is only when a conviction is sought on circumstantial evidence alone that it is necessary to give an instruction on the weight of circumstantial evidence. *State v. Bobbitt*, 215 Mo., loc. cit. 43, 114 S. W. 511; *State v. Donnelly*, 130 Mo. 642, 32 S. W. 1124; *State v. Fairlamb*, 121 Mo. 137, 25 S. W. 895; *State v. Robinson*, 117 Mo., loc. cit. 663, 23 S. W. 1066. And in this connection it may also be remarked that in her motion for new trial the defendant complains that the court did not instruct on the law of the case. There was no request to instruct on any other proposition, except upon the law of circumstantial evidence, and, as the case was one of direct testimony, there was no harm in the court refusing to instruct on that subject, otherwise than it did in giving the very full and ample instruction on the presumption of innocence and reasonable doubt, and alibi.

2. There is no merit in the contention that the various judgments of conviction of the defendant of various offenses were incompetent. Having made herself a witness, the defendant was then open to impeachment and cross-examination by the express provisions of section 4680, Rev. St. 1899 (Ann. St. 1906, p. 2549). *State v. Blitz*, 171 Mo. 530, 71 S. W. 1027; *State v. Brooks*, 202 Mo., loc. cit. 117, 118, 100 S. W. 416, and cases cited. While the defendant makes a formal assignment of error in the instructions given by the court of its own motion, her counsel have pointed out no error in any specific instruction.

A careful examination of each and every one of the instructions given by the court demonstrates that they are such as have often received the approval of this court, and there is no error in them or any one of them.

As to the assignment in the motion for new trial that the verdict was the result

of passion and prejudice, we can only say that it is refuted by the whole record, which leaves no doubt whatever of the guilt of the defendant, and contains no mitigating circumstances in her favor.

The judgment is therefore affirmed. All concur.

STATE v. FLEETWOOD.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. CRIMINAL LAW (§ 1064*)—APPEAL—REVIEW—EXCLUSION OF EVIDENCE—MOTION FOR NEW TRIAL.

The motion for new trial having failed to preserve the action of the court in excluding evidence, such action cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2679; Dec. Dig. § 1064.*]

2. CRIMINAL LAW (§ 1151*)—APPEAL—REVIEW—REFUSAL OF CONTINUANCE.

Refusal of continuance cannot be interfered with on appeal, unless it appears the discretion of the trial court was abused or arbitrarily exercised.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3046-3049; Dec. Dig. § 1151.*]

3. CRIMINAL LAW (§ 1118*)—APPEAL—MATTERS FOR BILL OF EXCEPTIONS.

Refusal of continuance cannot be reviewed; the application therefor not being in the bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2926; Dec. Dig. § 1118.*]

4. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REPETITION.

The matters embraced in a requested instruction having been fully covered by instructions given, it was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

5. ABDUCTION (§ 12*)—SUFFICIENCY OF EVIDENCE.

Evidence on a prosecution under Rev. St. 1899, § 1842 (Ann. St. 1906, p. 1273), for taking away a female under the age of 18 for the purpose of prostitution or concubinage, held sufficient to authorize a conviction.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. § 22; Dec. Dig. § 12.*]

6. CRIMINAL LAW (§ 1159*)—REVIEW—VERDICT ON CONFLICTING EVIDENCE.

A verdict of guilty on conflicting evidence, there being substantial evidence to support it, will not be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

Appeal from Circuit Court, Douglas County; John T. Moore, Judge.

John Fleetwood appeals from a conviction. Affirmed.

This cause is now pending before this court upon an appeal from a judgment of the circuit court of Douglas county, convicting the defendant, John Fleetwood, of an offense as defined by section 1842, Rev. St. 1899 (Ann. St. 1906, p. 1273), for the taking away of a female under the age of 18 years for the purpose of prostitution or con-

cubinage. Omitting formal parts, the information, which was duly verified, charging the defendant with this offense, was as follows: "Fred Stewart, prosecuting attorney within and for the county of Douglas, in the state of Missouri, informs the court upon his oath that John Fleetwood, on the 10th day of September, 1908, in the county of Douglas and state of Missouri, did then and there being one Myrtle Miller, a female person under the age of 18 years, to wit, 17 years old, unlawfully and feloniously take from one William Miller, her father, he, the said William Miller, then and there being in the legal charge of the person of the said Myrtle Miller, without the consent and against the will of the said William Miller, for the purpose of concubinage by having illicit sexual intercourse with him, the said John Fleetwood, against the peace and dignity of the state."

Upon this charge the defendant was duly arraigned and pleaded not guilty at the September term, 1908, of said Douglas county circuit court. At said term the trial proceeded, and the evidence introduced on the part of the state upon the trial of said cause tended substantially to prove: That the prosecutrix was the daughter of William Miller and lived with her father in Christian county, Mo., about a mile and a half from defendant's home in Douglas county. That on September 12, 1908, there was a reunion being held at Ava, the county seat of Douglas county. That on the morning of September 12th prosecutrix left her home in a conveyance with Mat Morrison (who had married a sister of prosecutrix) and his family to go to Ava, to attend the reunion, under the direction and with the consent of her father. That they arrived at the grounds where the reunion was held at about 10 o'clock a. m. That immediately after arriving at the reunion grounds the defendant and prosecutrix met and remained together all day. That defendant induced and overpersuaded the prosecutrix to remain with him at the reunion and accompany him home, and not to return to her own home with the Morrisons when they were ready to start home from the reunion. Mat Morrison and Mamie Morrison, his daughter, left prosecutrix and defendant together on the reunion grounds. That when Mamie Morrison, at least three different times, asked prosecutrix to return home, the defendant at each and all times coaxed, induced, and overpersuaded the prosecutrix to stay with him at the reunion grounds, without the consent of the Morrisons, in whose charge prosecutrix had been placed by her father. The state's evidence also shows: That prosecutrix was only 17 years of age at the time; that her father never consented to her going or being with the defendant, but, on the contrary, would not permit

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

prosecutrix to visit the home of defendant, and had not permitted defendant and prosecutrix to be together for two years prior to this time; that some time previous to this time the prosecutrix had been staying at the home of defendant—that is to say, about two years previous—and became pregnant and gave birth to a child; that since the occurrence of that event the father of prosecutrix had never allowed her to be in defendant's company or visit defendant's home. Prosecutrix testified: That she lived with her father; that she went to the reunion at Ava with her brother-in-law, Mat Morrison, and his family, and at the reunion defendant asked her to stay with him at the reunion grounds and not return to her home with the Morrison family; that when the Morrisons asked her to go home defendant would whisper to her to stay; that they remained together on the reunion grounds Saturday night until toward morning, when they started for defendant's home, a distance of 12 or 15 miles, arriving there about daylight Sunday morning; that defendant's home was a one-room house, in which were two beds; that no other persons were at defendant's home when they arrived; and that they remained there together from the time of their arrival until Monday morning about 2 o'clock, when her father, the constable, John Thurman, Perry Riniker, and Mat Morrison came there and took her to her father's home. Prosecutrix further testified: That, during the time they were at defendant's home together defendant lay down on the side of the bed by her; that she had her clothes off; and that she went to sleep while they were in that position; and that she was asleep when her father and the officer arrived there Monday morning. Prosecutrix further testified that none of her family knew she was with defendant.

Defendant testified: That he first saw prosecutrix at the reunion grounds; that she remained there and went home with him "because she wanted to"; that he did not take her away for the purpose of having sexual relations with her; that he did not have sexual relations with her; that it was at her request that she went home with him; that he expected to find his wife and family at home when he arrived there; that he knew his wife had gone to her father's home that day, but expected her to return home on Saturday evening. Defendant further testified: That he and prosecutrix were together at the reunion pretty much all day, and admitted that he was with her when Mamie Morrison came after her to get her to return home with the Morrisons. That he stayed with her Saturday night. That they left the reunion grounds at dark Saturday night and arrived at home at daybreak, having walked all night; the distance being 15 or 16 miles. That his home was a one-room house. And that he and prosecu-

trix remained together at his home from the time they arrived there until early Monday morning, when the father of prosecutrix and the officer came to his house and arrested him. On cross-examination defendant testified: That he requested the prosecutrix to remain at the reunion with him. That after reaching his home he lay down on the side of the bed by her, with his shoes and coat off, and asked her why she thought his wife had not come. That she was undressed at the time. That he remained there with her all day Sunday, except a short time, when he went to a neighbor's house, who lived a couple of hundred yards from his home. That he did not know that his child was sick at his wife's father's home until after his wife came home. However, his wife's father lived only a mile and a half from where he and prosecutrix were together from early Sunday morning until early Monday morning. Defendant further testified: That his wife was sick on the day of the trial; that he took a buggy and went after her, but she was too ill to attend the trial; that he and his wife had been living together since this trouble. J. William Miller, witness for defendant, testified that defendant's wife was at his (Miller's) home on the day of the trial, that she was not well when he left home, and that he did not suppose she was well enough to attend the trial. On cross-examination this witness testified that defendant's wife stated to him that she would attend the trial if they had to have her and would come after her. There was also other evidence introduced on the part of the defendant tending to show that the reputation of the prosecuting witness for chastity was bad.

At the close of the evidence, the court instructed the jury upon every phase of the case to which the testimony was applicable. We do not deem it essential to reproduce the instructions given, but will give them such attention as we deem necessary during the course of the opinion. The cause was then submitted to the jury, and they returned a verdict finding the defendant guilty as charged in the information and assessed his punishment at three years' imprisonment in the state penitentiary. Time motions for new trial and in arrest of judgment were filed and by the court taken up and overruled. Sentence and judgment were entered of record in conformity to the verdict returned, and from this judgment the defendant in due time and proper form prosecuted his appeal to this court, and the record is now before us for consideration.

E. W. Major, Atty. Gen., and John M. Dawson, Asst. Atty. Gen., for the State.

FOX, J. (after stating the facts as above). In the consideration of this cause, we are not favored with a brief, or even any suggestions concerning the errors complained

of, as disclosed by the record. However, in obedience to the commands of the statute, we will carefully analyze the disclosures of the record with the view of ascertaining if any substantial error has been committed in the trial of this cause.

1. We have analyzed in detail the disclosures of the record as to what occurred during the progress of the trial of the defendant in this cause, and find that numerous objections were made during the progress of the trial upon the introduction of evidence upon the part of the state. Upon this proposition it is sufficient to say that we have examined very carefully the objections urged to the testimony offered by the state, and in our opinion the testimony as offered, to which objections were interposed, was admissible; at least, we have reached the conclusion, after a careful analysis of the numerous objections to the introduction of evidence, that there was no substantial error in the action of the trial court in the admission or rejection of evidence. The evidence as offered by the state, to which objection was made, manifestly had a tendency to establish some essential elements of the crime charged. As to the rulings of the court excluding evidence offered by the defendant, the motion for new trial fails to preserve the action of the trial court upon that subject. Hence any complaint as to the rejection of testimony offered by the defendant is not before us for review.

2. Our attention is directed to the application for a continuance on the part of the defendant and the action of the court in overruling it. It is sufficient to say upon that question that we have fully considered the application, and in our opinion there was no error in denying the same. Granting or refusing applications for continuances in criminal cases is a matter that frequently rests within the sound judicial discretion of the trial court, and, unless it is apparent that such discretion has been abused and arbitrarily exercised, the appellate courts are not inclined to interfere with the action of trial court upon this subject. *State v. Day*, 100 Mo. 242, 12 S. W. 365; *State v. Cochran*, 147 Mo. 504, 49 S. W. 558; *State v. Burns*, 148 Mo. 167, 49 S. W. 1005, 71 Am. St. Rep. 588. But, aside from this, an examination of the record discloses that the application for a continuance is not embodied in the bill of exceptions which is signed by the judge of the trial court. This being true, it is not a subject for review by this court.

3. We have carefully considered the instructions which were given to the jury at the close of the evidence, and we are unable to discover any substantial error in the declarations as given. They are substantially in form with instructions which have heretofore met the approval of this court, applicable to offenses of this character.

They required the jury, before they were authorized in returning a verdict of guilty, to find beyond a reasonable doubt every essential element necessary to constitute the offense with which defendant was charged. The jury were fully informed by an appropriate instruction that the law presumed the innocence of the defendant, and that this presumption continued with him until it had been overcome by evidence which established his guilt to their satisfaction and beyond a reasonable doubt. The jury were also informed that the burden of proving the guilt of the defendant rested with the state, and if they had a reasonable doubt of the defendant's guilt they should acquit him. It may be further said that the court gave to the jury full information as to their duty in determining the credibility of witnesses and the weight and value of their testimony, substantially telling them that they were the sole judges of the credibility of the witnesses, as well as the weight and value of their testimony, and in determining what weight and credit they should give to the testimony of any witness they should take into consideration the interest such witness may have had in the result of the trial, the relationship, if any, of any witness to the defendant or to the prosecuting witness, the attitude and demeanor of the witness on the witness stand, and finally told the jury that, if they believed that any witness had willfully and knowingly sworn falsely to any material fact in issue, they were at liberty to disregard any or all of such witness' testimony. A careful consideration of all the instructions indicates very clearly that all of the subjects to which the testimony had any reference were fully covered by them. The defendant requested the court to instruct the jury as follows: "The court instructs the jury that if you find and believe from the evidence that the defendant did have sexual relations with Myrtle Miller, unless you further find that he took the said Myrtle Miller for the purpose of concubinage, if you find that he did take her, you should acquit the defendant, as sexual intercourse is not concubinage, as defined in these instructions." This instruction was refused, and we think properly so, for the reason that the matters embraced in that instruction had been fully covered by instructions given by the court. The court in its instructions had clearly presented the gravamen of this offense; that the essential element of it was the taking away of the female under the age of 18 years for the purpose of prostitution and concubinage. Hence we take it that the instruction as offered by the defendant was a repetition of what had already been declared to the jury by the trial court, and it constituted no error to decline to give the instruction requested.

4. This leads us to the consideration of

the question as to the sufficiency of the evidence to support the verdict. We have indicated in the statement the nature and character of the evidence upon which this cause was submitted to the jury. This cause is no exception to causes generally of this character. It presents evidence both ways, and it is sufficient to say that it was the province of the jury to settle and adjust the conflict in the evidence. It needs no citation of authorities upon the proposition that this court will not undertake, if there is any substantial evidence to support the verdict, to retry the cause upon the mere disclosures of the record. This has been the uniform expression of this court. *State v. Tetrick*, 199 Mo. 100, 97 S. W. 564; *State v. Mathews*, 202 Mo. 143, 100 S. W. 420; *State v. Smith*, 190 Mo. 706, 90 S. W. 440; *State v. Williams*, 186 Mo. 128, 84 S. W. 924.

5. We have indicated our views upon the legal propositions as disclosed by the record. We see no reason for further discussing the complaints presented by it. The trial court fully and fairly declared the law to the jury applicable to this case. There was substantial evidence upon which the jury had the right, if they believed it, to predicate their verdict.

Finding no substantial error disclosed by the record in this cause, the judgment of the trial court should be affirmed, and it is so ordered. All concur.

STATE v. KEATING.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1906.)

1. ELECTIONS (§ 328*)—FRAUDULENT REGISTRATION—OFFENSES—INFORMATION.

An information charging one with fraudulently registering in an election precinct of which he was not a resident need not allege that he was sworn when he made application for registering and before he answered the necessary questions.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 355-363; Dec. Dig. § 328.*]

2. CRIMINAL LAW (§ 165*)—"FORMER JEOPARDY."

One is in legal jeopardy when he is put on trial before a court of competent jurisdiction on an indictment sufficient to sustain a conviction, and a jury has been empaneled and sworn, unless the jury is discharged with the consent of accused, or when, after verdict of guilty, the same has been set aside on accused's motion for a new trial or the judgment arrested.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 290-298; Dec. Dig. § 165.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3802-3811; vol. 8, p. 7694.]

3. CRIMINAL LAW (§ 170*)—FORMER JEOPARDY.

Where accused was convicted on a second count of the information, and the court, on appeal, determined that the information was insufficient as to both counts, accused had not been put in jeopardy by reason of the conviction on

the second count and the acquittal by inference on the first count.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 312-321; Dec. Dig. § 170.*]

4. CRIMINAL LAW (§ 1167*)—APPEAL—HARMLESS ERROR—MISJOINDER OF COUNTS.

Where the court withdrew from the jury the first count of the information and submitted the case on the second count only, a misjoinder of the counts was not prejudicial to accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101-3106; Dec. Dig. § 1167.*]

Appeal from St. Louis Circuit Court; Hugo Muench, Judge.

Edward J. Keating was convicted of fraudulently registering in an election precinct, and he appeals. Affirmed.

See 202 Mo. 197, 100 S. W. 648.

Zachriyz & Bass, for appellant. E. W. Major, Atty. Gen., and Chas. G. Revelle, Asst. Atty. Gen., for the State.

BURGESS, J. On September 19, 1906, the circuit attorney of St. Louis filed in the circuit court an information in two counts, attempting to charge the defendant in the first count with unlawfully registering in two separate election precincts, to wit, in the Fourth and Ninth precincts of the Second ward, and in the second count attempting to charge him with the offense of fraudulently registering in an election precinct, to wit, the Ninth precinct of the Second ward, not having a lawful right to register therein; he not being a resident thereof. He was convicted upon the second count, and from the judgment entered in accordance with the verdict he appealed to this court, where the information was held insufficient, and judgment reversed and the cause remanded. *State v. Keating*, 202 Mo. 197, 100 S. W. 648. Thereupon, on the 6th day of January, 1908, the circuit attorney filed an amended information duly verified in two counts, charging in the first count the offense that he attempted to charge in the first count in the original information, and on which there had been no finding by the jury on the first trial, and in the second count charging the offense he attempted to charge in the second count of the original information. To this information defendant filed his plea in bar, alleging that, although the original information contained two counts, they covered but one and the same transaction and were supported by one and the same evidence, and the silence of the verdict as to the first count at the former trial amounted to a verdict of not guilty on that count, and therefore operated as an acquittal on both counts of the amended information. To this plea the state entered a general denial, and the defendant thereupon demanded that the issues thus presented be tried separate and apart from the general issue tendered by the

plea of not guilty. This the court refused to do, and defendant being arraigned, and pleading not guilty, the cause went to trial, and at the close of all the evidence the court sustained the plea as to the first count, and withdrew same from the consideration of the jury. On the second count the defendant was convicted, and his punishment assessed at three years' imprisonment in the penitentiary. After unsuccessful motions for a new trial and in arrest of judgment, he was sentenced on the verdict, and has appealed to this court.

The testimony on the part of the state tended to prove that, in accordance with the laws of this state, there was a general registration of voters and electors in the city of St. Louis on the 19th, 20th, 21st, and 22d days of September, 1904, and that the judges and clerks of registration, after having been properly appointed, were duly sworn and qualified, and during those days discharged their respective duties as such judges and clerks of registration. All persons applying for registration were required to state under oath their place of residence, name, date of birth, age, and occupation, duration of residence in the precinct, city, and state, and certain other matters touching their qualification and right to register as voters. These questions were propounded by one of the judges, and the answers were recorded in books prepared and kept for that purpose, and, if the answers were satisfactory to the judges, the applicant was declared a qualified voter by entering the word "Yes" opposite his name in the column, headed by the words "Qualified Voters," and the applicant was then permitted to sign his name on the register in the proper place as a qualified voter. On the 19th of September, 1904, defendant appeared before the judges and clerks of registration of the Ninth election precinct of the Second ward, and requested to be permitted to register. After being sworn to truthfully answer questions touching his right to register, he stated, among other things, that his name was Edward J. Keating; that he resided at number 3127 South Twelfth street in said Ninth election precinct of said Second ward; that he was 23 years of age; that his occupation was that of bartender; that he was born in Missouri, and had resided in said election precinct for 10 years, and in the city of St. Louis and state of Missouri for 23 years. These answers were written by the clerk in the registration record, at the proper place in said book, and in the column for qualified voters defendant signed his name, and the judges declared him a qualified voter, and wrote the word "Yes" opposite his name in the column headed "Qualified Voters," and he was duly entered on the registration books as such. The testimony on the part of the state then tended to show that the defendant's residence was not in the Ninth election

precinct, but that he was a young man and lived with his parents at 812 Wright street in the Fourth election precinct of the Second ward. The testimony also tended to show that defendant made application for registration in the Fourth precinct of the Second ward, and stated that he resided at 812 Wright street. He offered no evidence in his own behalf.

1. The information conformed to the rulings of this court on the former appeal in *State v. Keating*, 202 Mo. 197, 100 S. W. 648, and stated with particularity the doing by the defendant of all the acts necessary to registration within the meaning of Laws Mo. 1903, pp. 177, 178 (Ann. St. 1903, pp. 3506, 3507), and Rev. St. 1899, § 2120j, added by Laws 1903, p. 153 (Ann. St. 1903, p. 1373). The information did not allege that the defendant was sworn when he made application for registration, and before he answered the necessary questions, but, as held in *State v. Cummings*, 202 Mo., loc. cit. 624, 625, 105 S. W. 649, it was not essential that he do so, as this provision of the statute was one directed solely to the registration officers.

2. In regard to the special plea in bar, to wit, an acquittal on the former trial, it is sufficient to say that the legal efficiency of the record of the former trial offered to sustain the acquittal from the crime charged in the second information was entirely a question of law which the court was bound to decide. The identity of the prisoner and the record of the former information, trial and acquittal, were all admitted by the state, and there was nothing for a jury to pass upon. *State v. Williams*, 152 Mo., loc. cit. 120, 53 S. W. 424, 75 Am. St. Rep. 441; *State v. Manning*, 168 Mo., loc. cit. 429, 68 S. W. 341; *State v. Laughlin*, 180 Mo., loc. cit. 358, 79 S. W. 401; 1 Bishop's Crim. Proc. § 816, subsecs. 4, 5. The substantial question involved is: Did the court correctly hold that the said proceedings constituted no obstacle to a trial of the defendant on the new information? On the former appeal it was ruled that the information was insufficient to sustain the verdict and sentence, and for that reason the judgment was reversed and the cause remanded, with permission to the circuit attorney to file a new information if he thought fit. Without restating the doctrine and the reasons in support thereof in regard to what constituted jeopardy, we will content ourselves by adopting the language of Judge Phillips in *State v. Hays*, 78 Mo., loc. cit. 605, 606, to wit: "It is sufficient, for the purposes of this case, to say that if the former indictment had been sufficient to sustain a conviction, and its further prosecution had been voluntarily abandoned by the state after the impaneling of the jury, and the reading of the indictment, the defendant could not again be exposed to conviction upon the same charge.

Cooley, in his admirable work on Constitutional Limitations, p. 327, very succinctly asserts that a person is in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon an indictment which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance: 'And a jury is said to be thus charged when they have been impaneled and sworn.' There are exceptions to this general rule, among which is that if the jury are discharged with the consent of defendant, expressed or implied, or if after verdict of guilty the same has been set aside on defendant's motion for a new trial, or the judgment arrested. *Commonwealth v. Stowell*, 9 Metc. (Mass.) 572; *State v. Slack*, 6 Ala. 676." It is the accepted doctrine that, in order for a former trial and acquittal or conviction to be invoked on a plea of former jeopardy, it is essential that the former conviction or trial must have been upon a sufficient indictment or information. Thus in *State v. Manning*, 168 Mo., loc. cit. 430, 68 S. W. 341, this court said: "The indictment No. 2,123 was invalid on its face, and no judgment could have been rendered upon it, and hence the plea in bar was lacking in this essential to a good plea of former jeopardy." As this court decided on the former appeal that this information was insufficient as to both counts, nothing further need be added to show that that conviction on the second count and the acquittal by inference on the first count neither amounted to jeopardy within the meaning of our Constitution and law.

3. In regard to the motion to elect, it suffices to say that the defendant cannot complain for the reason that the court withdrew the first count from the jury's consideration, and no possible harm could have resulted to him from the alleged misjoinder of the two counts. *State v. Richmond*, 186 Mo., loc. cit. 81, 84 S. W. 880; *State v. Carragin*, 210 Mo., loc. cit. 365, 109 S. W. 553, 18 L. R. A. (N. S.) 561.

It remains only to add that the arraignment was sufficient and in proper form, and the evidence amply full to support the verdict.

We have carefully examined the record, and have passed upon all the alleged errors assigned in the motion for new trial which appear to us to have had any merit in them.

The judgment is affirmed. All concur.

STATE v. WILSON.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. FALSE PRETENSES (§ 16*)—STATUTORY PROVISIONS—"CONFIDENCE GAME" AS CONSTITUTING OFFENSE.

Rev. St. 1899, § 2213 (Ann. St. 1906, p. 1410), provides that "every person who, with intent to cheat and defraud, shall obtain or at-

tempt to obtain from any other person or persons, any money, property or valuable thing whatever, by means or by use of any trick or deception, or false and fraudulent representation or statement or pretense, or by any other means or instrument or device, commonly called the 'confidence game,' or by means or by use of any false or bogus check, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony," etc. *Held*, to be manifestly directed against obtaining money or property from one whose confidence has first been secured by false and fraudulent representations in connection with acts done, with intent to cheat and defraud, to provide for a class of false representations not included in some other section dealing with ordinary false representations, and to be intended to reach a class of offenders known as "confidence men," who obtain money by some trick or representation designed to deceive.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 20; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1420, 1421.]

2. FALSE PRETENSES (§ 34*)—SUFFICIENCY OF INFORMATION.

An information setting out in detail acts and representations of defendant, from which it appears that, by falsely representing he was the traveling salesman of a company with which the prosecuting witness was doing business, by assuming to take an order as such salesman, and by representing that an expected draft for his traveling expenses had not been received, he induced the witness to cash a draft, assumed to be drawn by him on the company therefor, sufficiently charges an offense under such section.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 46; Dec. Dig. § 34.*]

3. CRIMINAL LAW (§ 371*)—EVIDENCE—OTHER OFFENSES.

In a prosecution under Rev. St. 1899, § 2213 (Ann. St. 1906, p. 1410), for fraudulently obtaining money by means of a worthless draft, it was competent for the state, for the purpose of showing intent, to introduce evidence of defendant's perpetration, or attempt to perpetrate, frauds on other persons, thereby obtaining money from them under the same or similar circumstances at or near the time of the act in question.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 830; Dec. Dig. § 371.*]

4. CRIMINAL LAW (§ 1043*)—PRESERVING OBJECTION TO TESTIMONY FOR REVIEW.

An objection to testimony, to be considered on appeal, should at least briefly indicate some reason therefor.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2654; Dec. Dig. § 1043.*]

5. CRIMINAL LAW (§ 382*)—EVIDENCE—ADMISSIBILITY—COMPLAINT AND AFFIDAVIT OF PROSECUTING WITNESS.

The complaint and affidavit made by the prosecuting witness before a justice of the peace were properly excluded, in the absence of any tendency to prove or disprove any of the issues involved, or to contradict or impeach any witness.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 382.*]

6. CRIMINAL LAW (§ 770*)—TRIAL—INSTRUCTIONS.

There was no error in an instruction which fully covered the charge in the information, and required the jury to find every essential fact necessary to constitute the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1806; Dec. Dig. § 770.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

7. FALSE PRETENSES (§ 52*)—TRIAL—INSTRUCTIONS—LIMITING PURPOSE OF EVIDENCE OF OTHER FRAUDS.

In a prosecution, under Rev. St. 1899, § 2213 (Ann. St. 1906, p. 1410), for fraudulently obtaining money on a worthless draft, an instruction limiting the purpose of evidence of frauds by defendant on other persons at or near the time of the offense in question was entirely proper.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 64; Dec. Dig. § 52.*]

8. CRIMINAL LAW (§§ 778, 789*)—TRIAL—INSTRUCTIONS—PRESUMPTION OF INNOCENCE—BURDEN OF PROOF—REASONABLE DOUBT.

An instruction fully covering the presumption of innocence, and informing the jury that the burden of proof rests on the state, and requiring them to find defendant's guilt beyond a reasonable doubt, and directing them in the usual manner that if they entertain such a doubt of his guilt, they should give him the benefit of it, is proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1906; Dec. Dig. §§ 778, 789.*]

9. FALSE PRETENSES (§ 49*)—EVIDENCE—SUFFICIENCY.

Evidence held to sustain a conviction in a prosecution, under Rev. St. 1899, § 2213 (Ann. St. 1906, p. 1410), for fraudulently obtaining money by means of a worthless draft.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 62; Dec. Dig. § 49.*]

Appeal from Circuit Court, Texas County; L. B. Woodside, Judge.

D. E. Wilson was convicted of obtaining money fraudulently, and he appeals. Affirmed.

The defendant in this cause has brought this case to this court by appeal from a judgment of the circuit court of Texas county, Mo., convicting him of obtaining fraudulently, by means of a trick and deception, false and fraudulent representations, the sum of \$25 from one John H. Bauch. The amended information, which was duly verified, upon which the defendant was tried, was predicated upon the provisions of section 2213, Rev. St. 1899 (Ann. St. 1906, p. 1410). The sufficiency of the information was challenged in the trial court by a motion to quash, as well as in the motion in arrest of judgment. Hence it is well to reproduce the information upon which the judgment in this cause is based. Omitting formal parts, it is as follows:

"John H. Sanks, prosecuting attorney, within and for the county of Texas and state of Missouri, upon his information and belief, informs the court that D. E. Wilson, on the 10th day of January, 1908, in the county of Texas and state of Missouri, then and there with intent unlawfully and feloniously to cheat and defraud one John H. Bauch, then and there unlawfully, knowingly, and feloniously, by use of a trick and deception and false and fraudulent representation, statement, and pretense, did falsely and fraudulently represent and pretend to the said John H. Bauch that he, the said D. E. Wilson, was then and there the representa-

tive and authorized agent of the Pratt Food Company of Philadelphia, Pa., a corporation duly incorporated and existing under the laws of the state of Pennsylvania, and that he, the said D. E. Wilson, had full right and authority from the said corporation then and there to transact business for said corporation, to sell and contract for the sale of the goods and products of said corporation, and to furnish advertising matter to the dealers in said goods and products; that he, the said D. E. Wilson, was in the employ of said corporation, and sent by the said corporation for the purpose of selling the goods and products of said corporation, and furnishing and distributing the advertising matter of said corporation to dealers.

"And the said D. E. Wilson in pursuance of his purpose and intent to cheat and defraud the said John H. Bauch as aforesaid, did then and there, as the agent and representative of said corporation, pretend to, and did, sell to the said John H. Bauch a bill of goods and products of the said corporation, and then and there take an order, from the said John H. Bauch, for advertising matter of the said corporation, advertising the goods and products of the same, which order for said goods and advertising matter is in the words and figures as follows: 'Order No. Date. M. : Ship to John M. Bauch. At Cabool, Mo. How ship, Freight. When, At once. Terms, March 1st 60 days. 1,000 letter heads; 1,000 bill heads; 1,000 statements; 1,000 envelopes; 500 handbooks; plenty of signs to tack up on counter; plenty of large Litho signs; ½ bale 12-lb. sacks stock food, printed like sample attached. Ship at once.'

"And he, the said D. E. Wilson, then and there represented to the said John H. Bauch that he had expected to receive a draft or check from the said corporation to defray his traveling expenses as representative of the said corporation, but that said draft or check had not been received, that he, the said D. E. Wilson, was in need of money to defray said traveling expenses, and requested the said John H. Bauch to cash a draft of the said corporation for the sum of \$25 for the purpose of defraying said traveling expenses, which said draft he, the said D. E. Wilson, then and there drew on said corporation, said draft being in the words and figures as follows: '\$25.00. 'Cabool, Mo., 1-10-1908. At sight pay to the order of John H. Bauch, twenty-five dollars, value received, and charge the same to the account of D. E. Wilson. To Pratt Food Co. No. ———, Phila. Pa.'—which said draft the Pratt Food Company refused to honor and pay, but returned the same to the said John H. Bauch, and the said John H. Bauch, believing the said false and fraudulent representations and statements and pretenses made as aforesaid by the said D. E.

Wilson to be true, and being deceived thereby, was induced by reason thereof, and did then and there cash said draft, and in pursuance thereof paid to the said D. E. Wilson the sum of \$25 lawful money of the United States of the value of \$25; and the said D. E. Wilson by means and use of said trick, deception, false and fraudulent representations, statements, and pretenses so made as aforesaid, then and there unlawfully, knowingly, and feloniously did obtain from him, the said John H. Bauch, the sum of \$25, the money and property of the said John H. Bauch, with the intent then and there unlawfully and feloniously to cheat and defraud him, the said John H. Bauch, of the same.

"Whereas, in truth and in fact, the said D. E. Wilson did not have any right or authority then and there to transact business for said corporation, and was not then their representative or authorized agent of said corporation to sell and contract for the sale of the goods and products of the said corporation, or the furnishing of advertising matter to dealers for said corporation; that he was not employed in any manner by said corporation, and he, the said D. E. Wilson, well knew that he, the said D. E. Wilson, did not have any right or authority then and there to transact business for said corporation, or to sell the goods and products of the same, or furnish dealers with advertising matter, advertising the business of said corporation, or to receive any draft or checks or money from the said corporation in any manner to defray his traveling expenses, and he, the said D. E. Wilson, was not then and there, or at any time, sent by the said corporation to represent said corporation in any manner whatever, against the peace and dignity of the state."

Upon the overruling of the motion to quash this information the defendant was duly arraigned, entered a plea of not guilty, and the trial proceeded. The testimony developed upon the trial of this cause tended substantially to establish the following state of facts: That John H. Bauch, about January 10, 1908, and prior thereto, was engaged in the milling and mercantile business in the town of Cabool, in Texas county, Mo., and handled, among other things, Pratt's foods; that on the morning of January 10, 1908, defendant went to Bauch's store, and stated that his name was Wilson, and that he was the traveling salesman and representative of the Pratt Food Company. After inquiring of Bauch concerning his supply of such foods, defendant stated that his company, owing to the fierce competition it was then encountering, was preparing and furnishing free to its customers some special advertising matter. On being advised by Bauch that his supply of such advertising matter, including letter and bill stationery, was about exhausted, defendant remarked that he had better send him some, and there-

upon took from his pocket an order book, and, after writing in the book certain items which he called aloud as he entered them on the order book, he asked Bauch if that would be sufficient, to which inquiry Bauch replied in the affirmative. Bauch then informed defendant that he was in need of some 12-lb. sacks of stock food, and directed defendant to send him 100 pounds. Defendant placed this on the order with the advertising matter, and, after describing to Bauch some of the territory in which he said he was the traveling representative of the Pratt Food Company, and after ascertaining that Bauch would be in the store at a later hour that morning, defendant left the store, saying that he would return. Soon thereafter defendant returned to the store, and went to the office desk where Bauch then was, and informed Bauch that he had failed to get his check for traveling expenses and was about out of money, and requested Bauch to cash for him a draft in the sum of \$25. Bauch agreed to accommodate him, and defendant filled out a blank draft which he took from his pocket, and Bauch gave him the \$25. The draft was drawn on the Pratt Food Company, and was never paid, as defendant was in no manner connected with, and had at no time been the representative or employé of, that company. When defendant received the money, he took from his pocket the order, which, on the previous trip to the store was taken, and, after placing it in a stamped envelope, remarked that he would get it off on the morning mail. He then left Cabool on the morning train, saying he was going to Thayer, Mo. After defendant's arrest he stated to Bauch that his reason for doing as he did was because he had been drunk. Bauch let him have the money, relying upon his representations and statements that he was the agent of that company, and his conduct and acts in connection with taking the order, etc.

The testimony also discloses that at the town of Fordland, Webster county, Mo., a distance of about 53 miles from Cabool, and located on the same line of railroad, defendant, on January 11, 1908, went to another customer of the Pratt Food Company, Dr. John W. Good, and made the same representations and statements as he had made to Bauch. On that occasion he told Dr. Good that he would have the company send him some calendars and stationery, and, after taking out his order book and writing what he said was a requisition on the company for the calendars and advertising matter, stated that he was a little shy on traveling expenses, and asked Dr. Good to cash for him a \$10 draft. The doctor, needing for immediate use the money he then had on hand, declined to cash the draft, and thus escaped being fleeced. Again, on January 13, 1908, at the town of Rogersville, located about 60 miles from Cabool, and on

the same line of railroad and in the same direction from Cabool as Fordland, defendant called on N. T. Bowles, a druggist, and dealer in Pratt's Foods, and introduced himself as Pratt's agent, and, after taking an order from Bowles for some food and stationery and advertising matter, he said that he was in a hurry, and that some of the business men would have to help him out, as he was in need of money. He asked Bowles to accompany him to the bank and identify him in order to enable him to cash a draft. This Bowles did, and on his indorsement defendant's draft on the Pratt Food Company for \$25 was paid. Payment on this draft was also refused by the Pratt Food Company, and Bowles was required to take up the draft and refund to the bank the \$25. Defendant actually mailed to the Pratt Food Company the various orders he had thus taken, but attached no signature, and these orders and papers were received by the company, but not recognized, because defendant was not their agent.

At the close of the evidence the court gave instructions to the jury numbered 1, 2, and 3. It is not essential that we reproduce such instructions, but it is sufficient to say that instruction No. 1 was predicated upon the allegations in the information, and required the jury to affirmatively find the existence of every essential element necessary to constitute the offense charged. Instruction No. 2 simply limited the purpose of evidence introduced by the state of other similar offenses committed by defendant. Instruction No. 3 appropriately directed the jury upon the subjects of presumption of innocence, the burden of proof, and reasonable doubt. The cause was then submitted to the jury, and they returned their verdict, finding the defendant guilty as charged, and assessed his punishment at imprisonment in the penitentiary for a term of four years. Timely motions for new trial and in arrest of judgment were filed and by the court overruled. Sentence and judgment followed in conformity to the verdict returned, and from this judgment the defendant prosecuted this appeal, and the record is now before us for consideration.

E. W. Major, Atty. Gen., and Chas. G. Revelle, Asst. Atty. Gen., for the State.

FOX, J. (after stating the facts as above). The first legal proposition with which we are confronted, as disclosed by the record, is the challenge by the defendant to the sufficiency of the information. The statute, upon which this information is predicated is section 2213, Rev. St. 1899 (Ann. St. 1906, p. 1410), which, so far as it relates to the information in this cause, provides that "every person who, with intent to cheat and defraud, shall obtain or attempt to obtain from any other person or persons, any money, property or valuable thing whatever, by means or by use of any trick or deception, or false and fraudulent

representation or statement or pretense, or by any other means or instrument or device, commonly called 'the confidence game,' or by means or by use of any false or bogus check, or by any other written or printed or engraved instrument, or spurious coin or metal, shall be deemed guilty of a felony, and upon conviction be punished by imprisonment in the penitentiary for a term not exceeding seven years." It may here be noted that, in addition to the provisions of the statute, as herein indicated, it also makes provision as to the form of an indictment, but it will be observed that the information in the case at bar does not undertake to adopt the form of the charge as is embraced within that section. Hence it follows that the cases of *State v. Terry*, 100 Mo. 601, 19 S. W. 206, *State v. Cameron*, 117 Mo. 371, 22 S. W. 1024, and *State v. Kain*, 118 Mo. 5, 23 S. W. 763, wherein it was held that that statute in undertaking to prescribe the form of the indictment, was unconstitutional, has no application to the information in the case at bar. Manifestly the provisions of section 2213 were directed against the obtaining of money or property from a person whose confidence has first been secured by and through means of false and fraudulent representations in connection with acts done, with the intent to cheat and defraud. As was said in the case of *State v. Pickett*, 174 Mo. 663, 74 S. W. 844, the purpose of this statute was to provide for a class of false representations not included in some other section dealing with the subject of the ordinary false representations. It was intended to reach a class of offenders known as "confidence men," who obtain the money of their victims by means of, or by the use of, some trick or representation designed to deceive. The very essence of the crime denounced by section 2213 is that the injured party must have relied upon some false or deceitful pretense or device and parted with his property.

After a careful analysis of the charge as embraced in the information in the case at bar, we are of the opinion that the acts and representations as made by the defendant, which are set out in detail in the information, clearly places this offense within the class of cases defined by section 2213. It must not be overlooked that the defendant in the case at bar, at the very inception of his dealings with the prosecuting witness, sought to obtain his confidence by representations that he was acting as the agent of a firm dealing in goods and products that the prosecuting witness carried in stock; and it further appears from the allegations in the information that, to thoroughly obtain such confidence of the party charged to have been defrauded, he took his order for certain goods and products as the agent and salesman of the firm which dealt in such goods and products. All of these representations are alleged in the information, and properly so, for the trick and deception con-

sisted in convincing the prosecuting witness that he was the agent and traveling salesman of the firm he claimed to represent, thereby obtaining his confidence to the extent that, upon the false and fraudulent representation that he had expected to receive a draft or check from the Pratt Food Company to defray his traveling expenses, but that said draft or check had not been received, he induced John H. Bauch, the prosecuting witness, to cash a draft drawn by the defendant upon the Pratt Food Company for the sum of \$25 for the purpose of defraying the traveling expenses of the defendant. We are unable to conceive a series of representations and acts, all of which are averred in the information, which present more strongly and clearly a case contemplated by the provisions of section 2213. The false and fraudulent representations, pretenses, statements, and acts done by the defendant, which clearly point to a trick and deception, are all set out with remarkable particularity and precision in the information. In our opinion every essential element necessary to constitute an offense under that section is embraced in the information.

The defendant in this case doubtless realized that, if he simply requested the cashing of the draft upon the Pratt Food Company, in all probability his request would not be granted. Hence he resorted to the deception and trick of impressing the prosecuting witness that he was the agent and representative of a business concern with which the prosecuting witness had had dealings, and thereby obtained his confidence, and manifestly it was through this deception and trick that he obtained the money from the prosecuting witness upon the worthless draft. We repeat that this information sufficiently charges an offense under the provisions of section 2213, and is not out of harmony with the cases of *State v. Woodward*, 156 Mo. 143, 56 S. W. 880; *State v. Jackson*, 112 Mo. 585, 20 S. W. 674; *State v. Pickett*, 174 Mo., loc. cit. 667, 668, 74 S. W. 844; *State v. Vandenburg*, 159 Mo. 230, 60 S. W. 79.

2. The record before us discloses numerous complaints at the action of the trial court in the admission and rejection of testimony. The defendant is not represented in this court. Hence, under the provisions of the statute, we have examined in detail the record disclosing the objections and exceptions to the action of the trial court in the disposition of this cause. There was, during the progress of the trial, evidence introduced upon the part of the state tending to show that the defendant had perpetrated, or undertook to perpetrate, frauds upon other persons, thereby obtaining money from them under the same and similar circumstances, at or near the time it is charged the acts were committed in the case at bar. Learned counsel for defendant in the trial court interposed objections to this character of testimony, and properly preserved their excep-

tions. This proposition is not one of first impression, but has in many instances been in judgment before this court. In *State v. Myers*, 82 Mo. 553, 52 Am. Rep. 389, Judge Phillips, who was then a commissioner of this court, exhaustively reviewed both the English and American authorities upon this subject, and from such review deduced the conclusion that, while as a general proposition a distinct crime, for which the party might be separately proceeded against, could not be given in evidence against the prisoner on trial for a single offense, this well-settled rule has its exceptions, equally well settled, and it was expressly held in that case, adopting the views of Judge Story in *Wood v. United States*, 16 Pet. 342, 10 L. Ed. 987, that where "the question was one of fraudulent intent or not, and upon questions of that sort, where the intent of the party is matter in issue, it has always been deemed allowable, as well in criminal as civil cases, to introduce evidence of other acts and doings of the party of a kindred character, in order to illustrate or establish his intent or motive, in the particular act directly in judgment." This court, in *State v. Turley*, 142 Mo. 403, 44 S. W. 267, was confronted with the same proposition, in a case of similar character, and it was there said by Judge Burgess, speaking for this court, that: "Evidence of other efforts upon the part of defendant, made about the same time, to obtain goods from other merchants, upon the same character of statements and representations, was admissible for the purpose of showing the intent of the defendant, and to this purpose that kind of evidence was properly restricted by the state's fifth instruction, so that defendant had no right to complain on that score." To the same effect is *State v. Wilson*, 143 Mo. 334, 44 S. W. 722. In fact an examination of the authorities in this state makes it manifest that the case of *State v. Myers*, supra, on this point has been consistently followed and adhered to by this court in all of its subsequent rulings. *State v. Cooper*, 85 Mo. 256; *State v. Bayne*, 88 Mo. 604; *State v. Sarony*, 95 Mo. 349, 8 S. W. 407; *State v. Balch*, 136 Mo. 103, 37 S. W. 808.

The next objection to the admission of testimony to which the record directs our attention is that of witness Shafer, introduced by the state, who testified along the line that the defendant was not the agent, representative, or employé of the Pratt Food Company, and was in no manner authorized to solicit or take orders for them, or in any manner represent that company. The objection to the testimony of this witness seems to be predicated upon the theory that there was no allegation in the information that defendant was not in fact the agent and representative of the Pratt Food Company. In this we are of the opinion that it is a misconception of the charge as embraced in the information. The information plainly charges that the de-

fendant falsely and fraudulently pretended to be the agent of the Pratt Food Company, and this is followed by another allegation that he in truth and in fact was not such agent, and had no authority to represent them. There is no merit in this objection, and it must be ruled adversely to the appellant.

We find other objections disclosed by the record, but they are mere objections, without assigning any reasons for them. In other words, it is simply stated that "We object." In view of the uniform expressions by this court that objections in that form are insufficient to preserve the rulings of the court upon them for review in this court, we deem it unnecessary to burden this opinion with a citation of the authorities. An objection to testimony during the progress of a trial should at least briefly indicate some reason for such objection; and, in order to entitle it to the consideration of this court, this should be done.

Upon the trial of this cause defendant offered in evidence the complaint and affidavit made by the prosecuting witness before the justice of the peace. The court, upon the objection of the state, excluded the complaint and affidavit, and in our opinion the action of the court was entirely proper. Prior to the offering of the complaint and affidavit made by the prosecuting witness, a preliminary inquiry was made concerning the making and signing of the affidavit, to which inquiry prompt answers were given. The purpose of offering this complaint and affidavit as made before the justice of the peace was not disclosed by counsel for appellant in the trial of this cause, and manifestly the only theory upon which such offer was made would be that it tended to contradict or impeach the testimony as given in the trial of the cause by the prosecuting witness. The affidavit and complaint as made before the justice is fully set out in the bill of exceptions, and we have carefully examined it; and, while it is true that it does not set forth all of the details of the offense as fully as the information by the prosecuting attorney, yet it contains nothing which in any way contradicts or has a tendency to impeach the statements as made by the prosecuting witness upon the trial of this cause. Hence we have reached the conclusion that this testimony was immaterial. It had no tendency to prove or disprove any of the issues involved in this proceeding, nor did it tend to contradict or impeach any witness in the proceeding.

3. This leads us to the consideration of the instructions given by the court. Instruction No. 1 fully covered the charge in the information, and required the jury to find every essential fact necessary to constitute the offense. There was no error in that instruction. Instruction No. 2 was a very appro-

priate instruction, limiting the purpose for which evidence was offered by the state during the progress of the trial, to which reference has heretofore been made, as to the perpetration of frauds upon other persons at or near the time it is charged this offense was committed, in the same section of the country and under similar circumstances. This instruction was entirely proper, and is in accord with what this court held in *State v. Turley*, supra, concerning evidence of this character, that it should be properly restricted to the purpose for which it was introduced; that is to say in ascertaining the intent to defraud, which was an issue in the cause. Instruction No. 3 fully covered the subject of the presumption of innocence, and informed the jury that the burden of proof rested upon the state, and required them to find the guilt of the defendant beyond a reasonable doubt, and directed them, in the usual manner, that if they entertained a reasonable doubt of the defendant's guilt, they should give him the benefit of it and acquit him.

4. The defendant, not being represented in this court, has lead us to make a very careful examination of the disclosures of the record, with the view of ascertaining whether or not there was any substantial error committed during the progress of the trial of this cause. After such examination we are clearly of the opinion that there was no substantial error committed by the trial court which would authorize the reversal of this judgment. No one can read in detail the testimony developed upon the trial without being convinced that the defendant is guilty of the perpetration of the fraud charged in the information. The rulings of the court upon the admission and rejection of evidence were entirely in accord with the well-settled principles of law applicable to that subject. The instructions of the court fully and fairly covered every subject to which the testimony was applicable.

Entertaining these views, the judgment of the trial court should be affirmed, and it is so ordered. All concur.

HALTER et al. v. LEONARD et al.

(Supreme Court of Missouri, Division No. 2
July 13, 1909. Rehearing Denied Nov.
23, 1909.)

1. HIGHWAYS (§§ 29, 63*)—ESTABLISHMENT—JURISDICTION—JUDGMENT.

Under Rev. St. 1899, § 9414 (Ann. St. 1906, p. 4327), providing that the petition for new roads shall be accompanied by the names of the resident owners of the land, through which the proposed road will run, with the amount of damages claimed by them, etc., the petition itself need not contain the names of the owners, and the court has jurisdiction to pass on its sufficiency and to find as a fact that it is accompanied by a list of landowners, and, where it

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

does so find, its judgment is not open to collateral attack.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 168; Dec. Dig. §§ 29, 63.*]

2. COUNTIES (§ 85*)—SURVEYORS—"DEPUTY"—ACTS OF DEPUTIES.

Under Rev. St. 1899, § 10194 (Ann. St. 1903, p. 4629), authorizing any county surveyor to appoint deputies, a report of a county surveyor made in his name by his deputy is valid under the rule that official acts done by a deputy shall be done in the name of the principal; a deputy being one who by appointment exercises an office in another's right, having no interest therein, and doing all things in his principal's name, for whose misconduct the principal is answerable.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 85.*]

For other definitions, see Words and Phrases, vol. 3, pp. 2008, 2009.]

3. APPEAL AND ERROR (§§ 301, 719*)—QUESTIONS REVIEWABLE.

The question of the propriety of allowing attorney's fees to the successful defendant in a suit for an injunction not assigned in the motion for new trial, or in the regular assignments of error, is not reviewable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1753; Dec. Dig. §§ 301, 719.*]

4. INJUNCTION (§ 200*)—COSTS—ATTORNEY'S FEES.

The court in a suit for an injunction may allow, after final judgment denying relief after full hearing, costs for attorney's fees to defendant.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 420; Dec. Dig. § 200.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by John Halter and others against John L. Leonard and others. From a judgment for defendants, but ordering that the temporary restraining order issued in the cause shall remain in force pending an appeal, plaintiffs appeal. Modified and affirmed.

Mytton & Parkinson and C. C. Crow, for appellants. Luke H. Moss, for respondents.

GANTT, P. J. On the 6th of February, 1905, John A. Lynch et al. filed with the clerk of the county court of Buchanan county a petition to establish and open a county road in said county. The petitioners allege that they were citizens of said county, and at least 12 of them were duly qualified and competent adult petitioners, residents of and owners in their own proper rights of lands in the municipal townships through which said proposed road was to be located, three of whom resided in the immediate neighborhood of said proposed road. They stated that the said road was to be 30 feet in width and would be located in the townships of Agency and Washington in said county, and was of great public utility, and was not a change of a previous location, and that the beginning, courses, and termination thereof, with not less than two points named on the direction of said public road, are as fol-

lows: "Beginning at the quarter section corner between sections 7 and 8, in township 56, of range 34, in center of public road, and run north with section line 106 two-thirds rods, to a point, and thence west, 80 rods, and thence north, 53½ rods, to north line of section 7, and thence north to a point due of the center of section 6, and thence west to the center of section 6, and thence north to the north line of section 6 in same township and range, and thence west, 4 chains and 64 links, to quarter section corner south line of section 31, in township 57, of range 34, and thence due north with section line to Garrettsburg road, in section 31 aforesaid." The petition further avers that this road whenever practicable would run along government surveys, and that this petition was accompanied by the names of all the residents and other persons owning lands through which said proposed road would run, and also names of all who were willing to give the right of way for said public road. And they prayed for the establishment of said proposed public road and for all proper relief. At the time of the filing of said petition said John A. Lynch et al. whose names were subscribed thereto filed with the clerk of the county court a notice of said intended application for the location of said road, whereby notice was given that on February 6, 1905, at the regular February term, they would present said petition for said public road to the county court of said county. This petition was filed and proof of legal notice was made on the 6th of February, 1905, and the court set the cause down for hearing on the 27th of February, 1905. On the 20th of February a remonstrance was filed by the plaintiffs and others by the circuit clerk of the county of Buchanan against said road. The hearing was had on said petition and remonstrance on the 28th of April, 1905, and on which said last-named date the county court found that the said proposed road was of great public necessity, was practicable, and that the facts justified the location of the road at the expense of the county, and ordered the road commissioner to view, survey, and mark out said proposed road and report his proceedings in the premises at the next term of the said court to be begun in May, 1905. In obedience to the order of the court, the county surveyor on the 1st of May, 1905, made his report in which he stated the names of the landowners who gave the right of way, and of those who claimed damages, and named as among those who declined to state what damages they claimed John Halter, Mrs. J. G. Adams, and the heirs of the Stock estate. He also filed his estimate of the cost of building the bridges and culverts and grading said road, and filed with his report a plat which showed the owners of the land and the numbers thereof. Thereupon the court appointed J. L. Leonard, W.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

J. Wilson, and David Turner, commissioners, to assess damages on said road, and to report their findings to the August term of said court. The report of these commissioners was afterwards filed, in which it appeared that John Halter, the plaintiff herein, was allowed damages to the amount of \$30 by the running of the said road on the south side of the southwest quarter of the northeast quarter of section 6, township 56, range 34. The record then shows that the report of the commissioners was approved by the court, and exceptions were filed by the plaintiffs Halter et al., a jury waived, and the plaintiffs' exceptions overruled; and thereupon the plaintiff on behalf of himself and others was granted an appeal to the circuit court of Buchanan county. Pending the said appeal in the circuit court the plaintiffs commenced this suit in the circuit court of Buchanan county to obtain an injunction against the judges of the county court and the county surveyor and Peter Olson, the road commissioner, to enjoin and restrain them from taking or attempting to take any part of the plaintiffs' lands for the purposes of said proposed roads as described in said petition in the county court. On January 20, 1906, the defendants filed their answers, in which they denied each and every allegation complained of in the plaintiffs' petition, and prayed that the temporary injunction issued be dissolved. Thereupon the cause was heard in the circuit court, and on March 10, 1906, the court found for the defendants, and ordered that the restraining order theretofore made in the cause should remain in force pending the appeal to this court; plaintiffs having taken the proper steps for prosecuting this appeal to this court.

1. The plaintiffs rely upon practically two grounds only for the reversal of the judgment of the circuit court dissolving the temporary injunction and dismissing the bill. The first insistence is that the county court acquired no jurisdiction of the proceedings to establish the public road in question for the reason, as alleged, that the petition did not contain the names of all the persons owning land which would be taken for the said public road. By reference to section 9414, Rev. St. 1899 (Ann. St. 1906, p. 4327), it will be noted that there is a proviso therein in these words: "Said petition shall be accompanied by the names of all resident persons owning land through which said proposed road or change of road shall run, with the amount of damages claimed by them so far as can be ascertained and also the names of those who are willing to give the right of way of said proposed road or change of road." In the petition filed in this case for the opening of this road it was alleged: "This petition is accompanied by the names of all residents and other persons owning land through which said proposed road shall run with the amounts of damages claimed

by each of them so far as can be ascertained, and also by the names of all those who are willing to give the right of way for said proposed public road." And the county court, upon the final hearing of this petition and application, found as a matter of fact that said petition was accompanied by the names of all the resident persons owning land through which said proposed road would run. There is no warrant in the statute for the contention that the petition itself should contain these names. Full and complete jurisdiction was conferred upon the county court to pass upon the sufficiency of this petition, and to find as a matter of fact that it was accompanied by the list of landowners, as provided by the statutes. As said in *Bauble v. Ossman*, 142 Mo., loc. cit. 505, 44 S. W. 339: "The county court having the exclusive jurisdiction for the laying out and opening public roads, and having acquired jurisdiction in this particular case by the notice and petition, its findings and judgment are not open to collateral attack, and its judgment is entitled to every presumption in its favor. *Lingo v. Burford*, 112 Mo. 149, 20 S. W. 459; *Snoddy v. Pettis County*, 45 Mo. 361; *Rose's Guardian v. Kansas City*, 128 Mo. 135, 30 S. W. 518."

2. The contention that the proceeding was void and open to this collateral attack because the report of the county surveyor was made by his deputy in the name of his principal, and not by the principal himself, is equally untenable. By section 10194, Rev. St. 1899 (Ann. St. 1906, p. 4629), it is provided that "deputies may be appointed by any surveyor, who before they proceed to discharge their duties shall take an oath well, truly, and faithfully to discharge the duties of deputy surveyor." It is a well-settled rule of law that all official acts done by a deputy should be done in the name of the principal. "A deputy is one who by appointment exercises an office in another's right having no interest therein but doing all things in his principal's name and for whose misconduct the principal is answerable." 5 Am. & Eng. Ency. of Law, 623; *Carter v. Hornback*, 139 Mo. 238, 40 S. W. 893. In regard to the assignment found in the brief for the first time that the allowance for attorney's fees to the respondents was unauthorized, it is sufficient to say that no such ground was assigned in the motion for new trial or in the regular assignments of error. Nor do we see any objection any way to the allowance of this fee because it was only allowed after a final judgment had been rendered after a full hearing of the cause, and after all the damages, including the attorney's fees, had accrued up to that time.

It follows that the judgment of the circuit court dissolving the injunction is sustained and affirmed, and that the final order continuing said injunction in force until the

disposition of this appeal should be, and is, set aside, and the judgment in all other respects affirmed.

BURGESS and FOX, JJ., concur.

ANCELL et al. v. SOUTHERN ILLINOIS & M. BRIDGE CO. et al.

(Supreme Court of Missouri, Division No. 2. June 29, 1909. Rehearing Denied July 13, 1909. Motion to Transfer to Banc Denied Nov. 23, 1909.)

1. GUARDIAN AND WARD (§ 79*)—PROPERTY OF WARD—SALE OF "REAL ESTATE."

The homestead right of minors in land of their deceased father is "real estate" within Rev. St. 1899, § 3504 (Ann. St. 1906, p. 2000), permitting the probate court to order the sale of a minor's real estate when the personal estate is insufficient for his maintenance, etc., and section 3510 (Ann. St. 1906, p. 2002), permitting the court to order a sale of a ward's real estate when it would be for his benefit; the homestead being an estate in land.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 331; Dec. Dig. § 79.*]

For other definitions, see Words and Phrases, vol. 7, pp. 5989-5991; vol. 8, pp. 7778-7779.]

2. EMINENT DOMAIN (§ 49*)—PROPERTY TAKEN—HOMESTEAD RIGHT OF MINORS.

The homestead right of a minor in land can be taken by eminent domain.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 98, 101; Dec. Dig. § 49.*]

3. GUARDIAN AND WARD (§ 87*)—SALE OF WARD'S LAND—NOTICE OF SALE—NECESSITY.

No notice of the guardian's application to sell a minor's real estate for his maintenance and education need be given to the minor under Rev. St. 1899, § 3505 (Ann. St. 1906, p. 2000), providing that sales of a minor's real estate shall be made by the same proceedings as in cases of the sale of a decedent's realty for debts, except that there shall be no publication to parties in interest before making the order of sale.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 345; Dec. Dig. § 87.*]

4. GUARDIAN AND WARD (§ 84*)—GUARDIAN AD LITEM—SALE OF WARD'S LAND—PRESUMPTIONS.

There is no presumption of law that a guardian is so interested personally in a proceeding to sell the ward's real estate that a guardian ad litem should be appointed to represent the minor; every presumption being indulged that the guardian will protect the ward's interest until the contrary is shown.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 339; Dec. Dig. § 84.*]

5. GUARDIAN AND WARD (§ 88*)—SALE OF WARD'S LAND—TIME OF SALE.

That the order of sale of a minor's land was made the same day the petition therefor was filed by the guardian, and not at the next term of court, was at most an irregularity, which did not go to the jurisdiction of the probate court to order the sale and did not invalidate it; Rev. St. 1899, § 148 (Ann. St. 1906, p. 386), providing that, when the petition for the sale of a decedent's land for debts is filed, the court shall order a sale unless it be shown on the first day of the next term of court that the sale is not necessary, applying to administrator's sales, and not to a guardian's sale, notwithstanding section 3505 (Ann. St. 1906, p. 2000), providing that the sale of a minor's real estate shall be made by the same proceedings as in cases of the

sale of a decedent's realty for debts, except that there shall be no publication to parties in interest before making the order, that section not requiring notice to the ward of the obligation to sell.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 346; Dec. Dig. § 88.*]

6. GUARDIAN AND WARD (§ 105*)—SALE OF WARD'S LAND—QUESTIONS REVIEWABLE—SETTING ASIDE SALE.

Since the probate court had jurisdiction of the sale of a ward's real estate for his maintenance, etc., the question of the sufficiency of the guardian's petition for the sale was for it to determine, and its action in approving the petition cannot be reviewed in absence of fraud, so that the question of the invalidity of a sale because the guardian's petition was not sworn to will not be reviewed.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 383; Dec. Dig. § 105.*]

7. GUARDIAN AND WARD (§ 105*)—SALE OF WARD'S LAND—PROCEEDINGS TO VACATE SALE—GROUNDS—PROOF OF APPRAISEMENT.

A sale of a ward's land will not be declared invalid because the appraisers, who the guardian's certificate of appraisement showed had appraised the land, could not remember years afterward, upon testifying in proceedings to set aside the sale, of having appraised the land.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 388; Dec. Dig. § 105.*]

8. APPEAL AND ERROR (§ 1012*)—FINDINGS—CONCLUSIONS—EQUITY CASES.

While the Supreme Court can weigh the evidence in equity cases, where the evidence is mostly oral, it will defer largely to the judgment of the trial court upon questions of the weight and credibility of the testimony; it having a better opportunity to determine those questions, and its findings will not be disturbed in absence of a showing of abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3990-3992; Dec. Dig. § 1012.*]

9. CORPORATIONS (§ 388*)—ULTRA VIRES ACTS—PURCHASE OF LAND—ESTOPPEL TO ASSERT.

If a sale of minors' land to a corporation upon petition by the guardian was otherwise valid, and the minors have received the consideration of the sale, they cannot assert want of power in the corporation to take and hold the land as a ground for vacating the sale.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1566; Dec. Dig. § 388.*]

Appeal from Circuit Court, Scott County; Henry C. Riley, Judge.

Action by Alonzo W. Ansell and others against the Southern Illinois & Missouri Bridge Company and others. From a judgment dismissing the petition, plaintiffs appeal. Affirmed.

R. G. Ranney and Jno. A. Hope, for appellants. W. H. Miller, for respondents.

GANTT, P. J. This is a suit by Alonzo W., Florence A., and Thornton A. Ansell, the latter a minor child of Thornton Ansell, deceased, by his guardian and curator, Thomas M. Williams, to set aside a certain deed made by their former guardian, Samuel Tanner, to 9.1 acres of land particularly described as follows: "Beginning at a point 1,030 feet west of the northeast corner of

section 4 at the intersection of the south right of way line of the Gray's Point Terminal Railway and the west line of the public road lying in the N. E. $\frac{1}{4}$ of section 4, township 29, range 14 east, and extending in southwesterly along said right of way line, 1,280 feet, more or less; thence south, 310 feet; thence northeasterly parallel to said right of way line, 1,280 feet, to said public road; thence north, along said road, to the point of beginning, containing 9.1 acres, more or less, in Scott county, to the Southern Illinois & Missouri Bridge Company"—and also to set aside all the proceedings in the probate court of said county in relation to the sale of said real estate to the said bridge company, and to divest the said bridge company of all right and interest and title in said real estate and vest the same in plaintiffs.

The petition states the minority of the plaintiff Thornton Ancell and the appointment of Mr. Williams as his guardian and curator in May, 1903, by the probate court of Cape Girardeau county. It is then alleged that Thornton A. Ancell left surviving him at his death his widow, Margaret J. Ancell, and the three minor plaintiffs, as his only heirs at law; that the widow elected in the manner provided by law to be endowed absolutely of a share of the real estate in lieu of her dower therein, and afterwards conveyed her one-fourth share of the real estate above described to the said bridge company. It is then alleged that the plaintiffs were entitled to a homestead in the 40-acre tract of which said 9.1-acre tract is a part during their minority, and, in addition thereto, they were each entitled to one undivided one-fourth thereof in fee simple. It is then alleged that on the ——— day of November, 1897, the defendant Samuel Tanner at the request and instigation of the Gray's Point Terminal Railway Company, which desired to obtain a right of way through said land for its railroad, induced the probate court of Scott county to appoint him, the said Tanner, guardian and curator of the estate of these minors, and that thereafter said Tanner, by means of fraudulent representations, obtained from the said probate court a fraudulent and pretended order of sale, in pursuance of which he pretended to sell and convey ——— acres of said real estate to said Gray's Point Terminal Railroad Company for its said right of way, and thenceforth, until these plaintiffs selected Thomas M. Williams as their guardian and curator, said Tanner was constantly scheming and contriving with the Southern Illinois & Missouri Bridge Company and with the railroad companies that own and are interested in said bridge company to cheat and defraud plaintiffs out of their said real estate and vest the title of the same for a nominal consideration; that, in pursuance of said fraudulent scheme, said Samuel Tanner on May 28, 1902, at the May

term thereof, filed in the probate court of Scott county a pretended petition for an order to sell 9.1 acres of said real estate as above herein described, and falsely represented to said court that there was no personal estate belonging to plaintiffs; that the rents and profits of said lands were insufficient to pay the charges and expenses necessary to support and educate them, and that it would be to the interest of plaintiffs to sell said real estate and reinvest the proceeds at interest; that on said May 28, 1902, said probate court made and entered its order directing said Samuel Tanner to sell said real estate at private sale for cash, and thereafter said Samuel Tanner, in pursuance of said pretended petition and order of sale, sold said real estate to the defendant for the sum of \$500.50, and reported said sale to the said probate court on the 25th day of August, 1902, and wrongfully and fraudulently induced said court to approve said sale, in pursuance of which said order and approval said Samuel Tanner, acting as guardian and curator of plaintiffs, executed and delivered to defendant a deed, whereby he undertook to convey said real estate to defendant, which deed the defendant bridge company caused to be recorded on September 20, 1902, in book 45, pp. 336, 337, in the office of the recorder of deeds in Scott county. It is then alleged in general terms that the allegations in the petition for the sale of said lands were false and fraudulent, and that plaintiffs were not in need of any funds for support and maintenance or education, and that there was no occasion for selling the same at that time; that at that time said land was a most advantageous and profitable investment of plaintiffs' estate, and the said 9.1 acres was then and still is of the value of \$10,000. Various irregularities are then alleged as to the proceedings in the probate court, and a general allegation that the court had no jurisdiction to order the sale of real estate, for the reason that the same was the homestead of the widow and children of said Thornton A. Ancell, deceased.

It is also charged that the defendant bridge company had knowledge of all the irregularities and illegalities attending the sale of said land and the false representations made by which the probate court was induced to order and approve said sale. It is then alleged that the defendant bridge company had no authority to own, condemn, or acquire property in Missouri for the purpose of its terminal yards; that its claim to this property is violative of article 5 of the fourteenth amendment of the Constitution of the United States, and contrary to section 21 and section 30 of the Bill of Rights of the Constitution of the state of Missouri (Ann. St. 1906, pp. 148, 166). There is then an offer to return the money received from the defendant bridge company, and an allegation that the plaintiffs refuse to accept the

same from their guardian. To this petition the defendant answered by general denial only.

The cause was tried at the October term, 1905, of the circuit court of Scott county, Mo., and resulted in a judgment dismissing plaintiffs' petition. After an unsuccessful motion for a new trial, the plaintiffs have appealed to this court. As to the charge of inadequacy of consideration paid for this nine acres by the bridge company, the circuit court found as a matter of fact "that the price paid by defendant corporation for said land was a reasonable and fair one, considering the circumstances then existing, and was in excess of the sum fixed by the appraisers, who were duly appointed by the probate court and in the manner provided by law made their report to said court." The court also found that the defendant bridge company in pursuance of said purchase expended large sums of money in good faith upon said property, and the court further found that there was no fraud or conspiracy entered into by any of said parties or between any parties in any way connected with the sale of said real estate, and that the defendant bridge company was the owner in fee of the said 9.1 acres of land. For convenience, the various assignments of error for which the plaintiffs ask a reversal of this judgment will be considered in the order of the brief of their counsel.

1. The first proposition advanced by the plaintiffs is that the sale of the lands in suit was void because the plaintiffs had a homestead therein. This assignment is double. In the first place, it is insisted that the land, being the homestead, was not subject to sale under the provisions of sections 3504 and 3510, Rev. St. 1899 (Ann. St. 1906, pp. 2000, 2002), because under this section the probate court was only authorized to order the sale of "real estate"; and, secondly, that, if a homestead should be construed to be real estate or land within the meaning of the statute, then it is insisted that there is no power in the probate court to sell the real estate of infants for reinvestment when the same consists of a homestead. In support of the first contention, to wit, that a homestead is not real estate, it is sufficient to say that it is at variance with the statutes and the construction thereof by this court on numerous occasions. In *West v. McMullen*, 112 Mo. 405, 20 S. W. 628, it was ruled by this court that, upon the death of her husband, the homestead vested in the widow for her lifetime with the right of the minor children to occupy and enjoy the same with her until their majority. In that case it was said: "We think the statute vested in the widow and minor children, if any, an estate for her life, and during their minority, and not a mere right of occupancy. Decisions upon statutes essentially different from ours throw no light upon the question. But our own decisions and those of the Vermont

courts and of New Hampshire under the act of 1868 determine that the homestead is a life estate. The widow may use or rent it out as she sees fit during her life." In *Hufschmidt v. Gross*, 112 Mo., loc. cit. 657, 20 S. W. 679, the decision in *West v. McMullen* was expressly approved, and *Kaes v. Gross*, 92 Mo. 647, 3 S. W. 840, 1 Am. St. Rep. 767, was disapproved and overruled. In support of their position, the learned counsel cite us to *Snodgrass v. Copple et al.*, 203 Mo. 480, 101 S. W. 1090, as holding that a homestead was not real estate, but this is a total misconception of the meaning of that case. Speaking for this court, Valliant, C. J., in that case said: "On the trial of the issues involved in this motion, the court will begin with the necessary concession on the part of both parties that the title to the property is well vested in the defendant. But the defendant says, if the plaintiff is to have his way, my title will be divested. That brings us to the very point of the controversy. Defendant's title will not be divested by the judgment in this case, but the judgment will leave the defendant's property exposed to the sheriff's levy and the result of that levy with the sequence may be to divest the defendant of his title. But that is the indirect, not the direct, effect of the judgment." There is nothing either in the majority or dissenting opinion that holds, or was intended to hold, that a homestead under our laws was not an estate in land.

This brings us to the second proposition involved in this first assignment, to wit, that the probate court is without jurisdiction to order the sale of lands belonging to minors for the purpose of raising funds for their education and for reinvestment. In the discussion of this branch of the case, learned counsel say that this is at least a doubtful question, and that this court has never passed on it directly. The argument in brief is that, while the statute (sections 3504, 3510, Rev. St. 1899 [Ann. St. 1906, pp. 2000, 2002]) provides for the sale of the real estate of minors by their guardian for support and maintenance and education and in the proper cases for reinvestments, the homestead statute deals with the particular subject, the homestead rights of the widow and children in the land, and that, applying a familiar rule of construction, the special statute should prevail over the general one, and that to hold that a homestead could not be sold at all for the education, maintenance, and support of a minor or minors would best subserve the purpose of homestead legislation. On the other hand, it is to be observed that sections 3504 and 3510 provide that the probate court for the proper education, support, and maintenance of minors according to their means and for such purposes may from time to time, when the money income and personal estate of such minor shall be insufficient or incapable of such object or purposes, order the lease or the sale of the real

estate of such minor. There is an entire absence of any exemption of homestead estates from the scope of these sections. Like the learned counsel, we have not been able to find any case in which the present contention has been made and passed upon by this court. The nearest approach to it to which we have been cited is the case of the matter of the final settlement of the Estate of Christina Hesche, 73 Mo. App. 612. In that case the Court of Appeals says: "At the next term of the probate court after the sale, to wit, November, 1895, the administrator reported the sale as above shown. The report was continued until the next term. After the report was filed, an examination of the title revealed the fact that the deceased obtained title to the land through the will of her deceased husband, and that two of their children, who were minors, had a homestead right in the land. Thereupon the administrator, the guardian of the minors, and Mrs. Laville agreed upon the following settlement of the business: It was agreed that the value of the homestead right was \$502.42; that Mrs. Laville should pay this sum to the guardian of her wards, and in full satisfaction of their interest in the land; and that the administrator should receive and accept from Mrs. Laville \$2,522.58 as the amount due the estate on account of the purchase. This agreement was communicated to the probate court, and received its approval. It appears that, in order to consummate this arrangement, the probate court made an order authorizing the guardian of the minors to sell their interest in the land for the sum named. This settlement and adjustment was finally approved by the probate court." This action of the probate court met the approval of the St. Louis Court of Appeals without any suggestion that the probate court had no power to authorize the sale of the homestead estate of the minors. The reasons underlying the laws which permit the sale of the lands of minor children for reinvestment and for their support and education are very different from those which exempt such lands from sale for the payment of the debts of their ancestors. The homestead statute is a humane and salutary one, and has been liberally construed in behalf of those for whom homesteads were exempted from sale for debt. The probate courts of this state are the guardians and curators of minor children. The Legislature evidently had in mind that it must often happen that minor children should own a piece of real estate which was not a revenue producer, but, on the contrary, oftentimes an expense, and yet circumstances might arise that it could be sold for a good price and the proceeds invested in property producing good rentals. On the other hand, it must have occurred to the Legislature that a child might often be left with a piece of property which would not furnish revenue enough to educate and maintain it, and thus the child be compelled

to grow up in ignorance for the want of power in a probate court to sell or lease the said land for its education, and therefore these provisions were made for the sale and leasing of their real estate in such circumstances. The Legislature not having made any exception to this power of the courts to sell the real estate of minors, the courts cannot import and read such an exemption into the statute. And we are of the opinion that this point is not tenable. There can be no doubt that this property could be taken by a resort to eminent domain. In case of condemnation, the infant owner of a homestead would have the protection of the judgment of three disinterested commissioners or of a jury, whereas, in the case of a proceeding like this through the probate court, the infant would have the benefit of three disinterested appraisers with the judgment of a probate judge back of them to approve or disapprove their estimate of the value, and thus the rights of the infant would be as safely guarded by a proceeding in probate court as in a proceeding by eminent domain. But in the absence of any exception or exemption by the Legislature over the general and unrestrained power conferred upon the probate court, we think the courts have no right to import such an exception into the statute, and in our opinion the failure to place such an exception in the statute is in consonance with the failure of the Legislature to make such an exception.

2. But plaintiffs insist that, even if the probate court had jurisdiction to order the sale of these nine acres, still the guardian's sale and deed should be set aside on account of numerous other irregularities. First, no notice of the guardian's application to the probate court to sell the land was given to or served on the plaintiffs or either of them, although they resided in Scott county with their mother at the time. Counsel seeks under this head to draw a distinction between the statute in force in 1855 and our statute of 1899 in regard to the proceedings for the sale of real estate of minors (section 3505, Rev. St. 1899 [Ann. St. 1906, p. 2000]). This court in *Pattee v. Thomas*, 58 Mo., loc. cit. 172, we think disposed of this objection. Judge Napton, speaking for this court, said: "The objection that no notice of the intended application was given as required by the administration law is untenable. We presume that the act of 1851, in fact, intended to make the administration law no further applicable to guardians than would be consistent with the different positions occupied by administrators and guardians. To whom and for what purpose could a notice be required in the case of guardians? It would concern nobody but the minors, and they are in court already through their guardian, the only channel through which they can communicate with the court. The case of *Overton v. Johnson et al.*, 17 Mo. 446, answers the objection of the neglect of the guardian to file an inventory which is required in ap-

plications by administrators to sell real estate on account of deficiency of personal estate. Judge Gamble in that case observes: 'It is true that the statute directs that when such petition and such lists and inventories shall be filed the court shall order that all persons interested in the estate should be notified,' etc. But the provision is only designed to carry out the direction of the previous section, and does not affect the question of jurisdiction. The jurisdiction is acquired by filing a petition praying the court to do an act or make an order, which, under the statute, the court is competent to do. Whether the petition be in proper form or set forth sufficient facts, or is accompanied with the proper evidence, the court will decide in the exercise of its jurisdiction." Under the statute of 1851 under which the Pattee Case was decided, there was no exception, but the sale was required to be in conformity to the rules and regulations governing sales of real estate of deceased persons, whereas, section 3505, Rev. St. 1899 (Ann. St. 1906, p. 2000), after making this same general provision, provides: "Except that there shall be no publication to parties in interest before making the order." So that, while the statute now expressly dispenses with publication to parties in interest, it had already been decided under the act of 1851 which contained no such exception, that no notice was necessary to the minors of the application by their guardian. The decision of this court in that case has never been to our knowledge, criticised, or questioned. There is no presumption of law in this state that a guardian and curator is so interested personally that in a proceeding by a guardian to sell real estate a guardian *ad litem* should be appointed to represent the minor. On the contrary, every presumption is indulged by the law that the guardian and curator will faithfully guard the interest of their wards until the contrary is made to appear.

3. Another defect in the proceedings urged by the plaintiffs is that, because the petition was filed and the order of sale was made on the same day, therefore the sale was void; or, if not void, at least cogent evidence of fraud. It appears from the record that the petition for the sale of the nine acres was filed by the guardian, Tanner, on May 26, 1902, and that the order of sale was made on the same day and the appraisers appointed at that time. The report of the sale was made at the next August term, and the deed ordered to be executed. This report of sale was accompanied by the certificate of the appraisers. The purchase of the mother's interest was consummated on the 29th of July, 1902. In support of the proposition that the fact that the court ordered the sale on the same day the petition was filed rendered it void, we are referred by learned counsel to *Hutchinson v. Shelley*, 133 Mo. 412, 34 S. W. 838, and to sections 148,

3505, Rev. St. 1899 (Ann. St. 1906, pp. 386, 2000). But it is obvious, as said by Judge Napton in *Pattee v. Thomas*, that these provisions of the administration law were intended to apply to administrators, and not to the case of a guardian applying for a sale of his ward's land. This whole subject has been so often examined, reviewed, and discussed that we can do no better than adopt the language of this court in *Henry v. McKerlie*, 78 Mo., loc. cit. 429: "When the sale had been prematurely approved in the probate court, it was by the earlier decisions regarded as no approval at all. The sale was regarded as absolutely void and passing no title either legal or equitable. *Wohlien v. Speck*, 18 Mo. 563, and a number of cases. Whatever equity inured to the purchaser depended upon such facts as are described by us in the second conclusion recited by us as applying to void sales. But by the most recent decisions of the Supreme Court this doctrine which first arose in the case of *Speck v. Wohlien*, 22 Mo. 310, and which for a long time prevailed in this state, has been overruled; and such sales are now held to be as valid as if the approval had been in the circuit court, on the ground that the same presumptions of validity must be entertained in respect to the judgments and orders of the probate court in the matters of administration of estates as are accorded to the judgments or orders of the circuit court—citing *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Sims v. Gray*, 66 Mo. 614; *Wilkerson v. Allen*, 67 Mo. 502. It thus appears that the doctrine of *Speck v. Wohlien* is a thing of the past, and has given place to a more just and rational doctrine which cannot fail to have a good effect upon this class of litigation. While the doctrine prevailed that a premature approval in the probate court was not an approval at all, the courts, in their efforts to escape the injustice of the doctrine, commenced to hold that the sale might be approved 12 and 13 years after it had taken place, so as to pass a valid title to the purchaser. *McVey v. McVey*, 51 Mo. 406. The approval of the sale by the court need not necessarily appear by formal entry of an order. It is sufficient if the approval can be gathered from the whole record." Inasmuch as the law did not require service of a notice upon these minors of the application for the sale of this land, we hold that a failure to continue the case from the May term to the August term before making the order of sale was, at the most, an irregularity which did not go to the jurisdiction of the probate court, and therefore did not render the sale void.

4. It is next insisted that this sale should be set aside because the guardian's petition for the order to sell was not sworn to. But the probate court had jurisdiction of the subject-matter of this application, and the question of the sufficiency or insufficiency was one addressed to that court, and upon

which it was competent to pass, and; in the absence of fraud, its action in approving that petition is not open for review by this court or by the circuit court. It is next insisted that the land was not appraised. As to this the guardian filed his report of sale and certificate of appraisement showing that Vancient Helserchler, Casper Miller, and Joseph Miller on the 26th day of May, 1902, appraised this land at \$40 per acre, and on the trial of this case these appraisers were sworn as witnesses, and, when their attention was called to their appraisement, their recollection was that at the time they had appraised a 27-acre tract, and did not recollect that they had appraised the 9-acre tract. But the fact that they had forgotten that they appraised this 9-acre tract did not in the least overthrow their appraisement. Upon being re-examined, they still testified that this land at that time was worth \$40 per acre for farming purposes, and clearly a sale ought not to be overturned because an appraiser years afterwards should forget that he had been called upon to state the value of a piece of land in his immediate neighborhood. Any one might forget a matter in which he had no more interest than this witness had in the appraisement of that land. He testified that he was selected as an appraiser by Mrs. Rafferty, the mother of these children. He had no occasion to go back to look at the land after having been appointed as an appraiser, for the reason that he had lived within a mile and a half of it all of his life, and we are inclined to think that there is little merit in this objection. The evidence shows that Mrs. Rafferty received \$90 per acre for her one-fourth interest in this land and her right to possession during her lifetime, and that the children received \$500 for their three-fourths interest in the nine acres, subject to their mother's life estate. So the nine acres brought the family a sum largely in excess of the value which the neighbors who lived in the immediate vicinity, and who were themselves landowners, appraised it to be worth. The probate court approved that sale, and, upon a rehearing in this case, the circuit court expressly approved that sale, and found that the land brought its reasonable and fair value under all the circumstances. While this court has often ruled that it would not abdicate its right in a cause in equity to weigh the evidence for itself, yet it has often ruled that in a case like this, where the evidence was largely oral and the circuit judge had exceptional opportunities to see and hear the witnesses and to hear their testimony, this court would defer largely to the judgment of the local court. It would serve no good purpose to repeat in this opinion the testimony of the various witnesses on both sides, and it must suffice to say that in our opinion the great weight of the fair and impartial testimony was to the effect that this land was sold by the guardian, Tanner, for

a fair and reasonable price. And we think that the learned circuit judge, who heard this case, was competent to make all due and proper allowances for the expert testimony as applied to the actual facts of the case. And we find nothing in the judgment which calls for a reversal by this court on that question. And the same observation can be made in regard to the question of fraud. Circumstances which appear to learned counsel for the plaintiffs to indicate a fraudulent purpose on the part of the guardian of these children to sell this land for less than its value to the defendant bridge company have been marshaled and presented with great ability, but, on the other hand, it appears in evidence that this bridge company having obtained its charter to build its bridge over the Mississippi river and having received the permission of Congress to construct said bridge, at once took steps to acquire land for its approaches on the Missouri side of the river, and for this purpose it bought lands for its right of way for its tracks and yards from various landowners in the immediate vicinity of this land, and, its engineer having indicated this nine acres as a part of the land which it should acquire, negotiations were had with Mrs. Rafferty, the mother of these plaintiffs, which resulted in her agreeing to take \$90 per acre for her interest in the said nine acres, and then the guardian of these minors made his application to the probate court in the usual way for permission to sell the interest of the minors in said land at private sale. It was developed upon the trial that this particular nine acres was not absolutely essential to the bridge company, but that the tracks and yards could have been very easily moved to other lands without taking this land, but the order of sale was made, and the appraisement, and the company purchased the shares of these minors for \$500. The company entered in possession of the property, graded it, and put it in condition for use as a part of its yards. Three years afterwards and two years after the oldest child had attained his majority this action was brought and the circuit court found there was no fraud or conspiracy between the parties connected with this sale, and, having read this testimony, we are of the opinion that this judgment is well supported by the testimony.

The learned circuit judge was in a far better position to pass upon the question of the adequacy of the consideration paid by the defendant bridge company for this land at the time and under the circumstances than this court can possibly be. His acquaintance with the witnesses and his opportunity to observe their manner of testifying, their interest in the cause, and their connection with the several parties to the suit also made him the proper tribunal to pass upon the charges of fraud; and, in the absence of something to indicate that his judgment was the result of a prejudice or

was the exercise of an unwise discretion, this court ought not to set it aside.

Finally, it is insisted that the bridge company had no corporate power to purchase and take the title to the land in controversy. In regard to this proposition, this court has now passed upon it three times, and we must decline to again enter upon an investigation of that question. If we are right in affirming the judgment upon the other propositions, which have been advanced and discussed in this opinion, then we are clearly of the opinion that these plaintiffs having sold this land to the bridge company through their lawfully appointed guardian and curator, and having received the consideration above named on the merits of the question of the corporate capacity of the defendant bridge company to purchase and hold this land, it does not lie in the mouth of the plaintiffs to assert that want of corporate power. We have carefully gone through all the assignments of error and the record in this case, and are of the opinion that the judgment should be, and is accordingly, affirmed.

BURGESS and FOX, JJ., concur.

OFFENSTEIN v. GEHNER.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. TRUSTS (§ 372*)—ACTION FOR ACCOUNTING—BURDEN OF PROOF.

A petition merely alleged a conveyance by plaintiff to defendant of certain real property in trust to sell the same and pay certain notes, and that the defendant had sold the property, and paid the notes, leaving a balance in his hands which he refused to pay plaintiff. It did not set out the terms of the trust nor show the amount of the debt, interest, and costs, and furnished no substantial basis on which to determine the surplus, but the answer set forth the full purport of the deeds, the property, the amount of the debt, the interest, and the covenant of plaintiff that, if the holder or holders of the notes or the defendant or his successors should pay out moneys to protect the title, all such moneys would be secured by the deeds. He then showed that there had been a default in payment of the notes and interest, and a request of the holder that defendant should sell the property to satisfy the said notes, and that he did so in pursuance of his power as trustee stating the amount received for each piece, and then set forth a full itemized account of the debt, interest and taxes, both general and special, and struck a balance from which it appeared that, after applying the proceeds, there was still a specified sum unpaid on the principal note secured by the second deed of trust. *Held*, that this was not a plea of payment by the trustee, but an accounting by him, that the remedy, if any, against defendant, was to surcharge and falsify the items thus rendered, and the burden was on plaintiff to establish a breach of the trust.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 372.*]

2. TRUSTS (§ 372*)—ACTION FOR BREACH OF TRUST—PRESUMPTIONS AND BURDEN OF PROOF.

The presumption is that a trustee has acted in good faith and has done his duty, and the burden is on one suing him for a breach of trust to allege and prove the contrary.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 372.*]

3. DISMISSAL AND NONSUIT (§ 11*)—VOLUNTARY NONSUIT—CONDITION OF CAUSE.

A contention that plaintiff should have been allowed to take a nonsuit is without merit, where he had ample time to do so before final judgment against him, but made no request therefor.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. § 25; Dec. Dig. § 11.*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Adam Offenstien against August Gehner. From a judgment for defendant, plaintiff appeals. Affirmed.

Henry B. Davis, for appellant. Kehr & Tittmann, for respondent.

GANTT, P. J. This is an action in two counts, in the first of which plaintiff states that by his deed of trust of the 22d of July, 1896, he conveyed certain real estate in the city of St. Louis to the defendant, Gehner, in trust to sell the property and pay to the holder or holders of certain notes the sum of \$15,000, with interest and costs of sale; that Gehner subsequently sold the property for \$25,000, "leaving after the payment of said notes in said deed of trust and the costs of sale a balance of \$5,000 which defendant has declined and refused to pay, although demanded." The second count alleged that on the 4th of August, 1897, plaintiff conveyed to the defendant in trust for plaintiff and others a large tract of real estate in the city of St. Louis; that said conveyance was made to said defendant for the purpose of selling said property, and paying certain notes in said deed of trust described, amount not stated; that defendant in June, 1904, sold the property for \$7,700, paid the notes in the deed of trust described, and costs of sale, amount not stated, leaving a balance of \$5,000 in his hands, which he neglects and refuses to pay plaintiff although demanded. The answer was a general denial of each and every allegation in the petition and the two counts thereof. As a further defense, defendant alleges that the deed of trust executed by the plaintiff and his wife dated the 22d of July, 1896, was in trust to secure the payment of a principal note for \$15,000 and six interest notes for \$450 each, with a covenant therein on the part of the mortgagor to cause all taxes and assessments, general and special, to be paid whenever imposed upon the property, and that all sums, with interest, which the trustee or the holder of the notes should expend to

protect the title or possession of the premises, should likewise be secured by the deed of trust; that subsequently the plaintiff and his wife executed a second deed of trust on the property to secure a principal note of \$10,000 and interest; that plaintiff made default in the payment of the notes secured by the said deeds of trust, allowed the taxes, general and special, to become delinquent, and judgments to be rendered thereon; that for the protection of the title the holder of the notes advanced the money to pay the taxes, liens, and judgments, and that sale was made under the first deed of trust according to its terms. The trustee then sets forth an itemized account charging himself with the amounts realized for the property, and taking credit for the payments made under the terms of the deed of trust, each item of credit being set forth in detail, and showing as the result of the account that more than \$2,000 of the debt secured by the deeds of trust remained unpaid, and is still due the creditors by the plaintiff. In his reply the plaintiff did not surcharge and falsify a single item of the account so set forth, but made a general denial. The cause was referred, and, when called for a hearing before the referee, the plaintiff declined to introduce any evidence, whereupon the defendant also submitted the case upon the pleadings, and asked for judgment in his favor. The referee made the following report and judgment: "There being an utter failure to offer any evidence whatever of the matters, or any part thereof, set out in the petition, and there being no allegations in the answer which can be construed or tortured into an admission upon which the plaintiff would be entitled to judgment, and inasmuch as all matters alleged in the petition are met with a general denial in the answer, there is in the judgment of the referee but one finding that can be made, and that is that judgment be entered in favor of the defendant and the costs awarded against plaintiff." The plaintiff filed exceptions in the circuit court to the report of the referee, but the court overruled his exceptions, confirmed the report, and rendered judgment for the defendant. In his motion for new trial the plaintiff does not specifically refer to his exceptions to the referee's report, nor does he assign the overruling to his exceptions as a ground for new trial. He does assign that the judgment "is against the pleadings in the case" and "against the law." The plaintiff appeals.

1. The only ground upon which the plaintiff seeks to reverse the judgment of the circuit court is his assumption that the defendant stood in the relation of an ordinary debtor to him, and that the disbursements by the defendant as pleaded in his answer amounted to a plea of payment, and therefore the burden was on the defendant to prove the correctness of his account as trustee in the first instance.

We think the circuit court unquestionably was right. As meager as the plaintiff's petition is, it discloses that the defendant stood in the relation of trustee to the plaintiff and the holders of the notes secured by the two deeds of trust. The petition did not set out the terms of the trust, did not show the amount of the debt, interest, and costs, and furnished no substantial basis upon which to determine a surplus. But the defendant in his answer set forth the full purport of the two deeds of trust, the property, the amount of the debt, the interest, and the covenant on the part of the plaintiff that, if the holder or holders of the notes or the defendant or his successor in said trust should pay out moneys to protect the title to the said premises, then all such moneys should be secured by the deeds of trust. The defendant then showed that there had been a default in the payment of the notes and interest, and a request upon the part of the holder that defendant should sell the said property to satisfy the said notes, interest, and charges, and that he did sell the said premises in pursuance of his powers as trustee, stating the amount received for each piece of property, and then set forth a full itemized account of the debt, interest, and tax charges, both general and special, and struck a balance, from which it appeared that, after applying the proceeds, there was still \$2,000 unpaid upon the principal note secured by the second deed of trust. The contention of the plaintiff is and was that this was a plea of payment. We do not so understand the law. We think it was an accounting by a trustee, and that plaintiff's remedy, if any, against the defendant, was to surcharge and falsify the items of the account thus rendered, and that the burden was upon him to establish a breach of the trust on the part of the defendant. The presumption is that the trustee has acted in good faith, and has done his duty, and the burden is on the plaintiff to allege and prove the contrary. In 27 Amer. & Eng. Ency. of Law (1st Ed.) 293, it is said: "In drawing a bill against the trustee the pleader must bear in mind that there is a presumption that the trustee has performed his full duty, and he must set forth specifically all facts necessary to rebut this presumption." We think that the plaintiff had the laboring oar, and that, when he failed to offer any evidence to substantiate the allegations of his petition, the referee correctly held that he had failed to make his case, and therefore found against him. And we think the circuit court properly confirmed the report of the referee, and that plaintiff has no cause to complain whatever. The contention that the plaintiff should have been allowed to take a nonsuit is without merit, as the plaintiff had ample time to take a nonsuit before the final judgment

was rendered against him, but made no request to be allowed to do so.

The judgment of the circuit court is therefore affirmed.

BURGESS and FOX, JJ., concur.

BUFORD v. GRUBER et al.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. WILLS (§ 38*)—COMPETENCY OF TESTATOR—"INSANE DELUSION"—"DELUSION."

Where a person imagines something extravagant to exist which really has no existence, and he is incapable of being reasoned out of his false belief, he is in that respect insane, and if his "delusion" relates to his child, and he imagines that the child is not his, when there is no foundation for such conception, and is incapable of being reasoned out of the same, he is possessed of an "insane delusion" as to his child, and, if his will is found to be the fruit of such false conception and disinherits the child, the jury may find against the paper writing purporting to be the will, though it may develop that he was rational on other subjects and capable of transacting ordinary business (quoting Words and Phrases, vol. 2, p. 1971 et seq.).

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 78-81; Dec. Dig. § 38.*]

2. WILLS (§ 400*)—REVIEW—QUESTIONS OF FACT.

An action to contest a will on the ground of the insanity of the testator is an action at law within the rule that, where the evidence is conflicting, the Supreme Court will not undertake to reconcile it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 872; Dec. Dig. § 400.*]

3. WILLS (§ 400*)—REVIEW—EVIDENCE.

Where, in an action by a disinherited child to contest the parent's will on the ground of insanity, there was competent evidence of the insanity of testator, in that he possessed an insane delusion that his child was not his, and that the will was the fruit of such delusion, the Supreme Court would not disturb the verdict by undertaking to say that the jury placed an improper estimate on the weight of evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 872; Dec. Dig. § 400.*]

4. WILLS (§ 53*)—CONTESTS—INSANITY—EVIDENCE—ADMISSIBILITY.

In an action to contest a will on the ground of the insanity of testator, in that he possessed an insane delusion that a disinherited child was not his child, evidence of the condition of testator's mind long prior to and closely approaching the time of the execution of the will, and of the condition of his mind shortly subsequent to the execution of the will, is admissible to indicate whether testator, when the will was executed, had sufficient capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 111, 112, 120-130; Dec. Dig. § 53.*]

5. WILLS (§ 55*)—CONTESTS—INSANITY—EVIDENCE—SUFFICIENCY.

In an action by a disinherited daughter to contest her father's will on the ground of insanity of the father, in that he had an insane delusion that she was not his child, evidence held to justify a finding that his false belief amounted to monomania, or an insane delusion.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-161; Dec. Dig. § 55.*]

6. WILLS (§ 52*)—CONTESTS—INSANITY—PRESUMPTIONS.

Where the insanity of testator is the result of a temporary cause, there is no presumption of continuity; but, where an insane condition of mind exhibiting its peculiarities for a long period of years is shown, continued insanity will be presumed, and the burden of establishing a subsequent lucid interval at the time of the execution of a will is on him who asserts it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 105; Dec. Dig. § 52.*]

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Elizabeth E. Buford against Robert Gustav Gruber and others to contest the will of Gustav Gruber, deceased. From a judgment for plaintiff, defendants appeal. Affirmed.

This action was instituted by respondent, Elizabeth E. Buford, against Robert Gustav Gruber and Casper William Gruber, minors, and Walter B. Waddell and John Chamberlain, executors, having as its purpose the contest of the last will and testament of Gustav Gruber, the father of Elizabeth E. Buford, Robert Gustav Gruber, and Casper William Gruber.

It is charged in the petition filed by respondent that Gustav Gruber, on the 14th day of October, 1903, in form did sign a paper writing purporting to be his last will and testament, by which he gave to respondent, Elizabeth E. Buford, his daughter, \$1, and to his two minor sons, Robert Gustav Gruber and Casper William Gruber, all the remainder of his estate. It was further alleged: That at the time of making his will Gruber was, and for a long time prior thereto had been, afflicted with dipsomania, which had destroyed his mind and memory; that he was subject to and labored under the insane delusion that his daughter, the respondent, was not his child; and that his wife was unfaithful to her marriage vow. It is further alleged that the will in question was not executed by Gruber in sound mind and disposing memory, but that at the time of its execution, and for a long time prior thereto, he was mentally incapable of making same and was devoid of testamentary capacity on account of said disease and said insane delusion, which insane delusion operated upon and controlled his mind and induced him to sign said paper, and thereby to attempt to disinherit the respondent. On the issue presented by the pleadings, two trials were had. At both trials a jury found the paper writing proposed not to be the last will of Gustav Gruber. The first verdict was set aside by the learned trial judge because it was against the weight of the evidence, and the controlling question now before this court is whether the second verdict can be sustained.

As demonstrated by the instructions given, the only question submitted to the jury was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

whether or not, at the time of the execution of the will in question, Gruber, the testator, was laboring under the insane delusion that his daughter was not his child, and that his disinheritance of her was the result solely of such delusion. Proponents having interposed proper demurrers at the close of respondent's evidence, as well as at the close of all the evidence, and having saved proper exceptions to the action of the court in overruling said demurrers, it devolves upon this court to critically examine the evidence with a view of determining whether or not either of such demurrers should have been sustained. This will involve an extended statement of the facts.

Gustav Gruber married Mary M. Boulware, at Lexington, Mo., some time in 1880. Their married life was spent at that place. Gruber was in the insurance business and was quite successful. At the time of his death, his property amounted in value to about \$15,000. In 1884 the respondent, Elizabeth E. Buford (née Gruber), was born. Casper William Gruber, one of the proponents, was born in 1888, and the other proponent, Robert Gustav Gruber, was born in 1895. Mrs. Gruber died in March, 1901. Up to about the year 1899 the relations of Mr. Gruber's family had been happy. He was prosperous and was affectionately devoted to his wife and children. To the respondent, his daughter, who was known as and called "Bessie" (and who will be so termed hereafter), he was especially devoted, and as between her and his two young boys he was partial to Bessie. Mrs. Gruber was an exemplary lady and had the respect and esteem of all their acquaintances as a refined and virtuous woman and an affectionate wife and mother; but testator had formed the habit of drinking intoxicating liquor, and some time during the year 1899 the habit had developed to such an extent that he became intoxicated nearly every day. At this time, and continuing up to the time of the death of Mrs. Gruber in March, 1901, he invariably returned home in the evening in an intoxicated state. The drinking habit evidently increased, and he reached the point where, when he returned home in the evening, he acted like a maniac, cursed, swore, whooped, yelled, tried to imitate the voices of beasts, and, as the testimony shows, formed, without a reason, an intense aversion to his wife and his daughter Bessie. About 18 months or two years before Mrs. Gruber died, he became impressed with the notion that his wife had been untrue to him, and that Bessie was not his child. This notion gradually formed in his mind as a fixed conviction, which his wife and others were unable to reason away. In the presence of his wife, he would tell Bessie that she was not his child, and he would tell his wife that Bessie was not his daughter. He would make these charges both when he was drunk and when he was sober, in the morning, at noon, and in the

evening, and continued to do so almost daily up to the time of Mrs. Gruber's death. When Mrs. Gruber protested and remonstrated with him and tried to reason him out of his unfounded delusion, he became very much excited, flew into a passion, raved, and uttered oaths and imprecations. There is no question, and it is conceded, that Mrs. Gruber was a virtuous lady and a loyal, devoted, and dutiful wife. It is further conceded that Bessie was his daughter, and that there was no reason or foundation for the belief or delusion that she was not. Mr. Gruber's habits of drinking and his intense aversion to Bessie continued to increase up to the time of the death of Mrs. Gruber. In the meantime Gruber was attending to his business, which he continued to manage fairly well, although it fell off considerably on account of his intemperate habits. He kept bank and other accounts correctly. In short, the evidence shows that he continued to conduct his insurance business, but not with the same push and success as he had prior thereto.

Mrs. Gruber died early in the evening. Gruber had been gone that day, as usual, to his office. He came home shortly before her death. The scene that occurred at the death-bed beggars description. He would not believe that she was dying, but insisted that she was hungry and forced potted ham into her mouth. After her death, a few moments later, he poured raw whisky into her mouth, claiming that she was not dead, and that he possessed the hypnotic power to restore her to health. When the neighbor ladies who were presented protested, he threatened to throw them out and became almost violent. After the death of Mrs. Gruber, Bessie, who was then 17 years old, took charge as Mr. Gruber's housekeeper and assumed the motherhood of her two little brothers. She was fondly devoted to them both, and especially Robert, who was then only about 6 years old. She did all the cooking, mending, sewing, and other housework for her father and brothers; but Mr. Gruber's habits of becoming intoxicated continued after his wife's death. His attitude towards Bessie did not change. He still harbored in his mind the conviction that she was not his child, repeatedly told her so, and some time during the summer of 1901 he drove her from his house, telling her that she was not his child, and he did not want her there. He began before the death of his wife, and kept it up after her death, to tell Bessie that she would not get any of his property because she was not his child, and when Casper, her brother, remonstrated with him, he became very angry and acted like a maniac, tearing his hair, wildly demonstrating, etc. Some time after driving Bessie from home in the summer of 1901, he sent for her and had her come home. He treated her nicely for a few days, and then began to treat her as

before, only worse. He accused her of trying to poison him, would go into her room at night and abuse her while she lay in bed, order her not to lock her door, continued almost daily to tell her that she was not his daughter, that she would not get any of his property, and would refuse to drink the coffee she made or eat the victuals she cooked. This conduct on his part continued until January 1, 1902, when, on his return that evening from his office, he found her preparing the evening meal. He threw his meat, cakes, and other things Bessie was cooking out and drove her away into a very cold night, without wraps and without a home to go to, ordering her never to return, and telling her at the time she was not his daughter, and that he would see that she had trouble in getting any of his property. She never returned; but on the 9th of February, 1902, she was married to Mr. Buford. She met her father one time after that in Lexington, and, when she spoke to him and addressed him as father, he denounced her as no daughter of his and refused to have anything to do with her.

The foregoing facts were testified to by the respondent, Elizabeth E. Buford, known as "Bessie," one of the proponents, Casper, her brother, Belle Lewis and Hub Hayden, a couple of negro tenants who lived in the yard of Mr. Gruber and who were about the house every day, and George Parks, a neighbor. These persons saw more of Mr. Gruber, especially during the time he was drinking, than did the other witnesses who testified in the case. After Bessie left home on January 1, 1902, Mr. Gruber made arrangements for his boys and placed them in school. He took up his living quarters in rooms adjoining his office. On the 14th day of October, 1903, Gustav Gruber made and executed a will, in the presence of J. Q. Plattenburg, Henry C. Wallace, and D. W. B. Tevis, as witnesses, which will, omitting formal parts, is as follows:

"Item First. After the payments of my debts, including burial expenses, I do dispose of my property, both real and personal in the following manner: To my daughter, Bessie E. Buford, I bequeath one dollar (\$1.00) and direct my executors to pay such sum of one dollar to her in full, of her share of my estate. To my sons, Casper William Gruber and Robert Gustav Gruber, I bequeath all the rest and residue of my property and estate, both real and personal.

"Item Second. I hereby nominate, constitute and appoint Walter B. Waddell and John Chamberlain as executors of this, my last will and testament."

At the time of executing his will, testator was about 55 years old. After its execution he continued to use intoxicating liquor to a greater excess than before. He died in a hospital in Kansas City, Mo., on April 5, 1904, presumably from the effects of the excessive use of intoxicating liquors. Short-

ly after making the will, Gruber, upon becoming dissatisfied with the manner in which his son was sweeping out his room, told him that he was sweeping the same as Bessie did and was trying to run him out, then remarked: "I have her fixed now; I have made my will and cut her out. She is not my child, and I have got everything settled." Casper's testimony was that continuing on up to a few days before his death, or the last time he saw him, whenever Bessie's name was mentioned he would fly into a passion and declare that she was not his daughter, and that he was not going to give her any of his property. He made these statements to Casper before he went to Kansas City, and a few days afterward died. George Parks, a neighbor, testified: That he heard Gruber at home cursing, swearing, and apparently abusing his family; that Gruber talked to him about Bessie before and after she left, and stated that he was not going to give her anything; that she was not straight and was not his child. Both Hub Hayden and Belle Lewis testified about the conduct and drinking habits of Gruber and his treatment of his family, especially his wife and daughter, Bessie. Belle Lewis, a negro woman, who did the washing for the Gruber family and was at the house considerably, heard Gruber, on many occasions before Mrs. Gruber died, tell her (Mrs. Gruber) that Bessie was not his daughter, and that he did not intend to leave her any of his property. Also, after the death of Mrs. Gruber, she testified: That she heard Gruber tell Bessie she was not his child, and that she would never get anything; that he became infuriated about Bessie's cooking, would throw the meat and vessels out the door and accuse Bessie of trying to poison him. Casper Gruber, one of the proponents and brother of Bessie, also testified fully and freely about the conduct of his father, his drinking habits, and his numerous denials of Bessie being his daughter, both before and after the death of Mrs. Gruber, and after Bessie left her home in January, 1902, as well as the numerous declarations that she would get none of his property.

It was shown that, after the death of Mrs. Gruber, Bessie desired to attend school and take music lessons, but that her father would not allow her to do so. Several of her friends, especially lady school teachers, intervened and tried to induce him to let her go to school. He would promise to do so, but afterward would not allow her. Altogether respondent introduced 33 witnesses, and, outside of those above referred to, who knew most about his home and domestic life and of his treatment of his wife and Bessie, the other witnesses were his social friends and business associates, and they testified in a general way of his excessive habit of drinking; that during the latter part of his life he transacted but lit-

the business and was intoxicated most of the time. He was inclined to stand upon the streets, and did not appear to want to talk with any one, was quiet and morose. When he did talk his conversation was not connected and usually had no point to it. His condition from May to November, 1903, is best described by Robert Hicklin, an attorney at law, who had offices near the office of Mr. Gruber in the Commercial Bank Building at Lexington, from the spring of 1903 to November of that year. He says that he had known Mr. Gruber, and that they had been friends for a long time before, and that previously he had been a quiet, successful business man. During 1903, when Mr. Hicklin would be in town, he would be with Mr. Gruber more or less every day and converse with him. He stated: That a decided change had come over him for the worse; that his health had become seriously impaired and broken down, and he was under the influence of liquor all the time; that he never saw him sober during the year 1903; says that Gruber did not converse anything at all as he did formerly; that he was of a retiring manner when he was not under the influence of whisky; that he was formerly a quiet, gentlemanly man. When witness officed near him last time, he would talk and undertake to engage in conversation, but there was absolutely nothing to his conversation. His talk was silly and disconnected, no point to it. This witness, together with some 10 or 12 others, after describing his excessive drinking, his appearance and conduct, was of the opinion that he was not a man of sound mind. On cross-examination this witness says that he apparently was a man broken down by the excessive use of liquor.

The defendant introduced the subscribing witnesses to the will, who testified that Mr. Gruber signed the will in their presence, declaring it to be his last will and testament, and that he was of sound mind at the time, so far as they observed. Mr. Wallace, the attorney who wrote the will, in describing the circumstances under which the will was written, said: "He came in and said he was ready to have his will made. I drew it on the typewriter. I put the paper in the machine and began to write, and asked him what he wanted in the will, how he wanted it to be made, and he said he wanted his debts paid, and that he wanted to give his property to his two little boys, Robert and Casper; that he did not want Bessie to have any of his property, and he only intended to give her \$1; that he wanted it put in that way; that she was to have a dollar of his estate. He said the reason he was not going to give her anything was because she had run away and married against his will." Mr. Wallace says that Mr. Gruber selected the executors, who were leading business men of Lexington.

The testimony of numerous leading busi-

ness men of Lexington, among whom were presidents and cashiers of banks, school teachers, merchants, lawyers, druggists, etc., tended to show that Mr. Gruber, especially during his early married life, was an excellent business man, a fine penman, and a man who kept his books in excellent shape and attended strictly to his business. While most of these witnesses concede that in his latter life he became addicted to excessive drinking and was very often intoxicated and unfit for business, yet his accounts with banks and merchants and other business men were correctly kept, and that he had no business trouble of serious consequence. Nearly all of these witnesses were of the opinion that he was a man of sound mind and well fitted for business when he was not drinking. Some evidence introduced tended to show the declarations of Mr. Gruber that he disinherited his daughter because she was disobedient, would not go to school, and married against his wishes. On the other hand, the recorder, to whom the application was made for the license when Bessie was married, called upon Mr. Gruber for his consent, and he neither gave nor withheld his consent, but expressed himself that he did not care what she did nor whom she married.

As this cause must eventually be determined upon the question as to whether or not there was evidence tending to show that testator, at the time of executing his will, was laboring under the insane delusion that Bessie was not his child, and that such delusion prompted him to disinherit her, the above statement of facts sufficiently presents the record of the trial of this cause. At the close of the evidence, the court instructed the jury upon every phase of the case to which the testimony was applicable. We do not deem it essential to reproduce the instructions given, but will during the course of the opinion give them such attention as we deem necessary. The cause was then submitted to the jury, and they returned their verdict as heretofore indicated, finding that the paper writing propounded as the last will of Gustav Gruber, deceased, was not the will of said Gustav Gruber, deceased. Time-ly motions for new trial and in arrest of judgment were filed and by the court taken up and overruled. From the judgment entered in conformity to the verdict as returned by the jury, the defendants in due time and proper form prosecuted this appeal to this court, and the record is now before us for consideration.

H. C. Wallace and William Aull, for appellants. John I. Burden and Clarence Vivion, for respondent.

FOX, J. (after stating the facts as above). 1. The record discloses numerous objections and exceptions to the admission and rejection of testimony during the progress of the trial. The record in this cause is quite

voluminous, embracing 500 or 600 pages. However we have examined in detail the preservation of the objection and exceptions to the admission and rejection of testimony, and in our opinion the testimony as offered and introduced, to which objections were made, had a tendency to at least throw some light upon the issue presented by the pleadings, and the ruling upon that proposition must be adverse to the appellants.

2. This brings us to the consideration of the instructions given in this cause. Three instructions were given for plaintiff and nine for the defendants. Due exceptions were saved by defendants at the time to the giving of plaintiff's instructions. In substance, the court instructed on the part of plaintiff that an "insane delusion" is a conception originating spontaneously in the mind, without evidence of any kind to support it, which can be accounted for on no reasonable hypothesis, having no foundation in reality, and springing from disease or a morbid condition of the mind, and the person laboring under same cannot be reasoned out of such conception; that whenever a person imagines something extravagant to exist which really has no existence whatever, and he is incapable of being reasoned out of his false belief, he is in that respect insane; that if the delusion relates to his child, and the jury further believe that plaintiff was the child of Gustav Gruber, that he imagined that she was not his child, that there was no reason or foundation in fact for such conception, and that he was incapable of being reasoned out of same, then said Gruber was possessed of an insane delusion as to his said child; that if the jury believed from the evidence that said will was the fruit or offspring of such delusion or false conception, then they would find for plaintiff, although they might believe that said Gruber was sane and rational upon other subjects and capable of transacting ordinary business. Again, that if the jury believed from the evidence at the time said Gruber executed the will he was laboring under an "insane delusion" as defined in the instructions, and that such delusion affected the disposition of his property in regard to the plaintiff, and that it was the offspring or fruit of such delusion, then he was at the time without testamentary capacity.

At the request of the defendants, the jury were instructed, in substance, that if they believed from the evidence that, at the very time Gruber signed said will, he had sufficient understanding and intelligence to, and did, know that he was disposing of his property by will, and the disposition he was making of his property, and to whom he was giving it, then he had sufficient mental capacity to make a will, and the finding would be for defendants, unless the plaintiff had shown by a preponderance of the evidence that at the very moment he executed the will

he was laboring under the insane delusion that plaintiff was not his child, and that solely by reason of such delusion and belief at the very moment he signed such instrument, and for no other reason, he did not give the plaintiff the portion of his estate he otherwise would have given her. The jury were further instructed that, although they might find that Gruber possessed said insane delusion about his child when he was under the influence of intoxicating liquor, yet this would not be sufficient, and they must further find that he entertained such delusion when sober, and that his will was the fruit or offspring of such delusion.

The determination of the correctness of the instructions will depend upon the state of the law concerning delusions or partial insanity. "A delusion which might incapacitate a person from making a will is the conception of the existence of something extravagant which has no existence whatever, but of which the person entertaining it is incapable of becoming permanently disabused by argument, reason, or proof. * * * All delusions are not insane delusions. The difference between the two species is that one is the product of the reason, and the other a figment of the imagination. Thus, on an issue as to the insanity of testator, the question is not whether a certain view of his was sound, but whether he imagined or conceived something to exist which did not in fact exist, and which no rational person, in the absence of evidence, would have believed to have existed. * * * In order that the testator may comprehend the relations which he holds to those having claims upon him, no insane delusion should influence his will. Unreasonable prejudice against relatives is not ordinarily a ground for invalidating a will; but it may be set aside where the testator's aversion is the result of an insane delusion and his conduct cannot be explained on any other ground." Words & Phrases, vol. 2, pp. 1971-1973. "And to invalidate a will it must appear that the testator was subject to a delusion, as to the facts within his own observation, in the existence of which he actually believed, which a rational man, from the use of his senses under the same circumstances, would have known not to exist. To invalidate a will a delusion upon the part of the testator must have been not only the inducing cause of it, but also an existing one at the time the will was made." Knapp v. Trust Co., 199 Mo., loc. cit. 668, 98 S. W. 70. Insanity in the form of a delusion was exhaustively treated by Judge Wagner in the case of Benoist v. Murfin, 58 Mo. 307. The conclusion reached by Judge Wagner, after an examination of the authorities, was that "the correct principle is that whenever a person imagines something extravagant to exist, which really has no existence whatever, and he is incapable of being reasoned out of his false belief, he

is in that respect insane, and, if his delusion relates to his property, he is then incapable of making a will." The case of *Benolst v. Murrin* has been followed and repeatedly affirmed by a long line of decisions in this state. The principle is also recognized in that case that a man may have excellent business capacity, manage his estate with skill and vigilance, and yet be incapable of making a will by reason of an insane delusion possessed by him which relates to and controls the disposition of his property.

Insanity, such as will render a person incapable of making a will, may be general, or it may be partial. It may be termed "monomania" or a "delusion"; but the authorities agree in holding, as embodied in the instructions given in this cause, that where a person imagines something extravagant to exist which really has no existence whatever, and he is incapable of being reasoned out of his false belief, he is in that respect insane, and if his delusion relates to his child, and he imagines, believes, or conceives that she is not his child, when there is no foundation for such conception, and being incapable of being reasoned out of same, then the testator would be possessed of an insane delusion as to his child, and if the will made is found to be the fruit or offspring of such false conception, then the jury may be warranted in finding against the paper writing proposed by proponents, although it may develop that the testator was sane and rational on other subjects and capable of transacting ordinary business. The above principles seem to be well established as the law of this state, and, so holding, we are of the opinion that the instructions, taken as a whole, were fair and liberal to defendants, and clearly and tersely presented the law as applicable to the facts of this case. We are therefore fully convinced that the objections urged by appellants to the instructions given by the court are not well taken. Therefore the action of the trial court in this respect must be sustained.

3. Having found that the trial court committed no reversible error in the admission and rejection of testimony and in the declarations of law given the jury, we are now confronted with the proposition as to the sufficiency of the evidence developed upon the trial to authorize the submission of the cause to the jury. This being an action at law, the same rule applies as in other actions. If the evidence is conflicting, this court will not undertake to reconcile it. If there is any competent evidence tending to show the insanity of Mr. Gruber, in that he possessed an insane delusion that his daughter was not his child, and that the will in question was the fruit or offspring of such delusion, this court cannot disturb the verdict of the jury by undertaking to say that they placed an improper estimate upon the weight of evidence. *Knapp v. Trust Co.*, 199 Mo., loc. cit. 663, 98 S. W.

70, and authorities there cited. Therefore the only question remaining for this court to determine is whether or not there is sufficient evidence disclosed by the record to authorize the submission of the cause to the jury by the trial court and give support to the action of the court in overruling defendants' demurrer interposed at the close of respondent's testimony, as well as that asked at the close of all the testimony. It will be observed that the testimony in this case took a wide range. It began with the marriage of the testator to his wife in about the year 1880. It disclosed their family relations, especially the treatment of his family by Mr. Gruber from the time his first child, Bessie, was born, up to the time of the death of Mrs. Gruber in March, 1901, and continuing from that time up to the time of the death of Mr. Gruber in the early spring of 1904. His business habits, as well as his social relations, were gone into from the time of his marriage to the time of his death. Such latitude of investigation was proper and was justified under the law. Where a charge of insanity is made against a testator, evidence is competent to show the condition of his mind long prior to and closely approaching the time of the execution of the will, as well as the condition of his mind shortly subsequent to its execution. The purpose of such testimony is to indicate the state of his mind at the very time of the execution of the will. The condition of his mind is tried as of that time. All such evidence is receivable for the purpose of indicating to the jury whether or not the testator, at the time the will was executed, had sufficient mental capacity to fill the requirements of the law. *Von De Veld v. Judy*, 143 Mo., loc. cit. 363, 44 S. W. 1117; *Knapp v. Trust Co.*, 199 Mo. 640, 98 S. W. 70; *Holton v. Cochran*, 208 Mo., loc. cit. 426, 106 S. W. 1035.

After carefully analyzing in detail the whole record of the evidence in this case, we have come to the conclusion that the verdict rendered by the jury ought to be sustained for the following reasons: From about the year 1880, when Mr. Gruber married, up to about 1899, he lived a happy life with his wife and children. He had a prosperous business and accumulated property. He was affectionately devoted to his family, and the respondent, Bessie, was his favorite. The family stood high in the community where they lived, and there was never a breath of suspicion, so far as the evidence shows, against the marital loyalty of Mrs. Gruber. Some time, presumably after the birth of his children, Mr. Gruber began drinking, and the habit grew upon him until it reached an excessive state. He then began regularly to come home in the evening from his office work in a state of intoxication, grew irritable, cross, and fault-finding with his family, and especially Mrs. Gruber and his daughter Bessie. About this time, without any reason whatever, so far as the evidence discloses,

he conceived the false belief that Bessie was not his child, and by innuendo at least accused his wife of not being true to her marriage vows. The witnesses describe the first time that he made the charge that Bessie was not his child. He then continued nearly every day to make the same charge, and evidently formed a great aversion to his daughter Bessie. So far as the evidence shows, he never after that treated her kindly and as a daughter. Mrs. Gruber remonstrated and reasoned with him, and so did his children and the old colored woman who lived in the yard; but, instead of listening to them, he became insanely angry and raved like a madman. This conduct continued up to the time of the death of Mrs. Gruber in March, 1901. There is no doubt but that his habits of intoxication and his treatment of his wife and daughter hastened her death. After the death of Mrs. Gruber, passing by his unnatural conduct which occurred at her deathbed, he continued to keep up his excessive habits of drinking and intoxication, and his treatment of his daughter Bessie, instead of improving, grew worse, and he continued repeatedly and often to accuse her of not being his daughter, and to tell her that she would not get any of his property. The evidence shows that Bessie was dutiful and obedient to her father and very solicitous for his welfare; that she kept house for Mr. Gruber and her two little brothers; that she was very much devoted to her brothers and did all for them and her father she possibly could. There is no evidence showing that she was rebellious or disobedient, or that she refused to go to school, outside of one or two indefinite statements that should have been made by Mr. Gruber. In the summer of 1901, without any cause, so far as disclosed by the evidence, Mr. Gruber drove Bessie away from his house, telling her that she was not his child and to leave his home. Afterward, upon being sent for by him, she returned and remained with him until January 1, 1902; but his intemperate habits continued. His treatment of Bessie was the same as before. He insisted that she was not his child, and that he would not leave her any property, although she and her brothers, especially the older one, Casper, tried to convince him to the contrary. Their home life with Bessie as housekeeper and foster mother of her brothers terminated and ended on January 1, 1902, when he drove her from his house on a cold night, admonishing her never to return or to darken his door again, with curses and imprecations, and charging her that she was not his daughter, and he would give her none of his property, at the same time telling her to go and get married if she wanted to. The following month she was married to Mr. Buford, her present husband. Bessie saw her father only once after that. Some time during 1903, in the spring of the year, she met her father in Lexington. He refused to recognize her as his daughter, told

her that she was not his child, and refused to have a conversation with her.

The foregoing outline of facts was testified to by those who were close to him and saw him every day, and who were in the most favorable position and had the best opportunity of knowing and observing his conduct and actions. Appellants introduced quite a number of witnesses—business men of good standing, who occasionally had business transactions with Mr. Gruber—who testified to his good business qualifications, and that, so far as they had observed, he was a man of sound mind. They had no opportunity to observe his conduct at home and his treatment of his wife and daughter. Possibly Mr. Hicklin was closer to Mr. Gruber and saw more of him from the spring of 1903 to November, 1903, than any other person, except the sons of Mr. Gruber. He says that he was drunk about all the time; but, while he was talkative, he could not carry on a connected conversation, and there was no point to anything he said. Mr. Hicklin officed near him, and saw him every day, and had a better opportunity of observing his conduct during that time than any other outside witnesses who testified. It is well to note the circumstances under which the will was made. It will be observed that the provisions of the will made no change in the statutory devolution of the property, except to disinherit his daughter. It is quite evident that the only object he had in making the will was to deprive Bessie of any benefit of his estate. It will also be observed from the testimony of Mr. Wallace, who wrote the will, that while he spoke of Robert and Casper as his two boys, he spoke of Mrs. Buford as Bessie, and did not use the word "daughter," telling Mr. Wallace that he did not want Bessie to have any of his property, that he only intended to give her \$1, and that he wanted it put in that way. While it is true that he did not tell Mr. Wallace that he was disinheriting Bessie because she was not his daughter, yet it is difficult, in view of all the facts proven, to conceive how the jury came to any other conclusion than that at the time of making the will he entertained the false belief and delusion that Bessie was not his daughter, and that he was impelled by that false notion to execute the will. At least we are of the opinion that the jury was justified in reaching that conclusion by the evidence offered. There can be no question but that for a time, extending from about the year 1890 to January 1, 1902, Mr. Gruber entertained the fixed and false belief that Bessie was not his child, and that there was ample evidence to justify the characterization of such belief as "monomania" or an "insane delusion."

It is said in the case of *State v. Lowe*, 93 Mo. 547, 5 S. W. 889, that: "The rule of law, as I understand it to be, is that, where insanity is the result of some temporary cause, as a fit of sickness, or the like, then no pre-

sumptions of continuity flow from such temporary cause; but, on the other hand, when you establish, as the evidence tended to do in this case, an insane condition of mind, existing and exhibiting its peculiarities for a long period of years, I incline to think that an instruction embodying the principle evidently intended to be contained in the one asked should have been given. * * * This habitual * * * state of insanity being shown to exist, its continued existence will be presumed, and the burden of establishing a subsequent lucid interval at the time of the act, either civil or criminal, being done, lies on him who asserts it." In *State v. Wilner*, 40 Wis. 304, where the circumstances tended to show insanity or delusion, it was held error to refuse an instruction which embodied the idea of the presumption of continuance of such delusion. In the case at bar, the insane delusion having been shown to exist, taken in connection with the conduct of Mr. Gruber during the years 1902 and 1903, especially the condition of his mind growing out of his habit of the excessive use of intoxicating liquor, as well as the facts surrounding the execution of the will, we think the jury warranted in finding that at the time, and at the very moment when the will was executed, Mr. Gruber was laboring under the insane delusion that respondent was not his child, and that the will in question was the fruit or offspring of such delusion.

So holding that the verdict rendered by the jury in this cause finding that the paper writing propounded as the last will and testament of Gustav Gruber was not his will was justified by the evidence, and that the trial court acted correctly by submitting the cause to the jury upon proper instructions, the judgment of the trial court setting aside the will of Gustav Gruber, deceased, is affirmed, and it is so ordered. All concur.

MOWRY et al. v. NORMAN.

(Supreme Court of Missouri, Division No. 1.
Nov. 27, 1909.)

1. APPEAL AND ERROR (§ 1195*)—SUBSEQUENT APPEALS—FORMER DECISION AS LAW OF THE CASE.

In a will contest, the court directed a finding that the writing was the last will and testament of deceased, and on appeal the Supreme Court held that such a direction was error. *Held* that, on a subsequent trial of the case on the same evidence, the trial court properly refused to give this instruction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

2. WILLS (§§ 53, 164*)—CONTESTS—ADMISSIBILITY OF EVIDENCE.

It is the purpose of the law in will contests to place the jury in the position of the testator, especially as to his relations with those who are the natural objects of his bounty, and evidence is admissible to show the financial condition and relative situations and needs of

those having a claim upon testator's bounty; such evidence bearing upon the issue of undue influence and mental capacity.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 129, 405, 406; Dec. Dig. §§ 53, 164.*]

3. APPEAL AND ERROR (§ 882*)—ESTOPPEL TO ALLEGE ERROR—INSTRUCTIONS.

In a will contest, where the court, at the request of defendant, instructs the jury that one of the questions to be determined is the capacity of testator to make a will, he cannot complain of a proper instruction given at the instance of plaintiffs bearing upon the same issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3602-3604; Dec. Dig. § 882.*]

4. WILLS (§ 50*)—CONTESTS—INSTRUCTIONS.

An instruction, in a will contest, that in determining the issue as to the soundness of mind and testamentary capacity of testator, before the jury can find in favor of the will, they must believe from a preponderance of the evidence that, at the signing and execution thereof, testator had sufficient understanding to comprehend the nature of the transaction that he was engaged in, the nature and extent of his property, and to whom he desired to give it, and was giving it, without the aid of any other person, and unless the proponent of the will has shown, by such preponderance of evidence, that he did possess all these requisites, they should find that the writing introduced was not his will. *Held*, that the instruction was correct.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 96-100; Dec. Dig. § 50.*]

5. WILLS (§ 52*)—CONTESTS—BURDEN OF PROOF.

In a will contest, the burden is on the proponent to establish the mental capacity of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. § 52.*]

6. WILLS (§ 155*)—CONTESTS—INSTRUCTIONS.

In a will contest, an instruction that if the jury believe that at the time of the execution, deceased was of sound and disposing mind and of sufficient memory to execute a will, and if they further find from the evidence that, when it was executed, his mind was, from disease or other cause or causes, subject to the control of the beneficiary in the will, and that said beneficiary unduly exercised such control at the time of the execution of such paper, so as to destroy the free will of deceased in the disposition of his property, or so as to induce him to sign a paper making a different disposition of his property from what he would have made if uninfluenced, so that such disposition was not the free will and desire of deceased, then their verdict should be against the will, properly states the law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.*]

7. WILLS (§ 103*)—CONTESTS—INSTRUCTIONS.

An instruction, in a will contest, that if the jury believe from the evidence that the beneficiary of the will, who was testator's son, at the time of the making of the will, and for several years prior thereto, sustained confidential and fiduciary relations towards his father, and that he resided with his father until his death, and had complete control of the household affairs, had the close and implicit confidence of his father, that his father looked to him for advice, counsel, and direction, that he had sole control over his father's business, and that he is the only substantial beneficiary in the will, then the law presumes that the will is the result of the undue influence of the beneficiary over the testator, and, unless such presumption

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is rebutted by preponderance of the evidence, the jury should find against the will, and that the burden of overcoming such presumption is on proponent, is a correct statement of the law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.*]

8. STIPULATIONS (§ 14*)—CONSTRUCTION.

A stipulation that either party on the second trial of a case might read the evidence of any witness given on the former trial is broad enough to include witnesses who were present at the second trial.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. § 32; Dec. Dig. § 14.*]

9. APPEAL AND ERROR (§ 549*)—BILL OF EXCEPTIONS—NECESSITY.

Where it is stipulated, in the second trial of a case, that the evidence given at the first trial may be read at the second trial, and counsel for plaintiffs criticise defendant, who was present, for not testifying in person, an objection to such criticism cannot be considered on appeal, where it is not shown by the bill of exceptions that objections were made to the remarks in the course of the trial, or that exceptions were taken thereto, as such an objection cannot be preserved by setting out the remarks in the motion for new trial and sustaining such averment by an affidavit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2441-2451; Dec. Dig. § 549.*]

• Appeal from Circuit Court, Nodaway County; F. A. Cummins, Special Judge.

Action by Irena Mowry and Mary Kettering against Marion Norman. The court, at the request of plaintiffs for their second instruction, told the jury that although they may believe from the evidence that, at the time of the execution of the writing read in evidence as the last will of the deceased, he was of sound and disposing mind and memory and of sufficient mental capacity to execute a will, yet, if they further find and believe from the evidence that, at the time of the execution of such paper, his mind was, from disease, age, decrepitude, bodily or mental decay, or other cause or causes, subject to the control of the beneficiary of the will, and that said beneficiary unduly exercised such dominion, power, and influence over his mind at the time of the execution of said paper as to destroy his free will in the disposition of his property, or as to induce him to sign a paper which made a different disposition of his property from what he would have made if uninfluenced, and so that such disposition was not the free will and desire of the said deceased, then their verdict will be against the will. Judgment for plaintiffs, and defendant appeals. Affirmed.

See, also, 204 Mo. 173, 103 S. W. 15.

Cook & Wright, W. W. Ramey, and Shina-barger, Blagg & Ellison, for appellant. John Kennish and John M. Dawson, for respondents.

GRAVES, J. This case is here for the second time. It stands admitted that the facts are practically the same as before. In

fact, the greater portion of the evidence was read from the previous record, and that offered, in addition, does not substantially change the case or the questions involved therein. Upon this point, the present appellant says: "The evidence at the last trial was, as per stipulation duly filed, mostly, read to the jury from the bill of exceptions filed in the first appeal, there being but few witnesses introduced in person; and this very commendable method of procedure, adopted for the purpose of saving costs, gives rise to one of the important points urged by appellant as ground for reversal, viz., the misconduct of counsel for respondents as appears in the bill of exceptions, and presented in our brief." At the first trial, at the close of all the testimony, the learned trial judge, by peremptory instruction, directed the jury to find that the paper writing was the last will and testament of Wesley Norman. A verdict was returned in accordance with such direction from the court, and upon that verdict judgment was rendered, from which the plaintiffs (contestants) duly appealed. *Mowry v. Norman*, 204 Mo. 173, 103 S. W. 15. This judgment we reversed and remanded the cause. The pleadings and facts are fully set out in the opinion there given, and it would be a trespass upon time and space to reiterate them here. We were then fully possessed of the facts and in the opinion stated them. The inquiring mind can gather them from this first opinion.

Upon a retrial before a special judge, the cause was submitted to a jury, and this jury found that the paper writing was not the last will and testament of Wesley Norman, upon which verdict judgment was in due form rendered, and from this judgment the proponent of the will has now appealed. Whilst the facts in the case proper are practically the same, some new questions are raised upon the instructions, as well as some matters occurring during the trial. In the former opinion we held that the case should have at least gone to the jury upon the question of undue influence; but, as to the question of mental capacity, we declined to pass upon that issue in express terms either one way or the other; but from the opinion in general it may be gathered that the testimony upon absolute mental incapacity was somewhat scant and questionable in view of some of the Missouri cases. These cases we did not then go into because we had reached the conclusion that the case would have to be reversed and remanded upon the other ground. So that it will only be necessary to note the new questions in this record, leaving the summary of the evidence to be gathered from the former opinion. Such portions of the new record, as well as the old, as may be necessary to a disposition of the present legal questions,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

now urged, will be noted in the course of the opinion, and this on the theory that both opinions will be read together in order to get the full scope of this opinion.

1. At the close of all the evidence in the case, the defendant or proponent of the will, in this trial, as in the previous trial, asked a peremptory instruction, directing the jury to find that the paper writing was the last will and testament of Wesley Norman, deceased. Although given in the first trial, it was refused in this trial. This refusal is urged as error. In refusing such an instruction, the trial court was but following the mandates of this court. We examined the record on the former appeal and were satisfied that there was a case for the jury. Contestants' case has not been weakened by the facts presented in the last trial. This peremptory instruction was therefore properly overruled.

2. It is further urged that error was committed in permitting the plaintiffs (contestants) to show their financial condition, a condition thoroughly shown to have been within the knowledge of the testator. In will contests, the purpose of the law is to place the jury in the position of the testator. Especially is this true as to the relations of testator with those who are the natural objects of his bounty. If it be shown that one child has been successful in life, and further shown that this child bore a confidential or fiduciary relationship to the testator, and further shown that the testator was in position to know, and did know, the financial situation of the other children (natural children of his bounty), and, under these circumstances, a will is made giving all the property to the one who was in no way (financially speaking) dependent upon the bounty of the testator, such evidence is competent to show that the testator was either incapacitated to make a will by not being able to fully contemplate and know the objects of his bounty, or it is competent as tending to show undue influence upon the mind of the testator in the execution thereof. Such evidence bears upon the issue of undue influence and mental incapacity. *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; *Schouler on Wills* (3d Ed.) p. 263; 28 Am. & Eng. Ency. of Law (2d Ed.) pp. 106, 107. By the latter authority, with citations from many states, it is said: "The character of the provisions, however, as being just or unjust, reasonable or unreasonable, may be considered by the jury as tending to throw light on the capacity of the testator. Evidence is therefore admissible tending to throw light on the question of the justice or reasonableness of the will. Such evidence usually relates to the relative situations and needs of those having a claim on the testator's bounty, and to the relations between the testator and those receiving or claiming to have been unfairly deprived of this bounty." And this court, in the recent

case of *Meier v. Buchter*, 197 Mo., loc. cit. 90, 94 S. W. 883, 6 L. R. A. (N. S.) 202, has expressly approved this language. The writer hereof did not sit in that case, because not argued in his presence, but fully concurs in the doctrine therein announced. There can be no question of evidence as to the relative situations and needs of those having a claim upon the bounty of a testator being proper evidence. You can show the relationship as to whether the testator was friendly or unfriendly to the natural objects of his bounty. The principle of law which admits this evidence admits the other, and for the same reason. Case after case might be cited; but we will not take further space. This contention is untenable.

3. Defendant complains of the action of the court in giving instruction No. 1 for the plaintiffs. This instruction goes to the question of mental incapacity to make a will. If it were not for the fact that defendant himself had asked several instructions on this same question, it might be debatable as to whether or not the instruction should have been given. At the previous hearing of this cause in this court, we did not pass upon that question, but contented ourselves by saying that a peremptory instruction to find that the written instrument was the last will and testament of Wesley Norman was properly refused, at least upon the ground that there was strong evidence tending to show undue influence. The burden is upon the proponent of the will, or the defendant in this case, to show the mental capacity of the party making the will, and so long and so recently has this doctrine been announced that citation of authority is not called for. Now in the present trial the proponent of the will, defendant herein, by his instruction No. 1, had the court to declare that there were three questions to be determined: (1) As to whether or not the will was formally executed; (2) as to whether or not the decedent was sound enough in mind and memory to make a will; and (3) as to whether or not the testator's mind was operating under the undue influence of Marion Norman. As to the first question, defendant asked a peremptory instruction which was given. As to the second question, i. e., that of mental incapacity, the defendant, instead of asking for a peremptory instruction, and thereby forcing the court to declare whether or not there was any evidence upon which to submit said question, assumed a different course; that is to say, he asked and had given instructions fully covering and submitting to the jury the question of mental incapacity. Now bearing in mind that upon this question the burden was upon defendant, the plaintiffs asked and the following instruction was given: "The court instructs the jury that, in determining the issue of the sufficient soundness of mind and testamentary capacity possessed by said Wesley Norman to make a will, before you can find in

favor of said proposed will, you must believe from a preponderance of the evidence that, at the time of the signing and execution thereof, the said Wesley Norman had sufficient understanding to comprehend the nature of the transaction that he was then engaged in, the nature and extent of his property, and to whom he desired to and was giving it, without the aid of any other person, and, unless the defendant has shown by such preponderance of evidence that he did possess all these requisites, you should find that the paper writing introduced in evidence is not the will and testament of the deceased, Wesley Norman."

Defendant now says that this instruction is error, and in support thereof cites us to the cases of *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890, and *Winn v. Grier*, 217 Mo., loc. cit. 447, 117 S. W. 48. He also complains that it was indicated to the court in the previous trial that the question of testamentary incapacity was not shown by the evidence. The previous opinion in this court did not positively pass upon that question; but, in fairness to the defendant, it should be said that there was doubt as to the sufficiency of the evidence upon that point. This, however, need not be discussed at this time. Under all the rules, the defendant (proponent of the will) must establish the mental capacity of the testator. When such defendant, by instructions submitted by him and approved by the court, presents that question to a jury, it cannot be said that the opposite party has committed error when they submit and have approved an instruction upon the same question, unless the instructions so given are absolutely at variance, so that a jury might be misled by either or all of the instructions. It has been continuously held that, where one side presents instructions upon certain points, the other side cannot be held as committing error in presenting similar instructions upon the same question. See *Gordon v. Park*, 219 Mo. 600, 117 S. W., loc. cit. 1166, and cases cited.

In this case the instructions asked and received by defendant were as broad as the law will permit, and he, having invoked the judgment of the jury upon the question of mental incapacity, is in no position to complain of a proper instruction upon the same question by the plaintiffs. Defendant having the burden cast upon him as to the question of mental incapacity asked and received instructions fully as broad, if not broader, than the case law of the state. With this situation, the plaintiffs asked the instruction quoted above. They now say this instruction was error because this court had indicated that such question was not in the case. We did not in direct terms so indicate; but, whether we did or not, the defendant, having asked instructions upon the same question, is in no condition to complain, unless the instruction given for plaintiffs is absolutely

erroneous. Defendant might have asked a peremptory instruction upon this question, and thereby obviated the question here; but he did not seek so to do.

Defendant claims that such instruction as was given to the plaintiffs is condemned by the cases of *Couch v. Gentry*, 113 Mo. 255, 20 S. W. 890, and *Winn v. Grier*, 217 Mo. 447, 117 S. W. 48. The instruction we have set out above. In the *Couch Case*, Judge Black, in defining what he understood to be "mental incapacity," said: "If the testator understood the business about which he was engaged when he had prepared and executed the will, the persons who were the natural objects of his bounty, and the manner in which he desired the dispositions to take effect, he was capable of making a will. Schouler on Wills, § 68. Such is, in substance and effect, the rule as stated by this court in a number of cases. *Brinkman v. Rueggessick*, 71 Mo. 553; *Benolst v. Murrin*, 58 Mo. 307; *Jackson v. Hardin*, 83 Mo. 175; *Myers v. Hauger*, 98 Mo. 433, 11 S. W. 974; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510, 17 Am. St. Rep. 552; *Norton v. Paxton*, 110 Mo. 456, 19 S. W. 807. We said in the case last mentioned that a person, though aged or infirm, who is able to transact his ordinary business affairs, and who has a mind and memory capable of presenting to him his property and those persons who come reasonably within the range of his bounty, has the capacity to make a will." In *Winn v. Grier* Judge Fox said: "The cases above cited have firmly settled the question as to the requisite test of mental capacity sufficient to execute a valid will. As was said by Gantt, J., in speaking for this court in *Sayre v. Trustees of Princeton University* [192 Mo. 95, 90 S. W. 787], supra, 'the standard of mental capacity required to sustain a will has been fixed so far as judicial utterances can settle a principle, and it is that the testator must have "had sufficient understanding to comprehend the nature of the transaction that he was engaged in, the nature and extent of his property, and to whom he desired to give it, and was giving it, without the aid of any other person,"' citing, in support of such rule, *Crossan v. Crossan*, 169 Mo., loc. cit. 641, 70 S. W. 136; *Brinkman v. Rueggessick*, 71 Mo. 553; *Couch v. Gentry*, 113 Mo. 248, 20 S. W. 890."

Comparing the instruction given with the discussions made by Judges Black and Fox, we are unable to discover any error in plaintiffs' instruction set out above. In fact, we are impressed that the instructions upon the other side, asked and obtained, go further than the cases in Missouri. This contention therefore will be ruled against appellant.

4. The next complaint is that the court erred in giving instruction No. 2 for the plaintiffs. This instruction is copied bodily from *Moore v. McNulty*, 164 Mo., loc. cit. 121, 122, 64 S. W. 159, and in that case it was approved. It was the third in a series of in-

structions asked by the plaintiff. All the instructions are set out, and the court then used this language: "These instructions, with the exception of the fifth for plaintiff, fairly submitted the issue to the jury. The fifth given for plaintiff is so involved and obscure that we opine it is improperly copied. As it now stands, its only effect would be to confuse and mystify the issue." This instruction, in exact terms, therefore had the express approval of this court, in a case wherein the questions raised were largely upon the instructions. We see no reason to depart from the opinion of Gantt, J., in the McNulty Case.

5. It is next urged that instruction No. 6, given for plaintiffs, was error. This instruction reads: "The court instructs the jury that, if they believe from the evidence that Marion Norman was the son of the testator, Wesley Norman; that, at the time of the making of the paper purporting to be his will, and for several years prior thereto, he sustained confidential and fiduciary relations towards his father; that he resided with his father until his death, and had complete control of the household affairs, had the close and implicit confidence of his father; that his father looked to him for advice, counsel, and direction; that he had sole control and management of his father's business, property, and affairs; and that he is the only substantial beneficiary in said will—then the law presumes that said purported will is the result of undue influence of the said Marion Norman over the said Wesley Norman, and, unless such presumption is rebutted by a preponderance of the evidence, you should find that said paper writing read in evidence is not the last will and testament of the said Wesley Norman, deceased, and the burden of overcoming such presumption is on the defendant." This instruction is along proper lines. It follows the opinion of this court upon the former trial. Some of the language might be judiciously changed; but, in substance, it is correct. It is predicated upon the facts in evidence, and simply says to the jury that, if they find from the evidence certain facts, then undue influence will be presumed, and, further, that it devolves upon the defendant to rebut by the proof the existence of undue influence. The question and the authorities bearing thereon were discussed in the prior opinion, and we shall not repeat here. There is nothing new in the evidence or the authorities cited. They were reviewed at the last hearing.

6. Another assignment of error is that counsel for plaintiffs made improper remarks to the jury under a stipulation filed in the case. By stipulation it was agreed that either party might read the evidence of any witness from the former trial from the former bill of exceptions, and this stipulation

was broad enough to include witnesses who were present. Both sides acted under this stipulation. The defendant, although personally present, did not testify; but his evidence was read from the former transcript of the case. It is charged in the motion for new trial and a subjoined affidavit thereto that counsel for the plaintiffs took occasion to severely criticize the defendant for not having testified in person. This complaint is found for the first time in the motion for new trial and the subjoined affidavit. There is nothing in the bill of exceptions to show that any objections were made to these remarks through the course of the trial, or that any exceptions were taken thereto. That you cannot preserve a point on such remarks, by merely setting them out in the motion and sustaining such averment by an affidavit, has been often passed upon by this court. See *Norris v. Whyte*, 158 Mo. 20, 57 S. W. 1037, and the numerous cases therein cited.

The substantial and leading contentions of the defendant we have noted. We have read again the evidence in the record. We feel that the jury reached a righteous verdict in the cause, and, unless there was error upon the part of the court, it ought to be affirmed.

We discover no substantial error upon the part of the court, and the judgment is therefore affirmed. All concur, except WOODSON, J., not sitting.

STATE v. TIERNAN.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1900.)

1. ELECTIONS (§ 329*)—FRAUDULENT REGISTRATION—EVIDENCE.

The secretary of the board of election commissioners, or any other witness knowing the fact, could testify that there was a general registration of voters in a city at the time and place where accused was alleged to have illegally registered.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 365; Dec. Dig. § 329.*]

2. WITNESSES (§ 247*)—ANSWERS—REPETITIONS—ELECTION PRECINCTS.

Where a witness, in a prosecution for fraudulent registration, stated that there was a registration of voters on the days in question in all the election precincts of the city, and his attention was then called to the precincts by number, it was not necessary that he should repeat the word "election" every time he mentioned the precinct in order to establish that the offense was committed, as alleged, in the Eighth election precinct.

[Ed. Note.—For other cases, see *Witnesses*, Dec. Dig. § 247.*]

3. CRIMINAL LAW (§§ 1044, 1064*)—APPEAL AND ERROR—QUESTIONS NOT RAISED AT TRIAL.

Where an objection that the indictment was found without any evidence before the grand jury, and that the names of the registration officers were not indorsed thereon, was not raised by a timely motion to quash or in the mo-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

tion for a new trial or in arrest of judgment, it could not be reviewed on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2672, 2673, 2676; Dec. Dig. §§ 1044, 1064.*]

4. CRIMINAL LAW (§ 1064*)—APPEAL—OBJECTIONS NOT RAISED AT TRIAL.

An objection that accused, after being arrested, was taken to the office of the circuit attorney to get from him a statement, and the statement of the circuit attorney with reference thereto, not having been assigned as a ground for a new trial, could not be considered on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2676; Dec. Dig. § 1064.*]

Appeal from St. Louis Circuit Court; Geo. H. Shields, Judge.

William Tiernan was convicted of fraudulent registration, and he appeals. Affirmed.

C. Orrick Bishop, for appellant. E. W. Major, Atty. Gen., and Jas. T. Blair, Asst. Atty. Gen., for the State.

GANTT, P. J. On the 21st day of September, 1908, the grand jury of the city of St. Louis returned an indictment charging defendant, William Tiernan, with fraudulently registering under a name not his own in the Eighth election precinct of the Fifteenth ward of the city of St. Louis. Defendant was arraigned and pleaded not guilty. A jury was impaneled and sworn to try the issue thus made. Their deliberations resulted in a verdict of guilty and the infliction upon defendant of a penalty of three years' imprisonment in the penitentiary. Motions for new trial and in arrest of judgment were duly filed and overruled, judgment was entered upon the verdict, and defendant appealed.

In due time defendant filed his bill of exceptions. The state's evidence tended to show: That a general registration of voters was held in the city of St. Louis on the 14th, 15th, 16th, and 17th of September, 1908; that the registration booth for the Eighth precinct of the Fifteenth ward in said city was at 819 North Twenty-First street; the registration judges in the precinct named were John J. Hickey, August O. Huesser, Fred Reitz, and Joseph Byrne, and the clerks were Louis Hoffman and John Gallagher, all duly commissioned except Byrne, who was sworn in to fill a vacancy. The judges were furnished with cards containing a form of oath to be administered to those applying for registration, and also furnished with a list of questions as to their qualifications, to be answered by such applicants. On one of the days mentioned, while the registration was in progress, defendant presented himself before the judges and clerks of registration of the Eighth precinct of the Fifteenth ward of the city of St. Louis at 819 North Twenty-First street, as charged. The prescribed oath was ad-

ministered to him and the formal questions propounded as to his qualifications to vote at that place. His answers were such as, if true, to show him to be a qualified voter of said precinct and ward. Defendant stated, in answer to the questions of the judges, that his name was "Frank Clay." He then signed the name "Frank Clay" upon the registration books. He was arrested on the spot. Being asked his name by the arresting officer, defendant answered that it was "Frank Clay." He was taken to headquarters, there gave his name as "William Tiernan," and stated that he lived at 723 North Twenty-First street. It was shown that no such number in fact existed, and the occupant of the house at No. 721 had never seen defendant before the trial. Defendant was identified as William Tiernan. Defendant offered no evidence, but asked the court to direct an acquittal. The request was refused. The court instructed the jury as to the law in the case, including the presumption of innocence, reasonable doubt, the credibility of the witnesses, argument of counsel, etc. To all these instructions defendant, by his counsel, saved his exceptions. He also saved certain exceptions to portions of the argument of the circuit attorney.

1. The indictment is not assailed. It is identical in its charging parts with the information approved by this court in *State v. Cummings*, 206 Mo. 613, 616, 105 S. W. 649, and correctly charges an offense under section 2120j of the act of March 24, 1903 (*Laws* 1903, p. 153 [*Ann. St.* 1906, p. 1373]). No error is suggested in the record proper, and we have been unable to discover any. The arraignment of defendant, the impaneling of the jury, the return of the verdict, and the sentence were all in the usual and regular form.

2. The defendant has assigned various errors, and they will be noted in their order. John Ellsperman, Jr., testified he was secretary of the board of election commissioners of the city of St. Louis, and identified the records of his office offered in evidence of the registration lists made on September 14, 15, 16, and 17, 1908, of persons residing in the Eighth precinct of the Fifteenth ward of the city of St. Louis. He also identified the ward lines or boundaries of the Eighth precinct of the Fifteenth ward. He was then asked if there was a general registration of voters in said city in all election precincts on the said dates, to which defendant objected as calling for incompetent testimony and not the best way to prove it. The objection was overruled, and properly so. Any witness who knew the facts could have testified there was a general registration on those days, and no one naturally was better able to testify to that fact than the secretary of the board under whose supervision the registration was made.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

3. There is no merit in the insistence that there was a failure to show that the offense was committed in the Eighth election precinct. The witness had stated there was a registration on said days in all the election precincts of the city, and his attention was then called to the precincts by number. It was wholly unnecessary to repeat the word "election" every time he mentioned the precinct.

4. As to the contention that the indictment was found without any evidence before the grand jury, and that the names of the registration officers were not indorsed upon the indictment, it suffices to say it is bottomed upon an admission of the circuit attorney which falls far short of the insistence of counsel for defendant. While the admission may disclose a practice which should be avoided in the future, it comes short of admitting that the indictment was found without evidence. Moreover, no complaint was made on this point either by timely motion to quash or in either the motion for new trial or in arrest.

5. Equally unavailing is the assignment now made against the practice of taking the defendant, when he was arrested, to the office of the circuit attorney to get him to make a statement, and the statement of the circuit attorney on that point, for the reason that no such grounds are assigned in the motion for new trial.

We have considered the whole record and find no reversible error.

The judgment is affirmed.

BURGESS and FOX, JJ., concur.

STATE v. EXNICIOUS.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. ELECTIONS (§ 329*)—OFFENSES—FRAUDULENT REGISTRATION—EVIDENCE.

Evidence held to sustain a conviction of fraudulent registration.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 366; Dec. Dig. § 329.*]

2. ELECTIONS (§ 328*)—OFFENSES—FRAUDULENT REGISTRATION—VARIANCE.

Where an indictment charged that defendant falsely registered under the name "Joseph Walters," which was not his true name, evidence that in signing the primary books on two occasions he misspelled the word "Joseph" and the word "Walters," by omitting the final letter of each word, did not constitute a fatal variance.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 363; Dec. Dig. § 328.*]

3. ELECTIONS (§ 329*)—OFFENSES—FRAUDULENT REGISTRATION—EVIDENCE.

The secretary of the board of election commissioners was competent to testify that there was a general registration of voters in the city of St. Louis on the 15th day of September,

1908, on which date it was claimed accused was guilty of fraudulent registration.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 365; Dec. Dig. § 329.*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Harry Exnicious was convicted of fraudulent registration, and he appeals. Affirmed.

This cause is now pending before this court upon appeal by the defendant from a judgment rendered in the circuit court of the city of St. Louis, convicting him of the offense of fraudulently registering as a voter of the Tenth election precinct of the Fifteenth ward of the city of St. Louis, under a name not his own. On the 21st day of September, 1908, the grand jury of the city of St. Louis returned an indictment, charging the defendant with the offense as above indicated. The sufficiency of the indictment is not challenged. Hence there is no necessity for burdening this opinion with a reproduction of it. The defendant was duly arraigned and entered his plea of not guilty to the charge contained in the indictment, and the case proceeded to trial before a jury, which had been regularly impaneled.

The testimony developed upon the trial of this case tended to prove, substantially, the following state of facts: That there was a general registration of the voters and electors in the city of St. Louis on the 14th, 15th, 16th, and 17th days of September, 1908, and that the judges and clerks of such registration, after being duly sworn and qualified, proceeded in the discharge of their respective duties. All persons desiring to register as qualified voters were required to state, under oath, their place of residence, name, date of birth, age, occupation, and certain other matters touching their qualifications and right to register, and if their answers were satisfactory they were then permitted to sign their names on the register as qualified voters. Upon the 15th day of September, defendant appeared before the judges and clerks of registration of the said Tenth election precinct of the Fifteenth ward and requested that he be permitted to register. After being sworn to truthfully answer questions touching his right to register, he stated, among other things, that his name was Joseph Walters, his place of residence 2013 Olive street, which is in the Tenth precinct of the Fifteenth ward. These answers, together with others, were written by the clerk in the record kept for that purpose, and at the proper place in said books, and in the column for qualified voters, defendant signed his name, "Joseph Walters." His name, age, and residence, as given by him, were then entered on the registration books. When a patrolman, in accordance with directions from one of the judges, started to strike the defendant's name from the registration record, defendant tried

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to make his escape, and was apprehended only when he was shot in the leg. After his arrest, and on the 19th day of September, defendant signed a recognizance in the name of "Joseph Walters" and again gave his address as 2013 Olive street. The state's evidence also tended to prove that no one of the name of Joseph Walters had ever resided at 2013 Olive street, that defendant's name is Harry Exnicious, and at the time of his offense, and prior thereto, he resided at 821 or 823 Carr street, which was not in the Tenth precinct of said Fifteenth ward. At the close of the state's evidence, the defendant demurred thereto, but offered no evidence in his defense. At the close of the evidence, the court fully instructed the jury upon the charge embraced in the indictment, and upon the credibility of witnesses, and the necessity of establishing the guilt of the defendant beyond a reasonable doubt. The cause was then submitted to the jury, and they returned their verdict finding the defendant guilty as charged, and assessed his punishment at imprisonment in the penitentiary for a term of five years. Timely motions for a new trial and in arrest of judgment were filed and by the court taken up and overruled. Sentence and judgment was entered of record in accordance with the verdict, and from this judgment the defendant prosecuted this appeal, and the record is now before us for consideration.

C. Orrick Bishop, for appellant. E. W. Major, Atty. Gen., and Chas. G. Revelle, Asst. Atty. Gen., for the State.

FOX, J. (after stating the facts as above). We have read in detail all of the testimony as disclosed by the record, and in our opinion it conclusively establishes the guilt of the defendant of the charge embraced in the indictment.

1. Learned counsel for appellant directs our attention to the testimony wherein it appears that the defendant signed four registration books in the presence of the officers, and specially directs our attention to the fact that his signature was not precisely the same upon some of the books; but that he did sign the registration books there is no dispute. The indictment charges that he registered under the name of "Joseph Walters," and that his proper name was that of Harry Exnicious, the name under which he was indicted. The testimony clearly shows that the original registration book was signed by him as "Joseph Walters." Upon the copy of the original registration book, the most that can be said of his signature was that he misspelled the name, both "Joseph" and "Walters." However, it is clear that, notwithstanding the improper spelling of the name, it was intended for "Joseph Walters." Upon one of the primary books there was simply a mistake in the spelling of the name "Joseph." In the spelling of that

part of his name he omitted the letter "h," as well as omitting from the surname the letter "s," making it "Walter," in place of "Walters." The record discloses further that on line 21, and under the heading "Signature," he again simply misspelled his Christian name; that is to say, spelled it "Josph," instead of "Joseph." His surname, "Walters," was properly spelled in writing that signature. Upon another primary book we find the record disclosing the signature of "Joseph Walters." Upon these disclosures of the record, counsel insists that there was, by reason of the mistakes herein indicated in the spelling of the name Joseph Walters, in signing the registration books, a material variance between the allegations of the indictment and the proof as to how the appellant signed the alleged books of registration. In support of this insistence our attention is directed to the recent case of *State v. Judd*, 120 S. W. 780. We have carefully re-examined that case, and it is sufficient to state upon this proposition that it is clearly distinguishable from the case at bar. In the *Judd Case* it is charged in the information that the defendant had answered that his name was "Chas. Cohn," and that the judges, clerks, and officers of registration had entered and written his name in said register as "Chas. Cohn." The pleading in that case then proceeds to charge and allege that the defendant unlawfully and feloniously did sign said registers and books of registration by writing the name of "Chas. Cohn." As was said in that case, it charges a registration under one name and a signature of an entirely different name. That is not this case. Here the charge is that the defendant, Exnicious, registered under the name of Joseph Walters, and did then and there unlawfully, feloniously, willfully, knowingly, falsely, and fraudulently pretend and represent to the said judges, clerks, and officers of registration of said Tenth election precinct of the Fifteenth ward of the said city of St. Louis that his name was Joseph Walters, and the proof showed that he signed, correctly spelling the name as Joseph Walters. We take it that the simple mistake in the spelling of the name in the one or two instances pointed out does not constitute a fatal variance between the allegation in the indictment and the proof offered in support of it. Again, it may be said, recurring to the *Judd Case*, that it was charged in that case that defendant signed the registration books under the name of "Cohen," when the witnesses on the part of the state absolutely negative any signing of that name by the defendant. There was absolutely no evidence that defendant signed the registration book as "Chas. Cohen"; but it was clearly shown by the state's own testimony that said name was signed by one of the judges. A casual reading of the *Judd Case* makes it manifest that it is clearly

distinguishable from the case now under consideration.

2. It is next insisted that there was no evidence that this offense was committed in the Tenth election precinct of the Fifteenth ward of the city of St. Louis and at the place of registration of the said Tenth election precinct of the said Fifteenth ward. We are unable to give our assent to this insistence. We have carefully analyzed the testimony disclosed by the record, and the testimony of at least two of the witnesses clearly shows that this offense was committed in the Tenth election precinct of the Fifteenth ward of the city of St. Louis and at the place of registration of said election precinct of said ward; that is to say, at No. 1908 Olive street. This point must be ruled against the appellant.

3. Complaint is also made that the secretary of the board of election commissioners was permitted to testify, over appellant's objection, in a general way, that there was a general registration of voters in the city of St. Louis on the 14th, 15th, 16th, and 17th days of September, 1908, without any evidence that the same was held in pursuance of any notice or official action on the part of the election commissioners, or pursuant to any law. There is no merit in this complaint, and it is sufficient to say that a similar objection was urged in the case of *State v. Tiernan* (handed down at the present sitting of this court) 122 S. W. 728, and it was there held that the objection was properly overruled, and that any witness who knew the facts had the right to testify that there was a general registration on those days, and no one was better able to testify to that fact than the secretary of the board under whose supervision the registration was made.

The testimony disclosed by the record is amply sufficient to show that the defendant's true name is that of "Harry Enxicious," and that he did fraudulently register upon the registration book under a name which was not his own, that of "Joseph Walters."

Finding no reversible error disclosed by the record, the judgment of the trial court should be affirmed, and it is so ordered. All concur.

STATE v. SHELTON.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. HOMICIDE (§ 127*)—MURDER IN THE FIRST DEGREE—SUFFICIENCY OF INFORMATION.

An information against two defendants for first-degree murder held to sufficiently charge the offense, and that an allegation therein that the offense was committed with an ax, "which they the said F. S. and H. K. then and there in their hands held," while not to be commended, did not render it fatally defective.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 192-194; Dec. Dig. § 127.*]

2. CRIMINAL LAW (§ 1158*)—REVIEW ON APPEAL—WAIVER OF PRELIMINARY EXAMINATION—CONCLUSION OF TRIAL COURT.

Where it appears on appeal that the trial court heard the evidence on both sides, and decided that there had been a waiver of a preliminary examination as was recited in the transcript of a justice of the peace, and defendants were permitted to introduce evidence to contradict the conclusion of the trial court, its finding will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3074; Dec. Dig. § 1158.*]

3. CRIMINAL LAW (§ 1087*)—RECORD ON APPEAL—BILL OF EXCEPTIONS—EXTENSION OF TIME FOR FILING.

An extreme doubt as to whether or not disclosures of the record on appeal as to the entry of a nunc pro tunc order, extending the time for filing a bill of exceptions, authorized the filing, will be resolved in defendant's favor; but the action of the court, after lapse of two terms, and without any notice to the prosecuting officer, and without any showing as to any memorandum made by the court, either on its docket or on the record, that error was committed in preparation of the record, cannot be approved.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2780, 2781; Dec. Dig. § 1087.*]

4. CRIMINAL LAW (§ 1064*)—PRESERVATION OF QUESTIONS FOR REVIEW—MOTION FOR NEW TRIAL.

Whatever occurs during the examination and qualification of the panel of jurors from which the trial panel is to be selected must be preserved, not only in the bill of exceptions, but the court's attention must be directed to a complaint concerning the same in the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2677; Dec. Dig. § 1064.*]

5. HOMICIDE (§ 106*)—EVIDENCE—AS TO MOTIVE.

It is not improper to supplement evidence indicating that robbery was the motive for a killing, with proof that deceased usually had money in his possession.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 329; Dec. Dig. § 106.*]

6. CRIMINAL LAW (§ 508*)—EVIDENCE—TESTIMONY OF ACCOMPLICE—ADMISSIBILITY.

That an accomplice not jointly prosecuted with the defendant is a competent witness for the state is clearly settled by Rev. St. 1899, § 4680 (Ann. St. 1906, p. 2549), providing that "any person who has been convicted of a criminal offense is, notwithstanding, a competent witness."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1100, 1110; Dec. Dig. § 508.*]

7. CRIMINAL LAW (§ 508*)—EVIDENCE—TESTIMONY OF ACCOMPLICE—ADMISSIBILITY.

Any inducements held out to an accomplice, and the fact that he admitted that he was an accomplice, are questions which affect only his credibility and the weight of his testimony, which are matters for the jury's consideration, and do not affect his competency.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1101, 1102; Dec. Dig. § 508.*]

8. CRIMINAL LAW (§ 775*)—TRIAL—INSTRUCTION AS TO AN ALIBI.

An instruction that, unless the jury found from all the facts and circumstances given in evidence, the presence of defendant at the place of the alleged murder, and his guilt beyond rea-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

sonable doubt, they should acquit him, sufficiently covered the defense of alibi.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1834, 1835; Dec. Dig. § 775.*]

9. CRIMINAL LAW (§ 780*)—TRIAL—INSTRUCTIONS—TESTIMONY OF ACCOMPLICE.

An instruction that the testimony of an accomplice, that is, the person who actually commits or participates in the crime, when not corroborated by some other person or persons not implicated as to matters material to the issues, that is, matters connecting defendant with the commission of the crime, ought to be received with great caution, and the jury ought to be fully satisfied with its truth before they convict on such testimony, and that the jury were at liberty to convict "on the uncorroborated testimony of an accomplice alone, if any, will establish defendant's guilt," *held* to substantially accord with uniform rulings of the Supreme Court on the subject.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1862, 1863; Dec. Dig. § 780.*]

10. CRIMINAL LAW (§ 829*)—TRIAL—INSTRUCTIONS—REQUESTS.

Where an instruction given fully covered the subject of the corroboration of the testimony of an accomplice, a requested instruction by defendant as to such matter was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

11. CRIMINAL LAW (§ 784*)—INSTRUCTIONS—"CIRCUMSTANTIAL EVIDENCE."

An instruction, in a murder case, told the jury that the state sought to some extent to convict defendant on circumstantial evidence (that is, there is no evidence by any witness that saw the fatal blow struck); that evidence is of two kinds, direct and circumstantial; that circumstantial evidence is proof of certain facts and circumstances in a certain case in which the jury may infer other and connected facts which usually and reasonably follow according to the common experience of mankind; and that crime may be proven by circumstantial evidence as well as by direct testimony of eyewitnesses, but the facts and circumstances in evidence should be consistent with each other and with defendant's guilt, and inconsistent with any reasonable theory of his innocence. *Held*, that it declared the law substantially in harmony with the holdings of the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1884-1887; Dec. Dig. § 784.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1161-1163.]

12. CRIMINAL LAW (§ 785*)—TRIAL—INSTRUCTIONS—CREDIBILITY OF WITNESSES—WEIGHT OF TESTIMONY.

In a murder case, an instruction on the credibility of witnesses and weight to be attached to their testimony substantially told the jury that they were the sole judges thereof, that, in determining such credit, weight, and value to be attached to the testimony of any witness, they should consider the character of the witness, his or her manner on the stand and of testifying, his or her interest, if any, in the result; his or her relation to or feeling for defendant or deceased; the probability of his or her statement, as well as all other facts and circumstances detailed in evidence; and finally that, if they believed any witness willfully or knowingly swore falsely to any material fact, they were at liberty to disregard any part of his testimony. *Held* sufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1891; Dec. Dig. § 785.*]

13. CRIMINAL LAW (§ 755½*)—TRIAL—INSTRUCTIONS—COMMENT ON FACTS AND CALLING ATTENTION TO PARTICULAR FACTS IN TESTIMONY.

The court should not comment on the facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1765; Dec. Dig. § 755½.*]

14. CRIMINAL LAW (§ 811*)—INSTRUCTIONS—UNDUE PROMINENCE TO PARTICULAR FACTS.

The court should not call the jury's attention especially to particular facts developed in the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1960-1972; Dec. Dig. § 811.*]

15. CRIMINAL LAW (§ 811*)—INSTRUCTIONS—UNDUE PROMINENCE TO PARTICULAR MATTERS.

The manner and means of inducing an accomplice to testify with the view of getting a lighter punishment are matters of legitimate argument before the jury, but it would manifestly be erroneous to point out those facts, and say to the jury that they must specially consider them in weighing his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1971; Dec. Dig. § 811.*]

16. HOMICIDE (§ 341*)—INSTRUCTIONS—DESIGNATION OF PUNISHMENT JURY MAY INFLICT—HARMLESS ERROR.

The jury having been required to find every essential element of murder in the first degree, and having found defendant guilty thereof, and fixed his punishment pursuant to Act March 18, 1907 (Laws 1907, p. 235, § 1), amending section 1817, Rev. St. 1899 (Ann. St. 1906, p. 1262), providing for decision by the jury of the punishment to be inflicted on conviction of murder in the first degree, defendant was not injured by the court's failure to designate the punishment they might inflict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 721; Dec. Dig. § 341.*]

17. CRIMINAL LAW (§ 741*)—TRIAL—WEIGHT OF TESTIMONY—QUESTION FOR JURY.

It is the exclusive province of the jury to determine the weight of testimony introduced both by the state and defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1713; Dec. Dig. § 741.*]

18. HOMICIDE (§ 253*)—EVIDENCE—SUFFICIENCY.

Evidence *held* to support a conviction of murder in the first degree in a case wherein the conviction rested largely on testimony of an accomplice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.*]

Appeal from Circuit Court, Christian County; John T. Moore, Judge.

Frank Shelton was convicted of murder, and he appeals. *Affirmed*.

This cause is now before this court upon appeal from a judgment of the circuit court of Christian county, Mo., convicting the defendant of murder of the first degree. The amended information, upon which defendant was tried, and which was duly verified, was filed by the prosecuting attorney in the circuit court of Christian county on the 25th of August, 1908. Omitting formal parts, the charge upon which defendant was convicted was thus stated in the information: "Fred W. Barrett, prosecuting attorney within and for the county of Christian, in the state of

Missouri, for an amended information, informs the court under his official oath and upon his best information and belief that Frank Shelton and Henry Killion on or about the 12th day of May, 1908, in the said county of Christian, in the state of Missouri, in and upon the body of one William Bowen, then and there being, feloniously, willfully, deliberately, premeditatedly, and of their malice aforethought did make an assault, and with a dangerous and deadly weapon, to wit, an ax, of the weight of three pounds, which they, the said Frank Shelton and Henry Killion, in their hands then and there had and held, him, the said William Bowen, then and there feloniously, on purpose and of their malice aforethought, willfully, deliberately, premeditatedly did assault, strike, beat, and wound; and with the ax aforesaid then and there feloniously, on purpose, and of their malice aforethought, willfully, deliberately, and premeditatedly, did assault, strike, beat and wound him, the said William Bowen, in and upon the head of him, the said William Bowen, giving him, the said William Bowen, with the dangerous and deadly weapon aforesaid, to wit, the ax aforesaid, in and upon the head of him, the said William Bowen, one mortal wound of the length of two inches and the width of one-half inch, and the depth of one inch, of which said mortal wound the said William Bowen then and there instantly died. And the said Fred W. Barrett, the prosecuting attorney aforesaid, under his oath of office aforesaid, does say that the said Frank Shelton and Henry Killion, him, the said William Bowen, in the manner aforesaid, and by the means aforesaid, at the time and place aforesaid, feloniously, willfully, deliberately, premeditatedly, on purpose, and of their malice aforethought did kill and murder, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state."

The evidence developed upon the trial of this cause upon the part of the state substantially tended to show that the deceased, William Bowen, lived about two miles south of Nixa, in Christian county. He was 65 or 70 years old, and was a huckster by trade, collecting poultry and produce in the vicinity of his home, and making weekly trips to Springfield for the purpose of marketing his wares. Deceased was accustomed to carry sufficient money to transact his business; a considerable sum being required to purchase the produce which he hauled to Springfield on his weekly trips. The fact that he usually had money in his possession seems to have been known to a number of persons, including appellant's co-indictee. Deceased was last seen alive about dark on Tuesday, the 12th day of May, 1908, returning to his home after a trip to Springfield. Deceased's neighbors, attracted by the evident neglect from which his horses were suffering, on Thursday, May the 14th, visited deceased's premises and discovered the body. It lay, face downward, on

the floor in a pool of blood. A bloody ax lay near the body. There was blood upon a trunk and chair, and the former gave evidence of having been rifled. Death was caused by a blow upon the head, inflicted by a blunt instrument, which shattered the skull. The wound was necessarily and almost instantaneously fatal. Bowen had been dead 36 hours, or more, when his body was discovered. On Tuesday night preceding the discovery of the body defendant and his co-indictee, Killion, and one Stewart, all of whom lived or worked in the vicinity of Bowen's home, went fishing. Soon after 9 p. m. Stewart left appellant and Killion and went home, the latter stating at the time that he and appellant were going to an old pond near by and continue fishing. They retained Stewart's seine, and it was found in his yard the following morning. Appellant on Tuesday morning had suggested to his codefendant that they rob Bowen. After Stewart left the fishing party Tuesday night, appellant renewed his suggestion, threatening to kill young Killion unless he acceded thereto. The latter finally agreed to aid in appellant's enterprise, and the two went to deceased's house. Appellant stationed Killion in the road near the house, approached the door, rapped upon it, and was admitted by deceased. Killion testified that he then saw some one leave and re-enter the house; that he heard a "lumbering and then a groan" in the house. Soon thereafter, appellant emerged from the house, stooped and washed his hands in a rivulet at the roadside, and said to Killion, "I got the money," adding an admonition to Killion "not to tell, whatever he done." Appellant and Killion then went to the latter's home and there spent the night. Appellant offered Killion part of the money taken from deceased. After the discovery of the body, in a conversation concerning the killing, appellant, when asked if he did it, replied: "I wouldn't say I didn't, but there was nobody ever seen me kill him, if I did kill him." In the same conversation he offered one Fonville \$20 to leave the country, telling him that he, Fonville, was suspected. There was testimony to the effect that when appellant was arrested he said he "thought he could prove out of that," that there "was a little blood on his shirt," and "his shoes looked like they had blood or something on them." Appellant, after his arrest, was taken to view the body, and the officer who had him in charge testified that "he was nervous and shaky, turned white and pretty much every color a man could turn who was guilty of a crime."

When Killion, jointly indicted with appellant, was offered as a witness by the state, objection was made to his testifying. He was then permitted to plead guilty to manslaughter in the fourth degree. Appellant, still objecting to Killion's testifying, asked, and was granted, permission to offer testimony as to Killion's having been promised

as an inducement to confess a light sentence in the Reform School. The evidence offered on this head was conflicting. Counsel for appellant upon cross-examination of Henry Killion, the accomplice, sought to discredit Killion, and, in addition to the cross-examination, he offered in evidence a confession signed by Killion. While this signed confession of Killion offered by counsel for appellant tended to contradict him upon some of the matters to which he testified in his oral examination, yet as to some of the material facts this signed confession of Killion substantially agreed with his oral testimony while on the witness stand.

Defendant testified in his own behalf, and substantially stated that on the Tuesday night on which Bowen was killed he went fishing as detailed by witnesses Henry Killion and Stewart, and that about 9:30 p. m. he and Killion left the pond, where they had gone after Stewart left them, and went to Killion's home; that he had two little fish in his pocket. These he put into a tub near the door, followed Killion into the house, and slept there that night. He positively denied being at Bowen's house at all, and stated that the testimony of Killion regarding his connection with the killing of Bowen was absolutely false. Defendant also contradicted and denied the testimony of witness Fonville, and also denied the conversation attributed to him by witness Ball on the occasion when Ball arrested him. The defendant, as an explanation as to the blood on his shirt, said that he "might have got it from cleaning fish or popping a snake's head off." He further stated that there was no blood upon his shoes, and what was seen upon his shoes "was not blood at all, but was from a snag or something." There was other testimony offered on the part of the defendant tending to show that the witness Henry Killion, who was charged as an accomplice, had about two months before the tragedy threatened to kill Bowen, the deceased. It was drawn out in the examination on this subject that this threat on the part of Killion against Bowen resulted from Killion's father teasing him about Sabbath breaking, and suggested that the deceased, Bowen, act as judge to pass upon young Killion's misdemeanors. It also appeared in evidence offered by the defendant that prior to Killion's confession the prosecuting attorney offered him, Killion, partial immunity if "he would tell him about the killing and all about where the money was, and that Killion subsequently denied the truth of his confession."

There was other testimony offered by the defendant which tended to show that the reputation of witness Fonville for truth and veracity was bad. It also appeared in evidence that \$26.71 was found in some egg cases in Bowen's house after the killing. There was also evidence offered on the part of the appellant tending to show that a

horseman who strongly resembled Shelton appeared on the road leading from Bowen's to Killion's at "half past 8 or 9 o'clock, or later," on the night of the killing, and that this horseman, after inquiring as to the road to Nixa, continued up the road. Another witness testified that he saw a horseman between 11 and 12 o'clock the same night riding rapidly northward along the Springfield road. There was other testimony offered by the defendant which contradicted the state's evidence as to the time Henry Killion and the defendant reached the Killion home on the night of the tragedy. The state, in rebuttal, offered proof tending to show contradictory statements made by some of appellant's witnesses in reference to the time when appellant and Killion reached Killion's house. This sufficiently indicates the nature and character of the testimony upon which this case was submitted to the jury. At least, it is entirely sufficient to enable us to dispose of the legal propositions presented by the record.

At the close of the evidence, the court instructed the jury upon the various subjects to which the testimony was applicable. We deem it unnecessary to here reproduce all the instructions given or refused, but will during the course of the opinion give them such attention as they require. The cause was then submitted to the jury, and they returned their verdict finding the defendant guilty as charged, and fixed his punishment at life imprisonment in the penitentiary of this state. Timely motions for new trial and in arrest of judgment were filed, and by the court taken up and overruled. Sentence and judgment were rendered by the court in accordance with the verdict returned, and from that judgment the defendant prosecutes this appeal, and the record is now before us for consideration.

E. W. Major, Atty. Gen., and Jas. T. Blair, Asst. Atty. Gen., for the State.

FOX, J. (after stating the facts as above). The record in this cause discloses numerous complaints on the part of the appellant upon which are predicated the reasons why the judgment in this cause should be reversed. We will give to the errors complained of such attention as we deem the importance of the questions presented demand and merit.

1. The information in this cause sufficiently charges the offense of which the defendant was convicted. While perhaps the form of the information wherein it is charged that the offense was committed with an ax, "which they, the said Frank Shelton and Henry Killion, in their hands then and there had and held," is not to be commended, such defect does not render the indictment fatally defective. *State v. Dalton*, 27 Mo. 13; *State v. Payton*, 90 Mo. 220, 2 S. W. 394; *State v. Grimes*, 29 Mo. App. 470. In *State v. Dalton*, supra, it was expressly ruled by this

court that the manner in which the instrument is held by which the injury is inflicted is not material, and, even if it was material under the common-law rules of pleading, it is manifestly cured by the sweeping provision of our statute, which declares that "no indictment shall be deemed invalid on account of any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." The rule as announced in that case was unqualifiedly approved in the later case of *State v. Payton* in 90 Mo. 220, 2 S. W. 394.

2. It is next earnestly insisted that the information in this cause upon which the defendant was tried and convicted should have been quashed for the reason that the defendant was not afforded a preliminary examination prior to the filing of such information. Upon this proposition, we find that the transcript of the justice of the peace shows that there was a waiver on the part of the defendant of a preliminary examination; but, aside from this, the trial court permitted learned counsel for defendant to introduce evidence tending to contradict the recitals of the transcript of the justice for the purpose of showing that, despite the recitals of the transcript, defendant Shelton neither had nor waived a preliminary examination. Upon this inquiry the trial court heard the evidence on both sides and found the facts against the defendant. In other words, that there had been a waiver of the preliminary examination. Upon this state of the record this court is not inclined to disturb the conclusions reached by the trial court. *State v. Hathhorn*, 166 Mo. 229, 65 S. W. 756; *State v. Hunter*, 181 Mo. 316, 80 S. W. 955; *State v. Gordon*, 186 Mo. 185, 95 S. W. 420.

3. The learned Attorney General presents the question upon the disclosures of the record as to whether or not there is anything before this court for review save and except the record proper. It is sufficient to say upon that proposition that it is extremely doubtful as to whether or not the disclosures of the record as to the entry of the nunc pro tunc order extending the time for the filing of the bill of exceptions authorized the filing of such bill, yet we are disposed to resolve the doubt in favor of the defendant, but will add that we by no means approve of the action of the court after the lapse of two terms, and without any notice to the prosecuting officer, and without any showing as to any memorandum made by the court, either upon its docket or upon the record that an error had been committed in the preservation of the record, in entering a nunc pro tunc order which would authorize the filing of the bill of exceptions. It follows from this that we will treat the bill of exceptions as filed within the proper time, and give to the questions preserved by such bill the attention we deem necessary.

4. Appellant makes complaint concerning

the examination and qualification of the panel of jurors in this cause. It is sufficient to say upon this proposition that the appellant has failed to incorporate this complaint as one of the grounds in his motion for a new trial. Whatever occurred in the trial of this cause during the examination and qualification of the panel of jurors from which the trial panel was to be selected must be preserved, not only in the bill of exceptions, but the court's attention must be directed to that complaint in the motion for new trial. In *State v. Tomasitz*, 144 Mo. 86, 45 S. W. 1106, it was urged that the court erred in refusing to sustain defendant's challenge to one of the jurors upon the panel. The motion for new trial called the attention of the trial court to the error complained of in refusing to sustain defendant's challenge to the juror, but failed to give the name of the juror against whom the challenge was directed, and in that case it was said by this court, speaking through Judge Burgess, that: "We are therefore entirely at sea as to what juror was intended to be embraced in the motion, and must disregard this contention." In the case at bar the motion for new trial fails to assign any errors respecting the examination of jurors or the exceptions to those that were examined as being qualified to sit in the trial of the cause. Manifestly this complaint has not been sufficiently preserved to authorize this court to review the action of the trial court upon that subject. This cause presents a much stronger reason for declining to consider the complaint than the case above referred to, for in this case the motion for new trial is absolutely silent as to any complaint respecting the examination and qualification of jurors.

5. We have examined in detail the evidence disclosed by the record, and the objections and exceptions preserved during the progress of the trial interposed by the appellant to the introduction of such evidence. It is sufficient to say concerning the rulings of the court upon the admission of evidence that we find no substantial error; at least no such error as would authorize the reversal of this judgment. During the examination of witness Slane, the state, by her counsel, inquired whether or not he knew anything about the deceased having money, and how he kept it along about the time he was killed. There was an objection to this testimony upon the ground that it did not appear to have any connection with the defendant. It must, however, not be overlooked that during the progress of the trial there was testimony tending to show that the motive which prompted the killing of Mr. Bowen, the deceased, was that of robbery. With that view of the case, we have reached the conclusion that it was not improper to supplement the evidence indicating that robbery was the motive which prompted the killing with the proof that the deceased

ed usually had money in his possession. In *State v. Donnelly*, 130 Mo., loc. cit. 651, 32 S. W. 1124, it was ruled by this court that there was no error in permitting a witness to testify to the finding of the pocketbook of the deceased near the spot where he was found lying unconscious a day or two next thereafter; and also that it was not error to permit witnesses to testify that deceased had money on his person the day before his death. This testimony was in that case deemed appropriate for the purpose of supplementing the state's evidence indicating that the motive in the commission of the crime was that of robbery. There was no error in the admission of this testimony offered by the state along this line in the case at bar, and the action of the court in denying the motion of appellant's counsel to strike out all of Slane's testimony upon this subject was entirely proper.

6. Learned counsel for appellant earnestly insists that the court committed error in permitting the admitted accomplice of the defendant, Henry Killion, to testify against the defendant as a witness. The record upon this proposition discloses that the state offered Henry Killion, the accomplice, as a witness. When this offer was made, Killion was not on trial, and had not pleaded to the indictment. However, a severance had been granted. Defendant made the further objection to Killion's testifying on the ground that he had neither pleaded guilty nor been convicted, and, being indicted jointly with appellant, he could not therefore testify against him. Upon this objection being made, the accomplice, Killion, by his attorney, as is disclosed by the bill of exceptions, then pleaded guilty to manslaughter in the fourth degree. Counsel for defendant then interposed an objection to Killion's testifying in the case for the following reasons: First, because he had confessed the crime in writing; second, that the prosecuting attorney had agreed with Killion's counsel that, if he would turn state's evidence, he might plead guilty to manslaughter in fourth degree, and not be prosecuted for murder; third, that Killion made the confession and pleaded guilty by reason of hope and persuasion; and, fourth, because Killion was jointly indicted with the defendant. It further appears from the record that, after some controversy, defendant, through his counsel, suggested to the court that the jury be withdrawn, and the court then proceeded to make a preliminary examination as to whether he would permit this witness to testify. In the jury's absence, defendant introduced evidence tending to show that the prosecuting attorney, when Killion was first arrested, said to him: "If you will tell this straight, I know you are not, I will see that you go to the reform school; while, if you don't, I will see that your neck breaks." The prosecuting attorney in this preliminary examina-

tion testified that he promised Killion partial immunity if he would "tell where the money was, but he never made him any promise to get him to tell how this thing was done." The court then overruled the objection as to Killion's competency, and the defendant duly preserved his exceptions to the action of the court. The jury was recalled and the trial proceeded. Killion, the accomplice, was introduced, and the defendant objected to his testifying for the same reasons as heretofore stated. The objections as made were overruled, and defendant excepted. Upon this state of the record, we are simply confronted with the proposition as to whether or not this accomplice was a competent witness. We are unable to agree with counsel for the appellant that Killion, the accomplice, was not a competent witness, and, unless we are ready to overrule a long line of decisions in this state, there is no escape from the conclusion that the court did not commit any error in permitting him to testify. As was said in the case of *State v. Myers*, 188 Mo. 225, 94 S. W. 242: "It has been decided by this court that an accomplice not jointly prosecuted with the defendant is a competent witness for the state"—citing in support of that announcement *State v. Umble*, 115 Mo. 461, 22 S. W. 378; *State v. Walker*, 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *Wharton's Criminal Evidence*, § 439; *McKenzie v. State*, 24 Ark. 636; 1 *Bishop's Crim. Proc.* (3d Ed.) § 1167; *State v. Riney*, 137 Mo., loc. cit. 104, 38 S. W. 718. This proposition is clearly settled by the provisions of the statute (section 4680, Rev. St. 1899 [Ann. St. 1906, p. 2549]), which provides that "any person who has been convicted of a criminal offense is, notwithstanding, a competent witness." In the case of *State v. Minor*, 117 Mo. 302, 22 S. W. 1085, it was expressly held by this court that an accomplice jointly indicted with the defendant on trial was, after his own conviction, a competent witness for the state against his co-defendant on trial. In *State v. Riney*, 137 Mo. 102, 38 S. W. 718, it was expressly ruled that the mere fact that the witness expected a lighter sentence for his own confessed complicity in the crime because he had become a witness for the state did not affect his competency; that such fact could only be considered in determining his credibility and the weight to be attached to his testimony. *State v. Stewart*, 142 Mo., loc. cit. 417, 44 S. W. 240; *State v. Black*, 143 Mo., loc. cit. 172, 44 S. W. 340. To the same effect is *State v. Wigger*, 196 Mo. 90, 93 S. W. 390. In the treatment of the proposition now under consideration, this court in that case, speaking through Judge Gantt, said: "If anything is settled in the law of this state, it is that the evidence of an accomplice who confesses his own guilty participation in a crime is competent against his accomplice on trial for the same offense. And

the credibility of such a witness is a matter for the consideration of the jury trying the case. *State v. Hill*, 96 Mo. 357, 10 S. W. 28; *State v. Williams*, 149 Mo. 496, 51 S. W. 88; *State v. Franke*, 159 Mo. 535, 60 S. W. 1053. And it is also the accepted doctrine that the evidence of an accomplice, even though uncorroborated, is sufficient to sustain a conviction if believed by the jury. *State v. Williamson*, 106 Mo. 162, 17 S. W. 172; *State v. Black*, 143 Mo. 166, 44 S. W. 340; *State v. Tobie*, 141 Mo., loc. cit. 561, 42 S. W. 1076; *State v. Marcks*, 140 Mo. 656, 41 S. W. 973, 43 S. W. 1095; *State v. Harkins*, 100 Mo. 666, 13 S. W. 830." In further treating of this proposition in the *Wigger Case* this court also said: "The failure of the state to produce the other witnesses to corroborate the testimony of the accomplice could have operated only against the state, and was a legitimate subject for discussion before the jury, but would not authorize this court, which has not the opportunity of seeing and hearing the witness testify, to interfere with the verdict of the jury which did see and hear the witness, and observe his manner of testifying, as well also the manner and testimony of the defendant and his witnesses. Accordingly it must be ruled that the court did not err in submitting the evidence to the jury."

We have thus indicated the rules of law applicable to this proposition that have been uniformly announced by this court. As heretofore stated, the record in this case discloses that the defendant and the accomplice, Killion, were jointly indicted; that there was a severance, and before the accomplice testified in the cause he entered his plea of guilty to manslaughter in the fourth degree. Upon the entering of such plea of guilty and the disposition of his case, clearly, if the rules as heretofore suggested are to be longer followed, he was a competent witness against the defendant in the case at bar. Any inducements held out to the accomplice, Killion, and the fact that he admitted that he was an accomplice in the perpetration of this crime, are questions which affect only his credibility and the weight to be attached to his testimony, which are matters for the consideration of the jury; but, under the well-settled rules of law announced in an unbroken line of decisions in this state, it does not affect his competency as a witness. Upon this proposition, the ruling must be adverse to the contention of learned counsel for appellant.

7. This leads us to the errors complained of by the appellant respecting the declarations of law given by the court in submitting the cause to the jury. The record before us discloses that at the close of the evidence defendant, through his counsel, moved the court to instruct the jury on all points of law in this case, and especially upon the law of an alibi, the use of the evidence of a codefendant and his confession, also on the

law of circumstantial evidence, and on the impeachment of witnesses. The record then discloses that the court instructed the jury and that the defendant preserved his exceptions to the instructions given, and also excepted to the refusal of instructions offered by the defendant, but there is an entire absence from the record of any exceptions to the court's failure, if any, to instruct upon the subjects embraced in the motion above referred to. However, in our opinion, the instructions of the court fully covered the subjects to which counsel for the defendant directed its attention. Upon the subject of an alibi, to which the court's attention was directed by the defendant in his motion, the court instructed the jury as follows: "Gentlemen of the jury, unless you find and believe from all the facts and circumstances given in evidence the presence of defendant at the place of the alleged murder, and his guilt beyond a reasonable doubt, you should acquit him." It was expressly held by this court in *State v. Sanders*, 106 Mo. 188, 17 S. W. 223, that an instruction substantially the same as this sufficiently covered the defense of alibi, and rendered the one asked by the defendant unnecessary.

Upon the testimony of an accomplice, the court, in our opinion, by instruction No. 7, directed the jury substantially in accordance with the uniform rulings of this court upon that subject. This instruction was as follows: "Gentlemen of the jury, the court instructs you that the testimony of an accomplice in the crime—that is, a person who actually commits or participates in the crime—when not corroborated by some person or persons not implicated in the crime, as to matters material to the issues—that is, matters connecting the defendant with the commission of the crime as charged against him—ought to be received with great caution by the jury, and the jury ought to be fully satisfied of its truth before they should convict defendant on such testimony. The court further instructs the jury that you are at liberty to convict the defendant, Frank Shelton, on the uncorroborated testimony of an accomplice alone if you believe the statements as given by such accomplice in his testimony in his testimony to be true, if you further believe that the state of facts sworn to by such witness, if any, will establish the guilt of the defendant."

Upon the subject of circumstantial evidence, in our opinion, the court by instruction No. 6 declared the law substantially in harmony with the uniform holdings by this court. That instruction was as follows: "Gentlemen of the jury, the state in this case seeks to some extent to convict the defendant of the crime charged on circumstantial evidence; that is, there is no evidence by any witness that saw the fatal blow struck. Evidence is of two kinds—direct and circumstantial. Circumstantial evidence is proof of certain facts and cir-

cumstances in a certain case in which the jury may infer other and connected facts which usually and reasonably follow according to the common experience of mankind. Crime may be proven by circumstantial evidence as well as by direct testimony of eyewitnesses, but the facts and circumstances in evidence should be consistent with each other, and with the guilt of the defendant, and inconsistent with any reasonable theory of defendant's innocence."

Upon the question of the credibility of witnesses and the weight to be attached to their testimony, to which the attention of the court was directed by defendant's counsel, that subject was entirely and properly covered by instruction No. 8, given to the jury by the court. We deem it unnecessary to reproduce the instruction in full, but it will suffice to say that it substantially told the jury that they were the sole judges of the credibility of the witnesses and the weight and value of their testimony; that, in determining such credit, weight, and value to be attached to the testimony of any witness, the jury should take into consideration the character of the witness, his or her manner on the stand and of testifying, his or her interest, if any, in the result of the case; his or her relation to or feeling for the defendant or the deceased; the probability of his or her statement, as well as all other facts and circumstances detailed in evidence; and were finally told that, if they believed any witness had willfully and knowingly sworn falsely to any material fact in the case, they were at liberty to disregard all or any part of such witness' testimony. Manifestly the directions to the jury were sufficiently full upon that subject to properly guide them in considering the question treated of by the instruction.

Counsel for appellant further complains concerning the subject of instructions to the jury that the court erroneously and improperly declined to give instruction No. 10, requested by the defendant. This instruction was as follows: "The court instructs the jury that if you find and believe from the evidence that the evidence of Henry Killion, the codefendant of Frank Shelton, was obtained by threats and through fear from or by reason of any promise from the officers of the court or prosecuting attorney, you should weigh his evidence with great care and caution, as evidence obtained in this manner shows the vital interest of such codefendant, or accomplice, and could not be taken as a free and voluntary statement of such codefendant or accomplice given under and after such codefendant or accomplice had been cautioned that such statements may be used against him." It is sufficient to say upon that proposition that the instruction was properly refused. In our opinion instruction No. 7, as heretofore quoted, directing the jury respecting the testimony of an accomplice, fully covered that subject,

and furnished ample directions to the jury necessary to an intelligent consideration of the testimony of an accomplice, and advising them of the caution with which such testimony should be received. Instruction No. 10, as offered by the defendant, would clearly be an argument to the jury in the form of a declaration of law. It is fundamental that the court in declaring the law upon any subject should not comment upon the facts or call the jury's attention especially to particular facts developed in the testimony. The manner and means of inducing an accomplice to testify in favor of the state and the fact that he testified with a view of getting a lighter punishment are matters of legitimate argument before the jury, but it would manifestly be erroneous to point out those facts, and say to the jury that you must specially consider these in the weighing of his testimony. The court in the instructions given upon that subject told the jury that they ought to receive the testimony of an accomplice with great caution, and that, before they convicted the defendant upon that character of testimony, they ought to be fully satisfied of its truth. In developing the testimony before the jury, it was legitimate and in entire harmony with appropriate cross-examination to show to the jury all the facts and circumstances which were held out as an inducement to the accomplice to testify. This was proper and a matter of legitimate argument before the jury upon that subject, but, as heretofore indicated, it would be clearly erroneous to undertake to embrace in an instruction the particular facts developed in the testimony as matters of inducement for the accomplice to testify.

It is further insisted by counsel for appellant that the court in its instructions failed to designate the punishment that the jury might inflict if they found the defendant guilty of murder of the first degree. It is sufficient to say upon this proposition that the court properly instructed the jury as to the essential elements necessary to be found by the jury in order to find the defendant guilty of murder in the first degree. It is true that the court told the jury that, if they should find the defendant guilty of murder of the first degree, they should simply so state in their verdict. Doubtless the trial court was following the old form of instruction when there was no discretion in the jury as to the infliction of punishment for murder in the first degree. The act approved March 18, 1907 (Laws 1907, p. 235, § 1), amending section 1817, Rev. St. 1899 (Ann. St. 1906, p. 1262), provides substantially that the jury, if they find the defendant guilty of murder of the first degree, shall decide which punishment shall be inflicted, either death or imprisonment in the penitentiary during their natural lives. The jury in the case at bar returned a verdict finding the defendant guilty of murder of the first degree, and decided in accordance with the provi-

sions of section 1817 of the Laws of 1907 that his punishment should be fixed at imprisonment in the penitentiary during his natural life. While the court did not designate the punishment that the jury was authorized to impose, yet the jury fixed the punishment that was authorized by the law, and we are unable to see how the defendant's rights were prejudiced by reason of the failure of the court to designate the punishment. They were required, as before stated, to find every essential element necessary to constitute the offense of murder of the first degree, and they found the defendant guilty of that offense and fixed his punishment at life imprisonment, and we repeat that we are unable to see upon what theory the defendant could have been injured by reason of the failure of the court to designate the punishment.

8. Finally, it is insisted by appellant that the evidence as developed upon the trial of this cause was insufficient to support the verdict. We have carefully analyzed the testimony as disclosed by the record. It was the exclusive province of the jury to determine the weight of the testimony introduced both by the state and the defendant. If they believed the testimony of the accomplice and some of the other witnesses who testified in the cause, we are of the opinion that such testimony furnished full support to the verdict returned. We are not unmindful that this conviction rests largely upon the testimony of an accomplice, but, unless we have reached that point in the administration of the laws of this state that we are to depart from the uniform rules announced applicable to the testimony of an accomplice and overrule an unbroken line of decisions upon that subject, then there can be no escape from the conclusion that at last it was a question for the jury, with all the facts before them, to pass upon the testimony of the accomplice, as well as the other witnesses, and return a verdict in accordance with the conclusions reached. The witnesses testifying in this cause were before the court and jury, and, as has been repeatedly said, jurors and the courts have opportunities of judging of the credibility of the witnesses and the weight to be attached to their testimony that are not afforded an appellate court. Hence our conclusion is that the verdict of the jury should not be disturbed by reason of the claim of the insufficiency of the testimony.

We have indicated our views upon the legal propositions disclosed by the record, which results in the conclusion that there was no substantial error such as would require this court to reverse and remand this cause. Therefore the judgment of the trial court should be affirmed; and it is so ordered. All concur.

STATE v. LINN.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1908.)

CRIMINAL LAW (§ 1114*)—APPEAL—REVIEW—
ABSENCE OF BILL OF EXCEPTIONS—REVIEW
ON RECORD PROPER.

Where, though the transcript of the record entries on a criminal appeal contained a paper signed by the trial judge with the customary recital in closing bills of exceptions, none of the testimony was preserved, and no exceptions appeared in the transcript, only the record proper will be reviewed, and, that being regular, judgment of conviction will be affirmed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2918, 2921; Dec. Dig. § 1114.*]

Appeal from Criminal Court, Buchanan County; A. W. Lincoln, Special Judge.

David F. Linn was convicted of mayhem, and he appeals. Affirmed.

Frank H. Harl, for appellant. E. W. Major, Atty. Gen., and Jas. T. Blair, Asst. Atty. Gen., for the State.

GANTT, P. J. On the 25th day of November, 1907, the grand jury of Buchanan county returned an indictment charging the defendant, David F. Linn, and another, with the crime of mayhem. On the same date defendant waived formal arraignment, and entered his plea of not guilty. A change of venue from the regular judge was taken, and Hon. A. W. Lincoln of the Greene county criminal court was called in to try the case. A jury was impaneled and sworn, and by their verdict assessed defendant's punishment at 15 years in the penitentiary. Appellant's codefendant was acquitted.

On January 29, 1908, defendant filed his motion for a new trial. This and a motion in arrest were overruled, and judgment and sentence rendered on the verdict, and defendant appealed to this court. By successive orders the time for filing bill of exceptions was extended until the 1st day of November, 1908, term of court. No bill was filed in time, but on December 23, 1908, court and counsel collaborated in an effort to construct an entry which would retroact and close the gap between the 1st day of the November and the 1st day of the March, 1909, term. No bill of exceptions, however, was ever filed; no further entries with reference to the subject appearing. On a separate page appears the court's signature to the customary recital with which it is the practice to close bills of exceptions, but this is the sole particular in which the transcript certified as a "transcript of the files and record entries" intimates that a bill of exceptions was filed.

The indictment was drawn under section 1864, Rev. St. 1890 (Ann. St. 1906, p. 1285), and is a sufficient charge of mayhem. State v. Nerzinger, 119 S. W. 379; Neblett v. State,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

47 Tex. Cr. R. 573, 85 S. W. 813; United States v. Scroggins, 27 Fed. Cases 1000 (No. 16,244); 3 Russell on Crimes, pp. 696 and 698. The arraignment, the impaneling of the jury, and the verdict and sentence are all in due and proper form.

While there is a paper indicating that it is the closing of a bill of exceptions, in fact none of the testimony has been preserved, and none of the so-called exceptions appear in the transcript, and hence we have only the record proper before us for review, and, no error having occurred therein, the judgment is affirmed.

BURGESS and FOX, JJ., concur.

Ex parte GAUSS.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

WITNESSES (§ 297*)—EXAMINATION OF WITNESSES—PRIVILEGE.

Under Const. U. S. Amend. 5, and Const. Mo. art. 2, § 23 (Ann. St. 1906, p. 158), providing that no person shall be compelled in a criminal case to testify against himself, a witness before a grand jury is not compelled to answer questions as to whether he had made a bet on a horse race with a person named, or had given him money to be placed on such a race, or made him the custodian of any such bet, where the witness states that he cannot answer such questions without incriminating himself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1011, 1026-1037; Dec. Dig. § 297.*]

Tony Gauss brings habeas corpus proceedings against Louis Nolte. Petition granted.

T. J. Rowe, T. J. Rowe, Jr., and Henry Rowe, for petitioner. S. G. Jones, Circuit Atty., and F. G. Ferris, Asst. Circuit Atty., for respondent.

GANTT, P. J. The petitioner by this proceeding seeks to be discharged from imprisonment and the custody of the jailer of the city of St. Louis. It appears from the record that the petitioner was committed for contempt by the circuit court of the city of St. Louis for refusing to answer certain questions propounded to him by the grand jury of said city on the 27th day of September, 1909. It appears that in August, 1909, petitioner was arrested for making a wager on a horse race, and on September 30, 1909, he was summoned before the grand jury of the city of St. Louis, and was asked the following questions: "I want to ask you again, Mr. Gauss, on the day that you were arrested, which was some time in August, this year, had you, just prior to your arrest, made or placed a bet with Steve Pensa, at his place of business on Washington avenue, upon the result of a horse race? Q. Did you ever give Steve Pensa, or any other person in his place of business, any money to be placed upon a horse race to be run at any

place within the state of Missouri, or without the state? Q. Have you, at any time within the last three years, made Steve Pensa the custodian of any bet upon the result of a horse race?" The petitioner refused to answer these questions because by so doing he might incriminate himself. Whereupon his refusal was reported to the judge of division No. 10 of the circuit court of the city of St. Louis, who ordered him to answer said questions, and upon his refusal to do so committed him to the jail of the city of St. Louis until such time as he would answer said questions.

The petitioner insists that he is entitled to be discharged from said imprisonment, because the effect of the said judgment and order was to violate section 23 of article 2 of the Constitution of this state (Ann. St. 1906, p. 158), which provides "that no person shall be compelled to testify against himself in a criminal cause," and because said commitment is in violation of that part of the fifth amendment of the Constitution of the United States, which says: "Nor shall any person be compelled in any criminal case to be a witness against himself." In *State v. Young*, 119 Mo. 495, loc. cit. 520, 24 S. W. 1038, 1045, it was said by this court: "The Constitution means more than the protection of the accused on his final trial when his rights are scrupulously guarded by the courts. It as clearly protects him from being forced to testify against himself in any and all preliminary investigation, whether before the coroner, grand jury, or the justice on his preliminary examination. The immunity afforded him by the Constitution is broad enough to protect him against self-incrimination before any tribunal in any proceeding." *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110; *Cullen v. Commonwealth*, 24 Grat. (Va.) 624; *State ex rel. v. Hardware Company*, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676. Learned counsel for the state insists, however, that it is the province of the court to judge whether any direct answer to the question that may be proposed will furnish evidence against the witness. If such answer may disclose a fact which forms the necessary and essential link in the chain of testimony, which would be sufficient to convict him of any crime, he is not bound to answer it, so as to furnish matter for that conviction; but if the question propounded does not disclose upon its face that it will have such tendency, and the witness fails to clearly show to the court how it will have such effect, he may be punished for contempt after he refuses to answer after being directed to do so by the court; and their contention is that the petitioner was not entitled to invoke the protection of the Constitution against answering these questions for the reason, as they say, that it is not, under this act of 1907 (page

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

223) against book making, and pool selling, nor any other law, made a crime for a person to make or place a bet on a horse race, or to make any other person the custodian of a bet upon the result of a horse race. This court, in *Ex parte Arnot Carter*, 186 Mo., loc. cit. 614, 66 S. W. 544, 57 L. R. A. 654, said: "It is reasonable construction of the constitutional provision that the witness is protected from being compelled to disclose the circumstances of his offense, or the sources from which evidence of its commission, or of its connection with it, may be obtained, or make effectual for his conviction, without using his answers as direct admissions against him."

Chief Justice Marshall, when engaged in the trial of Aaron Burr (1 Burr's Trial, 244, 25 Fed. Cas. 40, No. 14,692e), said: "If the question be of such description that an answer to it may or may not criminate the witness, according to the purport of that answer, it must rest with himself, who alone can tell what it would be, to answer the question or not. If, in such a case, he say, upon his oath, that his answer would incriminate himself, the court can demand no other testimony of the fact. * * * According to their statement (the counsel for the United States), a witness can never refuse to answer any question, unless that answer, unconnected with other testimony, would be sufficient to convict him of crime. This would be rendering the rule almost perfectly worthless. Many links frequently compose that chain of testimony which is necessary to convict any individual of a crime. It appears to the court to be the true sense of the rule that no witness is compellable to furnish any one of them against himself. It is certainly not only a possible, but a probable, case that a witness, by disclosing a certain fact, may complete the testimony against himself, and to every effectual purpose accuse himself as entirely as he would by stating every circumstance which would be required for his conviction. That fact of itself might be unavailing; but all other facts without it would be insufficient. While that remains concealed within his own bosom, he is safe; but draw it from thence, and he is exposed to a prosecution. The rule which declares that no man is compellable to accuse himself would most obviously be infringed, by compelling a witness to disclose a fact of this description. What testimony may be possessed, or is attainable, against any individual, the court can never know. It would seem, then, that the court ought never to compel a witness to give an answer, which would disclose a fact that would form a necessary and essential part of a crime, which is punishable by the laws."

Learned counsel for the state seem to conclude that the only possible prosecution that could grow out of an affirmative answer to the questions propounded to the petitioner in this case by the grand jury would be one

for betting on a horse race; but the witness did not limit his reason to any particular offense, but stated that to answer the question would incriminate him. For aught that the court knew, the state may have been in possession of sufficient other evidence to have convicted the petitioner of some other crime if only it could fix upon him that he was present at Pensa's place at a given time, and then and there placed a bet with Pensa upon the result of a horse race, or gave Pensa money at that time to be placed upon a horse race. The meaning of this constitutional provision has time and again been held not to be merely a provision that a person shall not be compelled to testify in a then existing case against himself, but that he shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he himself has committed a crime; and this court has approved a doctrine, announced by Chief Justice Marshall, that, if the question be of such description that an answer to it may or may not incriminate the witness, it must rest with himself, who alone can tell what it would be to answer the question or not. And if, in such case, he say upon his oath that his answer would incriminate himself, the court can demand no other testimony of the fact. This rule, we think, is entirely consistent with the doctrine generally held that where the court can say, as a matter of law, that it is impossible that a witness would incriminate himself by answering a question one way or the other, then the court can require an answer; but we think the question propounded in this case is not such a question, but one which the witness had the right to decline to answer, if, in his opinion, it would incriminate him. To hold that he must have explained all of the other testimony in the case, which would be sufficient to convict him, by an answer to this question, would render the rule entirely worthless. The language of the court in *People v. Mather*, 4 Wend. (N. Y.) 252, 21 Am. Dec. 122, is, we think, very persuasive. Said the court: "When the disclosures he may make can be used against him to prosecute him for a criminal offense or to charge him with penalties or forfeitures, he may stop answering before he arrives at the question, the answer of which may show practically his moral turpitude. The witness knows what the court does not know, and what he cannot communicate without being a self-accuser, and is the judge of the effect of his answer, and if it proves a link in the chain of testimony, which is sufficient to convict him, he is protected by law from answering the question. If there be a series of questions, the answer to all of which would establish his criminality, the party cannot pick out a particular one, and say, if that be put, the answer will not criminate him. If it is one step having a tendency to criminate him, he is not compelled to answer." In *State ex rel. v. Simmons Hardware Com-*

pany, 109 Mo. 118, 18 S. W. 1125, 15 L. R. A. 676, Judge Barclay, speaking for this court, said: "It is a reasonable construction of the constitutional provision that the witness is protected from being compelled to disclose the circumstances of his offense, the source from which, or the means by which, evidence of its commission or of its connection with it may be obtained or made effectual for his conviction without using his answers as direct testimony against him."

In our opinion, the petitioner having testified that he could not answer the questions without incriminating himself, and it not being entirely plain that his answers might not lead to a prosecution of himself, we think the circuit court erred in committing him for contempt in refusing to answer, and he is therefore entitled to be discharged from his imprisonment, and it is so ordered.

BURGESS and FOX, JJ., concur.

Ex parte EICHEL.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

WITNESSES (§ 297*)—EXAMINATION OF WITNESSES—PRIVILEGE.

Under Const. U. S. Amend. 5, and Const. Mo. art. 2, § 23 (Ann. St. 1906, p. 158), providing that no person shall be compelled in a criminal case to testify against himself, a witness before a grand jury is not compelled to answer a question as to whether he ever made a bet with any person other than a person named, on the result of a horse race, where the witness states he cannot answer such question without incriminating himself.

[Ed. Note.—For other cases, see Witnesses. Cent. Dig. §§ 1011, 1026-1037; Dec. Dig. § 297.*]

David Eichel brings habeas corpus proceedings against Louis Nolte. Petition granted.

T. J. Rowe, T. J. Rowe, Jr., and Henry Rowe, for petitioner. S. G. Jones, Circuit Atty., and F. G. Ferris, Asst. Circuit Atty., for respondent.

GANTT, P. J. The petitioner was committed to the jail of the city of St. Louis for contempt of court in refusing to answer a certain question before the grand jury of said city. He was brought before the judge of division No. 10 of the circuit court, and having been ordered to answer the question, and having again refused to do so, was committed to the custody of the jailer until he should answer said question. Thereupon he sued out a writ of habeas corpus in this court.

The question which he refused to answer was the following: "Did you ever make any bet with any person other than one Steve Pensa upon the result of a horse race to be run anywhere in this state, or without the

state, at his place of business on Washington avenue?" The petitioner answered that he could not answer this question without incriminating himself, and the question now presented is whether he was guilty of pertinaciously refusing to answer a lawful question. While counsel for the state has endeavored to draw a distinction between the facts of this case and that of *Ex parte Gauss*, Petitioner (which has been heard and the opinion handed down at this sitting of the court) 122 S. W. 741, we have been unable to make any distinction in the principle which should govern in such a case. We think the witness was entitled to refuse to answer the question after he had disclosed under oath to the court that he could not do so without accusing himself of a crime.

For the reason given in *Ex parte Gauss*, supra, we think the commitment was wrongful, and, accordingly, the prisoner is discharged.

BURGESS and FOX, JJ., concur.

CORCORAN v. WABASH R. CO.

(Kansas City Court of Appeals. Missouri.
Nov. 1, 1909.)

1. RAILROADS (§ 411*)—INJURY TO ANIMALS ON TRACK—FAILURE TO FENCE.

An action against a railroad company for injury to animals on its unfenced right of way in rural territory, under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), requiring railroads to fence their rights of way through uninclosed lands, and section 2867 (page 1649), giving an action for animals killed or injured by railroad cars without proof of negligence, not to apply where the accident occurred on a portion of the road inclosed by a lawful fence, must be bottomed on the omission of the railroad to inclose its track at a place where the law contemplates that it should be inclosed, an inclosure necessarily consisting of lawful fences on each side of the track and of lawful wing fences and cattle guards at the ends of the inclosure, and the intent was not to require a fence on one side of the track at places where it was impracticable to inclose the track, and hence no cause of action exists thereunder, based upon the mere failure of a railroad to inclose a tract of land it owns on one side of the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1443, 1449, 1450; Dec. Dig. § 411.*]

2. RAILROADS (§ 411*)—INJURY TO ANIMALS ON TRACK—BASIS OF LIABILITY.

It is the point at which stock injured by a railroad train enters the right of way that determines the liability or nonliability of the railroad under the statute, and, in the absence of other proof, the place on the track where the animals were injured will be taken as marking the point of entry.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1429-1432; Dec. Dig. § 411.*]

3. RAILROADS (§ 411*) — CATTLE GUARDS — DUTY TO INSTALL.

No liability attaches to a railroad company for failure to put a cattle guard in a place

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

where to do so would endanger the lives or limbs of its employes.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1435, 1439-1442; Dec. Dig. § 411.*]

4. RAILROADS (§ 446*)—CATTLE GUARDS—PLACE OF INSTALLATION—MENACE TO OPERATIVES—QUESTIONS OF LAW AND FACT.

Whether a cattle guard at a given point outside the limits of a town, but near a station, would be a menace to the safety of train operatives in operating trains at the station, is an issue of law where but one inference may be drawn from the evidence, but where essential facts are in dispute, or where the inference from conceded facts must be a subject of difference among reasonable minds, the question is for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1634; Dec. Dig. § 446.*]

Appeal from Circuit Court, Nodaway County; W. C. Ellison, Judge.

Action by John W. Corcoran against the Wabash Railroad Company. There was a judgment for plaintiff, which was set aside and a new trial granted, and plaintiff appeals. Affirmed.

T. A. Cummins and P. L. Growney, for appellant. James L. Minnis and Shinabargar, Blagg & Ellison, for respondent.

JOHNSON, J. A stallion and two fillies owned by plaintiff strayed to defendant's railroad track at a point near the incorporated town of Clyde and were killed by a passing train. Plaintiff brought this suit to recover single damages for the killing of the animals. The cause was tried to a jury resulting in a verdict and judgment for plaintiff. Afterward the court sustained defendant's motion for a new trial on the grounds: "First. That the petition is insufficient to sustain a judgment. Second. That while there was evidence tending to prove the recitals of alleged facts in plaintiff's instructions numbered 1, 2, and 3, each of said instructions erroneously declare the law applicable to the alleged facts therein recited." Dissatisfied with this ruling, plaintiff brought the case here by appeal. The evidence is not in the record before us, and the facts we must consider in the determination of the questions of law argued in the briefs are to be gleaned from the petition and the instructions mentioned in the order granting a new trial.

The petition is as follows: "Plaintiff for his second cause of action states that on May 13, 1906, defendant was, and now is, a corporation running and operating a railroad through Nodaway county, state of Missouri, and by and through a station designated Clyde on its said railroad in said county. That adjoining its depot grounds at said station to the west thereof and on the north side of its track or roadbed, defendant maintained a scope of right of way 150 feet by 200 feet, unused by defendant and unfenced, forming a pocket or cul-de-

sac, and at date herein complained of was overgrown with succulent grasses, inviting to live stock, to graze thereon. That on said date, in said county, in close proximity to said station of Clyde, plaintiff was the owner of certain live stock, to wit, one iron gray stallion, two years old, and two mare colts one year old, commonly called 'fillies'; said stallion of the value of \$300, and said fillies of the value of \$100, each. That on said date said stallion and fillies strayed and went in and upon the right of way grounds and railroad track of defendant, at a point immediately west of said station on the 150 by 200 feet of unfenced right of way described as aforesaid, and from thence onto the unfenced track of defendant at said point and place, and were struck by a locomotive and train of cars, then and there run and operated by defendant, killing one of said fillies outright, and so injuring and maiming the said stallion that he died soon thereafter, and did cripple and injure the other filly so as to render her wholly worthless and valueless to plaintiff. That defendant might have fenced, and should have fenced, the space of right of way aforesaid so as to prevent horses and other live stock from going thereon, but had negligently failed to do so. That said portion of said right of way and track was not within the limits of any incorporated or platted town or village and not within necessary switch limits. That wholly by reason of said right of way being unfenced, said stock (stallion and fillies) did go thereon, and from thence onto the track of defendant, and were injured and killed as aforesaid, to plaintiff's damage in the value of the animals aforesaid, to wit, the sum of \$500. Wherefore he prays judgment for said sum of \$500 and costs of suit therefor."

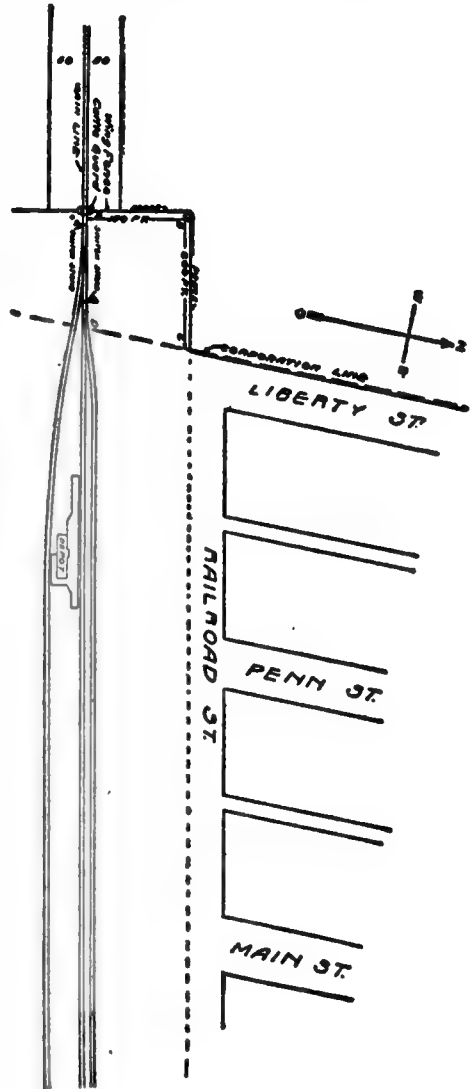
The three instructions given at the request of plaintiff and afterward pronounced to be erroneous in the order granting a new trial are as follows: "(1) The court instructs the jury that, though you may believe from the evidence that plaintiff's horses were killed or injured within the switch limits of defendant's station of Clyde, and that said switch limits were not in excess of such reasonable length as to enable defendant to conveniently carry on its business at said station, yet you are instructed that, beyond the necessary station or depot grounds at said station, the defendant was required to fence its right of way on the sides of its lines of track so near to its line of track as not to interfere with its employes or endanger their safety in making switches and handling its trains, provided same is outside of the corporate limits of said station and not intersected by any platted streets or public crossing; and if you find from the evidence that, beyond the limits of reasonably necessary depot or station ground at said

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

station, and outside of the corporate line or limit, there extended a strip of right of way about 150 feet wide parallel with said track on the north side thereof to the west switch limit or cattle guard a distance of about 200 feet, and that the same, including the track, was unfenced and open, and said strip was not reasonably necessary for use in connection with its switch limits as aforesaid, and that said strip of right of way formed an inviting pasturage for stock on May 13, 1906, and that plaintiff's horses entered on such unfenced right of way at said date and from thence onto defendant's track, and were killed and injured, you will find for plaintiff and assess his damages at the value of the animals killed or injured, as you may believe from the evidence they were reasonably worth at the time, the ones killed at their reasonable value, and the one injured to the extent of the injury, not to exceed \$300 for the stallion and \$100 for the filly killed, and not to exceed \$50 for the filly injured, not to exceed the total value of \$450. (2) The court instructs the jury that defendant is not required to fence its track within reasonable switch limits at a station on its line of railroad, or to fence its right of way so close to said tracks as to endanger the safety of its employes in handling its trains and transacting the lawful business of the company at a station, but is not permitted to leave open right of way ground on the sides of its track that are unused and unnecessary for the purposes aforesaid; and if you find from the evidence in this case that defendant did leave unfenced right of way ground at the point complained of that was not used or necessary for the purposes aforesaid, and that solely by reason of such unfenced right of way grounds plaintiff's horses strayed or entered thereon and from thence onto defendant's track and were killed or injured, you will find for plaintiff in such sum as you may find from the evidence to be the value of such horses as were killed and any injured to the extent of the injury, not to exceed the total value of \$450. (3) The court instructs the jury that defendant is not permitted to leave more unfenced track and right of way at its station than is reasonably necessary for depot and station ground for the convenient transaction of business between the public and said railroad, in the reception and discharge of freight and passengers at said point, and not more unfenced right of way and track for switch limits than is reasonably necessary for unimpeded use by its employes in making switches and handling its trains, and if you find from the evidence that defendant left more ground at said station outside of that used or needed for the purposes aforesaid, and outside of the corporate limits of said town, and that solely by reason of such unfenced ground and track plaintiff's horses strayed or entered thereon and were

killed and injured by an engine or train of defendant operated thereon by defendant, you will find for plaintiff and assess his damages at the value of the animals killed, as you may find from the evidence, and damage to any animal injured to the extent of such injury, not to exceed the total value of \$450."

From the facts stated in the petition and submitted in the instructions, as well as from the statements in the briefs of counsel, we assume that the subjoined plat copied from the brief of defendant's counsel correctly represents the locality in question:



The material facts collected from the sources of information to which we have referred thus may be stated: The railroad runs in an easterly and westerly direction through Clyde, an incorporated town. A station, station grounds, and switch tracks

are maintained in the limits of the town; but the western apex of the switch tracks is about 200 feet west of the limits and is in rural territory. Immediately west of the switch apex is a cattle guard and wing fences, and from thence west, the track is inclosed. East of the cattle guard the track is not inclosed. Defendant owns a square of land just north of its track and west of the corporation line. This track is 200 feet east and west by 150 feet north and south. Defendant extended its wing fence to the northwest corner of this square to a junction with a fence from that point east to the corporation line. No fence is on the eastern or southern boundary lines. It is alleged that the animals of plaintiff strayed into the pocket thus formed, attracted by the grass and vegetation, and, no barrier being interposed, went onto the railroad track and were killed.

It will be observed that the gravamen of the cause of action pleaded in the petition and submitted in the instructions is not the failure of the defendant to inclose its track "where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed lands," but consists entirely of the omission of defendant to inclose a tract of land it owned on one side of the track. Under the theory of the cause of action asserted, it may have been impracticable, and therefore not required of defendant, to place the eastern end of its track inclosure at the point where the town limit bisects the railroad tracks, instead of placing it at a point 200 feet west of that line, and still defendant would be required by law to inclose its land on the north side of the track which intervened between the corporation line and the nearest practicable point for the inclosure of the track. We regard this theory as being without support either in the statute or common law. Where, as in the case before us, the place where the stock entered the right of way is in rural territory, the cause of action to be maintainable (sections 1105 and 2867, Rev. St. 1899 [pages 945, 1649, Ann. St. 1906]) must be bottomed on the omission of the defendant to inclose its track at a place where the law contemplates it should be inclosed. Now an inclosure necessarily consists of lawful fences on each side of the track and of lawful wing fences and cattle guards at the ends of the inclosure. There cannot be an inclosure if only one side of the track be fenced, and manifestly the Legislature in the statute dealing with the subject had no thought of requiring a fence to be built on one side of the track at places where it was impracticable to inclose the track. Such a practice, instead of affording protection to trains and live stock,

would lay traps to catch and hold straying animals and put them in the way of passing trains. The law recognizes no such cause of action as that pleaded in the petition and submitted in the instructions, and the action of the learned trial judge in granting a new trial on the grounds stated was proper.

Notwithstanding the petition fails, as we have shown, to state a cause of action, we think it may be amended to state a good cause predicated on the absence of an inclosure where the track should have been inclosed. Though it appears from the facts before us that the switch tracks extended no further into rural territory than was necessary to the proper transaction of defendant's business at Clyde, the proof adduced by plaintiff might present that question as one of fact for the jury to solve; and, should it develop as a matter of law that the switch tracks as maintained were proper and necessary, the further issue might be raised by evidence that the east end of the track inclosure could have been placed as far east as the corporation line without endangering the lives and safety of train operatives. Such issue is to be treated as one of law for the court or as one of fact for the jury by the application of the following rules: It is the point at which the stock enters the right of way that determines the liability or nonliability in such cases. *Kirkpatrick v. Railroad*, 120 Mo. App. 418, 96 S. W. 1036; *Snider v. Railway*, 73 Mo. 465; *Acord v. Railway*, 113 Mo. App. 84, 87 S. W. 537. And in the absence of other proof the place on the track where the animals were killed will be taken as marking the point of entry on the right of way. No liability attaches to a railroad company for failure to put a cattle guard in a place where to do so would endanger the lives or limbs of its employees. *Gilpin v. Railway*, 197 Mo. 319, 94 S. W. 869; *Bridges v. Railway*, 132 Mo. App. 576, 112 S. W. 37; *Edle v. Railroad*, 133 Mo. App. 9, 112 S. W. 993. The issue of whether a cattle guard placed at a given point outside the limits of a town, but near a station, would be a menace to the safety of train operatives in performing necessary work in the operation of trains and cars, etc., at the station, is one of law for the court in cases where but one inference may be drawn from the evidence; but "where essential facts are in dispute, or where the inference to be drawn from conceded facts might be a subject of difference among reasonable minds, the question of whether a necessity did exist for the tracks to be uninclosed at the point in controversy should be sent to the jury as an issue of fact." *Edle v. Railroad*, *supra*.

It follows from what we have said that the judgment must be affirmed. All concur.

ENGLISH v. ROBERTS, JOHNSON &
RAND SHOE CO.

(St. Louis Court of Appeals. Missouri. Nov. 18, 1909. Rehearing Denied Nov. 30, 1909.)

1. MASTER AND SERVANT (§ 149*)—INJURY TO SERVANT—NEGLIGENCE IN GIVING ORDERS.

The master, superior servant, or vice principal may give such orders about the work as are essential to induce a prompt and attentive discharge of the duties imposed on the servant without breaching the obligation to exercise ordinary care for the safety of the servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 291; Dec. Dig. § 149.*]

2. MASTER AND SERVANT (§ 149*)—INJURY TO SERVANT—NEGLIGENCE IN GIVING ORDERS.

An order to hurry up the work is not negligence unless it tends to subject the servant to a hazard not ordinarily incident to the work, or operates to excite or disconcert him, so that he is unable to exercise due care for his own safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 291; Dec. Dig. § 149.*]

3. MASTER AND SERVANT (§ 190*)—INJURY TO SERVANT—ORDERS OF SUPERIOR SERVANT.

Where a servant is injured through the negligence of a superior servant in exercising the authority of the master by negligently directing the performance of a dangerous task, the master is prima facie liable for the injury if the injured servant was in the exercise of due care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 439; Dec. Dig. § 190.*]

4. MASTER AND SERVANT (§ 188*)—INJURY TO SERVANT—NEGLIGENCE OF SUPERIOR SERVANT.

Where a servant is injured through the negligence of a superior servant in the performance of a duty of the master, a ground of action against the master is prima facie shown.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 436; Dec. Dig. § 188.*]

5. MASTER AND SERVANT (§ 216*)—INJURY TO SERVANT—NEGLIGENCE OF SUPERIOR SERVANT—ASSUMPTION OF RISK.

Where two servants are working together in the performance of a common task, and the inferior servant is injured by the negligence of the superior in the performance of an act incident to the common employment, the master is not liable, as the risk ordinarily incident to the employment was assumed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 570; Dec. Dig. § 216.*]

6. MASTER AND SERVANT (§ 103*)—INJURY TO SERVANT—DUTY OF MASTER AS TO PLACE FOR WORK.

It is an absolute duty of a master which he cannot delegate to furnish his employé a reasonably safe place in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

7. MASTER AND SERVANT (§ 188*)—INJURY TO SERVANT—ACTS OF SUPERIOR SERVANT.

It is the character of the act complained of, and not the rank of the servant, which determines the master's liability for the acts of a servant occupying the dual capacity of fellow and also superior servant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 436; Dec. Dig. § 188.*]

8. MASTER AND SERVANT (§ 103*)—INJURY TO SERVANT—DELEGATION OF DUTIES.

Where the master intrusts to another a duty which he cannot delegate, and such other neglects the same and a servant is injured, the

master is liable, irrespective of the character of the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

9. MASTER AND SERVANT (§ 103*)—INJURY TO SERVANT—DELEGATION OF DUTY.

A master cannot delegate to another, so as to relieve himself from liability for a breach thereof, the duty to furnish a reasonably safe place to work, reasonably safe tools and appliances, reasonable rules governing the work, competent fellow servants, and proper direction and control of the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.*]

10. MASTER AND SERVANT (§ 190*)—INJURY TO SERVANT—ACTS OF SUPERIOR AND INFERIOR SERVANT.

A servant injured by the acts of another occupying the dual capacity of superior and fellow servant cannot recover against the master without showing that the injury resulted from an act in the exercise of the authority of the master distinct from any manual act in the common employment, unless such act operated as a breach of a nondelegable duty of the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 450; Dec. Dig. § 190.*]

11. MASTER AND SERVANT (§ 190*)—INJURY TO SERVANT—ACT OF SUPERIOR SERVANT.

The act of one occupying the dual capacity of superior and fellow servant in prematurely starting a machine at which both he and plaintiff worked, resulting in plaintiff's injury, was in the capacity of fellow servant for which the master is not liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 450; Dec. Dig. § 190.*]

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action for personal injuries by Arthur E. English, by his next friend, against the Roberts, Johnson & Rand Shoe Company. From a judgment for plaintiff, defendant appeals. Reversed.

Merritt U. Hayden, for appellant. C. W. Rutledge, for respondent.

NORTON, J. This is a suit for damages accrued to plaintiff on account of personal injuries alleged to have been inflicted upon him through defendant's negligence while plaintiff was engaged in feeding a heeling machine in defendant's shoe factory. The plaintiff recovered, and the defendant appeals.

It appears that the plaintiff was a boy about 15 years of age. He had had several months' experience in feeding and operating a heeling machine in the defendant's and other shoe factories; that is, he had worked for a number of months with a machine identical with the one on which he was injured, and was entirely familiar with its construction and mode of operation. He applied to the defendant's foreman for a position a day or two before he was injured, and, upon being given employment, was assigned to feed a machine in charge of and being operated by one Thein. Thein, too, was a boy of about the same age as the plaintiff. He had been engaged for a considerable peri-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

od in operating the machine referred to, and was entirely familiar therewith. There is no controversy in the case as to the competency of Thein. The evidence tends to prove that Thein, if not a vice principal, was at least a superior servant of the defendant, and as such had charge of the particular heeling machine mentioned, and was given authority to direct the plaintiff where to work and how to work, etc. The plaintiff was instructed to do what Thein bade him to do, and to assist him in and about the operation of the machine in Thein's charge. The machine was an appliance for the purpose of affixing heels to shoes in the course of manufacture. It was the duty of Thein to operate this machine by placing his foot upon a pedal, thereby causing a plunger to strike the heel of the shoe resting in the machine, and thus drive the nails essential to affix the heel thereto. It was the plaintiff's duty to insert the heel into the machine with his hand. It appears that the two operated the machine together, each performing manual labor concurrently to that end. While the plaintiff was in the act of inserting a shoe heel for the purpose mentioned, Thein, the superior servant, placed his foot upon the pedal, and caused the plunger or hammer to descend upon the heel, which act resulted in crushing plaintiff's fingers between the heel and the sole of the shoe. A short time prior to receiving his injuries the plaintiff informed Thein that he had been feeding a heeling machine at another factory, and that they only heeled about 18 cases of shoes per day where he had been working; that he was accustomed to feed a machine in heeling 18 cases a day. Thein replied substantially that the plaintiff would be required to work faster than that, as they were accustomed to heeling and turning out 60 cases of shoes per day in defendant's factory. About five minutes before the plaintiff received his injury, Thein instructed him to hurry up with the work, to the end that they might finish their task, and go out and walk around a while. This alleged order to hurry up, according to the plaintiff's testimony, was given about five minutes before the plaintiff was injured, and he says that he was hurrying with the work when he received the injury mentioned. The suit predicates, in part, upon the order of Thein to plaintiff to hurry up with the work and in part upon the fact that Thein negligently operated the machine at a rate of speed much faster than the plaintiff was accustomed to attend the same. The court refused to peremptorily direct a verdict for the defendant, and referred the case to the jury under instructions permitting a recovery for plaintiff if the jury found that he was exercising due care on his part, and that he received his injury through the negligence of Thein in ordering him to hurry up five minutes before his injury and in operating the machine more rapidly than the plaintiff was accustomed to work.

It is argued here on the part of the defendant that the evidence conclusively shows plaintiff received his injuries through the negligence of Thein in his capacity as a fellow servant of the plaintiff by the manual act of starting the machine while the plaintiff was inserting a shoe heel, and that there is no evidence tending to show that plaintiff received his injury through the negligence of Thein, the superior servant, in respect of any of the absolute duties of the master. It is said, too, that, conceding Thein to have been a vice principal, the mere order to hurry given five minutes before in no manner breached the obligation of the master to exercise ordinary care for the plaintiff's safety. Now, as a general proposition, the master, the superior servant or vice principal, may give such usual and customary orders in and about the business he is prosecuting and within the scope of the employment as are essential to induce a prompt and attentive discharge of the duties imposed by the contract of service, without breaching the obligation to exercise ordinary care for the safety of the servant. A mere order to hurry or to be quick in the performance of labor in and of itself is not negligence. Such, generally speaking, is a usual and proper exercise of authority. *Coyne v. U. P. R. R. Co.*, 133 U. S. 370, 10 Sup. Ct. 382, 33 L. Ed. 651; *Ruchinsky v. French*, 168 Mass. 68, 46 N. E. 417; *Herold v. Pfister*, 92 Wis. 417, 66 N. W. 355. Indeed, on this question the authorities go to the effect that a mere order to hurry up with the task is not negligence unless it tends to subject the party to an extraordinary hazard; that is, a hazard not ordinarily incident to the employment or operates to excite, distract, or disconcert the employé to such an extent as renders him unable to exercise due care for his own safety. *Sambos v. Cleveland, Cincinnati, etc., R. R. Co.*, 134 Mo. App. 460-467, 114 S. W. 567; *Saller v. Friedman Bros. Shoe Co.*, 130 Mo. App. 712, 109 S. W. 794. Now, there is not a word in the testimony in this case to the effect that the plaintiff became in the least excited, distracted, or disconcerted on account of the order referred to, and certainly nothing appears to the effect that his injury was received through any extraordinary hazard in the operation of the machine. Indeed, we are unable to perceive any causal connection whatever between the order to hurry with the work and the injury which plaintiff received five minutes thereafter. In truth, the injury befell him because his movement lagged, and not because he was hurrying. Had he inserted the heels in the machine as fast as his co-employé, Thein, operated the same, the injury would not have occurred. Now, the rule of liability announced in the plaintiff's first instruction is to the effect that the defendant should be held to respond for the injury if Thein directed the operation of the machine and operated said machine faster than the jury

might believe from the evidence was safe to the plaintiff in performing his work. This rule seems to couple the fact that Thein, the superior servant, directed the operation of the machine, and the fact that he operated the machine faster than plaintiff was accustomed to work, as equivalent elements of liability. We do not so understand the law with respect to those injuries which befall one servant through the negligent act of another servant occupying a dual status of employment and collaborating with the injured party. There can be no doubt that the dual capacity doctrine obtains in this state, and it is true that, if one servant is injured through the negligence of a superior servant in exercising the authority of the master by negligently directing the performance of a dangerous task, a *prima facie* ground of liability may be established, provided the injured party exercised due care for his own safety. *Fogarty v. St. Louis Transfer Co.*, 180 Mo. 490, 79 S. W. 664; *Bane v. Irwin*, 172 Mo. 306, 72 S. W. 522; *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297, 91 S. W. 460. And it is true, too, that where one servant is injured through the negligence of a superior servant or vice principal in the performance of a manual act which inheres with the authority of the master a ground of liability is *prima facie* shown. Such was the case of *Fogarty v. Transfer Co.*, *supra*. However, where two persons in the employ of a common master are working together in the performance of a common task, as was the plaintiff and Thein here, and the inferior servant is injured through the negligence of the superior servant, in the performance of a mere manual act of service incident to the common employment, then no liability for the hurt obtains against the master, for the reason such is a risk ordinarily incident to the employment, and, as such, is assumed. Such a risk is assumed in contemplation of law as within the contract of service. *Bane v. Irwin*, 172 Mo. 306, 317, 72 S. W. 522. Indeed, it is true there are cases in this state which indicate that, when a servant is injured by the negligent manual act of a vice principal engaged in jointly performing labors with an inferior servant incident to the common employment, the master may be liable therefor. Such are the cases of *Dayharsh v. H. & St. Jo. R. R.*, 108 Mo. 576, 15 S. W. 554, 23 Am. St. Rep. 900, and *Hollweg v. Bell Tel. Co.*, 195 Mo. 149, 93 S. W. 262. Some of the language employed in the opinions in these cases purports the doctrine of the master's liability broader than it obtains. However, when these cases are carefully scrutinized, they may be reconciled with the established law on the subject by reference to the doctrine of a reasonably safe place to work; for it is one of the absolute duties of a master, which he may not delegate, to furnish his servant a reasonably safe place in which to perform his labor.

In *Fogarty v. St. Louis Transfer Co.*, *su-*

pra, the Supreme Court pointed out the fact that, although the language employed in the opinion in the *Dayharsh* Case purported a broader ground of liability, the judgment of the court therein should be hereafter treated as resting on the doctrine of the safe place. The same may be said with respect to *Hollweg v. Bell Tel. Co.*, as was recently pointed out by Judge Goode in *McIntyre v. Tebbetts* (Mo. App.) 120 S. W. 621. Notwithstanding what was said in those cases, the doctrine is firmly established in this state with respect to the master's liability asserted on the grounds of negligence in a servant occupying a dual capacity to the effect that it is the character of the act, and not the rank of the servant, which determines the liability or nonliability in a given instance. *Fogarty v. Transfer Co.*, 180 Mo. 490, 79 S. W. 664; *Bane v. Irwin*, 172 Mo. 306, 72 S. W. 522; *Rigsby v. Oil Well Supply Co.*, 115 Mo. App. 297, 91 S. W. 460; *McIntyre v. Tebbetts* (Mo. App.) 120 S. W. 621; *Baltimore & Ohio R. R. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. Of course, this doctrine is limited in its application to those cases where there is no breach of a positive duty on the part of the master. There are certain nondelegable duties which the master owes to the servant, and, if the servant is injured through the failure of the master to exercise ordinary care with respect to these duties, then liability obtains therefor, even though the neglect was that of a servant; that is to say, if the master intrusts the performance of any one or more of his nondelegable and nonassignable duties to a servant and such servant neglects the same, or through negligent performance of such nondelegable duties injures another, liability obtains against the master therefor irrespective of the character of the act; this for the reason that the duty is a positive personal and continuing duty resting upon the master which he may not shift or escape by delegation to another. *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772. See, also, a most instructive and lucid article on the subject by Judge John F. Dillon in 24 Am. Law Review, 175. Among these nondelegable duties of the master is the duty to furnish the servant a reasonably safe place in which to work and reasonably safe appliances with which to work; good and reasonable rules to govern the employment, competent fellow servants, and, it seems, too, in Missouri, although not generally, the doctrine obtains to the effect that it is a personal nondelegable duty of the master to direct and control the work, and therefore, if he gives one servant power and authority to direct other servants where to work and how to work and what to do in and about the work, the master thus commits to such servant the performance of an absolute nondelegable duty which rests upon himself. *Miller v. Railroad*, 109 Mo. 357, 19 S. W. 53, 32 Am. St. Rep. 673; *Schroeder v. C. & A. R. R. Co.*, 108 Mo. 322,

18 S. W. 1094, 18 L. R. A. 827. Therefore the plaintiff is entitled to recover in this case only on its appearing that he received his injury as a result of the negligence of Thein, the superior servant, in exercising the authority of the master, separate and apart from the performance of a manual act of the common employment, unless such manual act operated a breach of a nondelegable duty of the master. Now, there is no claim whatever to the effect that the place in which the parties were working was unsafe or that the appliance was not reasonably sufficient for the purpose, or that Thein was an incompetent servant. In other words, there is no pretense that any nondelegable duty of the master was breached by Thein other than that he gave a negligent order to hurry which, operating together with his manual act of placing his foot upon the pedal and starting the machine before the plaintiff had removed his hand therefrom, after inserting a heel, resulted in the injury. As to the order complained of, it is obviously not a negligent one, for nothing whatever appears to indicate that it either disconcerted, distracted, or excited the plaintiff, or that its performance entailed upon him an extraordinary hazard; that is, a hazard not ordinarily incident to the service. In truth, the order amounted to no more than a remark by Thein to his companion to hurry up so that they might complete the task and go out and walk around a while. It therefore results that the plaintiff received his injury, not as the result of a negligent order, but, on the contrary, as a result of the manual act of Thein in placing his foot upon the pedal and prematurely starting the machine. This was an act of common service performed in his capacity as collaborator with the plaintiff, and, as such, was a risk ordinarily incident to the employment which the plaintiff assumed upon entering therein. The order referred to, even if negligent, was certainly not the proximate cause of the injury. In truth, we do not perceive that it contributed remotely to the plaintiff's injury.

The judgment should be reversed. All concur.

PHOENIX DUSTER & MFG. CO. v. LANDAU GROCERY CO.

(St. Louis Court of Appeals, Missouri. Nov. 17, 1909.)

SALES (§§ 359, 383*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an action to recover the price of goods sold and delivered and to recover profits lost by reason of defendant's refusal to take a part of the goods ordered held sufficient to sustain the judgment for plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1056-1059, 1097; Dec. Dig. §§ 359, 383*.]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action by the Phoenix Duster & Manufacturing Company against the Landau Grocery Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Nagel & Kirby, for appellant. Lee W. Grant and P. B. Kennedy, for respondent.

GOODE, J. Plaintiff is engaged in the manufacture of dusters, of its own patent, of manilla paper attached to handles either of wire or wood. The president of plaintiff, R. N. Fickett, called at defendant's place of business to sell defendant, which is engaged in the wholesale grocery business in St. Louis, some of the dusters. He sold defendant 100 gross; 75 gross being shipped at once; but, before the other 25 gross were shipped, defendant countermanded the order on the ground the sale had been induced by false representations in these regards: First, that the dusters were a novel article and never had been sold before in St. Louis, and, second, "were good sellers." Some correspondence ensued between the parties regarding the transaction, but, having failed to settle the dispute amicably, plaintiff instituted the present action in two counts, seeking in the first to recover \$937.50, the purchase price of 75 gross of dusters actually shipped to defendant and received by it, and \$250, the profit on the 25 gross which were not delivered. As instituted it was an action at law, but the answer filed by defendant was treated by both parties as converting the cause into one in the nature of a suit in equity. We will not say whether, in our opinion, the answer had this effect, being merely one to rescind the contract, but will treat the case as the parties did. The answer admitted the purchase of the dusters, and set up the contract was induced by fraudulent representations as stated, asked the court to decree its rescission, and tendered to plaintiff payment for some seven gross of dusters defendant had disposed of before it ascertained the alleged fraud in the sale. On the testimony the court entered judgment for plaintiff, finding against the defense of fraud. Defendant appealed, and contends the judgment was against the weight of the evidence, and, as the suit is in equity, this court ought to review the evidence and reverse it.

The main point of fact at issue was whether Fickett represented the dusters with wood handles, as all purchased by defendant were, were a novelty and never had been sold in St. Louis, as he asserted, or whether he represented that neither those with wood handles nor those with wire handles had been sold in the St. Louis market. It is conceded dusters of this pattern with wood handles had not been sold before in St. Louis, and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that those with wire handles had for seven or eight years; and defendant contends, in substance, the latter species had proved so unsatisfactory that those with wood handles did not find a good market. Fickett testified the only representation he made regarding the novelty of the articles in St. Louis was that the dusters with wood handles never had been sold there. He testified, further, he distinctly told Landau, the purchasing agent of defendant, the wire handled dusters had been "variously" sold in St. Louis. On the other hand, the testimony for defendant tends to prove Fickett's representation related to both dusters, and that, when he made it, he had both kinds in his hands, was striking them against a chair to show how they worked, and while he did this said the dusters were a novelty, meaning both of them, and never had been sold before in St. Louis. Defendant wished to obtain an exclusive market in St. Louis, and bargained for this for four months. The contract between the parties, written on a blank form, with insertions and interlinings in pencil, is set forth: "This contract made this 7th day of Oct., 1907, between Phoenix Duster & Manufacturing Co., of Atlanta, Ga., party of the first part, and Landau Grocery Co., of * * * party of the second part, witness: Said party of the first part has this day sold party of the second part 100 gross of their 5½ oz. Phoenix patent dusters, at \$12.50 per gross, f. o. b. Atlanta, Ga. The said party of the first part agreeing to sell or retail but no other wholesale houses in said St. Louis for 4 months from this date (sic). Party of the second part agrees in view of the concessions made in this contract to push sale of said dusters, and should they fail to do so then said party of the first part is privileged to sell other firms. It is distinctly understood that there are no other conditions, verbal or otherwise, not named in this contract. No agent or other person is authorized to make any statements or agreements that will affect this contract unless they are embodied in it in writing. It is further understood that this contract is accepted by party of the first part contingent to strikes, fires or inability to get stock. 75 Gro. once Bal. when order out. 1 Gro. Grats. [Signed] Landau Grocery Co., per L. Landau., Prest. Phoenix Duster & Manufacturing Co."

If the number of witnesses must control the decision of the point, the finding of the court below as to the representation made by Fickett would be against the weight of the evidence; for two or three witnesses testified the facts were as contended by defendant, whereas Fickett's testimony that his statement related only to the wood-handled dusters, and he advised defendant the wire-handled dusters "had been previously sold in St. Louis," was uncorroborated by any other witness. But it is to be remembered

the witnesses who testified for defendant were its officials and employees, and we are not so convinced their narrative of the affair was correct as to overrule the court below, who had the advantage of seeing the manner of the witnesses on the stand. The discreeter policy in this cause is to defer to the judgment of the chancellor, as we find indications in the record that he weighed the testimony rightly. The impression we derive is that defendant became dissatisfied because it had overbought, as a panic came on in October, 1907, and money was scarce; the St. Louis banks refusing to cash checks. Defendant did not ask rescission of the contract when it first discovered it had been imposed on, as it now alleges, but in a letter dated October 30, 1907, one week after the contract was made, said, in effect, that had defendant known of the prior sales in St. Louis it would not have bought so many. This portion of the letter reads as follows: "Under the circumstances, we cannot use this large quantity. We would not have bought this large quantity, but he insisted that we had the exclusive sale here and same was never introduced here before, and same would be sold in thirty days. Had he told us the truth, we would have taken five gross, and we are willing to accept that many, and we hold the balance subject to your order. If this is satisfactory to you, we will remit for the five gross, and we will keep the balance here and you can dispose of them and forward them from here wherever you placed them, as we will not accept them since your representative had the audacity to come to our office and lie to us the way he did." It was not until November 12th defendant declared the contract rescinded. On consideration of the whole evidence, we will leave the decision as the court below rendered it.

The representation, regarding the duster being a good seller, was not proved to have been either false or fraudulent. Defendant sold six or seven gross of the dusters in a week, and at the same rate of sale would have disposed of about all it bought during the four months it was granted an exclusive market.

The judgment is affirmed. All concur.

HANDLAN v. MILLER.

(St. Louis Court of Appeals. Missouri. Nov. 2, 1909. Rehearing Denied Nov. 16, 1909.)

1. **BROKERS (§ 8*)—EVIDENCE AS TO AGENCY.** Evidence, in an action by plaintiff to recover one-half of the total amount of commission received by defendant for negotiating the sale of steel rails, held sufficient to sustain a verdict for plaintiff.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 8.*]

2. PLEADING (§ 378*)—ISSUES—ANSWER—GENERAL DENIAL.

An answer containing a general denial only puts in issue all the affirmations of the petition to which it refers.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1232-1234; Dec. Dig. § 378.*]

3. PRINCIPAL AND AGENT (§ 22*)—PROOF OF AGENCY.

Agency cannot be established by statements of the agent to third parties.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

4. BROKERS (§ 86*)—EVIDENCE OF AGENCY.

Evidence, in an action by plaintiff to recover of defendant one-half of the amount of a commission received by defendant for making sale of a quantity of steel rails, *held* to sustain a finding by the jury that there was an agreement between the parties to divide commissions.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 86.*]

5. BROKERS (§ 86*)—EVIDENCE OF RELATION—QUESTION OF FACT.

Evidence, in an action by plaintiff to recover of defendant one-half of the commission received by defendant for making sale of a quantity of steel rails, *held* to sustain a finding that plaintiff, who was president of a corporation, acted in the particular transaction for himself.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 86.*]

6. TRIAL (§ 237*)—INSTRUCTIONS.

An instruction, on the preponderance of evidence, that plaintiff was required to establish his case by a preponderance of the evidence, that if the evidence was evenly balanced, and the jury were in doubt as to its preponderance, or if it favored the defendant, their verdict should be for the defendant, sufficiently covered the subject.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 542, 548-551; Dec. Dig. § 237.*]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action by Alexander H. Handlan against Joseph G. Miller. From a judgment for plaintiff, defendant appeals. Affirmed.

This is a suit brought by plaintiff, Handlan, against the defendant, Miller. The petition declares on an alleged contract to the effect that, if plaintiff would furnish defendant with information which would lead to the sale by or through defendant of steel rails and angle bars, defendant would divide with plaintiff equally whatever commission defendant made through such sale. Averring that plaintiff gave the information, and that defendant made the sale and had been paid a commission of \$1,587.44 thereon, plaintiff sues for one-half thereof, averring demand and refusal to pay any part. The answer was a general denial. Trial before a court and jury.

There was testimony to the effect that plaintiff was connected with and an officer of a company known as the "Handlan-Buck Manufacturing Company," he being the president thereof, and while defendant's testimony was to the effect that plaintiff was not acting in this matter for himself, but for

his corporation, and had so been understood by the defendant, plaintiff's testimony is to the effect that in the transaction involved he was acting for himself, and not for his corporation. There was testimony to the effect that plaintiff had sent an agent to the office of defendant to see whether an arrangement looking to a division of commissions on sales, made to any party whose name would be given to defendant's representative by plaintiff, could be made. Defendant himself was absent from the office at the time. There is no pretense of testimony that the arrangement was made with defendant direct, but whatever arrangement was made was made with a Mr. Irwin, a salesman for the defendant. There is testimony to the effect: That plaintiff's agent went to the office of defendant and stated the general object of his call to the man who was in charge of it. This man referred him to Mr. Irwin as the proper person to see about the matter in the absence of defendant. That plaintiff's agent or messenger saw Mr. Irwin there in defendant's place of business, and, telling him generally what he had come for, asked him to call on him and take up the matter with Mr. Handlan. That Irwin, accordingly, went to the office of the Handlan-Buck Manufacturing Company, and, seeing the agent who had before called on him, was referred by him to Mr. Handlan, who was sitting in the office, and that Irwin told him he had come there to take up the matter concerning which he had been approached, told Handlan that his (Handlan's) agent, Mr. Roubidoux, had referred him to him (Handlan) to figure on some rails with him that Handlan had an inquiry or customer for, and that Irwin said that if they—that is, defendant's firm—were not dealing with the same party, or did not have an inquiry from the same party, they would divide their commission with him (Handlan). That Handlan asked him if he would divide his commissions on these rails, provided they were not bidding on them, and he said they certainly would. Whereupon Handlan told Irwin what road it was that wanted the rails, and Irwin told Handlan that they—that is, defendant's firm—were not bidding with that railroad on these rails. The testimony on part of plaintiff further tended to show that, after the name of the party to whom a sale was ultimately made was given to defendant's agent by the plaintiff, the sale was made to that party by defendant, plaintiff co-operating, and that the commission received thereon by defendant was \$1,587.44; one-half of which amount, \$793.72, being claimed as plaintiff's share of the commission. The defendant himself and his agent, Irwin, were examined as witnesses for plaintiff, and while the witness Irwin gave testimony tending to show that he had held himself out as agent for defendant to plaintiff, and had acted for

defendant in the matter, and had cards printed on which he described himself as "manager," defendant himself testified that Irwin had no such authority, had not told him of any arrangement as to commissions being made on his behalf with plaintiff, and that he (defendant) supposed that he was dealing in the transaction with plaintiff's corporation, and not with plaintiff as an individual. It was in evidence, however, that Irwin had authority to solicit for defendant, was in charge of his business when defendant was absent, and was interested in commissions earned in Miller's business, being on a guaranteed salary. Defendant himself had no part in this transaction, so far as making any arrangement with plaintiff was concerned; that all being done by Irwin. He admitted, however, that Irwin had called on Handlan with his knowledge and consent, to take up the matter with Handlan, but testified that, while Irwin had told him of his arrangement with Handlan, he had not told him of the part relating to a division of the commission.

The only evidence introduced on behalf of defendant, apart from what was developed in cross-examination of defendant and Irwin, who were placed on the stand by plaintiff, consisted of correspondence concerning the matter of the sale of the material to the customer designated by plaintiff. None of the letters relate or refer to the question of commissions. It all appears to have been on the letter heads of the corporation when written to defendant, and to have been signed in the name of the corporation, and to have been on the letter heads of the corporation, and, on behalf of the defendant, all of the correspondence appears to have been addressed to the corporation. Plaintiff, however, testifies that, after he made the arrangement, he turned the matter of filling the contract, and all attention and correspondence about it, over to his corporation, but that the arrangement or agreement he claimed to have made about division of commissions was his own private matter, in which the corporation had no interest.

The two points in controversy in the evidence were: First, as to whether an arrangement of the kind testified to had been made by an authorized representative of the defendant; second, whether the disputed arrangement was for plaintiff individually, or for his corporation. It is furthermore testified by defendant that he had never known of any arrangement being claimed as existing for a division of commissions, until some months after the close of the transaction, when he then repudiated it and denied liability to the plaintiff. Defendant asked an instruction for nonsuit, which was overruled.

The court of its own motion gave the following instructions: "The court instructs the jury, if you find and believe from the evidence that the defendant, through or by his duly qualified agent, entered into an

agreement with the plaintiff to divide any commissions which defendant might receive by reason of the sale of angle bars and steel rails, provided plaintiff furnished information to defendant relative to a railroad which was in the market to purchase steel rails and angle bars, and provided that you further find that defendant did succeed in selling the railroad, the name of which was at the time given to defendant's agent by plaintiff, then your verdict will be for plaintiff for such sum as you find and believe from the evidence to be one-half of the commissions which defendant did receive by reason of such sale. The court instructs the jury that you will, in considering of your verdict, disregard all testimony in the case except that which either tends to prove or disprove the alleged verbal contract on the part of the defendant by which it is claimed that defendant agreed to divide his commissions with the plaintiff. The issue involved is whether or not there was or was not such a contract between plaintiff and defendant." It also gave the usual instruction as to the number of jurors necessary to concur in a verdict. Defendant excepted to the giving of these instructions.

At the instance of defendant, the court gave to the jury six instructions. The first told the jury that plaintiff was required to establish his case by a preponderance of the evidence before he could recover; that if he had not done so, and the evidence was evenly balanced, and the jury was in doubt as to its preponderance, or if the preponderance is in favor of defendant, then the verdict should be for defendant. In the second instruction the jury were told, in effect, that before plaintiff can recover he must prove either direct authority given to the person claimed to have made the arrangement, or that, knowing of the acts of the party, defendant had ratified them, or that the defendant knowingly and voluntarily permitted such person to hold himself out to the world as his agent for the purpose of doing either the act in question or similar acts pertaining to the same subject-matter. By the third instruction the jury were told that, even if plaintiff proves, by a preponderance of the evidence, that the relation of principal and agent existed between the defendant and Irwin on the date of the alleged transaction, the mere fact that Irwin was in the employ of defendant is not, in itself, sufficient to establish the agency; but they must believe and find from the evidence that the contract was made by Irwin, and that the defendant directed or authorized him to make it, or that he had ratified and approved it after it was made, or that in making it Irwin was acting within the apparent "scope of his authority" as such agent as defined by the instruction. The fourth instruction was on the credibility of the witnesses, and is in the usual form. The fifth instruction told the jury that if they found from the evidence

that plaintiff entered into the contract for the benefit of or in the name of the Handlan-Buck Manufacturing Company, and that with his knowledge and consent that company assumed the contract, and through its agents and officers "led the defendant to believe that his dealings in regard to the subject-matter of the contract were with the Handlan-Buck Manufacturing Company, then the plaintiff cannot recover in this action." The sixth instruction told the jury that in law a corporation is an artificial person, entirely distinct from any of its officers or stockholders, and that no stockholder or officer has the right to institute a suit in his own name upon a cause of action belonging to the corporation; that in this action plaintiff is suing in his own name, and that even if they believe from the evidence that the contract was entered into between defendant and the Handlan-Buck Manufacturing Company, and that the defendant was indebted to the Handlan-Buck Manufacturing Company upon the contract, then plaintiff cannot recover. The defendant also prayed several instructions which were refused; two of them specifically and with great particularity defining what "burden of proof" meant, another defining what "apparent scope of authority" meant, and two others for nonsuit. Defendant duly excepted to the refusal of these instructions. Plaintiff asked three instructions. The court refused to give them, substituting one of its own, heretofore set out, therefor.

There was a verdict for plaintiff for \$793.74, and judgment accordingly. A motion for new trial was duly filed and overruled, and exceptions duly saved to that refusal, as well as to various rulings adverse to defendant. Defendant thereupon appealed.

Fordyce, Holliday & White, for appellant.
John S. Leahy, for respondent.

REYNOLDS, P. J. (after stating the facts as above). We have set out the facts with some particularity, out of deference to the very earnest argument and full and able brief of counsel for appellant, as that counsel insists there was no evidence in the case justifying its submission to the jury. We cannot agree to this. The statement shows that there was evidence, contradictory to be sure, but some substantial evidence, in support of the allegations in the petition, to which petition a mere general denial was interposed by way of answer. We do not say that a general denial did not properly put the case at issue. It did, and was sufficient; but it put the affirmations of the petition in issue, those affirmations were supported by evidence, and, while that evidence was conflicting, it rested with the court and jury to weigh it. The jury found for plaintiff, and the court held that there was evidence to support that finding, and that the finding was not against the weight of the evidence.

That concludes us on that phase of the case; we holding, on reading all the testimony, that it cannot be said there was an entire absence of substantial evidence to sustain the verdict. We must so hold, to reverse on that ground. This disposes of two of the thirteen propositions made by counsel for defendant.

The remaining propositions cover the law of agency and proof thereof; as to the latter, it being argued that proof of agency is not established by the declarations of the agent to third parties. There is no doubt of the correctness of this proposition. Agency must be established aliunde the agent's declarations. In the case at bar, we think this was done. Irwin was a general soliciting agent for defendant. Defendant had knowledge of the fact that the deal by which he was making the sale came to his house through Irwin's arrangement with plaintiff. He received the benefit of the arrangement. It is clear from Irwin's own testimony that plaintiff gave him the name of the prospective customer with whom the deal was made, and, while Irwin's testimony tends to deny the arrangement as to division of commission, the testimony of plaintiff and his agent, who first took up the matter with defendant's agents, is emphatic and clear that division of commission was the very foundation of the transaction. The jury evidently took this view of it. Their verdict is conclusive. Whether plaintiff was acting for himself or his corporation was a question of fact, on which there was diversity of evidence. The jury found for plaintiff on that issue.

It is urged that the conduct of counsel for plaintiff, in the presence of the jury, was improper. Much allowance must be made to counsel, and their conduct must be very improper to cause their clients to suffer from it. Reading the record here, we do not find this assigned error sustained.

Error is particularly assigned to the refusal of the court to instruct with more particularity than it did as to the preponderance of evidence. We think the instruction given was ample on this branch of the case. The instructions given by the court, taken as a whole, and in connection with that given by the court at its own motion, fairly and correctly put the law of the case to the jury and surely in a very favorable light for defendant.

Error is assigned to the expression, in the instruction given by the court at its own motion, to the effect that the jury, in considering its verdict, will "disregard all testimony in the case except that which either tends to prove or disprove the alleged verbal contract on the part of the defendant by which it is claimed that defendant agreed to divide his commissions with the plaintiff." This has some tendency to submit the question of relevancy of testimony to the jury, which should not be done; but considering it

in connection with the rulings made by the court at the trial, when evidence was offered, and in connection with this instruction as a whole, as well as in connection with the instructions given for defendant, we are not prepared to say that the use of this phrase is reversible error.

Nor, reviewing the whole case, do we discover error in the exclusion or admission of testimony so serious as to work to the manifest prejudice of defendant. The issues as made by the pleadings are the ones, and the only ones, to be tried. Evidence must be kept within those issues, and, examining the record, we think that is what, and is all, the learned trial judge endeavored to do.

Finding no reversible error, the judgment of the circuit court is affirmed. All concur.

WEWNER v. GRAY.

(St. Louis Court of Appeals. Missouri. Nov. 17, 1900.)

APPEAL AND ERROR (§ 1082*)—OBJECTIONS IN TRIAL COURT—NECESSITY—OBJECTION TO ACCOUNT.

An objection that the account, required by Rev. St. 1899, § 3852 (Ann. St. 1906, p. 2135), providing that formal pleadings are not required in justice courts, but that plaintiff shall file with the justice a statement of the account upon which the suit is founded, etc., was insufficient to give the court jurisdiction, must be taken previous to or during the trial, and comes too late on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1135; Dec. Dig. § 1082.*]

Appeal from St. Louis Circuit Court; Virgil Rule, Judge.

Action by William Wegner against Stella Gray. Judgment for plaintiff, and defendant appeals. Affirmed.

Edw. N. Robinson and Stephen Rogers, for appellant. Jos. P. Vastine, for respondent.

GOODE, J. Action begun before a justice of the peace on an account for plastering and papering at No. 511 Clark avenue. The case proceeded to the circuit court, where plaintiff had judgment, and defendant appealed.

Plaintiff is a dealer in wall paper at No. 618 South Fourth street, St. Louis, and defendant resides at No. 521 Clark avenue. He testified she sent for him about September 1, 1905, and said she wanted some work done at No. 511 Clark avenue. Plaintiff went there with her and a man named Gus Stieglitz, who intended to run a restaurant in the first story of the house, No. 511. Plaintiff testified defendant showed him what work they (defendant and Stieglitz) wanted done. He gave her an estimate of what the work would cost. She selected the paper, and made suggestions about it, and was at the building every day during the progress of the work. An attempt was made to prove

the work was ordered by Stieglitz, and he was the person to whom plaintiff extended credit, afterwards charging the bill to defendant, because she was financially responsible, whereas Stieglitz was not. Suffice to say, as to this defense, the evidence was conflicting, but warranted a finding that the work was done by plaintiff for defendant and on her credit.

The case was tried and disposed of by the court without a jury, and no declarations of law were asked. It is now contended the account was insufficient under the statutes to give the court jurisdiction. Rev. St. 1899, § 3852 (Ann. St. 1906, p. 2135). There is nothing in this point worthy of examination, except as regards the name of the creditor in the account, which, as made out and sued on, named defendant as debtor to the American Wall Paper Company, of No. 618 South Fourth street, but also had the name of Wegner above that of the company. Perhaps the account as filed before the justice had better be set forth:

W. Wegner. St. Louis, Mo. Dec. 10, 1907.
Miss Stella Gray, to American Wall Paper Company, Dr.

618 South Fourth Street.

Kinloch, Central 4610.

Terms Cash.	Estimates Furnished.
To plastering as per agreement at 511	
Clark Ave.....	\$18 00
To papering 6 rooms, hall, toilet, and	
store at 511 Clark Ave.....	58 00
	<u>\$76 00</u>

Counsel for defendant attempts to explain the account being in the name of the American Wall Paper Company from some testimony plaintiff gave that, about three years before the trial, he had bought out a man named Woerhli—had "bought everything, accounts and all, from Woerhli." We do not see how that circumstance explains the matter; for there is no proof Woerhli, more than Wegner, did business as the American Wall Paper Company. Moreover, plaintiff testified he was by himself when the work in controversy was done. The account describes the American Wall Paper Company as of 618 South Fourth street, which was plaintiff's place of business; and, though he did not testify he did business under the style of the American Wall Paper Company, from the form in which the account was made out, it is likely he did.

The question is whether the judgment is to be reversed because of the form in which the account was filed as a statement. If the sufficiency of the account had been challenged by an objection to the reception of evidence, or in any other proper mode, likely it would have been held insufficient as a statement of a cause of action, in failing to disclose a demand in favor of plaintiff. Crescent Furniture & Lumber Co. v. Rad-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

datz, 28 Mo. App. 210; Smith v. Zimmermann, 29 Mo. App. 249. Nothing of the kind was done, but the case was tried on the single issue of whether plaintiff, Wegner, had extended credit to defendant or to Stiglitz. The account stated defendant in the face, and the proper time to object to it was previous to or during the trial. As this was not done, we must hold the error now assigned is not well taken. The exact point was decided in New England, etc., Co. v. Brown, 59 Mo. App. 461, 466. See, too, Trustees Warrenton v. Schwengerdt, 8 Mo. App. 572; Hammons v. Renfrow, 84 Mo. 332; Fowler & Wild v. Williams, 62 Mo. 403.

The judgment is affirmed. All concur.

BANK OF HOUSTON v. DAY et al.

(St. Louis Court of Appeals, Missouri. Nov. 16, 1909. Rehearing Denied Nov. 30, 1909.)

1. BILLS AND NOTES (§ 60*)—SIGNATURE OF BLANK NOTE—RIGHT OF HOLDER.

One signing a blank negotiable paper is bound by the law merchant, where the paper is completed by the holder, he having implied authority to fill in the blanks essential to complete the instrument, but the original payee, or a subsequent holder, with notice, has implied authority to fill in the true date only, or such date as is contemplated by the parties.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 86; Dec. Dig. § 60.*]

2. BILLS AND NOTES (§ 34*)—UNDATED NOTES—VALIDITY.

An undated promissory note may be valid under either the law merchant or under the negotiable instrument law (Laws 1905, p. 243 [Ann. St. 1906, § 463-1]).

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 42; Dec. Dig. § 34.*]

3. BILLS AND NOTES (§ 368*)—BONA FIDE HOLDER—DEFENSES.

Where an improper date is inserted in a note by the payee of a note issued without a date, and the note is thereafter negotiated to a bona fide holder, without notice, the latter may enforce the note notwithstanding the improper date.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 950; Dec. Dig. § 368.*]

4. BILLS AND NOTES (§ 60*)—BLANK—RIGHT OF ORIGINAL HOLDER TO FILL IN BLANKS—"ISSUE."

Under Negotiable Instrument Law 1905, pp. 244, 245, 246, 285, §§ 6, 12, 13, 17, 191 (Ann. St. 1906, §§ 463-6, 463-12, 463-13, 463-17, 463-191), declaring that the validity of a note is not affected by the fact that it is undated, that the instrument is not invalidated because antedated or postdated, providing that, where an instrument expressed to be payable at a fixed date after date is issued undated, any holder may insert therein the true date of issue, but the insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, and defining the word "issue" to be the first delivery of the instrument complete in form to the one taking it as a holder, the original holder of an undated accommodation note may not postdate the note and bind the accommodation indorsers; and, where the original holder postdates the note, he cannot recover from the accommodation indorsers, and this is especially true when the accommodation in-

dorsers notified the holder when delivering the undated note that they would not lend their credit to a further extension of the debt.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 86; Dec. Dig. § 60.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3778-3782; vol. 8, p. 7693.]

5. BILLS AND NOTES (§ 368*)—DEFENSES AGAINST BONA FIDE PURCHASER—INSERTION OF DATE—HOLDER IN DUE COURSE.

To make one a holder of commercial paper in due course within Negotiable Instrument Law 1905, p. 245, § 13 (Ann. St. 1906, § 463-13), providing that the insertion of a wrong date in a note issued undated does not avoid the instrument in the hands of a subsequent holder in due course, the element of good faith with respect to the same is essential.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 950; Dec. Dig. § 368.*]

Appeal from Circuit Court, Texas County.

Action by the Bank of Houston against John R. Day and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Lamar & Lamar and W. E. Barton, for appellant. Dooley & Salyer, for respondents.

NORTON, J. This is a suit on a promissory note against the defendants, who were accommodation indorsers thereon. The finding and judgment were for the defendants, and the plaintiff prosecutes the appeal.

It appears that Keel & Hoover, the makers of the note, were partners doing business under the firm name of Keel & Hoover. About April 27, 1905, Keel & Hoover executed their promissory note to one J. R. Day for the sum of \$550, payable four months after date, with interest from maturity, at the rate of 8 per cent. per annum. This note was indorsed by the payee J. R. Day, and by J. T. Chilton, C. H. Baumgardner, J. C. McCaskill, Levi McCaskill, and Jack McCaskill for the accommodation of the makers, Keel & Hoover. Being so indorsed, it was negotiated to the plaintiff Bank of Houston. The discount thereon was paid in advance for the four-month period, specified in the note. The note fell due on August 30, 1905, and the makers, Keel & Hoover, not being prepared to pay the same, forwarded to the Bank of Houston their check for \$14.65 to cover the discount on the amount of \$550 for an additional four months' period. They also executed a new note—that is, the note in suit, payable four months after date—to the order of J. R. Day for the sum of \$550, and requested Mr. Day to procure the indorsement of the several other parties as accommodation indorsers. J. R. Day, the payee, himself indorsed the note, and devoted something near three months' time in procuring the indorsements of the several other parties. The same persons as before indorsed this second note at the request of Day for the accommodation of the makers. The names indorsed on the back thereof besides J. R. Day are J. T. Chilton, C. H. Baumgardner, J. C. McCaskill, Levi

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

McCaskill, and Jack McCaskill. This note was filled out properly in every respect other than the date thereof which was blank; that is, a blank for the day and month were unfilled. The cashier of the plaintiff bank afterwards inserted the date December 30th therein, and, so dated, the note in suit is in the following form: "Houston, Missouri, Dec. 30, 1905. Four months after date, for value received, we promise to pay to the order of J. R. Day, \$550.00, Five Hundred and Fifty 00-100 Dollars, at the Bank of Houston with interest from maturity at the rate of eight per cent. per annum. Keel & Hoover, by V. M. Keel." The note is indorsed as follows, on the back: "J. R. Day. J. T. Chilton. C. H. Baumgardner. J. C. McCaskill. Levi McCaskill. Jack McCaskill. All of the parties having signed or indorsed the note, the same was intrusted to Jack McCaskill, one of the indorsers thereon, for the purpose of negotiation to the plaintiff bank in liquidation of the prior note dated April 27, 1905, executed by the identical parties. Jack McCaskill delivered the note to the plaintiff bank about the 1st of December, 1905, without any date of execution mentioned therein; that is to say, with the date line blank. Jack McCaskill gave testimony to the effect that at the time he delivered the note in suit to the plaintiff bank he instructed Mr. Davidson, the cashier, to insert the date August 30, 1905 (that is, to date the present note on the date which the prior note fell due), and further to notify Keel & Hoover, the makers, who resided in the Indian Territory, that the other accommodation indorsers and himself would decline to lend their credit to any further renewal thereof in the future, and that the makers would be expected to pay the note on maturity. Mr. Davidson, the cashier of the plaintiff bank, gave testimony to the effect that Jack McCaskill, upon delivering the note to him, about December 1st, said he and the other indorsers would decline to indorse for the makers again, and that, when the note matured, the bank should call on the makers for payment, but he insisted that McCaskill gave no instructions whatever touching the matter of the date to be inserted in the note; that is to say, that he delivered the note to him as cashier of the bank with the date line blank and without any instructions whatever as to what date should be inserted therein. It will be remembered that about August 30, 1905, when the first note fell due, Keel & Hoover, the makers thereof, had paid to the plaintiff bank \$14.65 as discount on the amount involved for the period of an additional four months. This being true, the discount was paid until December 30, 1905, or about one month after the note, which is the subject of the present controversy, was delivered to the bank; that is to say, about three months of the discount theretofore paid on August 30th had been earned prior to the delivery

of the note in suit to the bank on December 1, 1905.

This being the state of the case at the time the bank received the undated note in suit, the cashier of the bank, Mr. Davidson, wrote the makers, Keel & Hoover, in the Indian Territory, as the discount theretofore paid was practically earned before the present note had been negotiated, it would be well for them to send the bank an additional remittance to cover the discount for four months in the future; that is, for the period of four months after December 30, 1905, on which date the prior discount period would expire. Keel & Hoover complied with this request and remitted to the plaintiff bank their check for \$14.65 to cover the discount on the amount of money involved for an additional four months; that is to say, to cover the discount from December 30, 1905, to April 30, 1906. Upon receiving this second remittance from Keel & Hoover, the cashier of the plaintiff bank, Mr. Davidson, inserted the date December 30th in the blank space on the date line of the note which had been delivered to him by McCaskill about the 1st of December. As thus dated, the note would fall due about April 30, 1906, and concurrent with the period for which discount had been paid by the last remittance from the makers. It is conceded throughout the case that the date December 30th was inserted in the note by the cashier without any express authority whatever from either the makers or the indorsers thereon; and, if the testimony of Jack McCaskill is to be believed, it was inserted contrary to his instructions on delivery of the note to the bank. McCaskill testified that he instructed the cashier at the time of delivering the note to insert the date August 30, 1905. Be this as it may, the plaintiff bank does not rely upon any express authority from any one to date the note December 30, 1905, but, on the contrary, relies upon the fact that the note was undated, and that there was a blank left therein for date at the time of its delivery and the implied authority which, in the absence of express instructions, is assured by the law to the holder of a note, to fill in such blanks as are necessary to either make the obligation complete or render it an appropriate instrument as commercial paper.

In this connection, it will be remembered that the cashier, Mr. Davidson, testified that no express directions whatever were given by McCaskill as to when the note should be dated. The accommodation indorsers only defended the action, and the finding and judgment of the court were for them to the effect that in the absence of directions from McCaskill who delivered the note to the cashier of the bank, or an agreement of some kind to that effect, the cashier was without authority to postdate the note December 30, 1905; in other words, the instructions go to the effect that in the absence of

a direction from or agreement with McCaskill, who delivered the note to the bank, which might be regarded as express authority therefor, there is no authority implied by law authorizing the cashier to postdate the note December 30, 1905. The question, therefore, presented for decision is the soundness of the proposition of law announced in these instructions.

The defendant invokes section 13 and other provisions of our negotiable instrument law approved April 10, 1905. See Laws Mo. 1905, p. 243 (Ann. St. 1906, § 463-1), in support of the instructions. It is provided substantially in section 13 of the act referred to that, where an instrument expressed to be payable at a fixed period after date is issued undated, any holder may insert therein the true date of issue, and the same shall be payable accordingly. A further provision of that section is to the effect that the insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, but, as to him, the date so inserted is to be regarded as the true date. Now, it is argued by the defendant on this section that the holder of an undated instrument is authorized only to insert the true date of issue thereon, and that, while it is not so provided in express terms, it is at least implied that, although the insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, it does avoid it in the hands of the holder who inserts a date other than the true date, and is thus possessed of full knowledge of the fact that the date is not the true one. Section 196 of our new negotiable instrument law provides that for any case not provided for in this act the rules of the law merchant shall govern. In view of this provision, it is argued by the plaintiff that section 13, referred to, does not expressly inhibit the insertion of a date other than the true one, and that, therefore, we are remitted to the principles of the law merchant for a rule to ascertain and determine the controversy. In this connection it is argued that parties often loan their mercantile credit to others by signing their names to blank papers to be afterwards filed as bills of exchange or promissory notes written over their signatures as drawers or makers or by signing their names in the appropriate manner to indicate that they desire to bind themselves as acceptors or indorsers of the instrument which it is contemplated to complete upon such blank papers. And it is a settled principle of the commercial law that, when such instruments are afterwards completed by the holder of such blanks to whom they are loaned, such parties become as absolutely bound as if they had signed them after their terms were written out, and, further, that the presence of their names upon blanks purports an authority granted to the holder to fill them for any sum and for any terms as to time, place, and conditions of payment. Indeed, in his admirable work on

Negotiable Instruments (5th Ed.) § 143, Mr. Daniels says: "The authority implied by a signature to a blank, and the credit granted, are so extensive that the party so signing will be bound to a bona fide transferee in due course, though the holder was only authorized to use it for one purpose, and has perverted it to another, though authorized to be filled for a certain amount and a greater is inserted; and though the authority was limited to time which has expired, or was only to be exercised upon a condition which has not happened." It will be observed, however, that the doctrine thus stated by the learned author relates more particularly to a bona fide transferee in due course. Now, a promissory note may be a valid instrument either under the law merchant or under the negotiable instrument law even though it is undated. 2 Am. & Eng. Enc. Law (2d Ed.) 255, and section 6, Negotiable Instrument Law April 10, 1905. It is true there is an implied authority under the law merchant in the holder of a note signed in blank and delivered to another, for the purpose of negotiation, to fill in such blanks as are essential to make it a complete instrument for the purpose intended. *National Bank of Paris v. Nickell*, 84 Mo. App. 295; *Daniels, Negotiable Instruments* (5th Ed.) 144; *Schooler v. Tilden*, 71 Mo. 580; *Ivory v. Michael*, 33 Mo. 398; 2 Am. & Eng. Enc. Law (2d Ed.) 255 et seq. It not being essential to the validity of a promissory note that it shall express a date (that is, although a promissory note undated may nevertheless purport a valid obligation, the date of which may be inquired into and ascertained), we believe the implied authority touching the date may not be so broad and comprehensive as that pertaining to such blanks therein as are essential to rendering the instrument a complete obligation. Whatever authority there is in the law merchant for filling in the date of a note we believe rests more particularly upon the fact that it is essential to the free and uninterrupted negotiability of the instrument that it should be dated, and upon the presumption that all parties to a note intended for circulation obviously consented that a proper person to whom the same was intrusted for the purpose of raising money might fill the same with the proper date. 2 Am. & Eng. Enc. Law (2d Ed.) and cases cited.

Now, there is no doubt where a note is issued without a date and an improper date is inserted therein by the payee and the note is thereafter negotiated to an innocent party or bona fide holder without notice that such bona fide holder may enforce the same notwithstanding the improper date. This follows for the reason that one who signs such an instrument furnishes the means of fraud, and is estopped to deny his liability thereon. *Mitchell v. Culver*, 7 Cow. (N. Y.) 336; *Frank v. Llienfeld*, 33 Grat. (Va.) 377; *Redlich v. Doll*, 54 N. Y. 224, 13 Am. Rep. 573; *Joyce, Defenses to Commercial Paper*, § 22;

Daniels, Negotiable Instruments (5th Ed.) § 143; Androscooggin Bank v. Kimball, 10 Cush. (Mass.) 373. Be this as it may, the date of a negotiable instrument is important in many respects. Although it may be valid and enforceable without an expressed date, it is nevertheless an inconvenient instrument in the commercial world if undated and likely to produce much confusion and evil results. It would, indeed, be difficult to ascertain and determine the rights of the parties to an undated instrument in circulation expressing an obligation payable four months or six months after the date thereof. If no date appears, how is the bona fide innocent holder without knowledge of the date of issue to determine when the obligation is due and notice of dishonor should be given. These considerations would obviously authorize the payee or other proper person to insert the proper date as between the immediate parties. However, many reasons suggest themselves why the payee ought not to be allowed as between himself and the makers and indorsers, to insert an improper date, for by so doing he might materially increase the obligation to be paid. For instance, if a four-month note is issued, as was the one in suit, on the 1st of December, 1905, by antedating it December 1, 1904, the payee could, according to its face, increase the obligation a full year's interest, and at the same time render the note eight months past due at the time it was issued. On the other hand, if the payee is allowed to accept a note on the 1st of December, 1905, signed by several parties, as was this one, and postdate it to December 30, 1905, it may be that the makers and each of the indorsers thereof would die during the interim between the 1st of December and the 30th, the date of the note, and thus would be presented the anomaly of having a note dated the 30th of December, bearing genuine signatures of several gentlemen who are dead. It is no doubt true that a note issued bearing the month of its issue and the year, with a blank for the day of the month, may be enforced by a subsequent holder, although the day of the month is filled in by him without express authority therefor. Such was the case of *Page v. Morrel*, 3 Abb. Dec. (N. Y.) 433. In such a case it is obvious that the subsequent holder filling in the day of the month is not aware of the particular day on which the note was issued, for he knew nothing of its issue. The paper having come into his hands for value in due course, bearing date the month of June and the year in which it was issued, in the absence of any knowledge whatever as to the date of issue, authority was implied to him to insert any date during the month mentioned. However, that authority is not in point here for the reason that in that case the subsequent bona fide holder of the note had no knowledge as to what was the true date of the instrument; whereas, in the present controversy, the subsequent holder of the note (that is, the plain-

tiff bank), who, it may be said purchased it from Day, the payee, in fact an accommodation party only, knew the day and date of its issue, and, indeed, with such knowledge occupied the same position in respect of that matter as an original payee who knows the true date of issue; that is, the plaintiff bank knew that it acquired the note about the 1st of December, and not December 30th, for such was the date of issue under the facts in this case. Having this knowledge as between it and these accommodation indorsers, whom McCaskill represented when he delivered the note, it became the duty of the cashier of the bank to insert the date August 30, 1905, as instructed by McCaskill, if his testimony is to be believed. On the contrary, if no instructions whatever were given, then it became the duty of the bank to insert the true date of issue identically as though it were an original payee. Mr. Daniels says: "Any holder has a right to insert the true date; and, should he insert an improper date, the parties will still be bound to a bona fide holder for value and without notice of the impropriety"—thus implying, of course, that the holder who has notice of the facts may not enforce a note when other than the true date has been inserted. See Daniels, Negotiable Instruments (5th Ed.) § 143. And we believe the following cases cited in the note support the text: *Redlich v. Doll*, 54 N. Y. 234, 238, 13 Am. Rep. 577; *Frank v. Lillienfeld*, 33 Grat. (Va.) 373; *Overton v. Matthews*, 35 Ark. 147, 154; *Page v. Morrel*, 3 Abb. Dec. (N. Y.) 433. In the same section Mr. Daniels also says that a party, having notice that other than the true date has been inserted, cannot recover on the note unless he acquired it from one who took it bona fide without notice. This doctrine is supported by the case of *Emmons v. Meeker*, 55 Ind. 329. See, also, *Goodman v. Simonds*, 19 Mo. 107; 2 Cyc. 163; 2 Am. & Eng. Enc. Law, 255. If it be true, as declared in the authority above cited, that a subsequent holder having notice of the fact that an improper date has been inserted by the original payee cannot recover on the note, it is certainly true that although this plaintiff, a subsequent holder of the note from Day, the payee, may not recover against these indorsers after having actually itself with full knowledge of the date of issue dated the note otherwise than in accordance with the true date. The case is distinguishable from some in the books, inasmuch as the element of good faith does not obtain in favor of the subsequent holder here as it does in some other cases, for the reason that in the particular instance now in judgment the present holder actually knew the date of issue, and instead of acting upon the implied authority to insert the true date, if, as the cashier said, no instructions were given by McCaskill to antedate the note to August 30th, inserted the date which was untrue in every respect. When the matter is examined on principle touching the rights of

these indorsers, it must be remembered that, if the note were not paid when due, they were entitled to notice of dishonor, at any rate, when the note fell due, four months after the date of issue, which was December 1, 1905; whereas, as the note was dated by the cashier, their rights were infringed upon in this respect, so that, instead of being entitled to notice of dishonor in the event of nonpayment about April 1, 1906, they did not receive such notice until 30 days thereafter in accordance with the tenor of the note bearing a false date.

After much careful reading and reflection on the subject, we believe as a general rule between the original parties to the instrument or subsequent holder with notice the original payee or such subsequent holder with notice has implied authority by virtue of the blank contained in the note only to fill in the true date or such a date as was directed or contemplated by the parties. Daniels, *Negotiable Instruments* (5th Ed.) § 143a, 144; 2 Cyc. 163, 164; 2 Am. & Eng. Enc. Law (2d Ed.) 255; *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9; *Emmons v. Meeker*, 55 Ind. 329. It is obvious that what has been said is in accord with the public policy of this state as declared in the new negotiable instrument law approved April 10, 1905. See *Laws of 1905*. And the note in suit is in all respects subject to that enactment. Section 6 of the act referred to declares that the validity of a negotiable instrument is not affected by the fact that it is not dated. Section 12 declares that the instrument is not invalid for the reason only that it is antedated or postdated, "provided this is not done for an illegal or fraudulent purpose. The person to whom an instrument so dated is delivered, acquires the title thereto as of the date of delivery." This section seems to contemplate instruments which are antedated or postdated by the parties in accordance with a mutual agreement to that effect, as is frequently done, and declares that they are not invalid because of such fact, provided no illegal or fraudulent purpose is intended. Section 13 of the act is as follows: "Where an instrument expressed to be payable at a fixed period after date is issued undated, or where the acceptance of an instrument payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the instrument shall be payable accordingly. The insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, but, as to him, the date so inserted is to be regarded as the true date." It will be observed that this section authorizes the holder of an undated instrument to insert the true date of issue therein and makes the instrument payable accordingly. It provides, too, that the insertion of a wrong date does not avoid the instrument in the hands of a subsequent holder in due course, and, as to him, the

date so inserted is to be regarded as the true date. This is in affirmance of the doctrine which obtains in the law merchant, and it implies, at least, that the insertion of a wrong date in an undated instrument by one having knowledge of the true date of issue would avoid the instrument. Such we understand to be the settled doctrine of the cases hereinbefore cited, expounding the principles of the law merchant; that is, that such amounts to an alteration. 2 Am. & Eng. Enc. Law (2d Ed.) 142. Now, for one to be a holder of commercial paper in due course, the element of good faith with respect to the same is essential. *More v. Finger*, 128 Cal. 313, 60 Pac. 933-935; *Reese v. Bell*, 138 Cal. xix, 71 Pac. 87-89. Therefore, the present plaintiff, having inserted an untrue date in the instrument when it was possessed of knowledge of the true date of issue, is not a subsequent holder in due course within the meaning of the statute. It is proper, too, to invite attention to section 17 of the negotiable instrument law. That section, in treating of the question as to when interest shall commence on undated instruments, provides that, where the instrument is not dated, it will be considered to be dated as of the time it was issued. Section 191 defines the word "issue" to be the first delivery of the instrument, complete in form, to a person who takes it as a holder. It therefore appears that the note in suit was issued about the 1st of December, 1905, when it was delivered as a completed obligation in form to the plaintiff bank as the holder, for it was never delivered to Day, the original payee; he being an accommodation party only. It will be observed that the thought runs throughout the various sections of the negotiable instrument act to the effect that the true date of issue of an undated instrument is the date which controls, and is the date which under the provisions of section 13 any party holding the same is authorized to insert. Although we have thus given attention to the arguments presented in the briefs, the court is nevertheless of the opinion that the case was properly decided on the admitted facts. It will be recalled Mr. Davidson, the plaintiff's cashier, admitted that Jack McCaskill said, when he delivered the note, the indorsers would not lend their credit for a further extension of the debt. The cashier's testimony in that respect is as follows: "Well, he did say that when the note matured that they would not sign for them any more; that they would have to call on them for payment."

The note on its face expressed an indebtedness due four months after date. This statement of McCaskill to the cashier regarding the intention and attitude of the indorsers was obviously a direction to the effect that the indorsers did not intend to lend their credit to a five months' obligation; that is, it amounted at least to a direction that they would not extend their credit for a period

beyond four months after December 1st without the bank demanding payment from the makers at the expiration of that period.

The judgment should be affirmed. It is so ordered. All concur.

In re ULRICI'S ESTATE.
JOHNSTON v. THOMPSON.

(St. Louis Court of Appeals. Missouri. Nov. 17, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 190*)—ALLOWANCES TO SURVIVING WIFE—LIMITATIONS.

Rev. St. 1899, § 185 (Ann. St. 1906, p. 399), barring demands against an estate not presented in two years from the granting of letters of administration, does not apply to the demand of the widow for a cash allowance in lieu of provisions for one year's support, as authorized by sections 105, 106 (pages 372, 373).

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 703; Dec. Dig. § 190.*]

2. EXECUTORS AND ADMINISTRATORS (§ 190*)—ALLOWANCES TO SURVIVING WIFE—LIMITATIONS.

Though Rev. St. 1899, § 4273 (Ann. St. 1906, p. 2349), barring actions unless commenced within five years, applies to the demand of a widow for a cash allowance in lieu of provisions for one year's support, limitations do not begin to run until letters of administration have been granted; and the widow, though entitled to take out letters, need not do so.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 703; Dec. Dig. § 190.*]

3. INSURANCE (§ 586*)—EXECUTORS AND ADMINISTRATORS (§ 46*)—ASSETS.

One having an undivided interest in a paid-up policy of another has a vested interest during the life of the insured, and the insurance money is an asset of his estate after insured's death and payment by insurer, though he died before insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1470; Dec. Dig. § 586.* Executors and Administrators, Cent. Dig. § 297; Dec. Dig. 46.*]

4. EXECUTORS AND ADMINISTRATORS (§ 190*)—RIGHTS OF SURVIVING WIFE—ALLOWANCES—LACHES.

A widow, ignorant of the fact that her deceased husband had an interest in a paid-up policy on the life of another, who died after the husband's death, is not guilty of laches barring her from recovering a cash allowance in lieu of provisions out of the money paid on the policy, especially where the estate of the deceased husband was not prejudiced by her delay of about nine years in demanding the allowance.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 190.*]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

In the matter of the estate of Charles R. Ulrici, deceased. Proceedings by Erika Johnston, the widow of the deceased, against William B. Thompson, administrator of the deceased, to recover a cash payment in lieu of an allowance for provisions for one year's support. From a judgment granting relief, administrator appeals. Affirmed.

Fred Armstrong, Jr., for appellant. Stephen Rogers, for respondent.

GOODE, J. This proceeding was begun in the probate court by plaintiff to recover \$360 in cash out of the estate of Charles R. Ulrici, deceased, in lieu of an allowance of provisions for one year's support. Plaintiff, Erika Johnston, is the widow of said Charles Ulrici, and defendant, Thompson, is the administrator of his estate. Erika Johnston was married to the deceased in 1891, and lived with him in the city of St. Louis until 1898, when he died. She subsequently married a man named Johnston, and moved to Arkansas. Ulrici left no personal property whatever at his death, except his clothes, which he had bought with money advanced by plaintiff, but he was interested in a policy of insurance on the life of his father, a fact plaintiff was ignorant of at the time. This interest of the deceased was one-fourth of policy No. 172000, dated September 2, 1884, issued by the Connecticut Mutual Life Insurance Company, on the life of Rudolph W. Ulrici, being a paid-up policy for \$3,112. Said Rudolph died March 4, 1907, whereby one-fourth of the policy, or \$778, became payable to the estate of his son Charles R. Ulrici. Plaintiff claimed the right to have \$360 in lieu of the provisions, or money substitute therefor, the statute would have allowed her out of her husband's estate if he had been possessed of property or money when he died. Rev. St. 1899, §§ 105, 106 (Ann. St. 1906, pp. 372, 373). The court found plaintiff was entitled to \$20 a month or \$240 in lieu of such provisions, entered judgment in her favor for said sum, and defendant appealed, contending the demand was barred by limitation.

The statute cited as barring plaintiff's claim is the one which limits actions on a liability, other than a penalty or forfeiture, created by a statute, to five years. Rev. St. 1899, § 4273 (Ann. St. 1906, p. 2349). The argument is that plaintiff's demand rests on a statute giving her a year's provisions, or, in lieu of same, a reasonable appropriation out of the assets of the estate, and this statutory liability of the estate, not being a penalty or forfeiture, falls within the limitation prescribed in the cited section. Allowing this reasoning to be sound, though we think its soundness dubious, the question comes up regarding when the statute began to run against plaintiff's demand. No administration was granted on her deceased husband's estate until April 2, 1907, or more than nine years after his death; and on June 12, 1907, shortly after administration was granted, plaintiff presented her demand. Commonly the statute limiting the presentation of demands for allowance against an estate does not begin to run until letters are granted, and bars ordinary demands in two years aft-

er the grant. Rev. St. 1899, § 185 (Ann. St. 1906, p. 399). But the two-years statute does not apply to a demand by a widow like the one in controversy. *Campbell v. Whitsett*, 66 Mo. App. 444. Counsel for defendant insists the five-years statute began to run against plaintiff before letters were granted, because she was entitled to take out letters, citing *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316. In that case the Supreme Court of the United States followed the Supreme Court of Kansas in its construction of a statute of the state of Kansas. The construction adopted was that if the limitation period was running in favor of a debtor when he died, the statute was suspended by the death, but only long enough for the creditor to have an administrator appointed for the debtor's estate. Said decision, which does not declare the general doctrine held by the United States Supreme Court, but merely announces a rule peculiar to the state of Kansas as established by the decisions of its Supreme Court, would be no authority, even in Kansas, for the proposition in support of which it is cited in the present case, to wit, that a limitation statute will run in favor of the estate of a decedent, against a demand held by a claimant, who is entitled to take out letters of administration on the estate, even though, in fact, letters have not been granted to the claimant or any one else. We know of no authority anywhere for that proposition. It is true plaintiff, as the widow of Charles R. Ulrici, might have asked for letters on his estate if she had been apprised of any assets left by him, but she was not bound, even then, to take out letters; and, to hold the law will punish her for not availing herself of the privilege to administer, by barring a claim she holds against the estate for statutory allowances, or arising out of other matters, would be a ruling without precedent in the adjudicated cases. If the five-years statute of limitations has anything to do with this demand, it would only begin to run after administration had been granted, so that demand could be preferred in the probate court.

Neither do we see how the interest of Charles R. Ulrici in the insurance policy could have been administered upon until the death of his father, the insured, or plaintiff's demand paid, except by having the expectancy sold by order of court; and this would have been a most improvident procedure, and one any court would be slow to authorize, because such an uncertain interest probably would be sacrificed in a sale. No doubt the insurance money was an asset of Charles R. Ulrici's estate after the death of the insured and payment by the company. It then fell within that class of assets of a decedent which consists of property accruing after his death. 11 Am. & Eng. Ency. Law

(2d Ed.) p. 836, and citations; *Conigland v. Smith*, 79 N. C. 303; *U. S. Trust Co. v. Ins. Co.*, 115 N. Y. 152, 21 N. E. 1025. And it was a vested interest in Charles R. Ulrici as beneficiary even during the life of the insured. *U. S. Casualty Co. v. Kacer*, 169 Mo. 301, 69 S. W. 370, 58 L. R. A. 436, 92 Am. St. Rep. 641. For these reasons the defense of laches is raised against plaintiff; it being asserted she should have taken out letters or presented her demand sooner. Suffice to say she was ignorant that her husband had any interest in the insurance policy, or even of its existence, and hence laches cannot be imputed to her, especially as the estate has not been prejudiced by the delay. The judgment is affirmed. All concur.

BANNER IRON WORKS v. ÆTNA IRON WORKS et al.

(St. Louis Court of Appeals, Missouri, Nov. 2, 1909. Rehearing Denied Nov. 17, 1909.)

1. MECHANICS' LIENS (§ 32*)—LIENABLE "MATERIAL" OR "MACHINERY."

Iron castings from 10 to 24 feet in length, known as "sill castings or channels," were furnished to a tobacco company with the necessary bolts for use in its factories, to support tobacco presses. Most of them were used for supporting presses or tables connected therewith, without being fastened to the floor and without being put under all the presses. Some were used for other purposes, such as skids, and "dunnage"; that is, were put under goods to raise them above the floor. Those under presses and tables could be readily removed, and were in fact taken from one building to another. There was no proof that they were customarily thus placed in tobacco factories, or were in any way necessary to carry on the work, or that it could not be done as well without them. Held, that the castings were not "material" or "machinery," within Rev. St. 1899, § 4203 (Ann. St. 1906, p. 2277), giving a lien to a person furnishing the same for a building.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 37; Dec. Dig. § 32.*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4267-4269.]

2. MECHANICS' LIENS (§ 32*)—LIENABLE MATERIAL OR MACHINERY.

No material or machinery furnished for use in a factory is lienable except such as becomes part of the realty.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 37; Dec. Dig. § 32.*]

3. FIXTURES (§ 7*)—MODE AND SUFFICIENCY OF ANNEXATION.

Whether an article became a fixture is not determinable altogether, or even principally, by the mode of its attachment, and whether that is slight or strong, or whether the article can be removed readily without damage to the freehold, though these circumstances are to be considered.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 7-13; Dec. Dig. § 7.*]

4. FIXTURES (§ 4*)—INTENT IN MAKING ANNEXATION.

The principal criterion for determining whether an article became a fixture is the owner's intention in putting the material in or on

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the land or building—whether his purpose was to make it permanently a part thereof.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 3, 6; Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 3, pp. 2831-2847; vol. 8, p. 7664.]

5. FIXTURES (§ 4*)—INTENT IN MAKING ANNEXATION.

If the owner of the land or building purposed in putting an article in or on the same to make it permanently a part thereof, it will usually be treated as a fixture and lienable, though it is fastened only slightly, and may be displaced without injuring the freehold.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 3, 6; Dec. Dig. § 4.*]

6. FIXTURES (§ 4*)—INTENT IN MAKING ANNEXATION.

In case of machinery and other articles furnished to a factory, an important circumstance in ascertaining the intention of the proprietor to make it permanently a part of the building is the adaptability of the article or machine to the work or business of the place, and if the thing furnished was necessary thereto, or to the purpose for which the building was designed and used, or was a convenient accessory or commonly employed, in connection with such business, his intention to annex it permanently may be inferred.

[Ed. Note.—For other cases, see *Fixtures*, Cent. Dig. §§ 3, 6; Dec. Dig. § 4.*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Suit by the Banner Iron Works against the Ætna Iron Works and others. From a judgment for defendants, plaintiff appeals. Affirmed.

L. Frank Ottofy, for appellant. Dalton & Harris, for respondents.

GOODE, J. Plaintiff seeks to enforce a lien against a parcel of ground in the city of St. Louis and the six-story building on it, both belonging to the Christian Peper Tobacco Company, for material furnished to be used in the building. This material consisted of iron castings, denominated indifferently "sill castings or channels," and as "long and short sills or channels." The long ones were 23 or 24 feet in length, and the short ones 10 feet or more. The amount of the bill for which a lien is asked is \$190.60. The Christian Peper Tobacco Company owned several buildings in the city of St. Louis, and, among others, one on the west side of Main street between Morgan street and Lucas avenue. Said company manufactured tobacco in these buildings, and in carrying on that business used machines for pressing the tobacco. The pressing machines rested on a surface of copper which had been laid over wooden floors. In 1905 it ordered of the Ætna Iron Works some cast-iron sills or channels and the necessary bolts to be used for supports under the tobacco presses. The Ætna Iron Works arranged with plaintiff, the Banner Iron Works, to cast these "channels," as they are more frequently styled, and send them to the factory of the Ætna Iron Works, where holes were drilled

in them, and they were "trimmed up," painted, and otherwise adapted for use by the Peper Company. While the channels were in process of casting, the Banner Iron Works learned the Ætna Iron Works was "slow pay," and, before plaintiff would deliver them, it ascertained to what company the Ætna Company had agreed to furnish the channels, though it does not appear the particular building in which they were to be used was ascertained. Some 16 of the channels were used as supports under the presses, or tables connected with the presses, but four or five were used by the Peper Company for other purposes, such as skids, and "dunnage"; that is, were put under goods to raise them above the floor. Those placed under the presses and tables were not fastened to the floor and could readily be removed. In fact, the evidence shows such channels were taken from one building to another of the Peper Company's factories, according to the convenience of the company. Neither were they put under all the presses, but only here and there under them. The Peper Company contended at the trial plaintiff was entitled to no lien for two reasons: Because it did not make or furnish the channels for use in the company's building described in the lien statement, but for the Ætna Company; and because, further, the channels were not such machinery or material as is lienable under the statute. The court below gave copious declarations of law at the request of plaintiff's counsel, stating, on the two controverted issues, that if the court found the channels were furnished by plaintiff to the Ætna Company for the building described in the lien paper, and said Ætna Company had a contract with the Peper Company to furnish the same for said building, and the "said iron sill castings were placed in defendant tobacco company's factory, and were especially fitted and adapted to defendant's factory, and to the transaction of the business therein conducted by said defendant tobacco company, * * *" and were "intended by said defendant tobacco company to be a permanent improvement therein," plaintiff was entitled to have his lien enforced. Two declarations were given for defendant of which complaint is made; but it is not necessary to quote them or recite their substance, because we are clear the judgment, which was in defendant's favor, was for the right party.

Our statute gives a person who furnishes "material, fixtures, engine, boiler or machinery for, any building, erection or improvements upon land, or for repairing the same, under or by virtue of any contract with the owner or proprietor thereof, or his agent, trustee, contractor, or subcontractor," a lien on the building, erection, or improvement for the materials and machinery. Rev. St.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1899, § 4203 (Ann. St. 1906, p. 2277). The description of the channels or sill castings demonstrates that they were not material or machinery within the meaning of that section as construed by the courts. They were not attached to the building, or essential to its use as a tobacco factory, or used consistently for any one purpose, but for several different purposes, and could be and were moved from one building to another at the convenience of the company. No material or machinery furnished for use in a factory is lienable except such as becomes part of the realty. Whether in a particular instance the article became part of the realty, or, in other words, a fixture, is not determined altogether, or even principally, by the mode in which it is attached to the building or land, and whether the attachment is slight or strong, or whether the article can be removed readily without damage to the freehold. Those circumstances are to be considered in determining whether the material became a fixture; but they are not conclusive. The principal criterion is the intention with which the owner of the land or building put the material into the building or on the land—whether his purpose was to make it permanently a part of the land or tenement. If this was his purpose, then though it is fastened to the freehold only slightly and may be displaced without injury to the freehold, it usually will be treated as a fixture and lienable. In the case of machinery or other articles furnished to a factory or place of business, an important circumstance, in the attempt to ascertain the intention of the proprietor, is the adaptability of the article or machine to the work or business of the place. *Thomas v. Dabls*, 76 Mo. 72, 43 Am. Rep. 756. If the thing furnished was necessary to that work or business, or necessary to the purpose for which the building was designed and used, or was a convenient accessory, or commonly employed in connection with such business, the intention of the proprietor of the establishment to annex it permanently to the realty may be inferred. *Progress, etc., Co. v. Gratiot, etc., Co.*, 151 Mo. 501, 52 S. W. 401, 74 Am. St. Rep. 557; *Graves v. Pierce*, 53 Mo. 423; *Richardson v. Koch*, 81 Mo. 284; *Sosman v. Conlon*, 57 Mo. App. 25; *Roseville, etc., Co. v. Mining Co.*, 15 Colo. 29, 24 Pac. 920, 22 Am. St. Rep. 373; *Morotock Ins. Co. v. Rodefer*, 92 Va. 747, 24 S. E. 393, 53 Am. St. Rep. 846. See, also, 53 Am. St. Rep. 576, note. The most that can be said of those channels is that, like pieces of wood or stone, they were useful supports for the tobacco presses and were placed by the Peper Company under some of its presses. There was no proof they were customarily thus placed in tobacco factories, or were in any way necessary to carrying on the work

of manufacturing tobacco, or that it could not be done as well without them.

The judgment is affirmed. All concur.

JONES v. SHEPARD.

(St. Louis Court of Appeals, Missouri. Nov. 17, 1909. Rehearing Denied Nov. 30, 1909.)

1. MORTGAGES (§ 376*)—ACTION FOR SURPLUS PROCEEDS OF SALE—VARIANCE—ALLEGATIONS AND PROOF.

In an action by a mortgagor against the trustee to recover the surplus remaining after selling the mortgaged land and paying the secured note, where defendant answered, admitting that it was his duty to distribute the proceeds, and denied that he had failed to do so, alleging that plaintiff had agreed to assume a prior trust deed, and had failed to pay it, and that defendant had given plaintiff credit on the note secured by the prior trust deed for the surplus, he could not defend on the ground that there was a valid foreclosure under the first trust deed, and that hence plaintiff was not entitled to the surplus from the second sale.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1131; Dec. Dig. § 376.*]

2. PLEADING (§ 93*)—INCONSISTENT ALLEGATION.

Allegations of such defense could not have been coupled in the answer with the other defense as proof of the one would disprove the other.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 189; Dec. Dig. § 93.*]

3. MORTGAGES (§ 376*)—FORECLOSURE UNDER TWO TRUST DEEDS—RIGHT OF SENIOR INCUMBRANCER TO PROCEEDS OF SALE UNDER JUNIOR TRUST DEED.

If a lienor under a junior trust deed had assumed a senior trust deed, and there had been a valid sale under the senior trust deed and the note secured thereby had been satisfied, the holder thereof would not be entitled to the surplus of the proceeds of the sale under the junior trust deed.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1128; Dec. Dig. § 376.*]

4. MORTGAGES (§ 376*)—SALE UNDER TRUST DEED—DISPOSAL OF PROCEEDS.

Ordinarily a trustee who sells property under a trust deed must ascertain the method of disposing of the proceeds from the direction of the trust deed, providing they are not in conflict with law.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1128; Dec. Dig. § 376.*]

5. MORTGAGES (§ 376*)—SALE UNDER JUNIOR TRUST DEED—RIGHT TO PROCEEDS.

Upon a foreclosure sale under a junior trust deed, as between the mortgagor and senior lienors, the mortgagor is entitled to the surplus, unless he had relinquished it in the trust deed or otherwise, as against the senior lienors; the theory of the law being that the purchaser at a foreclosure sale buys subject to prior incumbrances, at least unless under some arrangement the whole fee is sold.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1128; Dec. Dig. § 376.*]

6. MORTGAGES (§ 376*)—SALE UNDER TRUST DEED—DISPOSAL OF PROCEEDS.

Upon a foreclosure sale under a trust deed, junior incumbrancers will take precedence over the mortgagor as regards the right to have their demands paid out of the surplus, since the execution of a junior mortgage amounts to an as-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

assignment to the mortgagor's equity of redemption to the junior mortgagee and of the assignor's right in equity to the surplus in case of a sale under the prior incumbrances, and the same is true of a person to whom a mortgagor conveys or assigns his equity of redemption by way of sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1128; Dec. Dig. § 376.*]

7. MORTGAGES (§ 376*)—FORECLOSURE—TRANSFEREE OF EQUITY OF REDEMPTION.

If a mortgagor's equity of redemption is sold under execution or otherwise transferred in invitum, the transferee will step into his shoes in respect of his right to the proceeds at a foreclosure sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1128; Dec. Dig. § 376.*]

8. MORTGAGES (§ 376*)—FORECLOSURE OF SENIOR TRUST DEED—RIGHTS TO SURPLUS PROCEEDS OF SALE UNDER JUNIOR TRUST DEED.

While the foreclosure of a senior trust deed cuts off a junior incumbrance and any equity to redeem therein, it does not transfer that equity to the purchaser at the sale under the first incumbrance, and does not cut off the right of the second mortgagor to surplus proceeds arising from a sale under the second instrument, especially where the senior trust deed is not given by the mortgagor in the junior incumbrance, but by his grantor, the senior trust deed standing as an independent transaction unrelated to the second mortgage or the equity to redeem therefrom, and whatever title was purchased, or attempted to be purchased upon foreclosure of the junior incumbrance, was one that had belonged to the mortgagor therein.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1128; Dec. Dig. § 376.*]

9. MORTGAGES (§ 361*)—FORECLOSURE UNDER TRUST DEED—DUTY OF TRUSTEE TO OBSERVE PROVISIONS OF DEED.

Where a trust deed required the trustee to sell for cash upon foreclosure, he could not give credit on a note secured by a senior trust deed, alleged to have been assumed by the mortgagor in his trust deed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1078, 1079; Dec. Dig. § 361.*]

10. EVIDENCE (§ 419*)—PAROL EVIDENCE—NATURE OF CONSIDERATION—ASSUMPTION OF INCUMBRANCES.

The assumption by a purchaser of land of an incumbrance thereon may be shown by parol.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1914; Dec. Dig. § 419.*]

11. MORTGAGES (§ 376*) — FORECLOSURE — RIGHT TO SURPLUS.

Fact that the purchaser of land who gave a trust deed to secure his note to the vendor verbally agreed to pay a note secured by a prior trust deed on the premises would not justify the trustee of the purchaser's trust deed, upon selling the premises thereunder, in turning over the surplus proceeds as a credit on the note secured by the senior trust deed, in violation of the provisions of his trust deed that the mortgagor should receive such surplus; such a verbal agreement being no equitable assignment of the surplus such as goes with the assignment of an equity of redemption.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1128; Dec. Dig. § 376.*]

Appeal from St. Louis Circuit Court; Virgil Rule, Judge.

Action by Shelby C. Jones against John A. Shepard. Judgment for plaintiff, and defendant appeals. Affirmed.

Plaintiff executed to defendant, as trustee, a deed of trust conveying certain property in the city of St. Louis to secure the payment of a promissory note of \$500, dated October 11, 1905, and payable to the order of Pingree McFerren, on or before April 15, 1906, with interest at 6 per cent. The conveyance provided for the sale of the property by the trustee if default occurred in the payment of the note, and the trustee covenanted "faithfully to perform the trust" created by the deed. Default having been made in payment, Jacob S. McFerren, the holder of the note when the default happened, called on defendant as trustee to foreclose the deed of trust by selling the property according to the terms of the instrument. This was done, and on July 5, 1907, defendant sold the property to the highest bidder, who was Jacob S. McFerren, for \$3,500, and executed a trustee's deed to him on said day. The amount of the note secured by the deed of trust at the date of the sale was \$552. The trustee's fees and other expenses of the sale amounted to \$108.86, and those two items added made \$660.86, leaving a surplus over the price bid of \$2,839.14. The foreclosed deed of trust provided as follows, regarding the disposition of the proceeds of a foreclosure sale by the trustee: That "he should pay first the cost and expense of executing the trust, including lawful compensation of said trustee, and also an auctioneer's fee of five dollars for each parcel of land sold hereunder, and next he shall repay to any person or persons who may or shall under the covenants hereinbefore set forth have advanced or paid any money for taxes, mechanics' liens, or insurance, as above provided, all sums so by him or them advanced and not already repaid, together with interest thereon at the rate of 8 per cent. per annum from date of such advance till day of payment, and next the amount unpaid on said notes, together with the interest accrued thereon, and the remainder, if any, shall be paid to the party of the first part or his legal representatives." On the day of the sale, plaintiff gave defendant written notice plaintiff claimed any surplus arising from the sale of the property above the amount secured by the deed of trust, and demanded defendant pay the same to plaintiff and to no one else. On the next day, July 6, 1907, plaintiff again notified defendant in writing plaintiff claimed any surplus arising from the sale, and asked defendant to furnish plaintiff the name and address of the purchaser of the property, amount bid, amount of the note secured by the deed of trust with interest and the costs of the sale. Instead of turning over the surplus to plaintiff as grantor in the deed of trust under which the sale occurred, defendant credited said surplus of \$2,839.14 on another note

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

for \$5,000 held by Jacob S. McFerren, which note had been executed by Mary C. Baker and James Baker to Joseph Dormitzer, November 5, 1885, and according to the recitals in the abstract had been secured by a deed of trust of the same date executed by said Bakers to Edward Rowse, as trustee for the benefit of said Dormitzer, the cestui que trust, and conveying the same property conveyed in the deed of trust under which defendant had sold. Though the note for \$5,000 described in the Baker deed of trust had been made to Joseph Dormitzer, it was held by Jacob S. McFerren at the date of the foreclosure sale on July 5, 1907, who also at that time held the note for \$500 secured by the foreclosed deed of trust; the latter note having been assigned to him by the original payee, Pingree McFerren. In the answer filed by defendant he admitted it was his duty to pay and distribute the proceeds of the foreclosure sale in accordance with the provisions of the deed of trust under which he sold; denied he refused, failed, or neglected to pay over to plaintiff the surplus money left after paying all costs and expenses incident to the sale and the debt secured by the instrument foreclosed, and then alleged Jacob S. McFerren was the owner and holder of another deed of trust on the property foreclosed, that plaintiff had assumed and agreed to pay said deed of trust and had failed and neglected to do so, and the note secured by it and the interest thereon were due and payable at the time of the foreclosure. Defendant alleged he gave plaintiff credit on the \$5,000 note for the surplus proceeds of the sale, and that this was in conformity to his duty as trustee, because plaintiff had assumed and agreed to pay said debt of \$5,000, but had failed and neglected to pay it. The reply denied the assumption by plaintiff of the \$5,000 note and deed of trust or agreement by him to pay the same, and denied defendant was authorized to give credit on said note for the surplus arising from the sale, or was authorized to pay said surplus to any one but plaintiff. Plaintiff had purchased the property covered by the two deeds of trust from Pingree McFerren and Mary C. McFerren, his wife, and they had conveyed the same to plaintiff by a warranty deed dated October 11, 1905, wherein the grantors warranted the title to the property "against the lawful claims of all persons whomsoever excepting the taxes for the year 1906 and thereafter, and a certain deed of trust for \$5,000 recorded in book 770, page 398, of the Recorder of Deeds' office in the city of St. Louis, Missouri." The incumbrance excepted out of the warranty was the Baker deed of trust for \$5,000.

Plaintiff testified he knew of the existence of said incumbrance when he purchased the property, and defendant's counsel attempted to prove plaintiff had endeavored

to obtain an extension of that incumbrance from Jacob S. McFerren to whom the note had been assigned by Dormitzer, but this evidence was excluded. Jacob S. McFerren presented the Baker note and deed of trust to defendant on the morning of the sale, and defendant gave credit for the surplus on the note, and took a receipt for the credit from Jacob S. McFerren. There had been a foreclosure sale under the first or Baker deed of trust prior to the sale by defendant under the deed of trust to secure the note for \$500, but defendant testified he regarded the sale under the Baker deed of trust as invalid. Plaintiff was asked while on the witness stand whether he knew, when he purchased the property, of the Baker incumbrance for \$5,000, and whether he ever made any effort to pay it off. Against the objection of his counsel, he was compelled to respond to these questions, and answered that he knew of the incumbrance when he bought and had not endeavored to discharge it. He was also compelled to answer regarding what he paid for the property, and in answering said he did not definitely remember, as there was "considerable detail," and his father had attended to the transaction as his agent. He was then asked whether he had paid any money on the purchase price, and, after some discussion of an objection to the question, the court said the witness had gone far enough into that matter. The purpose of the inquiry was stated thus by defendant's attorney: "It might become important for the reason it might be shown that this plaintiff had no interest whatever at any time in this property, no real interest, and it might appear that he was only used in this matter as a convenience." Defendant testified as follows regarding the reason why he paid Jacob S. McFerren the surplus of the proceeds realized by selling under the deed of trust wherein he was trustee: "Now, Mr. Shepard, you may state why you declined to pay over to Mr. Jones the surplus, as there claimed, arising out of the sale of the property. A. I considered that the foreclosure of the first deed of trust was not a legal sale and that the property was still—the title, the ownership to that first deed of trust and note, was still in McFerren. The title companies would not pass upon the title. * * * And I considered, as I said, that McFerren was still the legal holder of the five thousand claim against this property; that he had an equitable interest in any surplus created by the sale of the second deed of trust under the first. Those were my reasons for making that payment of that surplus on that first deed of trust note." The last part of the answer was struck out on motion of defendant's counsel. The court gave judgment for plaintiff, and defendant appealed, assigning for errors the exclusion of the first or Baker deed of trust and note when offered by defendant, not permit-

the second deed of trust, or the cause of that sale, and in excluding evidence regarding what plaintiff paid for the property when he purchased it from Pingree McFerren. The last assignment of error is in this form: "It was competent to show plaintiff had assumed the payment of the first note also, and had agreed the fund resulting from the sale of the property should be applied to the payment of both of them."

T. B. Harvey and H. G. Offenbach, for appellant. George V. Reynolds, for respondent.

GOODE, J. (after stating the facts as above). To make clear the theory of counsel for defendant, it should be stated they assign as error the exclusion of the Baker deed of trust and note and testimony regarding why defendant foreclosed under the second or Pingree McFerren deed of trust upon the notion that there had been a valid foreclosure of the Baker instrument which deprived plaintiff as grantor in the second incumbrance of right to the surplus proceeds arising from the foreclosure of the second one. It is obvious this theory is the antithesis of the one under which defendant acted in turning over the surplus to Jacob S. McFerren, as pleaded in the answer and told by him in his testimony. He stated he paid the surplus to Jacob S. McFerren because he thought the attempted foreclosure of the Baker deed of trust was invalid, and therefore McFerren was left with a lien for \$5,000 against the property, and in consequence was entitled to receive the surplus. This, too, was the purport of his excluded testimony. But now his counsel contend the foreclosure of the first deed of trust was valid and operated to exclude plaintiff from any participation in the surplus proceeds of the foreclosure of the second one by transferring the right to those proceeds, in equity, over to Jacob S. McFerren. We remark upon this contention that the only evidence offered to prove the Baker deed of trust had been foreclosed was an indorsement across the face of the note it secured, made by a deputy sheriff, which recited the note had been satisfied by sale made June 28, 1906, under a deed of trust securing the same. Whether Jacob S. McFerren purchased at the first foreclosure sale and the trustee conveyed the title to him by deed, or attempted to do so, was not offered in proof. Hence if we allow, for argument's sake, that a valid foreclosure sale had occurred under the first deed of trust, this fact was not supplemented by an offer of evidence which tended to prove McFerren acquired the title to the property, or any greater right to the surplus proceeds of the second foreclosure than he would have as the holder of the note secured by the Baker deed of trust if there had been no sale under it. In other words, nothing was offered to prove

defendant had right in paying the surplus to him. Hence all that remains of this point is the question whether, if there was a good foreclosure of the first incumbrance, that circumstance deprived plaintiff of right to the surplus proceeds accruing from the sale under the second one, and cut out his cause of action against defendant for the surplus. This defense could not be made under the answer, for, as said, it is in direct opposition to the averments therein, and allegations regarding it could not have been couped in the answer with the other defense; for proof of the one defense would disprove the other. *Bell v. Campbell*, 123 Mo. 1, 25 S. W. 359, 45 Am. St. Rep. 505; *Rev. St. 1899, § 606* (Ann. St. 1906, p. 640). But, if pleaded and proved, it would not have been a good defense. For one thing, if the first sale was valid, then according to the evidence relied on to prove its validity, the debt had been satisfied, and Jacob S. McFerren as holder of a fully paid note was entitled to no credit on it. We will consider the matter more at large. Ordinarily how a trustee who sells property under a deed of trust shall dispose of the proceeds must be ascertained from the directions of the instrument, provided these are not in conflict with the law. 2 *Jones, Mortgages* (6th Ed.) § 1927. There were no incumbrances junior to the second or Jones deed of trust, and the provision therein requiring a surplus remaining of sale money, after paying the secured debt, expenses of sale, etc., to be paid to plaintiff as mortgagor, was in accord with the law. As between senior lienors and a junior mortgagor, the latter is entitled to the surplus, unless he had relinquished it in the instrument or allunde, as against the former. The theory of the law is that the purchaser at a foreclosure sale buys subject to prior incumbrances; at least, unless under some arrangement, the whole fee is sold. *Helweg v. Heltcamp*, 20 Mo. 569; *Scott v. Shy*, 53 Mo. 478; *Schmidt v. Smith*, 57 Mo. 135; *Tanner v. Taussig*, 11 Mo. App. 534. Junior incumbrancers will take precedence over the mortgagor, as regards the right to have their demands paid out of the surplus, because the execution of a junior mortgage amounts to an assignment of the mortgagor's equity of redemption to the junior mortgagee and of the assignor's right in equity to the surplus in case of a sale under the prior incumbrance. *Cases, supra*; 2 *Jones, § 1929*; 27 *Cyc.* 1497. So will a person to whom a mortgagor conveys or assigns his equity of redemption by way of sale. *Reed v. Mullins*, 43 Mo. 306. And in this and some other states, if a mortgagor's equity of redemption is sold under execution or otherwise transferred in invitum, the purchaser will step into his shoes in respect of his right to the surplus proceeds of a foreclosure sale. 27 *Cyc.* § 1497, and note 97; *Foster v. Potter*, 37 Mo. 525, 534.

But we can conceive of no principle upon which the foreclosure of a prior mortgage, and especially one not given by the mortgagor in a second incumbrance, but by his grantor, will cut off the right of the second mortgagor to surplus proceeds arising from a sale under the second instrument. Pendency of the first mortgage as an outstanding incumbrance does not have that effect, and we perceive no reason why foreclosing it should have. It stands as an independent transaction, unrelated to the second mortgage or the mortgagor's equity to redeem from the second mortgage, though as a junior lienor he might redeem the first incumbrance, too. Neither is the first incumbrance, or the beneficiary therein, or a purchaser thereunder, in any way connected with the right of the second mortgagor to surplus money accruing from foreclosing the latter lien; at least, we do not discern any connection. We find no direct authority on this question, but our opinion appears to be according to the principles underlying the rules regarding what disposition shall be made of surplus proceeds, and *Hooper v. Castetter*, 45 Neb. 67, 63 N. W. 135, is nearly in point. In that case the holder of junior mortgages brought suit to have them foreclosed, and after decree of foreclosure, but before sale under the decree, bought the senior mortgage, and having bid in the property at the foreclosure sale, for more than the amount of the incumbrance foreclosed, sought to have the surplus credited on the senior incumbrance he had acquired. His claim was denied, and it was decreed the surplus should go to the intervening creditors of the mortgagor, less a homestead exemption of \$2,000 in favor of the latter and his wife, which was ordered paid to them. The Nebraska case is relevant to the point involved here in several respects. The court pointed out that under the decree of foreclosure the sheriff could sell only for cash, and hence could not accept the debt secured by the senior incumbrance as part payment, though under the law he could give credit on the purchase price for the amount of the debts secured by the deeds foreclosed. By parity of reasoning, as Sheppard was required to sell for cash, he had no right to give credit on the Baker note. The Supreme Court of Nebraska said it was optional with the second mortgagee, who had foreclosed those instruments, and had purchased the first mortgage whether the latter lien would be merged in the title he acquired by buying at the foreclosure sale; that the question of his right to the surplus did not turn on whether the first incumbrance had merged in his fee, but he had no more right to the surplus by virtue of the assignment to him of the first mortgage than a stranger would have had, or the original first mortgagee. If the title to the property passed to whomsoever bought at the sale under the Baker

mortgage, then the sale under the second or Jones deed of trust passed no title to the purchaser at the latter sale. Nevertheless, if Jacob S. McFerren was willing to buy in the property and pay a price for it which would more than discharge the debt secured, the surplus ought to go to plaintiff as mortgagor; because whatever title was purchased or attempted to be purchased was one which had belonged to him and he had conveyed to the trustee making the sale. An effort is made to treat the case as analogous to one in which the mortgagor in a second mortgage assigns his equity of redemption by way of a third mortgage, or by voluntary sale or sale in invitum. But there is no analogy between the two cases. The foreclosure of a prior mortgage cuts off a junior incumbrance, and any equity to redeem therein, but does not transfer that equity to the purchaser at the sale under the first incumbrance, and therefore does not carry any right to surplus proceeds arising from a sale under a junior incumbrance.

The second error assigned is the refusal of the court to permit defendant to inquire into the consideration plaintiff paid for the property in controversy when he purchased it from Pingree McFerren. The purpose was to prove defendant assumed, as part of the consideration, the payment of the Baker deed of trust for \$5,000. He certainly did not assume it in the deed Pingree McFerren made to him, but such an assumption may be established by parol evidence. *Bensieck v. Cook*, 110 Mo. 173, 19 S. W. 642, 33 Am. St. Rep. 422; *Nelson v. Brown*, 140 Mo. 580, 41 S. W. 960, 62 Am. St. Rep. 755. The offer to prove a parol assumption was vague, at best, and really we think the testimony of plaintiff, by whom defendant's counsel attempted to prove the fact, amounted to a denial that he had agreed to assume and pay the first mortgage. However, it might be contended he only denied having assumed it in Pingree McFerren's deed to him, and not that he did so verbally. Let us then take for granted he agreed verbally to pay said note as part of the purchase price of the property, and the question occurs whether this fact would be a defense to the present action, whether it justified defendant in ignoring plaintiff's demand for the surplus proceeds of the foreclosure sale and turning the surplus over to Jacob S. McFerren, as holder of the Baker note. No doubt such an assumption of the debt would have given Jacob S. McFerren a right of action against plaintiff personally, or to attach the surplus, or reach it by suit in equity, as the circumstances might warrant. But it was no authority or justification for defendant's turning the surplus over to McFerren, was no equitable assignment of the surplus, such as goes with the assignment of an equity of redemption. Plaintiff might have had ground to contend the debt had already been paid, or that he

had offsets or counterclaims against the holder of the note, or that the money, or part of it, was exempt from execution or liability for the debt, like the surplus in the Nebraska case, or might have preferred to pay other debts with it. To say defendant could hand the money over to Jacob S. McFerren to pay the Baker incumbrance would amount to investing defendant with the functions of a court and allowing him to settle the rights of the respective parties. He was a stranger to any such agreement, if it was made, and obtained no warrant from it for disposing, as he did, of the greater part of the price bid for the property. We are cited to the passage in a treatise wherein it is said the purchaser at a mortgagee's or trustee's sale takes the property subject to all prior liens, and "no part of the proceeds should be applied to their extinguishment in the absence of an express provision therefor in the deed of trust or other agreement binding on the mortgagor." 28 Am. & Eng. Ency. Law (2d Ed.) 833. The italicized words are argued to mean a trustee is entitled to pay the surplus to the holder of a note secured by a prior mortgage, if the party named as mortgagor in the junior deed of trust under which the trustee sells had promised payment of the prior mortgage as part of the purchase price of the land when he bought it. We think those words have no such meaning, but refer to contracts aliunde the deed under which the trustee sells, by which the grantor in said deed agrees regarding what disposition shall be made of surplus money accruing from a sale and authorizes the application of it to prior liens.

The judgment is affirmed.

NORTONI, J., concurring. REYNOLDS, P. J., having been of counsel, not sitting.

ROSE v. MAYES, Public Adm'r.

(Springfield Court of Appeals. Missouri. Nov. 2, 1909. Rehearing Denied Dec. 6, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS FOR LABOR—RELATIONSHIP.

Services between persons in family relation are presumed to be gratuitous, and, to warrant a recovery therefor against a decedent's estate, an express contract, or an intention to charge by one and to pay by the other, must be proved.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 901; Dec. Dig. § 221.*]

2. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS AGAINST ESTATE—EVIDENCE.

An intention to charge and to pay for services between persons in family relation may be proved by circumstantial evidence.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 908½; Dec. Dig. § 221.*]

3. TRIAL (§ 139*)—TAKING CASE FROM JURY—SUFFICIENCY OF EVIDENCE.

A demurrer to testimony should not be sustained if it is so strong that fair-minded men may differ as to the issue.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 338; Dec. Dig. § 139.*]

4. EXECUTORS AND ADMINISTRATORS (§ 221*)—CLAIMS AGAINST ESTATE—QUESTIONS FOR JURY.

Evidence in support of a mother's claim for services against the estate of her deceased daughter examined, and held to justify the direction of a verdict for the administrator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 908½; Dec. Dig. § 221.*]

Appeal from Circuit Court, Greene County; James T. Neville, Judge.

Action by Mary E. Rose against David Mayes, public administrator. From a judgment for defendant, plaintiff appeals. Affirmed.

O. T. Hamlin and J. T. White, for appellant. W. D. Hubbard and G. W. Goad, for respondent.

COX, J. This case arises upon the following account filed by plaintiff in the probate court of Greene county:

The Estate of Lillie Collins, Deceased, to Mary E. Rose, Dr.	
1893. To amount of money furnished Lillie to come to Kansas from Kentucky.....	\$ 26 00
1900. To value of organ given in exchange for piano purchased by Lillie.....	60 00
To services, household work, cooking, washing, etc., rendered for a period of fourteen years from 1894 or 1895 to 1908 at \$200 per year..	2,800 00
Total	\$2,886 00

There was a trial by jury and a verdict for plaintiff for \$1,600. The administrator appealed. There was a trial by jury in the circuit court, where, at the close of the plaintiff's testimony, the court sustained a demurrer thereto, and judgment was entered for defendant. Plaintiff has appealed from this judgment, assigning as error the action of the court in directing a verdict for defendant. It is conceded that the first item, \$26, is barred by limitation, and that there is no evidence to sustain the second item of \$60, and that as to these items the judgment is proper. The only contention is as to the item of \$2,800 for services.

The evidence tending to show the relationship of the parties, their condition, surroundings, and manner of living during the time for which services are charged developed this state of facts:

The plaintiff is the mother of the deceased. The deceased was married at the age of 16 to Collins, and removed to Kentucky in 1892. A year or so later, deceased, Lillie Collins, wrote to her mother, who then lived at Win-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 122 S.W.—49

ing except a little furniture. The mother and daughter continued from that day until the death of Lillie, in February, 1908, to live together as one family. The mother did most of the housework, the washing, cooking, etc. They remained in poor circumstances until the daughter Lillie came into possession of some money, the date of which does not appear, but presumably about 1899 or 1900, for on February 13, 1900, she purchased a home in Springfield, Mo., paying \$800 therefor. This home was comfortably furnished. They moved to it, and lived there, except for one short interval, until the date of Lillie's death. The care of the home and the burden of the work was performed by the mother. Lillie was away from home for a considerable portion of the time, but for what purpose does not appear. She dressed stylishly, the mother dressed comfortably, and the home was transformed from one of poverty to one of comfort. There was some evidence as to the value of the work performed by the plaintiff. Lillie died in February, 1908, leaving an estate of a net value, including the home, of about \$1,500. The plaintiff offered a great deal of testimony, in which witnesses detailed statements made by deceased in her lifetime relative to a desire upon her part to compensate her mother for the labor she performed in the home, and it is upon these statements alone that the plaintiff relies for a reversal of the judgment. Without detailing them in full we incorporate enough to show their general nature as follows:

In the presence of Mrs. Dowd, sister of the plaintiff, soon after her return from Kentucky, she said, in substance, to the plaintiff: "Mamma, if you will stay with me, I will never leave you, or forsake you. You have been very good to me, and I will repay you for all you ever do for me, and I will provide a home for you as long as I live." To this the mother made no reply. At other times she said to Mrs. Dowd practically the same thing in the mother's absence. To Mrs. Petty, about six months before her death, she said, in substance, that she got the home in Springfield purposely for her mother a home; that her mother had stuck to her and cared for her, and she got this home for her because she had no one else to care for her; that her mother was the best woman in the world, just waited on her like she was a second babe, did all the housework, etc. Mrs. Buckmaster heard Lillie say to her mother, in effect, that the work was pretty hard on her, but she expected to pay her for it. No reply by the mother. She also stated to Mrs. Buckmaster that she wanted to leave the place clear of all incumbrance to her mother at her death, because her mother, you might

so much for her; that she thought she could not do too much for her mother. To Mrs. Smithson she stated she thought her mother was the right one to have her property, and she wanted her to have it when she was done with it. She thought her mother had earned it, because she took care of her when she was sick. To Robert Smith and others she stated practically the same things. Lillie died from the effects of chloroform given preparatory to a surgical operation, and to Dr. Fulbright the evening before the operation she said: "Doctor, if this operation is a dangerous one, I want to know it, for, if it is, I want to make a will, and give all I have to my mother." He assured her the operation was not dangerous, and the will was not made.

The foregoing we think fairly states the substance of the testimony as preserved in this record. Was it sufficient to take the case to the jury? The rules of law applicable to this case are well settled in this state, and are as follows: In cases in which the family relation exists, as it undoubtedly did in this case, the presumption is that services rendered by one member of the family to another are gratuitous, and, to entitle one to recover for services performed while the family relation existed, the burden is upon the plaintiff to prove an express contract for payment, or that there was an intention on the part of the servitor to charge, and on the part of the recipient of the services to pay for such services at the time they were rendered. *McMorrow v. Dowell*, 116 Mo. App. 289, 90 S. W. 728; *Sloan v. Dale*, 90 Mo. App., loc. cit. 90. The intention to charge by one, and to pay by the other, need not be shown by direct or positive testimony, but may be shown by facts and circumstances from which such intention may be inferred. *Cowell v. Robert's Ex.*, 79 Mo. 218; *McMorrow v. Dowell*, 116 Mo. App. 289, 90 S. W. 728; *Fry v. Fry*, 119 Mo. App. 476, 94 S. W. 990; *Cole v. Fitzgerald*, 132 Mo. App. 17, loc. cit. 25, 111 S. W. 628. A demurrer to the testimony should not be sustained if there is substantial testimony adduced in support of the plaintiff's claim. By this is meant that it should satisfy a reasonable, fair-minded person of the truth of the claim, or that it should be, at least, strong enough that fair-minded persons might differ as to the truth or falsity of the claim. *Baird v. Citizens' Ry. Co.*, 146 Mo. 265, loc. cit. 281, 282, 48 S. W. 78; 2 *Thompson on Trials*, § 1663.

Keeping these wholesome rules of the law in view and weighing the testimony in the light thereof, could fair-minded persons differ as to the issue involved in this case, or could but one result follow? Here is an account of \$2,800 for 14 years of service as

a house servant by a mother against a daughter. If the services were rendered in this capacity at all, they began when both were very poor, and this condition continued for some time. Then the daughter becomes possessed of some means. A house is bought by her in Springfield, and the family home of poverty is changed to one of comfort. The daughter gives frequent expression of her affection for her mother, and her intention to pay her for what she does for her, also to leave her property to her if she should die first. Had she done this, as she might very properly have done, this controversy would never have arisen. The expressions of the daughter above referred to began upon her return to her mother in 1893 or 1894, and were continued, without interruption, at intervals, to the time of her death, sometimes in the presence of the mother, sometimes directly to her, and sometimes in her absence. The mother says nothing. When these expressions of affection and a desire to repay her for her goodness are made directly to the mother, no answer is given by the mother, but she goes on tolling as was her wont for the comfort of her daughter and the good of the home. No account is kept of services rendered during all this time. When the daughter acquires some means, not a word is said by either about the payment of any sum due for services, but the little home is purchased and the lives of both are made more comfortable, and the devotion and love of the mother and daughter continue unbroken to the end. They shared together the hardships of poverty, and enjoyed together the comforts of better financial circumstances. Shall we say that under this testimony the question as to whether they occupied the relation of master and servant or were simply living in the joy of each other's love was a doubtful one, and about which fair-minded men might differ? We think not. To our mind it would be a travesty upon justice and a slander against motherhood to say that under the circumstances developed in this case the daughter was master and the mother servant, and the motive for the continuance of loving deeds and tender care of the mother was a wage.

We have examined carefully the cases cited by appellant with other cases, and, while the courts have been very liberal in allowing claims for services against the estates of deceased persons, yet the evidence in all such cases must be weighed in the light of the relationship, conditions, and surroundings of the parties, and that construction given it which comports with reason and justice. Where there is urgent necessity for the services, very slight circumstances have been held to be sufficient to make out a prima facie case. It is apparent that no general rule can be laid down as to what evidence is required, but each case must stand

upon its own facts, but, in the absence of an express contract, there must be some evidence not only that the recipient of the services intended to pay for them, but there must also be some evidence that the one rendering the services expected to be paid for them, and that such intention on the part of both parties existed at the time the services were performed. In this case there are some facts that militate against the position of the plaintiff that she at the time the services were rendered intended to charge, and the daughter intended to pay, for the claimed services. This account is practically twice the value of the entire estate. For the first few years of the time for which compensation is claimed Lillie was poor, and, as far as the evidence shows, had no prospect of ever being able to pay anything. Then she by some means acquired some money. If both expected that the mother was to be paid for services rendered Lillie, why was not something paid then? Nowhere in the evidence does it appear that the mother changed her condition, or suffered possible financial loss by reason of the claimed services. There is direct evidence that in one instance the daughter paid a doctor's bill for the mother, and the only fair inference from all the testimony is that the daughter paid the bills incurred for the support of the family, and the mother did the work, and nowhere in this record do we find any evidence from which in our judgment it could be fairly inferred that the mother intended to charge for these services at the time.

Our conclusion is that the real facts were that this mother and daughter lived all those years together exemplifying a mother's love and a daughter's devotion, and this was the tie that held them together, and not the expectation of payment for services rendered, and that, under this evidence, no other conclusion could be fairly reached, and that, therefore, the learned trial judge was right in directing a verdict for the defendant.

The judgment is affirmed. All concur.

GOODLOE v. EMPSON PACKING CO.

(St. Louis Court of Appeals. Missouri. Nov. 16, 1909.)

1. ACCORD AND SATISFACTION (§ 11*)—PAYMENT BY CHECK—EFFECT OF RETENTION OF CHECK.

Where a voucher and letter showed that a check sent to a broker in payment of his commissions was in full payment of the account sued on, the retention of the check, unaccompanied by any explanation, operated as a payment in full of the account.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 75-83; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 1, pp. 81-84; vol. 8, p. 7561.]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

INGS ON PART OF DEFENDANT—NECESSITY OF.

Where a case comes to the circuit court from that of a justice of the peace, no pleadings on the part of defendant are required.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 686; Dec. Dig. § 174.*]

3. APPEAL AND ERROR (§ 903*)—PRESUMPTIONS—ACTION OF TRIAL COURT—RECORD.

Though all presumptions are to be indulged in favor of the action of the trial court, the court on appeal cannot indulge in presumptions in the face of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3671; Dec. Dig. § 903.*]

Appeal from St. Louis Circuit Court; Virgil Rule, Judge.

Action by Ward Goodloe against the Empson Packing Company. Judgment for plaintiff, and defendant appeals. Reversed.

Action before a justice of the peace on an account for commissions. On appeal to the circuit court the case was tried there before the court; a jury being waived. Objection was made to the sufficiency of the statement filed before the justice, and, the objection being overruled, the trial proceeded. Evidence as to the correctness of the claim made, and as to whether it was according to contract between the parties, was introduced, as also this letter: "Longmont, Colo., Oct. 23, 1906. Mr. Ward Goodloe, 509 Houser Bldg., St. Louis, Mo.—Dear Sir: Enclosed find check for \$41.73 in payment of brokerage on Ouerbacher, Gilmore Co's. contract and also on Inger and McKinzie of Joplin, Mo. You will note that we had to cut down both of these parties. Kindly sign enclosed voucher and return. Yours very truly [Signed] The Empson Packing Company, by J. H. Empson, Pres."

The letter was accompanied by a voucher to which was attached a receipt, all as follows:

The Empson Packing Company, Longmont, Colorado, to Ward Goodloe, Dr.

For items as per bill attached.

2½ per cent. brokerage sale to Ouerbacher-Gilmore	\$1,449 00	\$36 23
10 per cent. brokerage sale to Inger & McKinzie.....	55 00	5 50
		\$41 73

"Longmont, Colo., Oct. 23, 1906. Received from the Empson Packing Company, forty-one and 75/100 dollars, in full payment for above account. Goodloe Bros.

"Approved for payment. J. H. Empson, President."

Along with these was a check for \$41.73 to order of plaintiff. Respondent, plaintiff here, scratched out the word "full" in the receipt, and wrote over it in ink the word "part," and signed and returned the receipt to defendant, retaining the check. Some correspondence between the parties over their

is made in the correspondence or testimony to the receipt. There were no written pleadings other than the statement which had been filed before the justice which was a bill on billhead of plaintiff dated September 2, 1907, made out against defendant with dates, and items following:

1906.	
Sept. 30. Commissions on Reinhart order, \$4,770.00.....	\$119 25
Commissions on Ouerbacher-Gilmore Co., Louisville, Ky.....	\$163 92
Credit	41 73
Due	\$125 19 125 19 \$244 44

No declarations of law were asked or given. At the conclusion of the trial, the court disallowed the Reinhart item and found for plaintiff on the Ouerbacher-Gilmore item, awarding plaintiff \$113.46 on that, including interest. Defendant filed motions for new trial and in arrest. These being overruled, and saving exception, it has brought the case here on appeal.

Abbott, Edwards & Willson, for appellant. Wm. S. Campbell, for respondent.

REYNOLDS, P. J. (after stating the facts as above). The court committed no error in refusing to hold the statement filed insufficient. Neither by any rulings at the trial nor by declarations of law are we informed on what theory the trial judge acted in holding that there had not been accord and satisfaction between the parties. The voucher and letter accompanying the check sent shows that the check was sent in full payment of the account, which account covered the transactions here in suit. The retention of the check, unaccompanied by any explanation, in the face of the offer that it was in full payment, is conclusive on plaintiff. We have recently held in the case of Pub. Geo. Knapp & Co. v. Pepsin Syrup Co., 137 Mo. App. 472, 119 S. W. 38, that such was the law. See, also, Lightfoot v. Hurd, 113 Mo. App. 612, 88 S. W. 128. See further Barrett v. Kern, 121 S. W. 774, where the law of accord and satisfaction is discussed. There were no conflicting facts in evidence on this matter of accord and satisfaction. All there is about it is in the letter, receipt, and check. Respondent claims that no such defense was pleaded. This was a case coming to the circuit court from that of the justice, and required no pleadings on the part of the defendant. While it is true that all presumptions are to be indulged in favor of the action of the trial court, we cannot indulge in presumptions in the face of a record.

The judgment of the circuit court must be, and is, reversed. All concur.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

NICHOLSON v. ACME CEMENT PLASTER CO.

(St. Louis Court of Appeals. Missouri. Nov. 17, 1900. Rehearing Denied Nov. 30, 1900.)

1. CONTRACTS (§ 56*)—CONSIDERATION—MUTUAL PROMISES.

Plaintiff, a subcontractor, contracted to plaster the interior of a schoolhouse, agreeing to do a first-class job and to guarantee the plastering upon the ceiling would remain in place two years. The plaster which was manufactured by defendant was put upon the ceiling in a workmanlike manner, but, shortly after being put on, it began to blister and fall off. W., one of defendant's officers, was called in to examine the work, and he told plaintiff to replaster the ceilings at once, and send the bill to him, and he would pay it. Nothing was said about what materials should be used in replastering, and the same kind was used. Plaintiff had to replaster again, as the coat put on under the agreement with W. fell off. *Held*, in an action to recover the cost of the work done under the agreement with W., that plaintiff assented to W.'s proposal, which was a binding contract on both plaintiff and W. or defendants whom W. represented; it being supported by the mutual promises of the parties.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 56.*]

2. CONTRACTS (§ 22*)—UNILATERAL CONTRACTS—PERFORMANCE BY ONE PARTY—EFFECT.

Though the contract was unilateral in the first instance, it became binding on defendant when plaintiff had done the work and incurred expenses under it.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 75; Dec. Dig. § 22.*]

3. CONTRACTS (§ 52*)—CONSIDERATION—RESTRICTIONS.

Plaintiff's original contract did not bind him to use defendant's cement on the original work or in replastering, but as it was likely that plaintiff and W. understood that the replastering was to be done with it, thereby plaintiff's obligation was more restricted and onerous than the original contract, and was supported by that consideration.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 52.*]

4. CONTRACTS (§ 52*)—CONSIDERATION—DETREMENT TO PROMISEE.

Though plaintiff under his original contract was bound to replaster, and though he was not bound by his agreement with W. to use defendant's cement, W.'s conduct in cutting off further investigation as to where the responsibility lay for the failure of the plaster to adhere, and directing plaintiff to replaster at once, was such a detriment as to be a valid consideration for their contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 223, 224; Dec. Dig. § 52.*]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Action by Michael Nicholson against the Acme Cement Plaster Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

E. C. Gerhard contracted with the board of education of the city of St. Louis to erect the Webster School Building. He sublet the contract for the plastering to plaintiff, subject to the conditions of the main contract between Gerhard and the board of education.

One of those conditions was that the contractor would guarantee for two years the plastering on the ceilings should remain in place. Every subcontractor bidding on a portion of the work was bound to read the specifications in the contract of the main contractor, and it was provided that persons who proposed for subcontracts agreed to carry out the terms of the drawings and specifications. The main contract, which became binding on plaintiff when his bid for the plastering was accepted, required as follows:

"To be plastered throughout as above specified, with one of the following cement plasters: Acme, Royal, O. K., Peerless, Agatite, Fire Pulp, or Fitzgerald's Peoria Cement Plaster. Plastering to be done in strict accordance with the manufacturer's directions for a first-class job. Plaster the ceilings throughout with as thin a coat of plaster as possible to make a straight job, using neat Acme wainscot finish; the same to be mixed with clean water to the proper consistency for use. In case concrete lintels are used, this contractor shall include the plastering of all lintels, etc., in the basement.

"Guarantee: The contractor for plastering will be required to guarantee that the plastering upon the ceilings will remain in place—said guarantee to be for a period of two years dating from the issue of the final certificate to the general contractor. All of the above work to be a strictly first-class job to the satisfaction of the commissioner."

Plaintiff bought Acme cement plaster to use in the building. This plaster appears to have stood well on the walls, but much of that put on the ceilings cracked, blistered, and fell off; so that the work of plastering the ceilings was not satisfactory to the building commissioner, and it became incumbent on Gerhard, as general contractor, to make it good, and, in turn, Nicholson was responsible on his guaranty for two years. The Acme Cement Company had published pamphlets in which it advertised its plaster as possessing strong adhesive qualities, and adhering firmly to brick, stone, terra cotta, and wood; also describing the plaster and expatiating on its qualities and superiority over other plasters, saying it was guaranteed in every particular as far as the nature of the material was concerned, but had to be put on in a certain way to secure the best results, and setting out the mode in which it should be spread, saying, further, it always proved satisfactory to architects, owners, and plasterers when properly used. We are not much concerned with those matters, and suffice to say about them the evidence goes to show the plaster was laid on the ceilings of the building in question in a workmanlike manner. After it began to blister, crack, and fall off, there was a parley between the general contractor Gerhard, the superintendent

walker, who appears to have been the responsible officer of the defendant company. He examined the work, as did also a Mr. Dugan, who was connected with the company, and Mr. Toensfeldt, the structural engineer for the board of education. The board was insisting Gerhard, the general contractor, repair the ceilings at once and go on with the work, so the building would be ready for the opening of school in January, and Gerhard was insisting Nicholson make the repairs forthwith. The upshot of the matter was that Walker, representing defendant company, told plaintiff to replaster the ceilings at once, send him the bill, and he would pay it. This, in substance, is what the evidence tends to prove. The plaster had adhered to concrete well in other instances when plaintiff used it, and it is not made clear why it was a failure in this one; the evidence on the point being inconsistent. There was some that Walker said the plaster was too rich, other testimony he said it never would adhere to concrete, and other evidence that he said he would have some of it examined to see what was wrong with it. There was abundant evidence to prove the plaster was bad and had not adhered, though it was spread on properly; as there was also to prove Walker told Nicholson to replaster the ceilings and he would not lose a cent, or as some of the witnesses said, send him the bill, and he would pay it. When the interview occurred among the different persons interested, including Walker, there had been no official action by the board of education through the building commissioner rejecting the work, but the parties were merely investigating and debating the cause of the plaster falling off, and called Walker in to get his opinion. Gerhard said he was bound to have a first-class job done on the ceilings, and looked to Nicholson, and Nicholson said he would have had to replaster to make the job according to specifications, even if Walker had not directed him to do so, and agreed to bear the expense. Nothing was said in so many words about what material should be used in replastering, but Acme cement was used. In the conversations antecedent to Walker's agreement with Nicholson to bear the expense, the latter, according to Gerhard's testimony, felt like he ought not to stand any loss because of the condition of the ceilings. He was thinking about going on to Johannes, the dealer from whom he had bought the cement, but had not done so as yet. In fact, when Walker agreed with Nicholson, nothing definitely had been determined about the latter's responsibility, or whether the material was at fault, and, if so, in what respect, whether it would be wise to use it again, or who was liable. These matters were all undetermined.

son had to replaster a second time, for the coat put on under his agreement with Walker fell off; but he seeks no recovery for the second replastering. The cost of the work done under the agreement with Walker was about \$900, including repainting, material, and wages to plasterers and common laborers. When the bill was presented to Walker, he declined to pay it, saying he expected a bill of from \$50 to \$100, and, if a reasonable one had been presented, he would have paid it.

At the conclusion of the testimony, the court instructed the jury to return a verdict for defendant, and, judgment having been entered accordingly, this appeal was taken.

Daniel Dillon and Paul Dillon, for appellant. W. E. Fisse, for respondent.

GOODE, J. (after stating the facts as above). Plaintiff was defeated on the theory there was no consideration for Walker's promise to pay the cost of replastering the ceilings, because plaintiff was under a contract with Gerhard to do so if the plaster first put on crumbled, and hence in agreeing with Walker and performing under the agreement he neither undertook to do, nor did, more than was within the scope of his obligation to Gerhard. It is important at the outset to determine what this obligation was. We hold it was to do "a strictly first-class job to the satisfaction of the commissioner," and guarantee the plastering upon the ceilings would remain in place two years. The job as first done was concededly a failure, and, to perform his contract, it was incumbent on plaintiff to do it over so as to make it first class. His obligation was not limited to his guaranty in the sense that he had an option to respond in damages on his guaranty or make the job first class. It is true he might have refused to replaster, and perhaps, as the contract was for personal services, he could not have been forced to do so, and Gerhard's only remedy against him would have been in damages. But, if these things are true, it does not follow plaintiff would have performed his obligation by paying damages, though he might have discharged his legal liability. We are no friends to the doctrine which finds a consideration for a promise to pay additional compensation for the performance of a contract on the theory that the party to the contract was only bound to perform or pay damages at his option, and therefore the promise of further compensation to induce him to perform is good, because it secures to the promisee the service he wants instead of leaving him to his remedy in damages. As to this phase of the subject, we agree with the views expressed in *Harriman, Contracts* (2d Ed.) §§ 117-125, inclusive, and 8 *Harvard Law Rev.* pp.

27-30. But neither are we friendly to highly strained technical rules in regard to the consideration of contracts, whereby agreements which parties understood to be complete and valid contracts are annulled. In this matter, more than others, it is important to keep the law in accord with the understanding of the people; and it is our opinion that hardly any man, except an astute lawyer, if placed as plaintiff was, would doubt he had a good contract with Walker to pay the cost of replastering. It is a fair inference from the circumstances in proof that plaintiff assented to Walker's proposal for him to replaster at Walker's expense. If this was true, there were mutual promises which, according to reason and some authority, would constitute a contract binding on both plaintiff and Walker, or defendant whom the latter represented. Langdell in 19 Harv. Law Rev. 496; Harriman, Contracts, § 94. Whether plaintiff accepted the proposal in words or not, he accepted by conduct to Walker's knowledge, and replastered forthwith pursuant to the arrangement. If the agreement was unilateral in the first instance, according to the general doctrine, it became binding on defendant when plaintiff had done the work and incurred expense under it. Underwood Typewriter Co. v. Century Bldg. Co. (Sup.) 119 S. W. 400. When those two propositions of law are to be applied to a case where the new contract deals with the same subject-matter as a previous contract between one of the parties and another person, the courts of the United States for the most part do not treat the new mutual promises, or even performance under them, as sufficient consideration for the agreement, if the performing party already was under an obligation to do the identical thing. In such instances it is conceived there is no detriment to him from the new agreement, and whatever benefit, if any, accrues to the other party to said agreement, is held not an adequate consideration. Plaintiff's original contract did not bind him to use Acme cement in replastering, but he could choose among several kinds. The witnesses testified nothing was said about what material he should repair with; but likely he and Walker understood the replastering was to be done with Acme. If this was true, plaintiff's obligation was more restricted and onerous than the one he was under with Gerhard, and there could be no doubt that it was supported by a consideration. Corrigan v. Detsch, 61 Mo. 290. As the right to deduce this inference from the evidence is somewhat dubious, we will assume Walker's proposal meant plaintiff might use any of the cements mentioned in the specifications. Considered in this aspect, the case strikes us, after much search among the books, as one of first impression in respect of the posture of affairs when Walker's promise was given. There are numerous de-

cisions by the courts of this country that a promise given to a stranger by one party to a contract to do what he was already bound to do is no consideration for an agreement by the stranger to pay for the performance. 1 Parsons, Contracts (9th Ed.) p. 478, and note; Harriman, Contracts (2d Ed.) § 122; Walds-Pollock, Contracts (3d Ed.) p. 209, note 19. The rule is the other way in England and in a few cases in this country. Abbott v. Doane, 163 Mass. 433, 40 N. E. 197, 34 L. R. A. 33, 47 Am. St. Rep. 465, and annotations. An examination of the cases in which this proposition has been decided shows the underlying policy of the rule is to prevent persons from extorting compensation beyond what was agreed upon at first for complying with their contracts or discharging a duty imposed by law. The spirit of the rule is found in the maxim that a man will not be suffered to take advantage of his own wrong, and properly applied it is a wholesome rule. If allowed to control the decision of a case like the one before us, the reason and policy of it are forgotten, and its application becomes not only arbitrary, but unjust and mischievous. Considered from a commercial point of view, defendant had a strong motive to get the work done over without the faults of the plastering becoming generally known, as would happen if there was a prolonged dispute or litigation. It cannot be said this motive amounted to a consideration, for the financial benefit defendant would obtain from having the subject dropped, would be indirect, and not accrue from its agreement with plaintiff, to whom it was not liable for defects in the plaster. But let us look closely at the situation when the agreement was made, and the effect of it on plaintiff's conduct. It had not yet been settled what caused the plaster to drop, or whether the circumstances were such as to constitute a breach of plaintiff's contract. The questions of where the fault was and where the responsibility rested were under discussion. Conceding the conclusion would have been reached that plaintiff was bound to replaster, it then would have been for him to decide whether he would use Acme or some other plaster in the work. Now granting the arrangement with Walker did not bind plaintiff to use Acme, Walker's conduct in cutting off further investigation of said matters and directing plaintiff to replaster at once at least caused plaintiff to waive a further examination into his obligation and responsibility and further deliberation upon whether he would replaster with Acme cement or some other. On deliberation plaintiff might have decided to use a different plaster instead of making a second experiment with a kind that had failed; and in point of fact his re-use of Acme appears to have entailed on him the task of replastering a second time at his own loss. But the essential

fact is that, while plaintiff's obligation was under examination and in controversy, the matter was brought to a close by the agreement between plaintiff and defendant. The case resembles *Good Fellows v. Campbell*, 17 R. I. 402, 22 Atl. 307, where it appeared a sister who had been named as beneficiary of a certificate of insurance, while ignorant of the fact, agreed the insurance money might be distributed among all her brother's heirs, including herself. She was held bound by the agreement for this reason, among others: That who was entitled to the fund was uncertain when the agreement was made, and the parties agreed in consideration of mutual chances. See *loc. cit.*, 17 R. I. 405, 22 Atl. 307, and cases cited; also *Harriman, Contracts*, § 109. The situation with which we are dealing is not that of a party attempting to extort additional pay for doing something he had bound himself to do, for plaintiff was not attempting to evade his obligation, but to ascertain it and settle on how to perform it. We think there was a detriment to plaintiff in agreeing with Walker and performing the agreement, and, if there was, the arrangement became a contract supported by a valid consideration. *Strode v. Transit Co.*, 197 Mo., *loc. cit.* 622, 95 S. W. 851; *Underwood Typewriter Co. v. Century Bldg. Co.*, *supra*. We say nothing about whether the repairing was done for reasonable prices, as that is a matter for the triers of the fact.

The judgment is reversed, and the cause remanded. All concur.

DALPINE v. LUME et al.

(St. Louis Court of Appeals. Missouri. Nov. 16, 1909.)

1. COMPROMISE AND SETTLEMENT (§ 19*)—IMPEACHMENT—MISTAKE.

A compromise will not be disturbed by a court of equity because of a mistake either of law or fact, in absence of inequitable conduct of the other party affecting the complaining party.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 67, 73; Dec. Dig. § 19.*]

2. COMPROMISE AND SETTLEMENT (§§ 5, 19*)—NATURE OF TRANSACTION—COMPROMISE OR SETTLEMENT.

Where the accounts of a partnership were examined, and a balance struck, after an inventory was made in the presence of all the parties, and some \$60 was found to be due a partner as his share, his offer to take \$100 and retire from the firm was an offer to compromise, and not a final settlement, and he cannot have it set aside because of any mistake in striking the balance.

[Ed. Note.—For other cases, see *Compromise and Settlement*, Cent. Dig. §§ 10-16, 67-75; Dec. Dig. §§ 5, 19.*]

3. EQUITY (§ 66*)—MAXIMS—NECESSITY OF DOING EQUITY.

One coming into equity must do equity, and cannot repudiate a transaction without return-

ing to the other party what he has received thereunder.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 188-190; Dec. Dig. § 66.*]

4. PLEADING (§ 72*)—EQUITY—OFFER TO DO EQUITY.

A general prayer for relief and offer to do equity is sufficient, in order to invoke the powers of equity to set aside an inequitable transaction, without specifically pleading a tender of the money received thereunder, as the court will require complainant to put the other party in statu quo as the price of its decree.

[Ed. Note.—For other cases, see *Pleading*, Dec. Dig. § 72.*]

Appeal from St. Louis Circuit Court; Moses N. Sale, Judge.

Suit by Ugo Dalpine against Angelo Lume and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This is a suit by plaintiff against his former partners, the defendants, to set aside what is alleged to be a settlement arrived at between them on the dissolution of the partnership. The original petition charged fraud and mutual mistake, and avers: That, relying upon the representations of the defendants and correctness of figures, plaintiff had received and accepted the sum of \$70.39 in full settlement of his interest in the partnership business and withdrew from the firm; that the defendants appropriated to themselves all the balance of the accrued profits of the partnership business, which plaintiff alleges were of the value of about \$3,611.30, net, in which he avers his share is \$487.23, less \$70.39 paid him; that, on account of that fraud and mutual mistake, the settlement made should be vacated, and an accounting of the business and profits of the partnership be had, and the rights of the parties established; and that the court enter a decree dissolving the partnership and render a decree in favor of plaintiff for such sum as is found to be justly due him, and for general relief. The answer was a general denial. After the evidence was concluded, the court proceeded to render judgment, placing its finding in favor of defendants on the conclusion the court had arrived at, that there had been no fraud attempted or practiced on the plaintiff. Whereupon plaintiff's counsel asked leave to amend by striking out the allegation of fraud and to stand on the allegations of error and mutual mistake. The court permitted this to be done, and, taking the case under advisement, dismissed the case, finding for the defendants. Whereupon plaintiff appealed, having filed a motion for new trial, which was overruled; plaintiff duly saving exceptions.

It appears from the evidence in the case that plaintiff and defendants had formed a partnership to carry on the business of grocers, in St. Louis. After the partnership had existed for about a year, it appears to have been agreed that it should be dissolved

and a division made of the firm assets. A paper to that effect was drawn up in Italian by one of the defendants; all the parties being of that nationality. This paper was introduced in evidence by plaintiff, which, translated, is as follows: "The division will be made on the basis of the inventory, whether from the inventory there should be a gain or loss. The gain or loss will be divided among the partners in equal parts." It does not appear that this paper was signed by anybody, and the averment in the petition as amended is that the partnership itself was a verbal one; no written articles appearing ever to have been drawn up. Acting under this understanding or agreement, the defendants and plaintiff, with a Mr. Nasse, who had been requested by the defendant Lume to act as a sort of appraiser in the matter, met and proceeded to take and make an inventory and appraisal of the goods, accounts, credits, and debits, with a view of arriving at a basis for a dissolution. There was some evidence to the effect that plaintiff had offered to sell out his interest to one or both of the defendants, asking in the neighborhood of \$300 for his interest. The inventory and appraisal were made by, or in the presence of, three men and the plaintiff; so far as we can gather from the record, the three partners being present, plaintiff acting for himself, and Mr. Nasse acting for the other two. Several days were consumed in making up this statement and reducing it to writing, and on its completion the partners and Mr. Nasse meeting, the latter stated to the plaintiff, according to the latter, that there was \$70 coming to him. While Mr. Nasse was making the calculations from which he arrived at this result, plaintiff was sitting by him. According to Mr. Nasse's testimony, he went over the ledger with the plaintiff, added the outstanding accounts to the inventory, and, after they got through that, took the liabilities and deducted that from the former figure, then put down the three accounts in rotation, and took off what each man had drawn. Quoting Mr. Nasse: "The business showed a profit of so much, and Mr. Dalpine was sitting there, and I here (indicating), and the other two were standing on the other side, and after we had got the figures down we both added them, and I said, 'There is some 60 odd dollars that is coming to you, Mr. Dalpine.' I think that was the amount. I know it was not a hundred dollars, and we didn't examine the figures again. We just had them on yellow sheets of paper, and after we had this balance Mr. Dalpine said, 'Give me \$100 and I will walk out,' and I told Mr. Lume that that would be the best way to settle it, and he said, 'You pay him \$100,' and I told him I would do so, and they then wrote up the dissolution of partnership, and Mr. Dalpine then wrote out a receipt. This receipt reads: 'Received of Mr. Lume \$100 in full of ac-

count in law and equity.'" This witness further testified that, as Mr. Dalpine was writing the receipt, he asked witness how to spell the word "equity," and, after he was told, he asked witness what it meant, and witness explained it to him. Testifying as to what took place at the time when they were going over the figures, plaintiff said that Mr. Nasse told him that there was just \$70 coming to him, whereupon he said: "If I have \$70 coming, I ask \$100 to go out of business, because we had another stock of goods to be calculated at half the amount of costs not included in that inventory. I just trusted on what Mr. Nasse said. They gave me a check made by Mr. Nasse. I go down to his business place after the inventory, and he gave me a check for \$100." Plaintiff further testified that the day after that he talked with a friend, who was an expert accountant, and he told him there must be some mistake or misrepresentation about the matter, that he went to see Mr. Nasse, and told him that there must be a mistake about the inventory he had made the day before. Mr. Nasse said: "Well, I don't think so. What you say is a mistake is only money that must be paid on the expenses of the firm." Plaintiff afterwards went back to Mr. Nasse, accompanied by some one who spoke better English than he did, and had him explain the matter to Mr. Nasse, and Mr. Nasse said that, if it was the way he said, he would talk to defendants and have the matter settled. No other settlement, however, was made between the parties.

The defendant Lume, giving his version of the transaction, states that plaintiff, when the matter of dissolution was talked of, said he would rather take \$300 for his share and step out, whereupon Lume told him to collect all the money he could, and when he came back they would see how the firm stood. Plaintiff went out and collected some \$268, out of which he retained some \$18 for expenses and put the balance, \$250, in his pocket. After this the inventory and appraisal was entered upon. Mr. Lume's version of the transaction is that, after Mr. Nasse had figured with Mr. Dalpine, Mr. Nasse and Mr. Dalpine having done all the figuring in the matter, and neither Devoti nor himself (Lume) having anything to do with the figures, and after Nasse and Dalpine had gone over the papers, and Nasse had told Dalpine that his share was about \$60 or \$70: "Mr. Dalpine jumped off the chair and said, 'If you give me \$100, I will walk out,' and Mr. Nasse said, 'What do you think about it?' And I said, 'I would like to give you the \$100, Mr. Dalpine, but I haven't got it in my pocket,' and Mr. Nasse said, 'I will loan you \$100.' And afterwards Mr. Dalpine writes some paper receipt, and a paper dissolving the partnership. The receipt said Mr. Dalpine got \$100 in full payment 'in law and equity.' I remember Mr. Dalpine asked Mr. Nasse how to spell 'equity.'" On cross-

examination this defendant testified that the object of taking the inventory was for the purpose of showing the condition so that Dalpine could either buy them out or they could buy him out. "Mr. Dalpine asked for \$300, and I wanted to know how the firm's affairs were. The object was not to make a general dissolution, but to arrive at an amount at which one was to buy the other out." Asked if his idea was that they were not to dissolve the partnership and make a distribution of the profits and losses, but merely to determine the condition of the business so that he would have a basis for buying or selling, witness said: "No, my intention was, when the place paid all the debts, to divide it. My intention was to dissolve the partnership and pay the debts first and then divide it afterwards."

Joseph Wheless, for appellant. Buder & Buder, for respondents.

REYNOLDS, P. J. (after stating the facts as above). Probably with more particularity than necessary, we have set out the salient facts in the case as developed at the trial, not, however, giving figures of the basis of settlement, as, in the view we take of the case, that is not material. In our view of this case and of the testimony in it, the settlement arrived at between plaintiff and the defendant by which \$100 were paid to plaintiff, and for which he signed the receipt heretofore copied, comes more closely under the domain of a compromise of disputed matters than a case of intended settlement and adjustment of accounts between the parties with the nicety usually requisite in arriving at a basis for a settlement on dissolution of a firm. Referring it to the class of compromises, we find the rule in equity to be that such transactions "will not be disturbed for any ordinary mistake, either of law or of fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such possible errors without a judicial controversy." 2 Pomeroy's Eq. Jur. (3d Ed.) § 850. The author further calls attention to the fact that there are dicta "to the effect that a party will be relieved from a compromise in which he has surrendered property or other rights unquestionably his own, through a misconception of a clear legal rule, or an erroneous supposition that a legal duty rested upon him, whereas plainly no such duty existed; but the decisions show that these dicta must be confined to circumstances which render the compromise virtual surprise, or to cases in which it was induced by positive inequitable conduct of the other parties. Voluntary settlements are so favored that if a doubt or dispute exists between parties with respect to their rights, and all have the same knowledge, or means of obtaining knowledge, concerning the circumstances involving these rights, and there is no fraud, misrepresentation, concealment, or other misleading incident, a compromise into

which they thus voluntarily enter must stand and be enforced, although the final issue may be different from that which was anticipated, and although the disposition made by the parties in their agreement may not be that which the court would have decreed had the controversy been brought before it for decision."

It is pretty plain that, according to the statement drawn up by Dalpine and Nasse, and according to the way the interests of the respective parties were then cast up, there was only about \$60 or \$70 coming to this plaintiff. That may or may not have been the correct amount. It may have been the result of applying a wrong rule of accounting, adopted by Mr. Nasse; but when plaintiff, with the facts before him, ended the matter by saying that he would retire if he were paid \$100, it is pretty clear that he was not relying upon the agreement of dissolution or the correctness of Mr. Nasse's figures, but was making an offer that can bear no interpretation, but an offer of compromise. It is true that in his testimony plaintiff said something about the extra \$30 covering some stock not taken into account. That can hardly be, however, for the testimony of Mr. Nasse and of the plaintiff himself is that the inventory and appraisalment was complete and covered everything, and, indeed, the only contention now made is, not that there was something excluded from the inventory and the appraisalment, but that a mistake has been made in the manner of distributing this surplus, a misapplication of proper accounting or bookkeeper's rules—legal rules, more accurately, in the distribution of this surplus. To end the matter between them, however, plaintiff asked and was paid \$100, and he himself drew up a receipt, with full understanding of the terms, acknowledging full payment of all claims at law or in equity, even being careful to have the term "equity" explained to him. It is a serious question in this case as to whether the mistake, under these facts, is one of law or of fact. The decisions on this point turn upon such nice distinctions that, while that point is suggested by counsel for defendants, we do not think it necessary to enter into it. Counsel make the further point that there was no offer upon the part of the plaintiff, either in his petition or at the trial, to return the \$100, which beyond dispute were paid to him. It is a rule, without exception, that one coming into a court of equity must do equity, and, before he can have the transaction undone which he desires to repudiate, he must be required to return all that he has received on account of it; but this need not be by pleading an offer or tender of the return of that which was received. The rule is that where the party inserts a general prayer for relief, and proffers to do equity on his part, these general allegations are sufficient, and the court will require him to refund or put the other party in statu quo as the

price of the decree it gives. This has been distinctly held in a number of Missouri cases, which were equitable actions, when treating of the pleadings in them. The case of *Whelen v. Reilly*, 61 Mo. 565, the opinion by Judge Sherwood, is a leading authority in point. The case of *Paguin v. Milliken*, 163 Mo. 79, loc. cit. 104-106, 63 S. W. 417, 1092, follows the rule announced in the *Whelen Case*. This court, in the case of *Haydon v. Frisco R. R.*, 117 Mo. App. 76, loc. cit. 106 and 107, 93 S. W. 833, reviews these authorities and so held. The *Haydon Case* was affirmed on this point by the Supreme Court, 121 S. W. 15. The rule which requires a party to do equity before he is entitled to equity, as said by Judge Sherwood in *Whelen v. Reilly*, supra, "finds its application, not in questions of pleading nor by what the plaintiff offers to do therein, but in the form and frame of the orders and decrees, both interlocutory and final, whereby equitable terms are imposed as a condition precedent to equitable relief granted."

Upon consideration of all the facts in the case, we have concluded that the action of the circuit court in finding for the defendants is for the right parties, and its judgment is affirmed. All concur.

MARTIN et al. v. BENNETT et al.

(Springfield Court of Appeals. Missouri. Nov. 2, 1909. Rehearing Denied Dec. 6, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 111*)—LEVYING TAXES—INJUNCTION BY TAXPAYERS.

Taxpaying citizens of a city school district may sue to restrain the school board from levying taxes to pay interest on illegal school district bonds and to provide a fund to redeem them.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 266; Dec. Dig. § 111.*]

2. APPEAL AND ERROR (§ 301*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN COURT BELOW.

Where a defendant answered the amended petition, and did not save the point in his motion for new trial that the court erred in permitting the amended petition, the point was not reviewable on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1743, 1753-1755; Dec. Dig. § 301.*]

3. COURTS (§ 91*)—DECISIONS OF COURT OF LAST RESORT.

The Court of Appeals must follow the decisions of the Supreme Court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 325, 326; Dec. Dig. § 91.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—ISSUANCE OF BONDS—ELECTIONS—VALIDITY.

An order of the board of directors of a city school district reciting that a proposition to authorize the board to issue bonds for the erection of an additional school building shall be submitted to the voters at the annual election to be held on a designated date and that the secretary of the board shall give notice of the same as the

law directs is insufficient for failing to specify the place for the election.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 226; Dec. Dig. § 97.*]

5. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—ERECTION OF SCHOOL BUILDINGS—POWER OF DIRECTORS—STATUTES.

Under Laws 1906, p. 226 (Ann. St. 1906, § 9752a), empowering the board of directors of a school district to issue bonds to purchase a site for a school building when authorized by the voters, a board, authorized by the voters to purchase a site and erect a new building thereon, is without authority to use the money derived from the sale of bonds in erecting a new schoolhouse on the old site.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 227; Dec. Dig. § 97.*]

6. SCHOOLS AND SCHOOL DISTRICTS (§ 67*)—ERECTION OF SCHOOL BUILDINGS—POWER OF DIRECTORS—STATUTES.

Rev. St. 1899, § 9865 (Ann. St. 1906, p. 4523), authorizing the board of a school district to establish a school of higher grade than the primary, etc., authorizes the board of a district organized under chapter 154, art. 2, relating to the organization of city, town, and village school districts, to build additions to a primary school building when the necessities of the district do not demand a division of the district into a primary or ward schools, but prohibits the erection of more than one primary school building on one school site, and the authority to establish a high school carries with it the authority to erect a building therefor on ground owned or to be acquired by the district.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 168, 169; Dec. Dig. § 67.*]

Appeal from Circuit Court, Dent County; L. B. Woodside, Judge.

Action by W. T. Martin and others against H. A. Bennett and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

W. P. Elmer and G. C. Dalton, for appellants. J. D. Gustin, for respondents.

GRAY, J. This suit was instituted in the circuit court of Dent county July 11, 1907. The purpose was to procure a perpetual injunction restraining the appellants from selling certain school bonds issued by the Salem school district, and from erecting a schoolhouse on block 17 in the city of Salem. The Salem school district is a city district, and the appellants, except E. L. Dye, are the directors thereof, and said Dye at the time this suit was commenced had entered into a contract with the school board to erect a schoolhouse for the district on block 20, in said city. The respondents are taxpaying citizens of the district. Block 20 lies just west of block 17, and at one time was separated therefrom by a street 40 feet wide. In 1874 the school board erected a fence around the district property, including the street between the blocks, but leaving a way for vehicles on the west side of the district property, and erecting stiles or gates for footmen where the fence was across the street. This fence remained for 20 years

as the school grounds of the district. The records of the city were destroyed by fire in 1886, and the evidence does not show that the city of Salem by any official action vacated the portion of the street so fenced. An amended petition was filed alleging that block 17 was the schoolhouse site of the district, and that the board was about to move the site to block 20 without authority of law, and erect a schoolhouse thereon, and issue illegal bonds of the district, and levy taxes on all property in said district to pay the interest on said bonds, and to provide a sinking fund with which to redeem them; and further alleging that the erection of said building would necessitate establishing additional closets for the use of the pupils and teachers of said new building, and that no sewers were in said city, and hence the premises near said closets would become unhealthy, and further alleging that the children attending said school would disturb the peace of citizens living in the neighborhood, and that said closets and said disturbance would constitute a public and private nuisance, and praying that all the acts complained of be enjoined. A temporary injunction was granted. By agreement of parties the cause was referred to Hon. C. C. Bland to make a finding on both the facts and the law. The referee in due time made his report finding the district property in block 20 was a part of the schoolhouse site of the district, and not a new site, and failing to find that any private nuisance was about to be created, but finding that the bonds were illegal, and that the board had no right to erect the building on the old school site. The report of the referee was made a part of the judgment of the court, whereby the court adjudged "defendants have no right to erect the contemplated school building upon said described real estate," and the appellants were perpetually enjoined from erecting said building on said premises. On March 12, 1907, the school board at a legal meeting made the following order: "Moved and carried that a proposition be submitted to the qualified voters of Salem school district at the annual election to be held on the 2nd day of April, 1907, authorizing the board of directors of said school district to borrow the sum of ten thousand dollars for the erection of additional school building, and the secretary of the board was requested to give legal notice of the same as the law directs." The secretary posted the notices designating the courthouse as the voting place, and stating the purposes of the election as follows: "Erecting an additional schoolhouse and furnishing the same and for the purchase of a site for said schoolhouse." There was posted in the records of the school board what purported to be a typewritten order of the board calling the election for the purposes

suit was commenced. The appellants assert in this court that the petition does not state a cause of action, for the reason that, if the bonds are illegal, then the funds derived therefrom do not belong to the district, and the respondents are not concerned in the expenditures thereof. The petition, however, alleges that the board is about to levy taxes to pay the interest on said bonds, and to provide a fund for the purpose of redeeming them. Under such circumstances, the courts grant the taxpaying citizens relief by injunction. *Ranney v. Bader*, 67 Mo. 476; *Black v. Ross*, 37 Mo. App. 250. The court committed no error in permitting the amended petition to be filed. *Cohn v. Souders*, 175 Mo. 455, 75 S. W. 413. And appellants answered the amended petition, and did not save the point in their motion for new trial, and therefore the point is not here for review.

This brings us to the real points in the case, to wit: Is there anything in the proceedings of the board to constitute a foundation for the propositions voted on at the election; and was the board authorized to use the money derived from the sale of the bonds in erecting a schoolhouse on the old site? In *Thornburg v. School District*, 175 Mo., loc. cit. 26, 75 S. W. 84, the court said: "The authority to borrow the money and issue the bonds was devolved on the board of directors, but, before they could exercise the authority, they would have to order an election to ascertain the will of the voters. The board of directors was the organization through which the whole machinery of the law was to operate. The board was required by law to keep a record of its proceedings. That was a public record and to it we must primarily look to ascertain what action the board of school directors took in this matter. * * * Now let us see if there is anything in the proceedings of the board under those dates to constitute a foundation for the action of the directors in issuing the bonds. The only thing in the record of August 2d bearing on the subject is: 'Ordered that notices be posted calling meeting of voters for the purpose of changing site, selling old house, making appropriation of \$3,789 or one per cent. on assessed valuation, leaving proceeds arising from sale of present house for seating new house.' That is all there is in this record to support the claim that this board ordered a meeting of the voters to be held on August 28th to consider the proposition to authorize the board to borrow \$3,500 to build a schoolhouse and issue bonds to secure the payment thereof. The order of the board does not name a date on which the meeting of the voters is to be held, and it makes no reference to borrowing money. It refers to making an appropriation, but for what purpose is not stated. The statute im-

poses on the clerk the manual labor of signing and posting the notices, but it does not clothe him with authority to order a meeting of the voters or to designate the day on which an election shall be held. The board alone had authority to do that, but in this instance omitted to do it." It is our duty to follow the decisions of the Supreme Court, and under the authority of the case above quoted from we hold that the order of the board made March 12, 1907, was insufficient in not specifying the place for the election, and on that order the secretary was not authorized to submit the proposition of furnishing the schoolhouse and purchasing a site for the new building.

We do not believe the board was authorized to use the money derived from the sale of the bonds in erecting a new schoolhouse on the old site. The law provides that the board may, when authorized by the voters, issue bonds to purchase a site. Laws 1903, p. 266 (Ann. St. 1906, § 9752a). At the election the voters authorized the board to purchase a site and erect the new schoolhouse thereon. In erecting the new building on the old site the board was not carrying out the will of the voters expressed by their ballots. The respondents maintain that the directors have no authority to establish a school of higher grade than the primary one until they have divided the district into wards and established primary schools therein. The referee in his conclusions of law in our judgment clearly and correctly disposes of this point, as follows: "It is contended by plaintiffs that the board of directors have no authority to build an additional schoolhouse on a site when one has been built and is standing. Section 9865, Rev. St. 1899 (Ann. St. 1906, p. 4523), is made the basis of this contention. The section provides that the board may establish a school of higher grade than the primary one. The statute is silent as to the erection of a high school building, and, because silent, the contention is that school boards are without authority to erect a high school building or a building to be used exclusively by the higher grade. The statute should receive a reasonable construction. Such a construction, I think, would authorize school boards of districts organized under article 2, c. 154, Rev. St. 1899, to build additions to a primary school building when the necessities of the district do not demand a division of the district into a primary or ward schools, but prohibits the erection of more than one primary school building on one school site. I think, also, that the authority to establish a high school carries with it the authority to provide a home for the school and to erect a building for the purpose on ground owned or to be acquired by the district. It is shown that the additional building contracted for is to be used as a high school building, and I

think the board of directors might have erected such a building on block 20, if that proposition had been submitted to and favorably voted on by the voters of the district." By the terms of the judgment the appellants are forever, jointly and severally, restrained from erecting the schoolhouse on the old site. This was the relief prayed for, but, as the court found the facts and declared the law, the injunction is too broad. We will modify the judgment so as to enjoin the school directors, appellants, and each of them, from using any money obtained or authorized by the election of April 2, 1907, in erecting the schoolhouse.

With this modification, the judgment is affirmed. All concur.

GRISWOLD v. HAAS.

(St. Louis Court of Appeals. Missouri. Nov. 16, 1909. Rehearing Denied Nov. 30, 1909.)

1. PRINCIPAL AND AGENT (§ 22*)—PROOF OF AGENCY—DECLARATIONS OF AGENT.

Agency cannot be proved by the declarations of the agent to third parties.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 40; Dec. Dig. § 22.*]

2. PRINCIPAL AND AGENT (§ 21*)—PROOF OF AGENCY—COMPETENCY OF AGENT.

An agent is competent, unless disqualified for some other reason, to prove the agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 39; Dec. Dig. § 21.*]

3. APPEAL AND ERROR (§ 931*)—EXCEPTIONS TO ADMISSION OF EVIDENCE—SUBSEQUENT ADMISSION OF EVIDENCE—PRESUMPTIONS.

While, in a trial before a jury, the subsequent admission of evidence theretofore ruled out would have done away with the exception taken, in a trial before the court without a jury it must be assumed, on appeal, that the court determined the case on the theory announced in ruling out the testimony.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 931.*]

4. PLEADING (§ 395*)—VARIANCE—CAUSE OF ACTION SUED ON—RECOVERY.

Though the Code has abolished the distinction between the forms of action, and though one can waive the tort and sue in assumpsit, a plaintiff cannot sue upon one cause of action and recover upon another.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1333-1335; Dec. Dig. § 395.*]

Appeal from St. Louis Circuit Court; Robt. M. Foster, Judge.

Action by P. A. Griswold against Max Haas. Judgment for plaintiff, and defendant appeals. Reversed.

The plaintiff, respondent here, under appointment as commissioner by the court, advertised and auctioned six bonds in an electric railway, light, and power company; the bonds having come into the possession of the circuit court of the city of St. Louis through plaintiff as its commissioner, and the court having ordered a sale thereof. The sale was advertised to take place; the conditions being

*For other cases see same title and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a cash payment of \$15 at the time of the sale, and balance to be paid when sale was approved by the court. The petition or statement in the case, the case having been originally instituted before a justice of the peace, after stating these facts, set out: That, at the sale, the defendant being the highest and best bidder for the bonds, they were struck off and sold to him for \$278; that defendant then paid to plaintiff \$15, the cash payment required; that the sale was afterwards approved by the court; that afterwards plaintiff made a tender of the bonds to the defendant, demanding the balance, \$261, but defendant refused to pay that or receive the bonds. The statement further avers that plaintiff is now, and has ever been, ready to deliver the bonds to the defendant upon payment of the purchase price, and that afterwards the circuit court ordered plaintiff to institute legal proceedings to recover the balance of the purchase price. Judgment is prayed for the \$261 and interest. Judgment going against defendant in the justice's court, he appealed to the circuit court. On a trial there before the court, a jury having been waived, these facts were developed: Plaintiff, preliminary to the trial, stated that he had the bonds in court and tendered them to defendant in open court. Tender does not appear to have been accepted. Being sworn as a witness in his own behalf, plaintiff offered in evidence the files of the case in the course of which the bonds had come into his possession by order of the court as commissioner. The abstract states that the files themselves were offered in evidence, and the bill of exceptions calls for their insertion; but they are not in the abstract. Sufficient, however, appears in the abstract to show beyond controversy what these files contain, so far as is necessary to understand the facts in this case.

Plaintiff testified, with these files before him, that he had offered these bonds for sale on the date set out in the petition in this case, and that at the sale the defendant, Haas, was the highest and best bidder for them at the price set out in the petition here filed. Plaintiff further testified that the sale was made, and he had so announced it at the time, subject to the approval of the court. After bidding off the bonds, defendant deposited \$15 with him, and he reported the sale to the court, and it was approved. Thereupon he notified defendant, who declined to complete the purchase and pay the balance, tendered the bonds to defendant, and demanded the money. He refused to receive the bonds or to pay the money, and it had never been paid. The balance due and unpaid is \$261. On cross-examination plaintiff stated: That, while he could not say who all were present at that sale, he remembered defendant being present, and also Mr. Denvir. He first read the advertisement, and then called for bids, and there were two bidders, Mr. Denvir and defendant, and the de-

fendant's bid was the last and highest. That he struck the bonds off to Mr. Haas and asked him (Haas) who was the purchaser. Haas said, "G. F. McLain." That thereupon he made his report to the court, and that report set out that the sale was to G. F. McLain for the price named. Plaintiff further testified: That, after the approval of the sale, he went to Mr. McLain, who repudiated any interest in the matter, said he knew nothing about it, never authorized Haas to use his name, never put up the \$15 that was bid, and that Mr. Haas was not his agent in the matter; that thereupon he (plaintiff) went to Haas and made a demand upon him, and he refused to take the bonds. He repeated that when the bonds were knocked down, and Haas was asked for the name of the purchaser, he gave the name of G. F. McLain as the purchaser. Haas said he bought them for G. F. McLain. He did not say that he was buying them for himself. All that occurred was that witness asked him who was the purchaser, and he said, "G. F. McLain." On redirect examination plaintiff was asked, when defendant bid on the bonds, whether he bid as purchaser himself or as representing some one else, and witness answered, "Well, there was nothing said about representing any one until I asked for the name of the purchaser." That was after the bidding was closed, and after he had accepted the bid made by defendant. Plaintiff then put Mr. McLain on the stand as a witness; but on the suggestion of the court that Mr. McLain should be called in rebuttal, and not in chief, which the court suggested after Mr. McLain had testified, plaintiff withdrew him.

Plaintiff thereupon resting, defendant was examined as a witness in his own behalf. He testified: That he appeared at the sale of these bonds; that to the best of his recollection he bid on the bonds, and they were knocked down to him; that plaintiff, apparently acting as auctioneer, then asked him for whom the bonds were bought, and defendant said that he had bought them for G. F. McLain. Defendant's counsel then asked witness for whom he had appeared at that sale. He answered that he appeared for G. F. McLain. Upon counsel for plaintiff objecting, on the ground that agency could not be proved by the testimony of the agent himself, the court sustained the objection, saying: "Can't prove agency by the agent himself." Exception was duly saved to this ruling of the court. Witness was asked by the court how much he had paid down at the time of the sale, and he said that he had heard the testimony about his having paid \$15, but the matter had gone out of his mind, and that, without referring to books and papers in his office, he could not testify from personal recollection, but he had no doubt that the amount previously testified, namely, \$15, had been paid by him. He further stated that as a matter of fact he did not know the amount of the purchase price

until he read the petition in this case read in court; had entirely forgotten the details of the transaction as to how the payment was made or the amount of the bid. He was certain, however, that he gave the name of Mr. McLain as the purchaser, and that he paid the \$15, or whatever the amount was, by check. Whether it was his own check or not he could not say; but it was not McLain's check. Said that he could answer these matters if he was allowed to refer to his books. He was then asked if he had any conversation with Mr. McLain before going to the sale, and he said he had; that his recollection of the matter was that he "stepped into McLain's office the morning of the sale and told McLain he would buy the bonds for him, and he asked if it was all right, and I told him it was." On cross-examination he stated that McLain had not furnished him the \$15; that Mr. McLain did not have the money at that time. This is all the testimony on the part of defendant.

Whereupon Mr. McLain was put on the witness stand by plaintiff in rebuttal, and he was asked if he had heard the testimony of Mr. Haas. He said he had, and, on being asked to state whether or not the conversation which defendant had narrated occurred prior to the sale of the bonds, he answered: "Well, something similar to that occurred, but after the sale of the bonds. I didn't know there was any such sale to take place at all. He had been down here and purchased the bonds in my name and came back and told me and asked me if it is all right. I told him I thought it was if it is all right. He said it is all right. I told him he would have to protect me in case anything came up." After the sale was made, witness testified, Haas came back and told him that he had used his (McLain's) name. Had not had any conversation previous to the sale of the bonds with Haas; in fact, does not now know what the bonds are. Haas had not said anything to him as to whether or not he (McLain) should pay for the bonds. He (Haas) bought them for himself.

This was all the testimony in the case. The court found for plaintiff, and defendant, after an unsuccessful motion for new trial, perfected an appeal to this court.

Henry H. Furth, for appellant. John B. Denver, for respondent.

REYNOLDS, P. J. (after stating the facts as above). The ruling of the court that the fact of agency could not be proved by the testimony of the agent when on the witness stand, when asked concerning his agency, is such patent error as to in itself call for the reversal of the judgment. It is true that agency cannot be proved by the declarations of the agent to third parties and then putting those third parties on the stand and having them testify as to what the agent told them. Such testimony is excluded, not

only as not the best evidence, but as hearsay. That is very far from holding, however, that, when the witness is on the stand himself, he cannot testify as to the fact of his agency. He is entirely competent, unless disqualified for some other reason, to testify as to that fact. It is true that the defendant afterwards testified as to what took place between himself and McLain, and this testimony appears to have been admitted without any objection by counsel or by the court; but, as we have the declaration from the court that the agent could not prove his agency by his own testimony, we are bound to assume that the court gave the testimony of the defendant no consideration whatever in arriving at the determination of the question of agency. If this had been a trial before a jury, the subsequent admission of evidence theretofore ruled out would have done away with the exception made; but, as this was a trial before the court without a jury, we cannot do otherwise than assume that the court heard and determined the case on the theory that he had announced in ruling out the testimony.

But a far more serious question is presented on the record in this case. This is an action to recover the purchase price of goods alleged to have been sold to the defendant, and the statement or petition filed avers a sale to the defendant, a report of that sale to the court, and an approval by the court. The testimony of plaintiff himself discloses a fatal departure from the allegations of the petition, inasmuch as it discloses a sale to McLain, a report to the court of the fact of a sale to McLain, and an approval and confirmation by the court of a sale to McLain. He is not sued as agent, nor for deceit in pretending to be agent when in fact he was principal. In *Hall v. Crandall*, 29 Cal. 567, 89 Am. Dec. 64, the Supreme Court of that state has said: "If an agent, in executing the contract, employ terms which, in legal effect, charge himself, he may be sued upon the instrument itself as a contracting party. This is so because by the use of such terms he has made the contract his own; but if the instrument does not contain such terms, or, in other words, contains language which in legal effect binds the principal only, the agent cannot be sued on the instrument itself for the obvious reason that the contract is not his. If then the contract is not binding upon the principal because the agent had no authority to make it, and is not binding on the agent because it does not contain apt words to charge him personally, it is wholly void." In *Wright v. Baldwin*, 51 Mo. 269, our Supreme Court held that the proper action, in a case of this kind, where one falsely represents himself as an agent, is not on the contract itself, but against the agent for damages. While it is true that our Code has abolished the distinction between the forms of action, and equally true that one can waive the tort and sue in assumpsit,

said: "The law is well settled that where a person acts professedly for another, but without authority, he renders himself individually liable. There was formerly some difference of opinion as to the form of action in which he could be held; but it is well settled now that the action may be either on the case for deceit or in assumpsit upon the express or implied warrant of authority. If he knowingly and falsely represents that he had authority to act, the former remedy is the appropriate one. If he makes the representation in good faith, then the latter remedy should be pursued." After citing *Mechem on Agency*, § 549, and cases in the reports of this state and of New York, Judge Biggs concludes that the defendant in the case could not be held in that action, which was one for goods sold and delivered. That is this case, and this covers it so completely that it is useless to discuss it further.

The judgment of the circuit court is reversed. All concur.

KIDD v. PURITANA CEREAL FOOD CO.
(St. Louis Court of Appeals. Missouri. Nov. 17, 1906.)

1. CORPORATIONS (§ 156*)—PREFERRED STOCK—RIGHTS OF STOCKHOLDERS.

Burns' Ann. St. Ind. 1901, §§ 5064-5068, authorizes corporations to issue preferred stock. Section 5067 provides that such stock shall not exceed double the amount of the common stock, and shall be redeemable at par as expressed in the certificates, and that the holders of such stock shall be entitled to such semiannual dividend as may be expressed in the certificates, not exceeding 4 per cent., before any dividend shall be set aside or paid on the common stock, that the preferred stockholders, shall not be personally liable for the debts of the company, but in case of insolvency or dissolution the debts or other liabilities shall be paid in preference to such stock, but that such stock shall have priority out of the assets of the company over common stock, for the full face value, with all arrears of interest or dividends. Section 5068 provides that preferred stock shall not be voted, and the holder shall have no voice in the management of the corporation, but that the company may not convey its real estate or mortgage any of its property without the written consent of a majority of the preferred stock, nor, without such consent, declare any dividend on its common stock that will impair its capital. *Held* that, as a general rule of law, holders of preferred stock are not entitled to dividends unless the earnings justify the directors in paying them, and that the principal privilege such stockholders enjoy is priority of claim to dividends over the holders of common shares, and that a holder of preferred stock could not recover semiannual dividends on his stock where the same had not been declared by the corporation.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 581-583; Dec. Dig. § 156.*]

impaired the demands of its creditors be postponed.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 581-583; Dec. Dig. § 156.*]

3. CORPORATIONS (§ 153*)—PREFERRED STOCK—RIGHTS OF SHAREHOLDERS.

Merely denominating shares "preferred stock" in a legislative act does not per se define the rights and character of the holder of such shares, as those depend on the essential qualities of the transaction authorized by the statute, and the fact that installments to be paid on such shares are called "interest" in the statute, instead of "dividends," or that the two terms are used interchangeably, is not conclusive whether such installments are dividends or interest, although the name used by the Legislature to designate such shares has a bearing on the character intended to be given them, as under *Rev. St. 1890*, § 4160 (*Ann. St. 1906*, p. 2252), words of a statute are to be taken in their ordinary sense unless a different one is called for by the context.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 581-583; Dec. Dig. § 156.*]

4. WORDS AND PHRASES—"DEBT."

The essence of a "debt" is a legal liability on the part of one person to pay money to another at some time, which liability is enforceable by a judicial action.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

5. CORPORATIONS (§ 152*)—POWER TO PAY INTEREST INSTEAD OF DIVIDENDS—PRIORITY TO DEMANDS OF CREDITORS.

A corporation may bind itself to pay interest, instead of dividends, on stock; but its power to bind itself to pay installments of either kind in priority to demands of creditors must be found in a clear legislative grant.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 564-567; Dec. Dig. § 152.*]

6. CORPORATIONS (§ 155*)—DIVIDENDS—GUARANTY OF PAYMENT.

A guaranty of dividends by a corporation, pursuant to statutory authority, does not make dividends a debt and payable absolutely; but it simply binds the company to pay them out of net earnings, whether the guaranty payments are called "dividends" or "interest."

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 560-563, 568, 576-578; Dec. Dig. § 155.*]

7. CORPORATIONS (§ 155*)—PREFERRED STOCK—COMPELLING COMPANY TO DECLARE DIVIDENDS.

Where it is clear that a dividend should have been declared on preferred shares, a court of equity may compel the company to declare the dividends, or may proceed on the theory that they have been declared; but a dividend cannot be recovered in a legal action until it has been declared.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 560-563, 568-578, 593-603; Dec. Dig. § 155.*]

Appeal from St. Louis Circuit Court; Virgil Rule, Judge.

Action by Lulu B. Kidd against the Puritana Cereal Food Company. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action at law to recover three semiannual dividends of 3 per cent. each, alleged to have been due in September of 1906 and March and September of 1907, on certificate of stock No. 5, of the preferred stock of the Puritana Cereal Food Company, which certificate represented 500 shares of the preferred stock of said company, sold and delivered to plaintiff by the company on May 12, 1904. The company was incorporated under the laws of Indiana, and from the face of the certificate it appears preferred and nonassessable shares of \$1 each could be issued to the amount of \$30,000. The material parts of the certificate are as follows: "This certificate represents the number of shares herein above stated, of the Preferred Capital Stock of the Puritana Cereal Food Company, redeemable in whole or in part at the will of said company, at par, at any dividend-paying time before the twentieth and after the tenth semiannual dividend has been paid, and said company binds itself to pay a 3 per cent. semiannual dividend hereon." The articles of incorporation of the company were introduced and show its purpose was to manufacture and sell Puritana Mush and other similar food products where profitable sales could be made, and purchase, hold, and sell letters patent and grants of licenses under them on all articles manufactured and sold by defendant. The capital stock was limited to \$70,000 common, and, as said, \$30,000 preferred, of which only \$5,500 had been issued. Plaintiff put in evidence seven sections of volume 2 of Burns' Annotated Statutes of Indiana of the Revision of 1901, to wit, sections 5064 to 5070, inclusive. The sections of the Indiana statutes to which we are referred read as follows:

"Sec. 5064. Preferred Stock. That any manufacturing, mining or other company having a capital stock, which has been or which may hereafter be organized or incorporated under the law of this state, shall have power to create and issue shares of preferred stock in such company of not more than one hundred dollars (\$100.00) each, the aggregate amount of which shall at no time exceed double the amount of the common stock of such company.

"Sec. 5065. Provisions in Articles of Association. At the time any such company is organized and incorporated, the incorporators thereof may in their certificate or articles of association provide for the issuance of such preferred stock by such company by stating the amount of preferred stock proposed to be issued and the number of shares into which it is to be divided, and when so provided for in said certificate or articles of association, said company shall be duly authorized and have full power to create and issue certificates for shares of such preferred stock.

"Sec. 5066. Issuing of Preferred Stock. Any such company already organized desiring to create and issue shares of preferred stock in such company may do so at any annual,

regular or special meeting of its stockholders, by the vote of the holders of three-fourths of its common stock, and such company may at any such meeting or any subsequent meeting of its stockholders, by a vote of the holders of a majority of its common stock, authorize and empower its board of directors to dispose of and issue such preferred stock upon such terms and conditions as said board of directors may deem best, or as such company may prescribe; and when so authorized the validity of the issuance and the disposition made of such preferred stock by said directors shall in all things be binding and conclusive upon such company. Within thirty days after the time such company has authorized the issuance of preferred stock as provided in this section, it shall cause to be filed with the Secretary of State its certificate in writing, signed by its president and attested by its secretary, duly acknowledged, certifying that the issuance of preferred stock has been authorized by such company, the amount of such preferred stock, the number of shares into which it shall be divided, and the amount of each.

"Sec. 5067. Amount of Limit. Such preferred stock shall not at any time exceed double the amount of the common stock of such company actually subscribed or issued, and it shall be subject to redemption at par at such time or times, and upon such terms and conditions as shall be expressed in the certificates thereof, and the holders of such preferred stock shall be entitled to receive, and said company shall be bound to pay thereon, such semiannual sum or dividend as may be expressed in the certificates, not exceeding four per centum, before any dividend shall be set aside or paid on the common stock of such company, and in no event shall the holders of such preferred stock be individually or personally liable for the debts or other liabilities of such company, but in case of insolvency or upon the dissolution of such company, such debts, or other liabilities shall be paid in preference to such preferred stock. Such preferred stock, however, shall at all times have priority in payment out of the assets of such company over the common stock thereof, for the full face value, together with all arrearages of interest or dividends due thereon.

"Sec. 5068. Stock Not to be Voted. Such preferred stock shall not be voted at any meeting of such company, nor shall the holders thereof, as such, have any voice in the management of the affairs of such company, excepting, however, that such company shall not have authority to convey its real estate or mortgage any of its property without the written consent of the holders of a majority of the shares of such preferred stock; nor shall such company without such consent, declare any dividend upon its common stock that will impair its capital. Such preferred stock shall not entitle the holder thereof to any interest in the assets of such company

Sec. 3008. Redemption of Stock Certificate. When any such company has redeemed the preferred stock issued by it under the provision of this act, its directors shall within thirty days thereafter cause to be filed with the Secretary of State their certificate in writing, as directors of such company, duly acknowledged, certifying that such preferred stock has been redeemed; and in default thereof, the directors of such company shall be jointly and severally liable for all debts and liabilities of such company contracted after said thirty days and before said certificate is filed."

Two dividends have been declared and paid on the outstanding preferred shares, one in March, 1905, of 8 per cent., and the second in March, 1906, of 6 per cent. The sum of \$316 would be a 6 per cent. dividend on the shares issued, and the secretary of the company said: That in March, 1906, the company had a balance of \$1,200 after paying this dividend. That the company had not been able to declare dividends at the semi-annual periods falling due in September of each year, because the sale of Puritana Mush ends with the cold season about the middle of April, and from then on it is the custom to close down the factories operated by defendant until the cold weather commences in the following fall. Hence there were no earnings after March, and there were rentals to be paid while the factories were closed down. He testified further when the dividend period arrived in March, 1907, the company had in bank \$1,300; but it was the desire of the directors to develop the business along collateral lines so as to continue operating the factories during the warm weather, and hence they thought it better not to pay any dividend on the preferred stock. His testimony regarding the various items of expense and disbursement of the company during the spring and summer of 1907 was as follows: "Since March, 1907, this defendant company, through its directors, has purchased an oven for the St. Louis plant, paying therefor the sum of \$150, which oven is for the baking of cookies and other goods such as are now being sold, and which it is believed will continue to command a sale during the warm weather when the Puritana Mush will not be salable. In addition it has improved its machinery for cleaning and grinding horse-radish, and for the cleaning and preparing of potatoes for potato chips now being sold at St. Louis, the cost of which improvements is in the neighborhood of \$100. In addition to this expenditure, the company has been forced into expensive litigation brought in Marion county, Ind., in May, 1907, for the appointment of a receiver for the defendant company, which suit for receiver was brought by Lulu B. Kidd, who is the same person now suing the defendant in this court. After

the defendant company was appointed a receiver was refused by the court. Since March, 1907, this defendant company suffered a loss from fire at its St. Louis factory in the sum of about \$200. In January, 1906, this defendant company started the manufacture and sale of Puritana Mush in the city of Chicago, Ill., and, owing to the necessity of advertising its goods, the business was conducted at expense without any immediate profit. The factory was closed in the following spring of 1906, and reopened late in the fall of 1906; the two wagons and factory equipment and supplies being stored in a building on which the company paid a rental of \$12 a month. The Chicago factory continued in operation until about April, 1907. The season of 1906-07 incurred an expenditure of \$225 over and above receipts. The company's business at Chicago has at no time been conducted at a profit, and was not expected by the company to be profitable until the product had been introduced and become known to the consumer. The working capital of this company has not been and is not now sufficient to enable it to expend large sums in advertising, which is necessary to put a new product upon an immediate paying basis. The receipts at Chicago have been encouraging and satisfactory to the defendant company, and the factory is expected to be self-sustaining in the present season. The results further indicate that, when the product has become known to the consumers in Chicago, the profits will be proportionately larger than in cities further south, on account of the longer seasons within which mush is consumed. * * * It is hoped and believed, however, that the policy of the company in extending its business to Chicago, and in adding horse-radish, potato chips, cookies, cakes, and popcorn, that it will be able to extend its seasons so as to continue in operation throughout the entire year, and thereby be able to pay dividends at both semiannual periods on the common as well as the preferred stock."

A balance sheet prepared by the secretary of the company showed a balance on hand of \$325.67, on March 3, 1906, after the payment of all running expenses and dividends. Plaintiff introduced in evidence a letter of the secretary dated March 7, 1907, addressed to her, in which he said: That, because of the unusually open winter, the season had not been favorable to the sale of defendant's products; that the directors had long felt some effort should be made to keep the factories running throughout the year, instead of closing down during the warm months; that arranging to do this was entailing expenditures, and, while the profits of the season would justify the payment of a 6 per cent. dividend on the preferred stock, it had been decided to be wise not to pay out a dividend, "in order to

market, the construction of an oven to enable defendant to bake cookies, and the extension of its Chicago business. The general manager of the company testified there were no profits in September, 1906, as during the summer defendant was disbursing everything and taking in nothing. The court gave judgment for defendant, and plaintiff appealed.

Morrow & Kelly, for appellant. Walton & Baithel, for respondent.

GOODE, J. (after stating the facts as above). The relation of plaintiff to defendant company is argued by her counsel to have been that of creditor, instead of shareholder, and therefore they contend defendant was bound in every contingency to pay the dividends semiannually as stipulated, and whether its net earnings warranted a declaration of dividends, or even if its capital would have been impaired by paying them. The general rule of law is that holders of preference shares in a corporation are no more entitled to dividends, unless the earnings of the company justify the directors to declare and pay them, than are the holders of common shares, for dividends are payable only out of surplus earnings. 2 Clark & Marshall, Priv. Corp. § 529c, and cases cited in note 226; Purdy's Beach, Priv. Corp. § 476; Chaffee v. Railroad, 55 Vt. 110; In re London, etc., Co., L. R. 5 Eq. 525. Usually the holders of preference shares are stockholders of the company, subject to the rights and liabilities attaching to that relation, and the principal privilege they enjoy is priority of claim to dividends as against the holders of common shares, which priority is the prominent characteristic of preferred stock. Kent v. Mining Co., 78 N. Y. 159. Without authority from the Legislature, an incorporated company cannot confer on holders of preferred shares a right to be paid dividends, if the capital of the company will thereby be impaired or the demands of its creditors postponed. Hamlin v. Trust Co., 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826; 2 Clark & Marshall, § 417c; Purdy's Beach, § 476. Instead of the issuance of preferred stock necessarily creating a debt, a standard treatise says such a transaction "is a mode by which a corporation obtains funds for its enterprises *without borrowing money or contracting a debt*. Its holders (i. e., the holders of preferred stock) are a privileged class who are entitled to dividends of a certain percent. *out of the net earnings* in priority to any dividends upon ordinary stock." Pierce, Railroad Law, 124. (Italics ours.) But statutes have been enacted in language which was construed to invest a corporation with power to issue preference shares upon terms that made the holders of them not stockholders of the company, but its creditors,

and entitled also to payment of the value of the certificates by a certain date. Cases in which it was contended that a person nominally the holder of preference shares, in reality occupied the status of a creditor and should enjoy greater rights as such than he would as a stockholder, have engaged the attention of the courts often enough for the principles upon which the point is to be determined to become settled, though, perhaps, not all the results reached, or all the remarks contained in opinions, can be reconciled. The task of the court in such a controversy is one of interpretation, to determine whether the essential nature of the agreement between the apparent shareholder and the company makes the former a stockholder or a creditor; and the answer to this question always depends on the language of the statute which authorized the company to issue preferred shares, as well as on the language employed in the certificates of shares. It has followed that, while the same principles of interpretation are adopted by all the courts, the conclusions reached in the cases differ, because the statutes differ under which the various companies sued had issued preferred certificates, or what were such in form. The Supreme Court of Georgia said, in dealing with a similar controversy, the question whether the holder of a certificate issued by a corporation is a member of the corporation, or the certificate is simply evidence of a debt due by the corporation to the holder, is one depending on the peculiar facts of each case, and therefore the decisions relating to the questions are only helpful in so far as they lay down general principles to guide in the determination of any case that may be for consideration. Savannah Co. v. Silverberg, 108 Ga. 281, 288, 33 S. E. 908, 911. Nominal stockholders have been treated as actual creditors on several grounds. In some instances the statute involved obviously was enacted simply to empower the company to put out preferred shares and secure them by a lien on its assets, as an alternative mode of borrowing money in lieu of issuing bonds secured by a mortgage on the assets, as the company might have done. Burt v. Rattle, 31 Ohio St. 116; Heller v. Bank, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am. St. Rep. 212. In the first of those cases, the statute entitled the holder of preference shares not only to have their demands secured by a mortgage on the assets of the company, but authorized the company to guarantee semiannual dividends and full payment of the face value of the stock by a certain date, denied the holders the right to participate in the affairs of the company by voting, excluded them from either the profits or the losses of the business, and exempted them from liability to creditors of the com-

were germane to a loan, rather than to a subscription for stock.

For the same and other even more cogent facts tending to show the preferred stock was in truth simply a loan made by the company in that form, the judgment in *Heller v. Bank* treated the nominal stockholder as a creditor. In *Savannah Co. v. Silverberg*, supra, the decision that the nominal shareholder was in fact a creditor was rested principally upon the binding obligation of the company to redeem the preferred shares by a given date and the circumstances of embarrassment under which they were issued. It is to be noted, however, that, while the court held he was a creditor, it said the dividends to which the certificate said he was entitled semiannually, though really interest, were not meant "to be paid absolutely and at all events, but simply in the event the corporation earned a sufficient amount to pay each holder of such certificate"—a singular remark. The question in that case was whether the holder could collect the full value of the certificate when it matured, and the court decided he could. In another case to which we have been cited, and the one mainly relied on by plaintiff, the statute was held, on grounds not clear to our minds, to have been enacted to enable the company to borrow money for the discharge of debts, by issuing preferred stock, and hence the holder of such stock was treated as a creditor, and not as a stockholder. *Williams v. Parker*, 136 Mass. 204. An attempt to distinguish the statute on which that decision was given from the one on which *Field v. Lamson*, 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136, was determined, was attempted in the opinion in the latter case, wherein the preferred shares were treated as stock, and not as an evidence of debt. The distinction was put on the ground that the statute involved in *Field v. Lamson* required the dividends to be paid out of the net earnings—an important distinction if properly drawn—but the like requirement might have been implied in the earlier case, and, indeed, has been implied on a statute using similar language, as will appear from an excerpt infra from the opinion in *Elkins v. Railroad*, 36 N. J. Eq. 233.

Before scrutinizing the Indiana statute, it may be well to say merely denominating shares "preferred stock" in a legislative act, does not per se define the rights and character of the holder of such shares, which depend on the essential qualities of the transaction authorized by the statute. *Elkins v. Railroad* and *Burt v. Rattle*, supra; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496. And the circumstance that the installments to be paid on the shares annually or semiannually were called "interest" in the stat-

utes of interest. *Whinston v. Railroad*, 13 Allen (Mass.) 400; *State v. Railroad*, 16 S. C. 524; *Sturge v. Railroad*, 31 Eng. Law & Eq. Rep. 406; *Corry v. Railroad*, 29 Beav. 263. Nevertheless the name employed by the Legislature to designate the shares is one badge of the legal character intended to be given to them, for the words of a statute are to be taken in their ordinary sense, unless a different one is called for by the context. Rev. St. 1890, § 4160 (Ann. St. 1906, p. 2252). The court applied this rule of interpretation, in dealing with the very question before us, in *State v. Railroad*, 16 S. C. 524, and, in determining whether or not shares were stock or an evidence of debt, attached weight to the fact that the Legislature had called the shares "preferred stock." Whatever influence the name employed in the Indiana statute to designate these shares should have in determining whether the certificate was one for stock or an evidence of debt favors the former character; but there are weightier reasons for holding it stock.

An examination of the statute and of the certificate itself, makes it apparent that by no semblance of reason could we hold defendant became indebted to plaintiff for the face value of the shares; that is to say, \$500. This is so because defendant did not bind itself to pay the face value of the shares to plaintiff at any time, but only reserved an option to pay at its pleasure after ten semiannual dividends had been paid and before the twentieth matured. The essence of a debt is a legal liability on the part of one person to pay money to another at some time, which liability is enforceable by a judicial action. *Lockhart v. Van Alstyne*, 31 Mich. 76, 78, 18 Am. Rep. 156. The only plausible contention for plaintiff is that the obligation to pay semiannual dividends at maturity was absolute and created a debt; that the so-called "dividends" were not technically such, but installments of interest the company was bound to pay whatever befell. A company may bind itself to pay interest instead of dividends on stock; but its power to bind itself to pay installments of either kind in priority to the demands of creditors must be found in a clear legislative grant. 1 Cook, Corp. (6th Ed.) § 277; *City of Covington v. Covington, etc., Bridge Co.*, 10 Bush (Ky.) 69. It is unusual and anomalous for companies to bind themselves absolutely to pay installments periodically on shares, instead of as dividends are earned, and we think this company ought not to be held to have agreed to do that unless, upon a fair interpretation of the statute and contract, the conclusion that the installments were payable absolutely must be deduced. We regret the necessity of expounding the statute of another state unaided by an interpretation

by its courts of last resort, and it is with diffidence we announce our opinion that the Legislature of Indiana did not intend to make the semiannual installments accruing on preferred shares of stock in a manufacturing company, interest and a debt, any more than it intended to make the principal of the shares a debt; and this was not intended to be a debt necessarily, because the statute does not declare a company's liability for the principal shall have a date of maturity in favor of the holder, but makes it subject to redemption upon such terms as the certificate shall provide (section 5067).

The certificate under review provided for redemption at the pleasure of the company after ten dividends had been paid and before the twentieth fell due, and this reservation of an option to redeem is consistent with the statute. No provision regarding the installments can be found in the several sections of the statute, which tends to fasten on them the character of a debt in a way peculiar and distinctive, in comparison with the character the statute gives to the principal of the shares, except the fixed dates of maturity of the installments. As to this matter the certificate issued by the company obligates it to pay a semiannual dividend of 3 per cent.; but the statutory language is not imperative, and only binds a company which issues preferred shares to pay a dividend on them before setting aside anything for the common stock—that is, does not compel payment at stated intervals whatever happens. The circumstance that installments have a maturity date cannot alone be regarded as conclusive in favor of their being absolute obligations, or else all dividends stipulated to be paid at definite intervals would be payable without regard to a company's earnings, a conclusion opposed to the adjudicated cases. In our judgment the meaning of the statute is that the installments partake of the nature of the principal, and, if the latter is stock, they are dividends on stock and affected by the common incidents of dividends; that is, they will be postponed to debts and are declarable in the discretion of the directors, exercised in good faith.

Besides the decisive reason already advanced against regarding the principal as a debt, that no time was fixed in which it shall fall due, other reasons may be invoked. The Indiana statute does not authorize companies to issue preferred shares merely as a mode of borrowing money and only in the contingency of a necessity to borrow. No authority is given a company to secure preferred shares by mortgage or other lien on its property, as was the case in *Heller v. Bank*, 89 Md. 602, 43 Atl. 800, 45 L. R. A. 438, 73 Am. St. Rep. 212, and *Burt v. Rattle*, supra. Moreover, the statute authorized the issue of preferred shares in double the amount of the common stock of the company, and it is improbable the Legislature meant to empower companies to borrow

twice as much as their capital; but this would be the effect of construing the act to make preferred shares a debt instead of part of the capital stock of a company. All issues of preferred stock must be reported to the Secretary of State with particulars, and the shares of such stock are subject to redemption at whatever time shall be provided in the certificate, but, as already said, need not be redeemed at any time unless the company agrees they shall be. As pointed out supra, section 5067 does not bind a company to pay semiannual dividends on preferred shares, but says it shall be bound to pay dividends in the sums expressed in the certificate, not exceeding 4 per cent., before any dividends shall be set aside or paid on the common stock. We take that language to mean the dividends shall be paid out of surplus earnings and after creditors have been satisfied, but before dividends are declared or paid on common stock. The section goes further and says, in case of insolvency or dissolution of the company, its debts and other liabilities shall be paid in preference to preferred stock. This language makes the preference shares participate in business losses; whereas, the last clause of section 5068 prevents them from participating in profits beyond interest or dividends, and says, in effect, they may take out of the assets of a company only their face value and arrearages of dividends or interest.

The most important inquiries in cases like this relate: Firstly, to whether a date is fixed within which a company is bound to pay the preferred shares, for all true debts must fall due some time; and, secondly, to whether such shares are subject to losses of the business in the sense that the holders of them are postponed to creditors at large in case the company becomes insolvent, for such postponement is not easily reconcilable with the notion that the holders of what are nominally preference shares are in reality creditors. The proviso in section 5067 that preferred stock shall at all times have priority of payment out of the assets of the company for their full face value, together with all arrearages and interest thereon, over the common stock, appears to emphasize the only priority accorded to preferred shares, and the language of the section as a whole imports that other liabilities and debts of a company shall take precedence in payment over interest and dividends on preferred stock. Similar language was treated in *Elkins v. Railroad*, 36 N. J. Eq. 235, 236, as equivalent to expressly declaring dividends on preference shares should be paid out of net earnings, and as entitling the holder of those shares to payment of arrearages of dividends which had accrued in back years, before common stockholders could share in the profits; but not to entitle him to payment absolutely and without regard to earnings. The statute there involved was, at this point, like the one before us, and reads:

"That when so issued and declared to be preferred stock, the holders thereof respectively shall be entitled to receive dividends on the same not to exceed seven per centum per annum, before any dividend shall be set apart or paid on the other and ordinary stock of said company." The portion of the Indiana statute, which at first glance looks most favorable to plaintiff, is the one forbidding the company to mortgage any of its property without the written consent of the holders of a majority of the preferred stock. Section 5068. One might think this proviso useless unless the preferred shares are intended to enjoy priority of payment over debts; but section 5067 expressly gives debts and liabilities the priority. This proviso about mortgages is an incongruous one, and, when narrowly observed, rather clashes in its own terms with the idea that preferred shares are to have absolute priority, for the assets may be mortgaged with the consent of a majority of the preferred shares against the will of the minority. Just what the purpose of the proviso was is difficult to say; but we suppose the Legislature apprehended preferred stock might suffer some detriment from a mortgage it would not suffer by merely postponing it to unsecured debts if the company became insolvent.

The gist of the argument for plaintiff is this: The statute authorized the company to guarantee payment of dividends on preferred shares and deprived the holder of those shares of the right to vote—two facts which demonstrate the Legislature intended to make the holder a creditor of the company. The statute nowhere clearly empowers the company to guaranty the dividends; but, granting this power may be deduced, the reasoning for plaintiff would compel the untenable conclusion that the principal as well as the interest on the shares is a debt. Moreover, a guaranty of dividends by a company pursuant to statutory authority does not make the dividends a debt and payable absolutely. *Taft v. Railroad*, 8 R. I. 310, 5 Am. Rep. 575; *Chaffee v. Railroad*, supra; *Lockhart v. Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156; *Miller v. Ratterman*, 47 Ohio St. 141, 24 N. E. 496; *Fieid v. Lamson*, 162 Mass. 388, 38 N. E. 1126, 27 L. R. A. 136; *Ulverstone, etc., R. R. v. Com'rs*, 2 Hurlst. & C. 855. And neither does denying the holder of preferred shares a vote, ipso facto, deprive him of the status of stockholder. 2 *Thompson, Corp.* 2281; *Savannah Co. v. Silverberg*, 108 Ga. 281, 287, 33 S. E. 908. According to the general doctrine, a guaranty to pay dividends means the company binds itself to pay them out of such assets as are legally available for that purpose—that is, net earnings—and this is true whether the guaranteed payments are called "dividends" or "interest." 1 *Morawetz, Priv. Corp.* 457, quoted and followed in *Feld v. Investment*

Co., 123 Mo. 603, 620, 27 S. W. 635. The reasoning and authorities supra lead to the conclusion that plaintiff was a preferred shareholder and not a creditor of defendant, and her right to dividends depended on whether the earnings of the company justified the directors in paying them. The undisputed evidence shows the earnings were not sufficient to pay more than one dividend a year. Perhaps the inference might be drawn that one dividend could have been declared in 1907, had not the directors thought best to extend the business. Where it is clear a dividend ought to have been declared on preferred shares, a court of equity, in a proper suit, may compel this to be done, or treat it as having been done. *Boardman v. Railroad*, 84 N. Y. 157, 180. But the present action is one at law, and certainly a dividend cannot be recovered in a legal action until it has been declared. 2 *Clark & Marshall*, § 517b, and cases cited in note 9.

The judgment is affirmed. All concur.

MARSHALL v. BROWN.

(St. Louis Court of Appeals, Missouri. Nov. 16, 1909. Rehearing Denied Nov. 30, 1909.)

1. ATTACHMENT (§ 122*) — PROCEEDINGS — AMENDMENT — AMENDMENT OF AFFIDAVIT — RIGHT.

Under Rev. St. 1899, § 413 (Ann. St. 1906, p. 501), permitting an attachment to be dissolved on motion before final judgment if the supporting affidavit is insufficient, but prohibiting its dissolution if plaintiff files a sufficient affidavit in such time and manner as the court directs, plaintiff could, pending the hearing of a motion to dissolve the attachment because the affidavit was not signed, amend by signing the affidavit, or by filing a sufficient affidavit.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 323-337; Dec. Dig. § 122.*]

2. APPEAL AND ERROR (§ 281*)—PRESENTATION BELOW—MOTION FOR NEW TRIAL—DENIAL OF AMENDMENT—NECESSITY.

Since attachment is only ancillary to the principal case, an appeal from an order discharging an attachment upon denying plaintiff's motion to amend a defective affidavit, after which plaintiff obtained judgment in the principal case, was not an appeal from an order disposing of the whole case upon a motion against the pleadings, but from an order denying an amendment, so that its denial cannot be reviewed in absence of a motion for new trial or for rehearing.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 281.*]

Appeal from Circuit Court, Butler County; J. C. Sheppard, Judge.

Action by John B. Marshall against Ed. L. Brown. From an order discharging a writ of attachment, plaintiff appeals. Affirmed.

L. R. Thomason, for appellant. Abington & Stanley, for respondent.

NORTONI, J. This is an attachment suit which originated before a justice of the peace, and found its way into the circuit

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

court by appeal. It appears the plaintiff filed his affidavit for an attachment before the justice, and, according to the jurat thereon dated and signed by the justice of the peace, he was sworn to the same. However, he failed to affix his signature thereto. After the case reached the circuit court, the defendant moved a dissolution of the attachment for the reason there was no affidavit filed therein before the justice. The point made and pressed upon the court was to the effect that although the plaintiff may have sworn to the affidavit before the justice of the peace, as appeared from the jurat thereon, executed by the justice, the affidavit was nevertheless no affidavit at all unless the plaintiff had affixed his signature thereto, and it appeared that he had failed to sign it. Upon the hearing of the motion, the plaintiff proffered to amend by affixing his signature to the affidavit or by filing a new and proper affidavit duly signed and verified. The court overruled the plaintiff's application to amend the original affidavit or to permit him to file an amended affidavit. Having overruled the application to amend, the court sustained the plaintiff's motion to dissolve the attachment on the grounds that there was no sufficient affidavit; it appearing that plaintiff had not signed the same. The attachment was therefore dissolved and the lien thereof discharged. Thereafter the cause went to trial on the merits, and the judgment was given for the plaintiff thereon. The plaintiff prosecutes this appeal from the order of the court dissolving and discharging the attachment. The court was clearly in error in denying the plaintiff's right to amend. Our statutes (section 413, Rev. St. 1899 [Ann. St. 1906, p. 501]) provide substantially that attachments in courts of record or before justices of the peace may be dissolved on motion at any time before final judgment if the affidavit on which the same was found shall be adjudged by the court insufficient; but it is provided, too, therein that no attachment shall be dissolved in such case if the plaintiff shall file a good and sufficient affidavit to be approved by the court in such time and manner as the court shall direct. It may be that the mere failure of the plaintiff to sign the original affidavit was not sufficient of itself to defeat it; it appearing from the jurat thereon that he had actually sworn to the same before the justice. On this question we express no opinion, as it is unimportant here. The plaintiff certainly had the right, under the statute above referred to, to amend by affixing his signature or by filing a new and sufficient affidavit. *Clafin v. Hoover*, 20 Mo. App. 314; *Musgrove v. Mott*, 90 Mo. 107, 2 S. W. 214.

However this may be, it appears that we are unable to relieve the situation for the reason the plaintiff filed no motion for a new trial or rehearing on this question.

This is not a case, as argued by the plaintiff, where the court disposed of the whole cause upon a motion against the pleadings, and for that reason rendered its ruling reviewable on appeal in the absence of a motion for new trial or rehearing, as was decided in *Aultman v. Daggs*, 50 Mo. App. 280. The posture the case has assumed on appeal does not present that question, but, instead, it presents the question of the action of the trial court in denying the right of an amendment. Indeed, the whole case was not disposed of on a motion, for in truth the attachment is only ancillary to, or in aid of, the principal cause on the merits. *Coombs Commission Co. v. Block*, 130 Mo. 668-674, 32 S. W. 1139. The entire attachment might fall upon a trial, and still the case upon its merits proceed to final judgment and the plaintiff recover, as was the fact touching the suit on the merits in this case, for the plaintiff here actually recovered and obtained a judgment on his cause of action. Moreover, the appeal here is not prosecuted from the order of the court in dissolving and dismissing the attachment because of the defective affidavit, for it was conceded by the plaintiff, who prosecutes the appeal here, in the trial court that the affidavit was insufficient and he sought to amend the same. This being true, the identical question presented is the ruling of the court on its denying the plaintiff the right to amend. This ruling is one to which the plaintiff should not only have saved an exception, but one which may not be reviewed on appeal, unless called to the attention of the trial court in a motion for a new trial or rehearing thereon. For the reasoning on the subject, see *Union Brewing Co. v. Ehlhardt* (Mo. App.) 120 S. W. 1193; *In re Estate of Howard*, 128 Mo. App. 482, 106 S. W. 116.

It may be, had the question been called to the attention of the trial court by a motion for rehearing, it would have reconsidered its action and reinstated the attachment. It is said to be highly unjust to the trial court in such circumstances to pronounce it in error on a ruling which it has had no opportunity to correct or review.

The matter not having been called to the trial court's attention by motion for new trial or rehearing, the judgment must be affirmed. It is so ordered. All concur.

COOPER et ux. v. COMMONWEALTH TRUST CO.

(St. Louis Court of Appeals. Missouri. Oct. 19, 1900. Rehearing Denied Nov. 30, 1900.)

1. PRINCIPAL AND AGENT (§ 23*)—EVIDENCE. Evidence held to show that persons who had negotiated for a loan with an association sent trust deeds and notes, executed by them to

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

evidence the loan, to bankers as agents for the association, and not as their own agents.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. § 41; Dec. Dig. § 23.*]

2. TROVER AND CONVERSION (§ 16*)—MONEY RECEIVED (§ 13*)—RIGHT OF ACTION.

Where plaintiffs, who had negotiated for a loan with an association, sent the trust deeds and notes, executed by them, to bankers as agents for the association, title to the papers passed from plaintiffs, and the association, having remitted payment of the notes to defendant, designated by the bankers the association agent to receive it, defendant's failure to pass the money on to plaintiffs, while it might raise a question between it and the association, does not give plaintiffs a right of action against defendant, either for money had and received, or for conversion, as the owner of the notes alone could maintain such actions.

[Ed. Note.—For other cases, see *Trover and Conversion*, Dec. Dig. § 16;* *Money Received*, Cent. Dig. § 40; Dec. Dig. § 13.*]

Appeal from St. Louis Circuit Court; Matt G. Reynolds, Judge.

Action by Charles B. Cooper and wife against the Commonwealth Trust Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Rehearing denied. REYNOLDS, P. J., not participating in consideration of the motion or in action of the court in overruling it.

Salmon & Salmon, a copartnership, were private bankers at Clinton, Henry county, Mo.; Thomas M. Casey being the cashier and acting manager of their bank. On Wednesday, June 21, 1905, this bank failed, and was on that day taken in charge by the Secretary of State of Missouri and placed in the hands of a receiver. Subsequently, upon the petition of the creditors thereof, it was adjudged bankrupt by the United States Court. The Missouri Savings Association, also referred to as the Missouri Savings Association Bank, or as "The Bank," and meant when hereafter referred to as the "Association," was a Missouri corporation, doing business in Kansas City, Mo., and engaged in making loans on farm lands in this state and elsewhere. W. S. Webb was the vice president and cashier of that Association; he and the Association having their offices in Kansas City. Otto Seigle was engaged in the lumber business at Clinton, and was also a local agent or solicitor there for the Association, engaged in soliciting and procuring farm loans for it. His course of business under his employment appears to have been that when applied to for loans to have the applicant sign a written application for the loan, addressed to the Association, and forward the application to that institution at Kansas City, whereupon Mr. Webb, acting for the Association, would examine the application and inspect the property offered as security for the loan. Upon his return to the office of the Association at Kansas City the loan was approved or disapproved, as the case might be. The Commonwealth Trust

Company, defendant and appellant, is a trust company in the city of St. Louis, doing a general trust company business, including the buying and selling of commercial paper and receiving deposits. The First National Bank of Kansas City is a national bank, doing business in Missouri and located at Kansas City in that state, and a correspondent there of the Commonwealth Trust Company of St. Louis. The Mutual Benefit Life Insurance Company is a life insurance company, making farm loans in this state, and represented at St. Joseph, Mo., by Bartlett Bros.

Charles B. Cooper and Lena M. Cooper, his wife, plaintiffs and respondents here, own a farm of 160 acres in St. Clair county, this state, some 20 or 26 miles from Clinton. In the year 1904 Cooper and his wife had executed a deed of trust securing a note for \$1,500 on this 160-acre tract; the note and deed of trust being in favor of the Mutual Benefit Life Insurance Company, which note matures on April 1, 1909. This deed of trust was duly recorded. Bartlett Bros. were handling this loan for the Life Insurance Company. Desiring to pay off and discharge this loan, and also to raise additional money on his land, Cooper, according to his own testimony and to the testimony of Seigle, went to Seigle at Clinton, as the representative there of the Missouri Savings Association, and asked him for a loan of \$3,000 on his land. Whereupon Seigle, representing the Missouri Savings Association and acting for it, as the testimony shows beyond any dispute, took Cooper's application and sent it in to the Missouri Savings Association. To state the transaction in Seigle's own language: "Why, Mr. Cooper came to me for a loan of \$3,000 on his land, and I took his application and sent it in just like I do all of them, and it was accepted by the company, and they sent the papers down to me, which they always do." This application appears to have been signed by Cooper, and by him sent to Seigle at Clinton and forwarded by Seigle to the Missouri Savings Association at Kansas City. The written application is addressed to the Missouri Savings Association, and applies for a loan of \$3,000 for 6 years, to bear interest at the rate of 8 per cent. per annum, payable semiannually, Cooper agreeing to secure the same by notes and mortgages or deeds of trust in the usual form of the Savings Association, which should be a first lien on the real estate described, he agreeing to furnish the Missouri Savings Association with an abstract of title to the property from the United States down to and including the mortgage and deed of trust to be given to the Association, and to pay the expenses incurred by the Association in perfecting title and recording fees, and to take the money at any time within 30 days; also agreeing that if the Savings

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Association negotiated the loan at a less rate than 8 per cent., to make his note in favor of the Association for the difference between that rate and the rate at which the loan was negotiated, this latter amount to be payable in 6 installments, corresponding with the interest payments on the loan, and to secure it by a second mortgage or deed of trust on the same property. The agreement in terms constituted the Missouri Savings Association, under the name of "Missouri Savings Association Bank," the agent of Cooper to procure the loan for him, and it authorized that Association to pay the proceeds of the same "to my said agent, and whatever incumbrances the abstract shows upon said premises you are hereby authorized to pay to the party holding the record title thereto as shown by said abstract."

It appears that after his preliminary negotiation with Seigle, Cooper and his wife had gone to Wagoner, in the then Indian Territory, and were residing there from that time on, Mr. Cooper apparently not returning to Clinton until some time after the 21st or 22d of June, 1905, and the written application referred to as well as the deeds of trust and notes, were signed and executed by the Coopers at Wagoner. After receipt of this written application at its Kansas City office, to which place it had been forwarded by Seigle, Mr. Webb went down to St. Clair county, Mo., inspected the farm, approved the loan, prepared the two deeds of trust, the note or bond, as it is called, and the coupons, and forwarded them to Seigle. Seigle, upon receipt of the papers, sent them to Cooper at Wagoner, accompanied by a letter instructing him to execute them and return them to the Salmon & Salmon Bank at Clinton. This letter of instruction was not produced in evidence, and plaintiff Cooper testified that, so far as he knew, it was not in existence. Seigle testified that he had no copy of this letter, and that all the instructions contained in it were for Cooper to send the papers back to the Salmon & Salmon Bank. Cooper testified that after he received these papers, he held them for some time, then signed them and returned them to the Salmon & Salmon Bank, as instructed by Mr. Seigle, and that he also wrote that day to Salmon & Salmon, that he had sent the papers, under the instruction of Mr. Seigle, to their bank. Cooper testified that he had no copy of this letter of transmittal to Salmon & Salmon, nor was the original produced, but he testified that all that was in it was merely that "Inclosed they [Salmon & Salmon] would find the deeds of trust and papers for the loan which he [Cooper] had made with the Missouri Savings Association Bank, and that he had sent them to Salmon & Salmon under the instruction of Mr. Seigle." He further testified that on the same day he had written to Mr. Seigle, which letter was neither produced nor a copy of it in evidence, but was

mailed at Wagoner, Ind. T., June 16, 1905, and that the substance of the letter was that he "had returned the papers which he [Seigle] had sent him to the Salmon & Salmon Bank, as he [Seigle] had instructed him to do." The envelope in which the letter was said to have been contained was produced; the letter itself, however, was not. After testifying in chief to having sent these papers, accompanied by a letter, to Salmon & Salmon, and also writing to Seigle to the effect that he had done so, and that he had never received any money from anybody in the transaction, and had never authorized Salmon & Salmon to collect the money for him or to draw any draft, and that the prior deed of trust had not been paid off, plaintiff Cooper, in cross-examination, reiterated that he had made the application for the loan through Seigle, and in sending the papers to Salmon & Salmon had been acting under the direction of Seigle. He was asked who he understood Seigle to represent in the matter, and he answered that he understood Seigle to represent the Missouri Savings Association Bank. His attention was then called to this clause in his application for the loan: "I hereby appoint Missouri Savings Association Bank my agent to procure the loan for me, and authorize you to pay the proceeds of the same to my said agent"—and he was asked if he had appointed the Missouri Savings Association his agent in this matter. He answered, "Yes." Asked if Mr. Otto Seigle was the agent of the Missouri Savings Association, he said, "Yes." Asked if he had authorized Salmon & Salmon to draw a draft for that money, he said he had not. Asked when Salmon & Salmon drew that draft, whether they were acting as his agents according to his theory of the case, he answered, "They were not." Asked when Salmon & Salmon received any money on that draft, if they were not acting as his agents according to his theory, he answered, "They were not." Asked why he sent the bond and note to Salmon & Salmon Bank, he said that he did that because he was instructed to do so by Mr. Seigle. He was asked if he had not been the plaintiff in two other suits in connection with this same matter, and he answered: "Yes, sir; I guess so." These questions and answers, in fact Cooper's whole testimony, appear in the transcript, and in the supplemental abstract furnished us by attorneys for the respondents.

We give the following verbatim, taken from that abstract, as questions asked and answers given by plaintiff Cooper on cross-examination: "Q. You have been plaintiff in two other suits in connection with this matter, have you not, Mr. Cooper? A. Yes, sir; I guess so. Q. In one of these suits you and your wife joined with the Missouri Savings Association, and brought suit against Mr. Egger, as receiver for the Salmon & Salmon Bank, did you not? A. Yes, sir. Q.

you do it? That is the same question. A. Well, the only reason I can give was through the instructions of my attorney. Q. I believe you brought another suit relative to this same transaction, did you not? A. Yes, sir. Q. That second suit you and your wife sued the Missouri Savings Association, didn't you? A. Yes, sir. Q. The Commonwealth Trust Company and the First National Bank of Kansas City? A. Yes, sir. Q. In this petition I will call your attention to the fact that you state that those papers were forwarded to the Salmon & Salmon Bank, as agents of the Missouri Savings Association? A. Yes, sir. Q. Is that a fact? A. How was that? Q. That those papers—the notes and the bond and the deed of trust—were forwarded to Salmon & Salmon as agents for the Missouri Savings Association? A. They were forwarded to Salmon & Salmon. Q. Yes; as agents of the Missouri Savings Association? A. Yes, sir."

It appears by the evidence in the case that these papers, apparently mailed about the 16th of June, at Wagoner, addressed to Salmon & Salmon, at Clinton, reached the latter place on Saturday, June 17, 1905. They consisted of one note for \$3,000, payable to the Missouri Savings Association or order June 1, 1911, with interest at the rate of 5 per cent. per annum, interest payable semiannually, as evidenced by 12 coupons attached, and expressed to be for value received, and one note for \$545, payable to the Missouri Savings Association or order in 12 installments. Attached to the \$3,000 note were interest coupon notes, payable to bearer. The notes, as well as the coupons, were dated May 15, 1905, and were negotiable, and it was stated in each of them that they were secured by a deed of trust or mortgage on real estate in St. Clair county, Mo. The notes and coupons were signed by Charles B. Cooper and Lena M., his wife. The \$3,000 note and its coupons were secured by what was intended to be a first mortgage on the real estate in St. Clair county, and the \$545 note was also secured by a deed of trust, which was intended to follow the first one, on the same property. The deeds of trust, executed to Webb as trustee for Missouri Savings Association, securing these notes, were also inclosed. It will be noted, therefore, that the Missouri Savings Association elected to take the loan itself, or in its own name.

On receipt of the deeds of trust, notes, and coupons on that morning of the 17th, which was Saturday, Casey, in the name of Salmon & Salmon, on the same day transmitted the deeds of trust to one Rodgers, at Osceola, the county seat of St. Clair county. Rodgers was an abstractor of titles, and Casey,

ance Company. These papers appear to have reached Rodgers on the afternoon of that Saturday, the 17th, on which afternoon they were placed of record, the \$3,000 one 10 minutes before the one for \$545. A supplemental abstract made by Rodgers was placed in the mail that Saturday night, directed to Salmon & Salmon at Clinton. It reached Salmon & Salmon at Clinton about noon on Sunday, June 18th.

Seigle had testified that there was some delay in the sending on of the papers by Cooper to Salmon & Salmon, and he had several times asked Casey if they had arrived. Beyond this, and prior to the arrival of the papers, there is no evidence whatever in the record to show that Seigle had ever said anything to Casey about the papers, or what instructions, if any, he had given Casey concerning them. He testifies that he was not in Clinton on Saturday the 17th, and that, after the receipt of the papers by Casey, the latter called him (Seigle) up over the telephone, Seigle being at his farm out in the county, and told him that he was going to draw a draft, and wanted to know if he (Seigle) thought the Missouri Savings Association Bank would turn down these papers, and he (Casey) wanted him (Seigle) to come up and sign them himself, but he (Seigle) told Casey he would not do it. The next time that Seigle met Casey was the following Monday or Tuesday, at any rate before the bank finally closed, which was Tuesday night about 4 o'clock, its usual closing hour. It did not reopen on Wednesday. Whatever day it was, and it was one or the other of these days, and before the bank was closed out, Seigle came back from his farm and had a conversation with Casey, at Clinton, who asked him if he thought the draft would be turned down by him (Casey) signing it, and Seigle told him that "that wasn't the way we done business; that the borrower signed them; that Mr. Webb sent him (Seigle) the drafts to pay off that mortgage with the one ahead of it and to pay Mr. Cooper the other one." These two conversations—the one over the telephone and the other in person—between Seigle and Casey are the only conversations testified to by any one as having taken place between them concerning the transaction, and this is all we have of those conversations, except that Seigle further testified that when he met Casey in the bank Monday or Tuesday, Casey told him that he had drawn the draft and had sent on the papers. He had then drawn the draft and sent on the papers to the Commonwealth Trust Company. Seigle also testified that he had not communicated to the Missouri Savings Association anything about Casey going to draw the draft; made

understand it that Casey was referring to a draft drawn by Salmon & Salmon." What Casey wanted him (Seigle) to do was to sign Cooper's name to the draft, and he "wouldn't do it; didn't know then what Casey was going to do; didn't care what he had done after that, as long as he (Seigle) wasn't going to do it"; but understood on Monday that Casey had drawn a draft "simply because Casey had told him so."

On Sunday the 18th of June, and on receipt of the supplemental abstract, Casey, in the name of Salmon & Salmon, wrote and mailed the following letter to Webb, cashier of the Missouri Savings Association, dating it, however, June 17th: "Clinton, Missouri, June 17, 1905. W. S. Webb, Cashier, Kansas City, Missouri—Dear Sir: We send you herewith supplemental abstract of title to real estate covered by your loan of \$3,000 to Mr. Charles B. Cooper. This is done at the request of Mr. Seigle. We have drawn on you for \$3,000 on account of this loan, attaching to draft a \$3,000 bond and commission notes, out of which we will pay off the Bartlett or rather the Mutual Benefit Life Insurance Company loan. The draft for three thousand dollars will not be presented until Tuesday, hence if you prefer to take up said loan yourself, please call us up to-morrow, or rather Monday, at our expense, and we will remit you to cover said loan. Yours very truly, Salmon & Salmon, 'C.'" This letter was received by the Missouri Savings Association at Kansas City on Monday morning, June 19th, and with it the supplemental abstract, but that Association neither telephoned nor wrote to Salmon & Salmon or Casey in response to it. While this letter is dated June 17th, it could not have been mailed before the 18th; that is to say, Sunday. It inclosed the supplemental abstract, and that supplemental abstract had not been received by Salmon & Salmon or Casey until the afternoon of Sunday, the 18th. It was undoubtedly written on the 18th. Casey, in the name of Salmon & Salmon, drew this draft: "Customer's Draft. Salmon & Salmon, Bankers. \$3000.00. Clinton, Mo., June 17, 1905. Pay to the order of ourselves three thousand dollars for attached papers, and charge to account of Salmon & Salmon. To Missouri Savings Bank, Kansas City, Mo." This was indorsed on the back: "Pay any bank or banker or order. All prior indorsements guaranteed. Salmon & Salmon, Bankers." This draft, dated the 17th, along with the notes attached, was mailed by Casey, in the name of Salmon & Salmon, to the Commonwealth Trust Company at St. Louis, on Sunday evening June 18th, and was received by the Commonwealth Trust Company Monday June 19th, although the Trust Company's receiving stamp bears date the 18th.

When the Commonwealth Trust Company received the draft with attached papers, it with other drafts and miscellaneous credits

by the Commonwealth Trust Company to the amount of \$798.58. The total amount remitted by Salmon & Salmon of date June 17th, including the draft for the \$3,000, amounted to \$5,437.05; the remittance outside of the \$3,000 draft being made up of express orders, exchange, and various smaller items. The Commonwealth Trust Company, having carried the amount in it to the credit of Salmon & Salmon June 19th, allowed them to draw on it that day, not only for the \$798.58 credit with which their account had that day opened, but for an amount in excess of that and of the deposits received during the day, so that at the end of the day Salmon & Salmon's account with the Commonwealth Trust Company was overdrawn to the amount of \$1,331.81. On the same day the Commonwealth Trust Company attached the \$3,000 draft to the commission note and the \$3,000 loan note and its coupons, and indorsed the draft: "Pay to the order of First National Bank, Kansas City, Missouri. All prior indorsements guaranteed. [Signed] Commonwealth Trust Company, St. Louis, Mo., by J. M. Wood, Secretary"—and transmitted the draft and attached papers, as well as other exchange items, to the First National Bank at Kansas City, Mo. The draft with papers attached to it, as well as the other items, reached the latter bank on Tuesday, and that bank presented the draft and its attached papers on that day to the Missouri Savings Association, which latter paid the draft and retained the notes and coupons. The First National Bank of Kansas City thereupon carried the proceeds of the draft to the credit of the Commonwealth Trust Company that day, and on that day so advised the Commonwealth Trust Company by letter or postal. As before noted, on the evening of the same day—that is, Tuesday, June 20th—and at the usual hour for closing the bank, 4 o'clock, Salmon & Salmon closed their doors. On the succeeding day, June 21st, the bank was taken possession of, as also before stated by the banking department of the state. This fact became generally known on the forenoon of that day, and the Missouri Savings Association officers, learning of it, called up Bartlett Bros., of St. Joseph, Mo., who, representing the Life Insurance Company, held the \$1,500 incumbrance, to ascertain if Casey or Salmon & Salmon had paid off the loan. Being informed that they had not, the Missouri Savings Association telephoned to Seigle at Clinton, to see Cooper, and to see what was to be done. Seigle telephoned that Cooper was not in Clinton. Whereupon the Missouri Savings Association asked the First National Bank of Kansas City to telephone the Commonwealth Trust Company to hold the money and not turn it over to Salmon & Salmon. This was done on this 21st day of June, both by telephone and telegram; in the latter the First National Bank stating

amounting to \$3,000, to Salmon & Salmon. This telegram was sent about noon. The same day the Missouri Savings Association telegraphed the Commonwealth Trust Company as follows: "Do not pay Salmon & Salmon \$3,000. Yours 19th to First National Bank obtained by fraud and misrepresentation; trust fund; have written"—and on that day the Missouri Savings Association wrote the Commonwealth Trust Company to the effect that the \$3,000 paid by the Missouri Savings Association to the First National Bank, Kansas City, on draft dated June 17, 1905, and drawn on Missouri Savings Association by Salmon & Salmon of Clinton, Mo., "is not the property of said Salmon & Salmon and should not be paid to them or treated by you as their property." The letter then went on to state what were claimed to be the facts in the case, among other things setting out that the papers for the loan—that is to say, the note and deeds of trust—were prepared by the Missouri Savings Association, sent by it to Seigle for execution; that Seigle sent them to Cooper, who, after executing them, "returned them to said Seigle, who delivered them to said Salmon & Salmon, as the agents of Cooper, to receive from us [Missouri Savings Association] the amount of the loan, to be applied, \$1,500 to said old deed of trust, and the balance for Cooper; that the draft above referred to for \$3,000, was drawn by Salmon & Salmon as a means of receiving from us the amount of said loan, as appears by the words 'for attached papers' in said draft, the attached papers being said notes and deed of trust, and we [Missouri Savings Association] paid the money on said draft as the money of said Cooper; that the said \$3,000 was and is not the property of Salmon & Salmon, but a trust fund belonging to said Cooper for the use above stated." After stating that they had wired the Commonwealth Trust Company not to pay the draft to Salmon & Salmon, but to hold the money for Cooper, the letter adds: "In which (\$3,000) we also have an interest, because that under our agreement with Cooper, \$1,500 of it was to be applied to satisfy the first deed of trust now on said farm." The receipt of this letter was acknowledged by the defendant, accompanied by the statement that on the facts of the case as written to them by the cashier of the Missouri Savings Association, the Commonwealth Trust Company could see nothing upon which the Savings Association could base any claim as against funds which had been paid to the Commonwealth. There was uncontroverted testimony to the effect that the acts of the Commonwealth in crediting the draft to Salmon & Salmon as a cash item, and allowing

payment of the draft to the First National Bank of Kansas City, had kept and still retained possession of the notes and coupons, and also holds the deeds of trust. It was in testimony that plaintiffs had never received anything from anybody on account of the transaction. The Commonwealth Trust Company declined to pay the \$3,000 to Cooper, and this present suit was instituted; the petition alleging "that defendant is indebted to plaintiffs in the sum of \$3,000 on account of money had and received by the defendant for the use of plaintiffs on the 17th day of June, 1905, and which sum of money defendant agreed to pay to plaintiffs." Judgment is demanded for this \$3,000, with interest thereon from June 17, 1905, and for costs. The answer was a general denial. The trial was before the court, a jury having been waived, and the facts as here outlined given in evidence. At the close of plaintiffs' evidence defendant asked an instruction in the nature of a demurrer, and renewed it at the conclusion of the trial. At the instance of the plaintiffs the court gave the following declaration of law: "If the court, sitting as a jury, believes and finds from the preponderance of the evidence that Charles B. Cooper and Lena M. Cooper, his wife, the plaintiffs, signed the bond and coupons and note, in amount \$3,000, read in evidence, with the deeds of trust read in evidence, on the lands in St. Clair county, Mo., to Watt Webb, as trustee for the use and benefit of the Missouri Savings Association of Kansas City, Mo., and sent the same to Salmon & Salmon, bankers, at Clinton, Mo., on or about June 17, 1905, without any directions, authority, or request from plaintiffs to Salmon & Salmon, or to Thomas M. Casey, cashier, to negotiate the same, or to collect the amount due thereon, or to otherwise collect, sell, or dispose of the same, and that the said Salmon & Salmon, or Thomas M. Casey, cashier thereof, without payment of consideration, and without authority, direction, or request or consent, did cause the deed of trust to be recorded, and that he or said Salmon & Salmon, without payment and consideration, authority, request, or knowledge or consent of plaintiffs, drew a draft for \$3,000 on the Missouri Savings Association, signed, Salmon & Salmon, payable to Salmon & Salmon, for attached papers, and attached the bond, coupons, and note, read in evidence, to the draft aforesaid, on the 17th day of June, 1905, and sent the draft and attached papers aforesaid to the Commonwealth Trust Company of St. Louis, the defendant, and that the draft and attached papers were by the defendant forwarded to the First National Bank of Kansas City, Mo., for presentation and payment, without the knowledge, au-

thority, direction, or request of plaintiffs, and that the said last-mentioned bank did present the draft and attached papers to the Missouri Savings Association on June 20, 1905, and did then and there receive payment in the sum of \$3,000, and delivered the draft and attached papers to the Missouri Savings Association, without the knowledge, authority, directions, or request of plaintiffs, and that the First National Bank then and there remitted the proceeds, or its equivalent, so received, in amount \$3,000, to the Commonwealth Trust Company, and that the same was so received by defendant, on June 21, 1905, without the knowledge, authority, or direction of plaintiffs, and that the defendant has failed, refused, and neglected to pay to the said plaintiffs the said sum of \$3,000, or any part thereof, upon demand, but has retained, appropriated, and kept the same ever since the reception thereof, then the plaintiffs are entitled to recover, and your verdict will be for plaintiffs in the sum of, \$3,000, with 6 per cent. interest from the date the same was collected and received."

In addition to the instructions for a nonsuit, defendant asked several instructions, all of which were refused. In the view we take of the case it is not necessary to notice these. There was a finding and judgment for plaintiffs and against defendant, for the whole amount claimed. After an unsuccessful motion for new trial, the case has been duly appealed to this court by defendant; exceptions having been duly saved to the various adverse rulings and action of the court.

Bryan & Christie, for appellant. Edward C. Crow and John A. Galbreath, for respondents.

REYNOLDS, P. J. (after stating the facts as above). When this case was first argued before us, we arrived at the conclusion that the judgment of the lower court should be affirmed. A motion for rehearing having been filed, we sustained that, and the case has been reargued and elaborately briefed by counsel. On full and careful reconsideration we have arrived at the conclusion that our first determination of the case was erroneous.

If it is true that Salmon & Salmon were acting as the agents of the plaintiffs in the transaction, and were authorized by them to send on the notes, collect the money on them, and pay it over to them, then the theory so earnestly and ably advanced by counsel for respondents that, as bailees of any character or as agents for the plaintiffs, Salmon & Salmon could not deal with the papers in any way by which they could throw title to them out of plaintiffs, or invest any person with any right under them, is correct. In a case of that kind Salmon & Salmon or their manager, Casey, would have been guilty of a tortious conversion, and any person receiving any benefit thereunder would be equally liable for the value of

the securities converted, or responsible, as was claimed in this case by the petition in it, for money had and received. Such third party would be held to respond to the plaintiffs as for money had and received to their use and for their benefit. It was on this theory of the case that we all agreed in the affirmance of it when it was first presented to us. It was presented to us by appellant on the theory that the defendant was protected by dealing with commercial paper in the ordinary course of business. We declined to agree to that. That question does not arise, and is unnecessary to be determined in the light of the case as disclosed by a more careful examination of the testimony in the case, particularly that of the plaintiff Cooper himself. He testifies in the most positive and unequivocal manner that Salmon & Salmon were treated with by him, and recognized by him, not as his agents, but as the agents of the Missouri Savings Association, the very parties to whom the notes were payable, and the very parties who were entitled to the possession of them, and who were bound to pay them if they accepted and retained possession thereof.

It was argued before us at the bar, and is repeated in the very able briefs presented by the learned and industrious counsel for the respondents, that the statement of Cooper, when on the witness stand, that he considered Salmon & Salmon the agents of the Missouri Savings Association was a mere inadvertent statement, and that he did not mean to so testify. If that is so, it is very unfortunate for these plaintiffs. This court is bound by the record that he himself has made by his own testimony. He has testified in the most unequivocal manner that he delivered these papers, or mailed them, more correctly, to Salmon & Salmon, considering and treating the latter as representatives and agents of the Missouri Savings Association, and not as his agents. In point of fact a careful consideration of the testimony confirms this, and demonstrates that the Missouri Savings Association itself, as well as Casey, the latter acting for Salmon & Salmon, so understood the matter. The letter which we have given at length in the statement of the case, from Casey to Webb, is the letter of an agent writing to his principal for directions as to what he shall do with the fund in the event that the draft is honored, and it was full notice to the Missouri Savings Association that Salmon & Salmon proposed to act, not for the plaintiffs in the case, but for the Missouri Savings Association, in seeing to the payment of the prior incumbrance out of the \$3,000 for which the draft had been drawn. It is true that the Missouri Savings Association did not answer this letter either by letter or telephone, as requested to do in the letter, but they did not repudiate it, and it is in evidence that, when they heard of the failure of the Salmon & Salmon Bank, they

not Casey or Salmon & Salmon had paid off this prior incumbrance, which, in a measure at least, lends support to the view that they were, up to then, satisfied to have Salmon & Salmon act for them in the transaction, and were solicitous only to find out whether or not they had, with the proceeds of the draft, lifted the prior incumbrance and cleared the land from that burthen. It was not until the Missouri Savings Association took up the matter with the Commonwealth Trust Company that it is suggested in any manner that they looked upon Salmon & Salmon as the agents of the plaintiffs in the transaction. In that letter, set out in the statement of the case, the proposition is for the first time advanced that Salmon & Salmon were the agents, not of the Association, but of the plaintiffs. That came too late. We do not mean to hold that these acts of the Savings Association are binding on plaintiffs. They are, however, evidence of the light in which the Association regarded Salmon & Salmon, and are confirmatory of the testimony of Cooper to the effect that Salmon & Salmon were agents of that Association, and that he had so dealt with them. The acts of all the parties, prior to the time of the failure of the bank of Salmon & Salmon, which up to that time, so far as the evidence shows, enjoyed credit and was a going concern, clearly prove that all of them considered Salmon & Salmon the agents of the Missouri Savings Association in the transaction, and considered them the conduit through which, not only the papers were to pass from the plaintiffs to the Missouri Savings Association, but, more than that, the agents of that Association in the proper application of the money which was to be paid on the loan.

It will not do, therefore, to say, under these circumstances, and in the light of the testimony, as the very earnest counsel for plaintiffs now do, that Mr. Cooper was mistaken, and did not mean what he said, when he declared in that testimony that Salmon & Salmon were the agents of the Missouri Savings Association, and that he so considered them at the time, and that he had never at any time considered them his agents in the transaction. When plaintiff delivered the notes and deeds of trust to Salmon & Salmon, according to his own sworn testimony, he delivered them to the agents of the Missouri Savings Association as he had been directed to do. With that delivery his title to them passed out of him. The Missouri Savings Association received, and, according to the testimony, still holds, these papers. It remitted the money on the draft drawn against them, not to plaintiffs, but to defendant, who was the person designated by the agent of the Association to receive it. If

tiffs a right of action against it, either for money had and received or for conversion. If there had been a conflict in the testimony as to the question of whose agents Salmon & Salmon were in the transaction, it would have been the duty of the trial court to have declared that an issue of fact to be determined on the testimony. The declaration of law given at the instance of plaintiff ignored this, and proceeded upon the theory that Salmon & Salmon were the agents in the transaction, not of the Missouri Savings Association, but of the plaintiffs. While not expressly doing that in the instruction, the rule of law announced in it is sustainable upon no other theory. Looking at the facts in the case as developed by the evidence in it, there was no conflicting testimony on this point. It was all one way, and positive to the effect that Salmon & Salmon, in the transaction, were the agents of the Missouri Savings Association, and not the agents of the plaintiffs.

The acts of the defendant, on receipt of the draft and attached papers, so far as the evidence in the case shows, seem to have been in entire accordance with the usual banking custom. There was nothing irregular nor unusual in defendant crediting Salmon & Salmon with the draft as a cash item; and whether it was warranted in so doing is another matter. As Salmon & Salmon, who drew that draft, were not, as we hold, the agents of plaintiffs in so doing, these plaintiffs are not, in this case, concerned with that.

The owner of the notes alone can maintain action for conversion or for money had and received thereon. When the notes and deeds of trust were delivered by plaintiff Cooper to Salmon & Salmon, it was a delivery to the agent of the Missouri Savings Association, the party entitled to them. They then and thereafter became the property of the Missouri Savings Association. This did not affect the right of plaintiffs, either to recover any sum due thereon, from the holder or owner of the notes, or to have them canceled for nonpayment, but it did extinguish their title to the notes as notes. Plaintiffs were no longer the owners after delivery to Salmon & Salmon, and hence cannot recover.

It is due this court to say that when this matter was first argued and presented to us, this feature of the case upon which we now decide it was not presented by counsel, or dwelt upon in such a way as to attract our attention, or to turn our minds to a consideration of the effect of this aspect of the case.

For the reasons now stated, the judgment of the trial court is reversed. All concur.

1. VENDOR AND PURCHASER (§ 18*)—OPERATION OF CONTRACT—OPTION.

No title passed under an option to purchase land which required the owners to furnish the option holder a survey and tender an acceptable title within 90 days, where it did not appear that any survey or abstract of title was ever tendered, or that the option holder paid anything for the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 13.*]

2. EXECUTORS AND ADMINISTRATORS (§ 356*)—SALE OF LAND FOR PAYMENT OF DEBTS—ORDER OF SALE—MATTERS CONCLUDED.

Where, in a suit by a creditor to settle a decedent's estate and to sell his lands for the payment of his debts, judgment was rendered directing the land to be sold, and at the time of such rendition a cross-petition alleging title to the land in cross-petitioner, and praying that title be adjudged in him, was on file before the court, the judgment necessarily adjudged that cross-petitioner had no title, though his name was not mentioned therein.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1463; Dec. Dig. § 356.*]

3. APPEAL AND ERROR (§ 79*)—DECISIONS REVIEWABLE—FINALITY OF JUDGMENT—DETERMINATION OF CONTROVERSY—DETERMINATION AS TO ONE PARTY.

Where, at the time judgment was entered directing land to be sold for a decedent's debts upon petition by a creditor, a cross-petition alleging ownership of the land and praying that title be adjudged in cross-petitioner was before the court, the judgment necessarily adjudged that cross-petitioner had no title, though his name was not mentioned therein, and was a final appealable judgment as to him, though the land was not sold thereunder until some years after.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 487; Dec. Dig. § 79.*]

Appeal from Circuit Court, Breathitt County.

"Not to be officially reported."

Suit by John W. Cardwell and others to settle the estate of a decedent and to sell his lands for payment of his debts. Charles J. Little filed a cross-petition and answer alleging ownership of the tract, and praying that the petition be dismissed and title adjudged in him. From the judgment ordering the land sold and from the final order confirming the sale, Little appeals. Appeal dismissed.

Gourley, Redwine & Gourley and Jno. E. Patrick, for appellant. McGuire & McGuire, for appellees.

CARROLL, J. In October, 1886, William Smith died intestate in Breathitt county, leaving surviving him as his only heirs at law his widow, Nancy, and his son, George Smith. In July, 1887, John W. Cardwell, a creditor of the decedent, brought suit in the Breathitt circuit court to settle his estate, and in the petition described a tract of land that he asked should be sold for the purpose of paying the debts due by the estate. In 1889 the appellant Little filed his petition in this ac-

tion to be made a party, making it an answer and cross-petition, in which he set up that in July, 1887, more than six months after the death of William Smith, one Harry Baldwin for a good and valuable consideration paid to Nancy Smith and George Smith purchased from them the tract of land described in the petition filed to settle the estate, and on that day the same was conveyed to Baldwin by deed; that in August, 1889, Baldwin sold and conveyed the land to him, and in 1889 Nancy and George Smith conveyed it to him; that immediately after he purchased the land he took actual possession thereof, and was in possession at the time he filed his petition. He asked that the pleading be taken as his answer to the plaintiff's petition, and as a cross-petition against the other defendants, and prayed that the petition be dismissed and he be adjudged the owner of the land.

The orders of the court show that this pleading was duly filed in January, 1889. In 1888 an order was made referring the case to the master commissioner to report claims, and a commissioner's report of claims was filed, and again in the same year a second report was filed. In 1889 the reports of claims, excepting two small items, were confirmed. In 1891 the action was submitted for judgment, and a judgment entered directing the commissioner to sell the land mentioned in the petition for the purpose of paying the debts due by the estate. This judgment does not make any mention of Little's claim or pleading, although his original pleading setting up that he was the owner of the land and asking that Cardwell's petition be dismissed had been filed two years before. In 1894 the commissioner filed his report of sale, reciting that the real estate was sold to W. T. Hogg for \$418. In March, 1894, an order was entered showing that the papers and commissioner's report of sale were lost, and an order made referring the matter to a special commissioner to supply the lost papers. In July, 1894, there is an order showing that the commissioner's report of sale was filed, and in March, 1896, Cardwell made a motion to confirm the commissioner's report of sale filed in 1891. In 1899 the motion to confirm the commissioner's report of sale was renewed, to which Little excepted. In June, 1909, Little filed exceptions to the commissioner's report of sale, and thereafter, at the same term, the cause was submitted upon Cardwell's motion to have the sale confirmed and a deed made and upon the exceptions filed by Little to the report of sale. The judgment recites that the court "finds that said Little's petition to be made a party was filed on the 4th day of January, 1889, setting up claim to the land described in the petition, and that the judgment ordering said sale was made at the September

term 1891. He further finds that the matters and things claimed by said Little were settled by said judgment." The court further overruled the exceptions of Little to the commissioner's report, and, it appearing that all the debts had been paid, ordered that the commissioner's report of sale be confirmed and a deed made to the assignee of the purchaser.

The appellant prosecutes this appeal from the judgment rendered in 1891, and also from the final order entered in 1909. Whether or not the appellant's cause of action is meritorious is doubtful. The conveyance by Nancy and George Smith was merely an option giving to Baldwin the right to purchase the land at \$3 per acre, provided the Smiths furnished to Baldwin a survey of the land, and tendered a title acceptable to him within 90 days after the date of the option. This conveyance was made some 8 months after the death of William Smith, and about 30 days before the suit was filed to settle the estate. It nowhere appears that the Smiths within 90 days or any other time tendered to Baldwin either a survey or an abstract of title, or that Baldwin ever paid to them anything for the land. The deed from Baldwin to Little, and from Nancy and George Smith to Little, were not made until after the suit to settle the estate had been filed. So far as the deed from Baldwin to Little is concerned, it is sufficient to say that Baldwin had no title to the land he attempted to convey. The deed made by Nancy and George Smith to Little was made nearly two years after the suit was filed to settle the estate and sell the land for the purpose of paying the debts of the decedent under whom they took the land by inheritance. But, whether or not there is any merit in Little's contention—passing the question of the title, if any, he obtained—we see no escape from the conclusion that he rested too long upon his rights, if he had any. At the time the judgment was entered in 1891 Little was before the court upon his own motion by the pleading filed by him in 1889 asserting title to the land sought to be sold in the suit to settle the estate and asking that the petition be dismissed. And, although this judgment does not mention Little's name or his pleading, it is manifest that the court entering the judgment was of the opinion that the claim asserted by him was not a valid or meritorious one. In adjudging that the land should be sold to satisfy the debts of William Smith, the court necessarily adjudged that Little had no title to it. So far as Little was concerned, it was a final, adverse, and appealable determination of the claim of title to the land asserted by him in his pleading. That judgment has never been vacated or modified. After its entry, Little had no interest or concern in the subsequent proceedings, as the judgment, in effect, determined

that he had no title to the land. We are unable to perceive how the fact that the sale made under the judgment was not confirmed for many years afterwards, or that the papers in the case were lost or mislaid, or that the action was continued for years at a time, can be of any benefit to Little. No satisfactory reason—nor indeed any reason—is assigned why Little, who was before the court with actual notice of this judgment, did not take some steps to have it set aside by appeal to this court or motion in the lower court.

As the appeal was not prosecuted in time, it must be dismissed, and it is so ordered.

SPENCER v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 26, 1909.)

1. CRIMINAL LAW (§ 741*)—TRIAL—DIRECTION OF VERDICT.

It is only where there is no evidence tending to connect accused with the commission of the crime that the court is warranted in taking the case from the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727; Dec. Dig. § 741.*]

2. CRIMINAL LAW (§ 1159*)—APPEAL AND ERROR—WEIGHING EVIDENCE ON REVIEW.

Where there is evidence sufficient to take the case to the jury, the verdict will not be disturbed on review, in the absence of other errors, though the evidence is slight.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3074; Dec. Dig. § 1159.*]

3. CRIMINAL LAW (§ 1180*)—APPEAL AND ERROR—REVIEW—SUBSEQUENT APPEALS.

A decision on appeal that the evidence is sufficient to take the case to the jury is the law of the case, and conclusive on a subsequent appeal, where the evidence is substantially the same.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3003; Dec. Dig. § 1180.*]

4. HOMICIDE (§ 339*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The exclusion of cumulative evidence to show ill will and threats toward deceased by a third person does not require a reversal of a conviction of murder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 714; Dec. Dig. § 339.*]

Appeal from Circuit Court, Jefferson County, Criminal Division.

"Not to be officially reported."

Samuel Spencer was convicted of murder, and appeals. Affirmed.

See, also, 107 S. W. 342, 32 Ky. Law Rep. 880.

Ray Mann, for appellant. Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

LASSING, J. On the morning of the 21st of February, 1907, Mary Virginia Sauer was found dead in her bed at the end of a hall on the second floor of Mrs. Watson's boarding house, on Third and Walnut streets, Louisville. There were circumstances which led the authorities to believe that she had been murdered, and Samuel Spencer was ar-

rested, charged with this crime. It was developed that she had met her death by strangulation. This was apparent from finger marks upon her throat and neck, and it was the theory of the commonwealth that the accused had thus killed her, either for the purpose of robbing her, or else to satisfy a feeling of revenge and hatred which he entertained toward her. Shortly thereafter he was indicted, tried, and convicted; the death penalty being imposed. From the judgment predicated on that verdict, an appeal was prosecuted to this court and the case was reversed because of the admission of certain incompetent evidence. The facts of the case are fully stated in the former opinion, which may be found in 107 S. W. 342, 32 Ky. Law Rep. 880. Upon a second trial the accused was found guilty, and his punishment fixed at life imprisonment, and the case is again before us for review. The errors complained of are two: First, that the verdict is not supported by the evidence, and is contrary to the evidence; and, second, that the court erred in excluding certain evidence offered by the defendant to his prejudice.

The first ground relied upon for reversal is wholly untenable, for the twofold reason: First, where there is any evidence in criminal cases, under a long line of decisions of this court, it is proper to leave the question of guilt or innocence to the determination of the jury, and it is only in cases where there is no evidence at all tending to connect the accused with the commission of the crime that the trial court is warranted in taking the case from the jury, and, where there is evidence to take the case to the jury, its finding will not be disturbed, in the absence of other errors, because the evidence is slight (*Barrett v. Meek*, 2 Ky. 34; *Vowells v. Commonwealth*, 83 Ky. 193; *Tipper v. Commonwealth*, 1 Metc. 6; *Johnson v. Commonwealth*, 9 Bush, 224; *Kean v. Commonwealth*, 10 Bush, 190, 19 Am. Rep. 63; *Murphy v. Commonwealth*, 1 Metc. 365; *McDaniel v. Commonwealth*, 6 Bush, 326; *Patterson v. Commonwealth*, 86 Ky. 313, 5 S. W. 387); and, second, because practically all of the evidence which was given on behalf of the commonwealth on the first trial was given to the jury on the last trial, and upon the former appeal this court held that the evidence tending to show the defendant's guilt, or to connect him with the commission of the crime, was sufficient to take the case to the jury. We are still of that opinion; but, even if we entertained a different view, under another line of authorities it is held that a ruling upon a former appeal will not be disturbed upon the second appeal, but must be regarded as the law of the case, and hence, having on the former appeal said that the evidence was sufficient to take the case to the jury, we would be bound by that ruling on this ap-

peal. *Brown v. Crow's Heirs*, 3 Ky. 451; *Webb v. Porter*, 76 S. W. 363, 25 Ky. Law Rep. 745; *L. & N. R. R. Co. v. Survant*, 44 S. W. 88, 19 Ky. Law Rep. 1576; *Schmetzer v. L. & N. R. R. Co.*, 44 S. W. 395, 19 Ky. Law Rep. 1713; *Commonwealth v. L. & N. R. R. Co.*, 46 S. W. 206, 20 Ky. Law Rep. 351; *Lancashire Ins. Co. v. Monroe & Co.*, 52 S. W. 1058, 21 Ky. Law Rep. 782; *Brashears v. Letcher County Court*, 54 S. W. 840, 21 Ky. Law Rep. 1250; *Freeman v. Mills*, 59 S. W. 3, 22 Ky. Law Rep. 859.

The second ground relied upon for reversal arises out of the attempt, on the part of the accused, to show that the murder may have been committed by another. It is made to appear from the evidence that Mrs. Watson, the landlady, a woman of some 70 years of age, weighing about 180 pounds and rather masculine in appearance, entertained a feeling of hostility toward this girl, and had at various times given expression to this feeling of ill will and resentment, and had even gone so far, on several occasions, as to state that she, the Sauer woman, made her mad enough to want to kill her. Several expressions of this kind on the part of Mrs. Watson were admitted in evidence, and it was abundantly made to appear, from the statements of this character that were admitted in evidence, that Mrs. Watson had repeatedly said that the Sauer girl made her mad enough for her to want to kill her. The statements that were excluded would have been but cumulative upon this point, although, perhaps, one which was excluded was more emphatic than the others. Mrs. Watson, shortly after the death of this girl, was adjudged to be insane, and, when being taken from the building, tried to choke those who had her in charge. This, it is urged, is evidence of the fact that she chose this method of attack. All of this show of ill will toward, and hatred for, Mary Sauer, and her frequent talks about her, indicative of a willingness to punish or injure her, was fully brought out by the evidence of this character that was admitted to the jury, and appellant could not possibly have been prejudiced by reason of the exclusion of the evidence complained of.

Upon the whole case, and after a careful examination of the record, we fail to find that the court committed any error prejudicial to the substantial rights of the appellant. He has been given two trials, and upon each he has been found guilty. The jury which tried him last, as did the first, found that he was guilty of willful murder. The only difference between the two is that the last was more merciful, if it can be considered such, in that, instead of the death penalty, it inflicted the life imprisonment punishment. The opinion of these 24 jurors, who heard all of the evidence and observed the appellant and his conduct during each of

the trials, is entitled to much consideration; and, even though there are some matters brought out in the evidence which are difficult of explanation, we find many facts and circumstances which tend strongly to show that the jury reached the right conclusion.

Judgment affirmed.

MITCHELL v. WEDDINGTON.

(Court of Appeals of Kentucky. Nov. 26, 1909.)

BROKERS (§ 58*)—COMMISSIONS—DEFENSE.

Defendant, who contracted to pay plaintiff a certain amount per acre commission if plaintiff would buy for him the coal on a certain farm, is not estopped to assert, as against plaintiff's claim for commission, that one of the owners was an infant, so that a binding contract for sale of all the coal, which was contemplated, was not obtained; he not having employed defendant with knowledge of the infancy of such owner, though he had not based his refusal to carry out the contract of purchase on such infancy.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 58.*]

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by W. B. Mitchell against Ballard Weddington. Judgment for defendant. Plaintiff appeals. Affirmed.

N. J. Auxier and Roscoe Vanover, for appellant. York & Johnson, for appellee.

CLAY, C. This action was instituted in the Pike circuit court by the appellant, W. B. Mitchell, to recover from appellee, Ballard Weddington, the sum of \$477, as commission for the purchase of the coal and minerals on the Samuel Keel farm, which appellant alleges he was employed by appellee to purchase. At the conclusion of appellant's testimony the court instructed the jury to find for appellee. To review the propriety of this ruling this appeal is prosecuted.

It is charged in the petition that appellee employed appellant to obtain for him a written contract from Samuel Newsom and those to whom he had made deeds for portion of his land for the coal and minerals on said land, that there are 954 acres of land, and that the commission which appellee agreed to pay was 50 cents per acre. It was further charged that the price to be paid the vendors was \$5 per acre. The petition alleged that, in pursuance of said contract of employment, appellant secured from Samuel Newsom and his children, to whom he had conveyed portions of the land, the following contract:

"We the undersigned have this day bargained and sold to Ballard Weddington, all the coal and mineral products in, on and under our lands on Indian creek for the agreed price of \$5.00 per acre with the exclusive right of way to enter upon said land, mine, operate and remove said mineral prod-

ucts. Said land to be surveyed at the expense of said Weddington, and to be done within thirty days from this date, otherwise this trade is null and void.

"It is agreed that Samuel Newsom reserves the inclosed lot around his dwelling house and orchard. It is further agreed that the parties of the first part reserve the right to use coal for domestic purposes.

"Said parties of the first part give the right to use timber on said land at the time of mining for mining purposes, twelve inches and down.

"Given under our hands this March 23, 1908.

"(Signed) Samuel Newsom,
"J. L. Newsom,
"Preston Newsom,
"Noah Newsom,
"Henry Newsom,
"Mary Owens."

It was also alleged in the petition that the parties signing the above contract were the sole owners of the land known as the "Old Samuel Keel Farm," and of all the land that appellant contracted and agreed to buy for appellee; that the parties signing said contract had requested appellee to take the coal and minerals and pay for same, but that he had refused to do so; that said parties were ready, able, and willing to convey same to appellee by deed with covenant of general warranty.

Besides other defenses set up in the answer and amended answer, appellee defended on the ground that Noah Newsom, one of the parties signing the contract, and who owned a portion of the land, was an infant at the time, and also at the time of the bringing of the suit, and was unable to convey a good title to appellee. It appears from the record that appellant met appellee at Catlettsburg, Ky. Appellee said he understood the coal and minerals on the Samuel Keel or Samuel Newsom land on Indian creek could be bought for \$5 per acre, and that he wanted appellant to go up there and buy it for him if he could buy it so it would not cost more than that price; that if appellant would do so, appellee would give him 50 cents per acre for buying it. Appellant then went to Pike county and secured the contract in question. He got a party to notify appellee that he had secured the contract. A few days before the contract of purchase was to expire, three of the Newsoms who had signed the contract met appellant and appellee in Pikeville. At that time appellee made some objection to the contract, based on the reservations therein made, and stated that he was willing to buy the land in fee. Appellee took the contract to his attorney, who said it was no account. He did not then refuse to carry out the purchase because one of the parties signing the contract was an infant. The proof further shows that, as a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

The lower court, in giving a peremptory instruction, based its action upon the fact that Noah Newsom was an infant, and was therefore unable to make title to his part of the land. It is earnestly insisted for appellant that appellee, after giving other reasons for not completing the purchase, is estopped from setting up the defense that Noah Newsom was an infant. It is manifest, however, that appellant was employed to secure a contract of purchase. Had he obtained a written contract that was binding upon the parties signing it, and from parties who were ready, able, and willing to convey the land, appellant would have been entitled to his commission. This, however, he failed to do. When appellant was employed to purchase the land, it was evidently contemplated that he should purchase all the coal and mineral interests therein, and not a part of it. There is nothing in the record tending to show that appellee knew that one of the owners of the coal and minerals was an infant, and, notwithstanding this fact, he employed appellant to purchase the interests so far as he could. When we consider the language which appellant says appellee used in employing him, there can be no doubt that he was employed to purchase all the coal and minerals. It was not incumbent upon appellee to state any reasons for refusing to purchase the land, and the fact that he stated one reason for refusing to purchase at a time could not estop him from refusing to carry out the contract when he had a valid and legal reason for refusing to do so. The cases cited by appellant are not applicable to the facts of this case. In those cases the brokers had done all that they contracted to do. Here the appellant did not do all that he contracted to do, because he failed to purchase the land by a contract that was binding on all the parties signing it. We, therefore, conclude that the court properly instructed the jury to find for appellee.

Judgment affirmed.

GLASS et al. v. HAMPTON.

(Court of Appeals of Kentucky. Nov. 24, 1900.)

1. CONTRACTS (§ 266*) — CONSIDERATION — REPUDIATION.

Where a widow holding a life estate in certain land, after having contracted to permit defendants to use it so long as they should provide for her support, repudiated it because it rested in parol, defendants were not entitled to charge for their services regardless of the proportionate value of the use of the land; the contract being valid so far as executed.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1186; Dec. Dig. § 266.*]

placed valuable permanent improvements on the property on the faith of their right to possession, they were entitled, on the life tenant's repudiation of the contract because resting in parol, to a lien on the life estate to the extent that the improvements enhanced the vendible value of the property, not exceeding the reasonable value of the improvements.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. §§ 19, 20; Dec. Dig. § 4.*]

3. VENDOR AND PURCHASER (§ 105*) — IMPROVEMENTS BY VENDEES — REMOVAL.

Where improvements placed on property by a vendee did not enhance the vendible value of the property, the vendee, on the rescission or repudiation of the contract of sale by the vendor, may remove the improvements, if practicable.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 184; Dec. Dig. § 105.*]

Appeals from Circuit Court, Owen County.

"Not to be officially reported."

Suit by Mary C. Hampton against W. A. Glass and others. Judgment for complainant, and defendants appeal and complainant prosecutes cross-appeal. Reversed in part.

See, also, 116 S. W. 243.

Jno. W. Douglas and W. A. Lee, for appellants. James H. Settle, for appellee.

CARROLL, J. These two appeals are prosecuted on the same record, one having been filed by the appellee and the other by appellants. The appellee is the widow of R. N. Hampton, who devised to her a tract of land containing about 80 acres, to hold during her life or until she married. In this suit against the appellants she alleged they were wrongfully holding it against her, and that she was entitled to the possession and damages for the detention. The appellants filed an answer, in which they set up in substance that under the will they had an estate in remainder in the land, and that in September, 1906, they entered into an oral contract with the appellee, whereby they agreed to board, nurse, and care for her as long as she lived, and in consideration for this service they were to purchase the interest of the other devisees in the farm and have the use of it so long as they or either of them should comply with the contract with appellee; that relying upon this contract, they purchased the interest of the other heirs, removed from their former residences to the farm, and for some two years had performed their contract with the appellee by boarding, nursing, and caring for her, and were able and willing to continue so to do. To this answer a general demurrer was filed and overruled, and the appellee, electing to stand by her demurrer, brought the case to this court. Here the judgment was reversed in an opinion that may be found in 116 S. W. 243; the court holding

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

that the contract was for an interest in real estate, and therefore, to be valid and enforceable, must be in writing. Upon a return of the case the appellants offered to file an amended answer, set-off, and counterclaim. In this pleading they averred that under and in compliance with the parol contract they had nursed, cared for, and supported the appellee for two years and six months, and that this service was reasonably worth \$1,300. They further averred that, relying on appellee's agreement, they made at her request, and with her knowledge and consent, permanent and lasting improvements on the land, which were reasonably worth the sum of \$300—none of which would have been made had they known that appellee would attempt to take possession of the land or dispossess them. They further averred that the reasonable rental value of the land during the two years and six months they occupied it was \$312.55, and set up that they were entitled under the contract, either to the possession of the land, or to compensation for the services rendered and improvements made. They asked that if the petition could not be dismissed, they have judgment against the appellee for the reasonable value of the improvement placed on the land, and the amount charged for the services rendered appellee, and that they be adjudged a lien on the land to secure the payment of these sums. To the filing of this pleading objection was made and sustained, and, declining to plead further, judgment was entered, awarding to appellee the possession of the land in controversy. From that judgment this appeal is prosecuted.

It will be observed that in the original pleading, which was only an answer, no claim whatever was made for improvements, nor was the amount to which appellants claimed to be entitled for services set out. The pleading merely set up the contract, and the fact that under it the services mentioned had been rendered, and asked that the petition be dismissed. No affirmative relief was sought. Whereas in the amended pleading facts are stated with reference to the improvements that present affirmatively, by way of counterclaim, a good cause of action, and the court in our opinion erred in sustaining the general demurrer.

So far as the claim for boarding, nursing, and caring for appellee is concerned, the appellants do not state a good cause of action. Under the contract they undertook, in consideration of the use and possession of the land, to board, nurse, and care for appellee. They have had the use and possession of the land during all of the time for which they seek to recover for board, nursing, and attention. In other words, appellee has already paid them for the services rendered everything that she agreed to. They have received the compensation for which they obliged themselves to render the services. It

is true the pleading asserts that the services rendered during the two years and six months were reasonably worth \$1,300, while the fair rental value of the land during the time was only worth \$312.55, but the appellants cannot, by mere averments like these, overturn the very contract under which they seek relief. If they are entitled to anything, it is by virtue of the contract under which they agreed to render the services charged for and receive as compensation the use of the land. And so the use of the land fully satisfies their claim for services during the time they enjoyed the use.

But the question of improvements stands upon a different ground. There was no express contract that obliged the appellants to make any improvements, or the appellee to pay for any they might make. But the pleading charges—and as the record now appears we must accept the averment as true—that when the improvements were made, the appellants believed in good faith that the appellee would permit them to use and occupy the land during the time that she was entitled to hold it under the will, and in addition thereto that they were made at her request and with her knowledge. It has been adjudged in several cases that, when a vendee enters upon land in good faith under a verbal contract, and, believing that the contract will be adhered to, puts, with or without the knowledge or express or implied consent of the vendor, upon the premises valuable and lasting improvements that enhance the vendible value of the place, if the vendor after the improvements have been made rescinds or repudiates the contract and recovers the premises, the person making the improvements is entitled to be paid a sum equal to the amount that the improvements enhance the vendible value of the property, not exceeding the reasonable value of the improvements, and to secure the payment of such sum will be allowed a lien upon the property. But, unless the improvements do enhance the vendible value of the property, the person putting them on the premises will not be allowed anything except the privilege of removing them if this can practicably be done. *Robards v. Robards*, 85 S. W. 718, 27 Ky. Law Rep. 494; *Poole v. Johnson*, 101 S. W. 955, 31 Ky. Law Rep. 168; *Bell v. Bair*, 39 S. W. 732, 28 Ky. Law Rep. 614; *Hawkins v. Brown*, 80 Ky. 136; *Thomas v. Thomas*, 16 B. Mon. 421; *Pulliam v. Jennings*, 5 Bush, 433.

Applying to this case the principles stated, the appellants, while not entitled to hold possession of the land as against the appellee, should be given a lien on it to secure them in the payment of any sum that may be adjudged in their favor on account of improvements put on the land. The sum, if any, allowed appellants should be the amount that the improvements enhance the vendible value of the life estate, not exceeding the amount expended in the improvements, and

in no event should any sum be allowed for improvements that are not permanent and lasting. Upon a return of the case, issue may be joined upon the question of the improvements, and evidence taken by either or both parties. Appellants do not ask, and if they did would not be entitled under the circumstances of this case to, the possession of the property until the question concerning the improvements is settled. They only ask a lien to secure the amount that may be allowed for improvements, and this they are entitled to.

Except as to the matter of improvements, the judgment will not be disturbed, but upon this point it must be reversed, with directions to proceed in conformity with this opinion.

AKERS et al. v. NICHOLSON et al.

(Court of Appeals of Kentucky. Nov. 26, 1909.)

FRAUDULENT CONVEYANCES (§ 299*)—ACTION TO SET ASIDE—EVIDENCE.

In an action to set aside deeds of an insolvent judgment debtor as in fraud of her judgment creditors, evidence *held* to show that one of the deeds conveyed a lot as security for money advanced by the grantee, which was paid to the creditors on the judgment, so that the grantee had a lien on the lot for that sum and interest prior to the creditors' claim.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 877; Dec. Dig. § 299.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"Not to be officially reported."

Action by John Nicholson and others against Fannie B. Akers and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded as to one defendant, and affirmed as to the others.

Boldrick & Gocke, for appellants. Kinney & Thomas, for appellees.

NUNN, C. J. One Frank B. Akers, a son of Mary J. Akers and a brother of the other appellants herein, was engaged in the business of making brick in the city of Louisville, and appellees, Nicholson & Hackett, dealers in coal in that city, furnished Akers with coal with which to burn his brick, for which Akers became indebted to them in the sum of about \$360, for which he executed his note with his mother, Mary J. Akers, as surety. The debt was not paid, and appellees brought suit against the son and mother and recovered a judgment for the amount of the indebtedness, less a credit of \$150. Mary J. Akers owned three vacant lots on St. Catharine street in the city of Louisville, one of which she conveyed to appellant John H. Akers, one to Fannie B. Akers, and the other to Ella A. Akers. And this action was brought to set aside these deeds as fraudulent, and to subject the lots to the payment of appellees' judgment. The lower court

sustained appellees' claim, and appellants have appealed.

Under the testimony, there is no doubt about the fact that Mary J. Akers and Frank Akers were insolvent at the time she made this conveyance, and that appellants knew it. In fact, appellants Fannie B. and Ella concede, in effect, in their testimony that they took titles to their lots with the intention of preventing appellees from selling the lots for the payment of their debt. It was alleged and proved by appellants that John H. Akers had furnished to his mother before the conveyance to him money to the amount of \$425, which she owed him at the time of the conveyance; that Fannie B. furnished to her mother before and after the conveyance, the exact amount before and after not stated, to the amount of \$275; and that Ella, in the same way as Fannie, to the amount of \$125. It appears that the girls were working for themselves; that they collected their wages monthly and delivered them to their mother to keep for them, and from time to time authorized their mother to take from their money different sums, until she had taken from each the amounts above stated. John H. Akers was married and lived with his family, a wife and five children, apart from the other appellants. The testimony shows that he furnished to his mother small sums of money from time to time as she needed it, to the amount of about \$300, and a short time before the conveyance was made to him she requested him to furnish her money with which to pay appellees, which he refused to do, stating that he had a family to support, unless he could be secured in some way. The testimony further shows that she agreed with him that, if he would furnish her as much as \$150, she would secure him by conveying this lot to him. He furnished her the \$150, and she paid it to appellees, which is the credit referred to.

The lower court uses the following language in its opinion, to wit: "I am not at all satisfied that these children were real creditors of their mother. The testimony is entirely consistent with the mere paying of board on the part of the girls; while John does not satisfactorily show how he saved \$450 out of a salary of \$45 a month, plus an indefinite income from the teaming business, while supporting a family consisting of a wife and five children. The burden is upon him to explain that, and he has not done it." We do not feel inclined to differ with the court's conclusion as to the evidence, except in one particular. John H. Akers stated in his testimony that he borrowed the \$150, which was paid to appellees, from the German Insurance Bank, which shows that he did not save it out of his business after supporting his family. If it were not true that he borrowed this money from the bank, appellees could have shown it by some of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

officials of the bank, and, if this money was given to his mother with which to pay appellees upon a promise by her that she would secure him by conveying a lot to him, which she did, it would have the effect to make the deed operate as a mortgage to secure the \$150 which he borrowed and loaned her. Upon this matter, the equity of the case is with appellant John H. Akers. He perpetrated wrong or fraud with reference to this matter upon appellees, nor did he aid his mother to do so, but enabled them to get \$150 in which they were urging should be paid. In our opinion appellant John H. Akers has no prior lien on the lot conveyed to him for payment of this sum, \$150, with its interest. We do not feel authorized in any other respect to disturb the finding of the court.

For these reasons, the judgment with reference to John H. Akers is reversed and remanded for further proceedings consistent herewith, and affirmed as to the other appellants.

LOUISVILLE & N. R. CO. v. (Court of Appeals of Kentucky. No. 1002*)

1. APPEAL AND ERROR (§ 1002*) WEIGHT OF EVIDENCE.

The jury has the exclusive right to weigh conflicting evidence.

[Ed. Note.—For other cases, see Error, Cent. Dig. §§ 3935-3937 1002.*]

2. COURTS (§ 95*) — INJURY RIGHT OF ACTION—WHAT LAW?

The right of recovery for a road crossing in another state is governed by a statutory provision, to the laws of that state as declared by the Supreme Court.

[Ed. Note.—For other cases, see Dig. §§ 322, 323; Dec. Dig. § 322.]

3. CARRIERS (§ 337*) — INJURY CONTRIBUTORY NEGLIGENCE

A person going to a train with a friend, who exercised due care in the situation in passing from a crossing was not so negligent in passing between cars three feet apart as to prevent him from being struck by one of the cars suddenly under the rule in Alabama to stop, look, and listen before crossing. If track is such contributor to the accident, it defeats a recovery for contributory negligence unless the evidence shows that the contributory negligence was gross, willful, or wanton.

[Ed. Note.—For other cases, see Dec. Dig. § 337.*]

4. CARRIERS (§ 304*) COMPANYING PASSENGER

Though a carrier is not liable for injury to a passenger due to carelessness of a passenger, the carrier has a duty to care for his safety.

[Ed. Note.—For other cases, see Cent. Dig. § 111.*]

5. CARRIERS (§ 304*) COMPANYING PASSENGER

A person going with a passenger need not exercise due care for his safety.

*For other cases

have been inserted after the words "then you may" in the clause allowing an award of such damages is too technical for consideration.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1064.*]

15. DAMAGES (§ 215*)—PROPRIETY OF INSTRUCTIONS ON PUNITIVE DAMAGES.

Where there is evidence that the injury at a crossing was caused by a reckless disregard of human life, an instruction on the subject of punitive damages is proper.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 543-547; Dec. Dig. § 215.*]

16. DAMAGES (§ 132*)—EXCESSIVE DAMAGES—PERSONAL INJURIES.

Verdict for \$12,500 for permanent personal injuries held not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385; Dec. Dig. § 132.*]

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by L. W. Smith against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Helm & Helm and Benjamin D. Warfield, for appellant. W. O. Bradley and Snodgrass & Dibrell, for appellee.

CARROLL, J. The appellee, Smith, at Blount Springs, Ala., while on his way to the depot platform from which passengers got on and off trains, was caught between the bumpers of the cabooses on two trains on the siding between the depot and the passenger platform. Both of his hands were crushed so badly that his right hand had to be amputated and his left hand is practically useless. To recover damages for the injuries sustained he brought this action, and upon a trial before a jury was awarded \$12,500.

A reversal is asked upon four grounds: First, that under the laws of Alabama the plaintiff was guilty of contributory negligence in endeavoring to pass between the trains, which were attached to engines with steam up, and therefore the defendant's motion for a peremptory instruction should have been sustained; second, that the court erred in instructing the jury that they might find for the plaintiff, Smith, notwithstanding his contributory negligence, if they believed that when he came in peril from the trains the employees of the company in charge of the trains could, by the exercise of ordinary care, have discovered his peril and by ordinary care have prevented his injury; third, that the court erred in allowing the jury to award punitive damages if they found the defendant guilty of gross negligence; fourth, that the company's theory of its defense was not submitted to the jury, and the instructions given are involved in confusion.

The evidence upon all material points is conflicting but with the weight of it on any issue we are not particularly concerned, as the jury have the exclusive right, in cases

like this, to decide controverted questions of fact. Therefore, having in mind only the controlling facts, and without attempting to set out the testimony in detail, we may say that the evidence is, in substance, as follows: Blount Springs is a small village immediately on the line of the appellant's railroad, and at the time of the injuries complained of it was frequented by a number of people who went there to visit the springs in the neighborhood. The appellee, a native of Texas, arrived at Blount Springs for the first time on the morning of July 22, 1907, and spent the day in and around the hotel and the village. About 5:40 in the afternoon he started on his way to the passenger platform for the purpose of meeting a friend he was expecting on the north-bound Decatur passenger train that was due to arrive about the time he went to the station. The railroad at Blount Springs runs north and south, and on the east side of the road is situated the depot, the houses that constitute the village, and the springs. The track nearest to the depot is a long siding, and between this siding and the main track is the platform used by passengers in getting on and off trains standing on the main track. At the time appellee started to go to this platform there were on the siding four trains. One of these trains, known as No. 12, was a long freight, headed north, that went in on the south end of the siding, and pulled up until its caboose was opposite the depot and then stopped. Soon thereafter train No. 21, known as the "water train," consisting of an engine, two cars, and a caboose, backed in on the siding from the south end, and stopped with its caboose some 30 to 60 feet from the caboose of train No. 12 thereby leaving a space of that distance between the two cabooses immediately in front of the depot, through which persons going to and from the passenger train to the depot might pass. Shortly after the water train backed in, a long freight train, known as No. 19, going south, also backed in on the south end of the siding, and stopped with its caboose some 40 to 80 feet from the engine of the water train. After this, passenger train No. 8, going north, also ran partially in on the south end of the siding, but could not go far enough to clear the main track on account of the freight trains. About the time that passenger train No. 8 went in on the siding, passenger train No. 5, going south, came up on the main track, and stopped in front of the depot to permit passengers to get on and off. With the four trains on the siding, and the spaces before mentioned that had been left between them, passenger train No. 5 going south could not pass passenger train No. 8 standing partially on the south end of the siding and partially on the main track. So that, when passenger train No. 5 started on its journey south, signals were given to the engineers on the water

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

But before the space between the cabooses in front of the depot was closed at all by the moving of the water train, a number of passengers and people had passed between the cabooses going to and from the train and the platform. Appellee was not at the depot or observing the trains when the space between the cabooses was 30 to 60 feet, or when the signals to close the space were given, or when the water train started back, but about the time he reached the depot on his way to the platform the caboose of the water train had been backed to within 3 to 10 feet of the caboose of train No. 12, and was standing still, and the caboose of train No. 19 had been backed close to the engine of the water train. Just as appellee, who stopped, looked, and listened to ascertain if the passage was safe, stepped on the siding, the water train suddenly backed, and he was caught between its caboose and the caboose of train No. 19, which had never moved its position after going on the siding. The evidence is very satisfactory that when the water train by backing closed up the original space of 30 to 60 feet between it and train No. 19 to a distance of from 3 to 10 feet, it stopped for a few minutes, and it may be inferred from the testimony that the trainmen did not intend, at this time, to run it any closer to the caboose of train No. 19, and that the sudden movement of the water train that caught appellee was caused by the slack running out of train No. 21, the caboose of which had been stopped within a few feet of the engine of the water train, and striking the engine of the water train, thereby shoving it and its cars back. At the moment appellee was injured the trainmen who were giving the signals that moved the water train and train No. 19, were standing between the siding and the main track, but before this, and when the passengers from No. 5 were being discharged and the signals to close the space were about to be given, these trainmen, and probably others, notified people to get out of the way; that the space would be closed. Whether or not any persons were on the rear platform of the caboose of the water train, or the caboose of train No. 12, when appellee was injured is sharply disputed; the evidence for the company being that one brakeman was on the rear platform of the water train caboose, and one brakeman on the rear platform of the caboose of train No. 12, while the evidence for the appellee is that there was no brakeman at that time on either of these cabooses. The evidence also conduces to show that, just as the cabooses came together, one of the trainmen, and probably a spectator, holloed at appellee in an effort to warn him of his danger, but it was too late.

From this statement it may be summarized

a space of from 30 to 60 feet in front of the depot between the cabooses, left for the purpose of permitting persons to go to and from the depot to the passenger train; (2) that when passenger train No. 5 started, it was intended to close the space of 40 to 80 feet between the caboose of train No. 19 and the engine of the water train, and to partially at least close the space in front of the depot between the caboose of the water train and the caboose of train No. 12, so that No. 8 might clear the main track and allow No. 5 to pass; (3) that when the caboose of the water train came within 3 to 10 feet of the caboose of train No. 12, the water train stopped, and after stopping for a few minutes it was put in motion, and its caboose caused to hit the caboose of train No. 12; (4) that at the time Smith was injured the bells on the engine of train No. 19 and on the engine of the water train were ringing; (5) that train No. 8, on which appellee expected the person he went to the depot to meet, would have reached the depot platform a few minutes after he started to go to the platform; (6) that appellee did not know anything about the movements of the trains until he went to the depot to cross, and then there was a space in front of the depot of 3 to 10 feet between the cabooses of train No. 12 and the water train, both of which were standing still; (7) that before appellee went between the cabooses, he stopped, looked, and listened to ascertain if it would be safe to cross, and had no warning or notice that it would not.

Upon these facts the court gave to the jury the following instructions:

"No. 1. The court instructs the jury that the law is for the plaintiff, and they should so find, unless they shall believe from the evidence that, before the defendant moved its trains, or either of them, which were standing on the passing switch at Blount Springs, Ala., at the time mentioned in the petition to close the passageway across the said switch between the ends of its two freight trains then standing on said switch track, the employes of the defendant in charge of the train by which plaintiff was injured exercised ordinary care to give timely and reasonably sufficient notice that the train was about to be moved to close the said passageway, and exercised ordinary care to prevent injury to the plaintiff from the moving train, unless they shall further believe from the evidence that the plaintiff himself was negligent, and thereby helped to cause or bring about his injuries; that but for his own negligence, if any there was, he would not have been injured.

"No. 2. But if the defendant did give timely and reasonable notice, as mentioned in instruction No. 1, that the passageway be-

tween the said trains was about to be closed by backing one or both of said trains, and did exercise ordinary care to prevent injury to the plaintiff from the moving train, the law is for the defendant, and so they should find.

"No. 3. It was the duty of the plaintiff, before he entered upon the passway between the said two trains, to exercise ordinary care for his own safety, and to stop and look and listen to ascertain whether he could cross the track without injury from the said trains; and, if he failed to discharge either of these duties, and by reason of such failure he helped to cause or bring about the injuries of which he complains, and he would not have been injured but for his contributory negligence in that respect, then the law is for the defendant, and so they should find, even though you may believe from the evidence that the defendant was negligent in failing to give notice of the fact that the train was about to be backed to close the passageway, if such is the fact, unless you shall further believe from the evidence that when the plaintiff came in peril from the train, the employees of the defendant in charge of the train could, by the exercise of ordinary care, have discovered his peril, and by ordinary care have prevented his injury.

"No. 4. If you find for the plaintiff, you should find in such a sum as will reasonably and fairly compensate him for any pain and suffering, mental and physical, caused him by his injuries, and for any pain and suffering which it is reasonably certain from the evidence he will endure in the future as a result of his injuries, and for any permanent reduction in his power to earn money directly resulting from his injuries; and, if you shall believe from the evidence that his injuries were caused by the gross negligence of the defendant, then you may in your discretion find in such a further or additional sum as you may think right and proper under the evidence, and on these instructions, not exceeding in all the sum of \$50,000, the amount claimed in the petition. If you find for the defendant, you will say so, and no more.

"No. 5. Ordinary care means the degree of care usually observed by ordinarily careful and prudent persons under the same or similar circumstances. Negligence means a failure to observe ordinary care. Gross negligence means a failure to observe slight care. Contributory negligence means a failure upon the part of the plaintiff, if he did so fail, to observe care for his own safety, as mentioned in instruction No. 3, and by reason of such failure he helped to cause or bring about his injuries, and when but for such failure he would not have been injured."

Under the law of this state, as settled in more than one opinion of this court, the facts of this case authorized the trial court to instruct the jury as it did, and warranted the jury in finding a verdict in favor of Smith

and assessing the damages at the amount awarded. But, as the injuries occurred in the state of Alabama, the right of Smith to recover, and the propriety of the instructions given, is, in the absence of any statutory law in that state on the subject, to be determined by the laws of that state as declared by its Supreme Court. *L. & N. R. Co. v. Whitlow*, 43 S. W. 711, 19 Ky. Law Rep. 1861, 41 L. R. A. 614; *Illinois Central R. Co. v. Jordan*, 117 Ky. 512, 78 S. W. 426, 25 Ky. Law Rep. 1610; *L. & N. R. Co. v. Graham*, 98 Ky. 688, 34 S. W. 229, 17 Ky. Law Rep. 1229; *L. & N. R. Co. v. Harmon*, 64 S. W. 640, 23 Ky. Law Rep. 871; *L. & N. R. Co. v. Wyatt*, 93 S. W. 601, 29 Ky. Law Rep. 437; *L. & N. R. Co. v. Keiffer*, 113 S. W. 433. That court has frequently considered questions like the one involved in this case, and counsel in support of their respective contentions have furnished us with an ample array of authorities. And so we will proceed to examine these decisions and apply them to the evidence and the law as given by the trial judge, for the purpose of ascertaining whether or not the errors assigned are well taken.

Taking up, first, the question of contributory negligence:

The theory of the company is that at the time appellee went through the opening the space between the two cabooses was not over three feet, and that if the water train was not at that time moving, it had only stopped a moment before, and appellee from his position could and should have known that the trains were closing up the space; that as there was then no passenger train at the platform, and the passenger train upon which appellee expected his friend to arrive was on the siding some distance off, appellee in attempting to cross as he did went into an obviously dangerous place, which, if he desired to cross, he could have avoided by crossing on the platform of one of the cabooses. It may be conceded that, if we should accept as true this view of the case, there would be much force in the argument that the appellee was guilty of such contributory negligence as authorized a direction to the jury, under the law as expounded by the Supreme Court of Alabama, to find a verdict for the company.

In *Pannell v. Nashville, F. & S. R. Co.*, 97 Ala. 298, 12 South. 236, the facts were as follows: Several parallel tracks crossed streets in a town, and on one of these tracks cars had been placed for the purpose of being loaded and unloaded, but at the crossing a space of 15 or 20 feet was left between the cars for the use of the public. The cars had been placed in this way on the day preceding the accident, and Pannell, the injured party, who resided near the crossing, was entirely familiar with the location of the cars. On the day after the cars had been so placed, he passed through this opening, but on his return in about 30 minutes the opening had

been materially diminished by an engine that was moving the cars, and in attempting to pass through he was caught between the drawheads and crushed. At the time the cars were placed on the track they were not connected with any engine, nor in charge of any employé, and no notice that the company intended to move them was given until shortly before the accident, when an engine was attached to the cars, and they were shifted about. In the course of the opinion the court said: "When Pannell crossed the track going west, the opening at the crossing was 15 or 20 or more feet, and the cars on either side were stationary. Everything about the crossing indicated perfect security in traveling the highway. When he returned appearances had greatly changed. The lumber cars left on the north side of the crossing had been moved so as to nearly block up the highway. Only a small opening was left. This should have been a warning to him that all was not well. He should have looked and listened. He was clearly guilty of contributory negligence in attempting, under the circumstances, to pass through the narrow opening. Had he looked at any time after passing the main track, save a narrow space hidden by a stack of shingles, he could not have failed to see the engine on the spur track with steam up."

In *L. & N. R. R. Co. v. Crawford*, 89 Ala. 244, 8 South. 243, 244, 245, a watchman while in the discharge of his duties was injured by a switch engine pushing a box car. In announcing the general rule the court said: "It is culpable negligence to cross the track of a railroad at a highway crossing without looking in every direction that the rails run to ascertain whether a train is approaching. If a party rushes into danger which by ordinary care he could have seen and avoided, no rule of law or justice can be invoked to compensate him for any injury he may receive. He must take care, and so must the other party. * * * We regard the question as settled in Alabama by our rulings cited above, and that a failure to employ the senses on approaching a railroad crossing, when such employment would insure safety, is as a matter of law contributory negligence, and a complete defense to a suit for injuries sustained by the negligent handling of a railroad train, unless such negligence was so reckless or wanton as to be in law the equivalent of willful or intentional. * * * No man should put himself in peril; and, if he negligently does so, the duty of active effort to avert injury is as binding on him as is the defendant corporation's duty to do all in its power to extricate him. If he fails in this, when such effort would probably save him from harm, he cannot be heard to complain that the defendant failed to do for him what he neglected to do for himself. We have stated the duty required of mere travelers."

In *East Tennessee, Virginia & Georgia R. Co. v. Kornegay*, 92 Ala. 228, 9 South. 557, Kornegay was injured while on his way to a depot to see a person who was a passenger on an east-bound train that had just come in. This train stopped on the main track, and a west-bound train took the side track, and its engine was standing still across a dirt road. Kornegay passed by the side of the engine and walked parallel with the track, and then turned and stepped on the side track in the direction of the east-bound train, which was still standing on the main track. Just as his foot touched the crossing on the side track, he was knocked down by the engine of the west-bound train and injured. The court said: "It appears from Kornegay's own testimony that he was guilty of negligence proximately contributing to the injury. It is plain that he undertook to cross the railroad track without stopping or looking or listening to ascertain if a train was approaching. He says himself that he did not stop or look. When he passed the engine, it was standing still on a downgrade. It appeared from the testimony that the engine could not have been put in motion without making a noise, which the plaintiff must have heard if he had been listening. He was not in apparent danger until he turned and stepped on the side track. He was bound to look and listen before attempting to cross the track. His neglect of this duty avoids his right of recovery, in the absence of evidence tending to show that the defendant was guilty of negligence so reckless or wanton as to be in law the equivalent of willful or intentional wrong."

In each of these cases the rule is announced that the failure to stop and look and listen before crossing a railroad track is such contributory negligence as will defeat a recovery, in the absence of evidence showing that the company was guilty of reckless or wanton negligence. But in neither of them are the facts similar to those upon which the appellee rests his case. If we should assume that the railroad company in Alabama owed no higher duty to passengers or persons occupying the relation of appellee than it does to travelers at a public crossing, we should nevertheless feel obliged to hold that under the Alabama rule the appellee was not guilty of such contributory negligence as would defeat a recovery. The evidence introduced in his behalf shows that he was not negligent or inattentive, but that, on the contrary, before attempting to cross, he exercised ordinary care for his own safety by stopping and looking and listening. The appellee in attempting to go to the passenger platform was not a trespasser. He had a right to go there; and, although the company did not owe him the high duty attaching to a passenger, it did owe him the duty of exercising ordinary care for his safety. *Montgomery & Eufaula Ry. Co. v. Thompson*, 77 Ala. 448, 54 Am. Rep.

72; *Berry v. L. & N. R. Co.*, 109 Ky. 727, 60 S. W. 690, 22 Ky. Law Rep. 1410; *C. & O. Ry. Co. v. Meyer*, 119 S. W. 183; *Hutchinson on Carriers* (3d Ed.) § 991; *Thompson on Negligence*, §§ 2685, 2686. The fact that the train upon which he was expecting his friend was not then standing on the main track at the depot for the purpose of discharging passengers is a matter of small moment, as it was only a short distance off on the siding, and might reasonably be expected to reach the depot in a few minutes, and was in fact due to arrive. A person going to the train to assist or accompany or receive a passenger need not wait until the train actually arrives before going on the platform, in order to avail himself of the principles of law that require the carrier to exercise ordinary care for his protection and safety. He may go to the platform when he sees the train approaching, or when it is reasonably near, or at the time he believes it should arrive. This being so, when appellee went to the depot, and saw an opening between the two cabooses amply wide for passage to the platform; saw other persons going through it; saw the trains standing still—he had the right to assume that the opening through which he attempted to pass had been purposely left there to permit persons to go to and from the depot and platform. The fact that the opening was there was an invitation to avail himself of it to cross. When an opening like this is left in a place like this, it is the duty of the railroad company to exercise ordinary care to prevent injury to persons rightfully using it, and this duty, under circumstances like those proven in this case, is not fulfilled by ringing engine bells or sounding whistles. The duty of the company in this respect is not discharged until, or unless, it has given reasonably sufficient warning to the public having the right to use the passway that it is about to be closed; and whether or not it performed its duty in this particular was in this case a question for the jury. Tested by the Alabama rule, the appellee was not guilty of such contributory negligence as would defeat a recovery, and under the facts it was not necessary to show that the company was guilty of reckless or wanton conduct that would be in law the equivalent of willful or intentional wrong. This principle is only to be applied when it is attempted to avoid the consequences of a state of facts that would amount to such contributory negligence as would defeat a recovery in the absence of willful or intentional wrongdoing on the part of the company. When the injured person has not been guilty of this character of contributory negligence, it is not essential under the Alabama law that the company should be guilty of willful or intentional wrongdoing before he can recover. *The Kentucky Cases of Southern Railway Co. v. Clarke*, 105 S. W. 384, 32 Ky. Law Rep. 69, 13 L. R. A. (N. S.) 1071, *Southern Rail-*

way Co. v. Thomas, 92 S. W. 578, 29 Ky. Law Rep. 79, and *Brackett's Adm'r v. L. & N. R. Co.*, 111 S. W. 710, 33 Ky. Law Rep. 921, 19 L. R. A. (N. S.) 558, cited by counsel, are not in conflict with the views we have expressed on the subject of contributory negligence. On the contrary, they are in harmony with them.

The next argument presented as grounds for reversal is that the court erred in instructing the jury that, if they believed appellee would not have been injured except for his contributory negligence, they should find for the company, "unless they further believe from the evidence that when he came in peril from the trains, the employees of the defendant in charge of the train could, by the exercise of ordinary care, have discovered his peril, and by ordinary care have prevented his injury." The objection raised to this instruction is that there was no evidence upon which to base the qualifying clause relating to the discovery of the peril in which appellee was placed. This objection is not well taken. Looking at the instruction from the viewpoint that it was the duty of the company to give reasonably sufficient notice to warn persons not to use the passway, the instruction was proper. We have found that the ringing of the bells was not sufficient notice, and in effect that the full measure of the company's duty required that some of its employees should have been stationed at the opening to notify appellee and others not to use it. It is true that the evidence for the company shows that it did have employees stationed at suitable places to perform this duty; but, on the other hand, the evidence for appellee shows that it did not. With this conflict in the evidence it was the duty of the court to submit to the jury the theory of each of the litigants, and to do this the court gave this instruction. If the company had exercised the degree of care required under the circumstances, the peril of appellee could have been discovered in time to prevent the injury, as the employees, if located where they should have been, could have warned appellee not to cross. This view of the law was expressed in *Louisville Railway Company v. Hudgins*, 124 Ky. 79, 98 S. W. 276, 30 Ky. Law Rep. 316, 7 L. R. A. (N. S.) 152, where it was said, in answer to a similar objection to a like instruction: "It was the duty of appellee when she started to cross the tracks to exercise ordinary care for her own safety; but, although she failed to do this, and her failure may have contributed to such an extent to bring about the injury of which she complains that it would not have happened except for her failure to exercise this degree of care, this will not relieve the appellant of liability if the persons in charge of the car that struck her could, by the exercise of ordinary care, have discovered the peril appellee was in, and by the exercise of ordinary care have

who might be expected to cross the street immediately behind it, and to have his car under such control as that he might stop it at a moment's warning; and it is manifest that, if the motorman had exercised this degree of care, he could and should have discovered the appellee's peril in time to have prevented injuring her. It was therefore entirely proper, under the facts of this case, to qualify the instruction as to contributory neglect as was done."

Did the court err in allowing the jury to award punitive damages if they found the defendant guilty of gross negligence? A careful examination of the Alabama cases introduced in evidence by appellant fails to disclose that that court has ever considered the question when punitive or exemplary damages may be awarded. The question of what constitutes gross negligence is presented in more than one decision, but it always came up in a discussion of the law of contributory negligence, and when the court was indicating the character of negligence on the part of the defendant that would authorize a recovery by the plaintiff notwithstanding he was guilty of negligence. If the Alabama court had defined the class of cases in which punitive damages might be allowed, and the character of negligence that would authorize a jury to award it, we would feel bound to follow its ruling, although it might not conform to our decisions on the subject, as the measure of damages recoverable under the law of the place where the injury occurred must control. But, in the absence of decisions from the Alabama court, we will assume that the rule adopted in this state applies in Alabama, or would be applied if the question came up. This principle was laid down in *Chesapeake & Nashville R. Co. v. Venable*, 111 Ky. 41, 63 S. W. 35, 23 Ky. Law Rep. 427, where the court said: "Where a party seeks to recover or defend under a foreign law, such law must be pleaded and proved like any other fact; but, in the absence of averment and proof, the rule is that foreign states, whose system of jurisprudence is derived from the same source as our own, are presumed to be governed by the same law." To the same effect is *Murray v. L. & N. R. Co.*, 110 S. W. 334, 33 Ky. Law Rep. 545. Conceding that the law is as we have announced, the argument is yet made that, under the law as declared and administered in this state, the evidence did not warrant exemplary damages, and the instruction submitting this issue was not only unauthorized, but defective in form. This court has repeatedly ruled that gross negligence is the absence of slight care, and that, in personal injury cases where the negligence from which the injury results is

degree of care for the safety of appellee, and that he was injured by its reckless disregard of the duty it owed him. Nor is the instruction upon this subject open to meritorious criticism. It told the jury that they might in their discretion allow punitive damages. The argument that the words "or may not," after the words "then you may," should have been inserted is entirely too technical to be seriously considered; nor is it sustained by the opinion in *Illinois Central R. Co. v. Houchins*, 121 Ky. 526, 89 S. W. 530, 23 Ky. Law Rep. 499, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205. The addition of these words might slightly improve the verbiage of the instruction, but would make no change in its substance. Whether or not an instruction upon the subject of gross negligence or exemplary damages should be given is often a close one. Frequently, when the verdict appears to be excessive, or the evidence of gross negligence is not satisfactory, we have, as in the *Houchins* Case, ordered a new trial, and pointed out the impropriety of submitting this question. But when there is evidence that the injury was caused by conduct that amounted to a reckless disregard of human life, it is the settled law in this state that an instruction upon this subject is proper. *Lexington R. Co. v. Fain*, 80 S. W. 463, 25 Ky. Law Rep. 2243; *Southern Ry. Co. v. Goddard*, 121 Ky. 567, 89 S. W. 675, 23 Ky. Law Rep. 523; *L. & N. R. Co. v. Mount*, 125 Ky. 599, 101 S. W. 1182, 31 Ky. Law Rep. 210.

But, aside from all this, it is apparent that the jury did not award appellee more than fair compensation. At the time of his injury he was 44 years of age, a strong, vigorous man of good health and industrious habits, in the prime of life and usefulness, earning by his labor and brains an annual income of as much as \$2,000. But now he is virtually a physical wreck. One hand is gone; the other is useless. He cannot follow any wage-earning occupation or business in which the hand is an essential member of the body—and there are few in which it is not. So that, taking into consideration his age, physical condition, and earning capacity, it cannot be said that the amount awarded was more than reasonable compensation for the mental and physical suffering that he has already undergone and the permanent impairment of his power to earn money.

The contention that the instructions are involved and difficult to understand is not well founded. They presented to the jury the law of the case in simple and concise language.

Nor did the court fail in the instructions to submit appellant's defense. It was fully set out in instruction No. 3.

A careful examination of the record and the reasons urged for reversal convince us that no substantial error was committed to the prejudice of the appellant, and the judgment of the lower court is affirmed.

JEFFRIES et al. v. BOARD OF TRUSTEES OF COLUMBIA GRADED COMMON SCHOOL.

(Court of Appeals of Kentucky. Nov. 19, 1909.)

1. SCHOOLS AND SCHOOL DISTRICTS (§ 11*) — "COMMON SCHOOLS."

Graded schools are "common schools."

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 14; Dec. Dig. § 11.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1335, 1336.]

2. ELECTIONS (§ 65*)—QUALIFICATION OF VOTERS—SEX—SCHOOL ELECTIONS.

Ky. St. 1909, §§ 4464-4500a (Russell's St. §§ 5736-5785), relating to graded common schools, provides no qualification for voters in graded school district elections except the qualification provided generally for school elections, in view of which it has been held that the qualifications are the same, and that under section 4458 (Russell's St. § 5672), providing that, in a common school district election to levy a district tax for common schools, any resident widow or spinster who is a taxpayer, or who has children within school ages, may vote, such persons may vote upon the question of tax for a graded school in a proposed graded common school district. Act March 24, 1908 (Acts 1908, p. 133, c. 56), establishes in some particulars a radical departure from the pre-existing system, but without any design to render the system as a whole inharmonious, and provides that graded common school districts operating under special charter or established by popular vote in school districts operating in municipal districts established under special charter, and supplementing the state school fund by a local tax of a certain amount, shall retain their present boundaries and be exempt from the provisions of the act. *Held*, that the effect of the prohibition of the act of 1908 was to re-enact sections 4464-4500a as part thereof, and the graded common school districts operating under special charter or established by popular vote remained unaffected by the later law in their boundaries, government, and regulation; but the later act, providing that all resident males over 21 years of age shall have the right to vote at elections, women are no longer entitled to vote in graded common school elections.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 62; Dec. Dig. § 65.* Schools and School Districts, Cent. Dig. § 120.]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 103*) — LEVY OF TAX—SCHOOL ELECTION—MANNER OF VOTING.

Ky. St. 1909, § 4467 (Russell's St. § 5739), relating to the voting upon the question of establishing a graded common school and a tax to maintain it, provides that on the day set apart for the election the officers shall open a poll and propound to each voter the question, "Are you against or for the graded common school tax?" and his vote shall be recorded for or against the same as he may direct, which has been held to require a viva voce vote on the subject of taxation. Act March 24, 1908 (Acts 1908, p. 133, c. 56), which in effect re-enacted the former act, as a part of the latter act, makes no provision as to how the vote shall be taken whether by ballot or otherwise, though, in a

election for trustees, voting by special ballot and the manner of preparing and furnishing the ballots are all provided for. *Held*, that the intent was that the vote on the question of the tax should be viva voce.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 241; Dec. Dig. § 103.*]

4. SCHOOLS AND SCHOOL DISTRICTS (§ 103*) — SCHOOL ELECTION—IRREGULARITIES.

Ky. St. 1909, § 4467 (Russell's St. § 5739), provides that on an election upon the question of a tax for the establishing and maintaining of a graded common school there shall be one judge and a clerk. Act March 24, 1908 (Acts 1908, p. 133, c. 56), for the government and regulation of common schools, which re-enacted in effect the former act as a part thereof, provides that two judges and a clerk shall be appointed by the county election commissioners. At such an election the sheriff appointed a judge and clerk, and the county election commissioners ratified the appointment and appointed one additional judge. He failed to act, and his place was filled by another. *Held* that, as nothing done by the substitute affected the result, and there being no claim that the regular judge and clerk did not of their own judgment and action do all that the substitute is claimed to have attempted to do, his participation was, at most, a harmless irregularity.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 241; Dec. Dig. § 103.*]

5. EVIDENCE (§ 10*)—JUDICIAL NOTICE—LOCATION OF HIGH SCHOOL.

The court will take notice of the location of the Columbia Male and Female High School building in the town of Columbia.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 9; Dec. Dig. § 10.*]

6. SCHOOLS AND SCHOOL DISTRICTS (§ 103*) — SCHOOL ELECTIONS — PETITION — SUFFICIENCY.

Ky. St. 1909, § 4464 (Russell's St. § 5736), relating to elections upon the question of a tax for the establishing and maintaining of a graded common school, provides that the petition for the election shall indicate with exactness the location and site of the schoolhouse, meaning the schoolhouse that will be provided for the proposed graded common school. *Held*, that the intent was to settle as nearly as might be the location of the proposed building, and a petition, stating that the "location of the school house * * * shall be at the building known as the Columbia M. & F. High School if it can be secured upon terms satisfactory to the trustees who may be elected in said proposed district, or at some other suitable point within the corporate limits of the town of Columbia," was sufficient; the other words of the description being treated as surplusage.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 241; Dec. Dig. § 103.*]

7. SCHOOLS AND SCHOOL DISTRICTS (§ 103*) — SCHOOL ELECTIONS—PETITION—SUFFICIENCY — "OTHER EXPENSES NEEDFUL IN CONDUCTING A GOOD GRADED COMMON SCHOOL."

Ky. St. 1909, § 4464 (Russell's St. § 5736), provides for an election upon the question of levying a tax to maintain a graded common school and for erecting or repairing suitable buildings therefor, if necessary. Section 4481 (section 5758) makes it the duty of the district trustees to provide funds for purchasing suitable buildings, or for erecting or repairing them, and for other expenses needful in conducting a good graded common school, and permits them to use such part of the proceeds of the tax as

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

they may deem necessary. *Held*, that the phrase "and for other expenses needful in conducting a good graded common school" implies the power to rent a suitable building temporarily and until one can be secured or built by the trustees, and a petition for the election, reciting that the proposed tax was to be used for the purpose of maintaining a graded common school and for the erecting, purchasing, leasing, and repairing of suitable buildings therefor if necessary, was no more than the two sections of the statute authorized, meaning that the trustees were to buy a building if they could, and, if not, to buy a lot and build a house, to repair any building bought or built by them, and in the meantime, to lease a suitable building for the continuation of the school, and did not render the petition insufficient.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 241; Dec. Dig. § 103.*]

8. SCHOOLS AND SCHOOL DISTRICTS (§ 65*)—DISTRICT PROPERTY—POWER OF STATE.

The maintenance of public schools is a state question done in the exercise of the state's sovereign power, and where the state authorized the application of public lands to build an academy for public education, and subsequently let the town sell the academy lot and use the proceeds in paving its streets, the Legislature could require the town to reimburse the state by buying another lot for common school purposes, and, the town having done so without complaint, its subsequent holding of the title, as required by the Legislature, was a naked trust which the Legislature could end at its will, and it having provided by Ky. St. 1909, § 4484 (Russell's St. § 5762), that the title of all common school property in the limits of any graded common school district organized under the provisions of the act shall be vested in the board of trustees of the school district and empowered them to sell the same if they should think it best, the trustees could convey a good title thereto to their grantees.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 161-164; Dec. Dig. § 65.*]

9. SCHOOLS AND SCHOOL DISTRICTS (§ 65*)—PURCHASE OF PROPERTY—DISCRETION OF TRUSTEES.

The discretion of trustees elected upon the establishment of a graded common school district, as to buying a particular property for the school, which property the petition for election specified should be procured, if expedient, will not be interfered with by the courts, at least in the absence of such proofs of abuse as would be tantamount to fraud.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 163; Dec. Dig. § 65.*]

Appeal from Circuit Court, Adair County.
"To be officially reported."

Action by the Board of Trustees of the Columbia Graded Common School against W. F. Jeffries and others, in which certain other persons intervened. Judgment for plaintiffs, and defendants and interveners appeal. Affirmed.

W. W. Jones, James Garnett, and Rollin Hurt, for appellants. Montgomery & Montgomery, for appellees.

O'REAR, J. This action was brought by the trustees of the Columbia Graded Common School against the town of Columbia, its trustees, and the board of education of Adair

county, to quiet the title of the plaintiffs to the school house and lot in Columbia, which was known as "common school district No. 1" (formerly No. 29). The town of Columbia is of the fifth class. It was embraced in parts of two school districts. A petition of the requisite number of electors and property holders resident of the two school districts was presented to the county court, asking the submission of the proposition whether the two districts would avail themselves of the provisions of the statutes allowing them to establish, in lieu of the district common school therein, a graded common school, and whether a tax necessary to procure a suitable building should be voted by the electors of the proposed graded school district. The proposition was ordered submitted. At the election the officers returned, and the canvassing board certified, that both propositions had carried by a majority of the votes cast, and that appellees were elected trustees of the graded school district. The newly elected trustees, deeming the old school building in district No. 1 inadequate, proposed to sell the building, and to buy another. Certain citizens opposed the proposition, claiming that the vote by which the graded school was established was void, as was the vote by which the tax was authorized, and that the election of the trustees was void. They also denied that the trustees, even if the elections were valid, took the title to the school building and lot, or had power to sell it, or to invest the proceeds or any taxes raised to the purchase of the proposed site. The result was that the title of the plaintiffs to the lot they proposed to sell was so clouded that purchasers were deterred from bidding, and the contention of the dissident taxpayers clogged the action of the trustees so as to defeat their purposes. The plaintiffs asked that their title to the lot in question be quieted by the judgment of the court, and inasmuch as the legal title appeared to be vested in the trustees of the town of Columbia, who refused to join in the sale and conveyance, that the lot be sold by the court's commissioner, and the proceeds turned over to the plaintiffs. The board of education disclaimed any property interest in the subject of controversy, as well as any denial of the plaintiffs' title and authority in the premises. The trustees of the town by demurrer raised the question of their title; the facts being set out in the petition. Certain citizens and taxpayers of the proposed school district, who are appellants here, filed their intervening petition, alleging that the trustees of the town would not defend the action, being favorable thereto, and asked permission to defend on behalf of themselves and all other taxpayers concerned. Their petition was allowed. As defense they relied upon certain facts as showing that the elections were void, and that in any event the graded school

trustees were not invested with the title to the lot in question. They also assailed the wisdom of the contemplated purchase of the other lot. A general demurrer was sustained to their answer because the facts stated did not present a defense to the cause of action set up in the plaintiff's petition, and, as they declined to plead further, the allegations of the petition were taken as true, and judgment rendered in conformity to its prayer. The trustees of Columbia and the interveners appeal from that judgment.

It is contended by appellants that the election by which the graded school proposition, including the tax proposition, was voted, was so irregular as that it was void. The irregularities relied on are: (1) That the petition of the county court did not show the location of the site of the graded school building with exactness, as required by the statute; (2) that the tax proposition included the leasing of a building, whereas the statute allows only the purchase or erection of a building; (3) that the election submitting the tax and district propositions was not held by secret ballot, whereas it should have been; (4) that the election of trustees was by secret ballot, whereas it should have been viva voce; (5) that one acted as judge of the election without appointment or authority and fraudulently interfered in its conduct; (6) that legally qualified voters were prevented by the fraud of the officers of election from voting, who would have voted against the propositions, and others not legally qualified voters were permitted to vote who voted for the propositions, the result of the election being changed by the combined actions referred to. As the facts were pleaded, either in the petition of the plaintiffs, or the answers of the interveners, the question presented was one of law; no issue of facts being raised by the pleadings.

The elections were held under the provisions of article 10 of chapter 113, Ky. St., relating to graded common schools (section 4464 et seq., Carroll's Ky. St. [Russell's St. §§ 5736-5785]). The provisions of that article are part of the common school law of the state, and are part of the original act of 1893 for the government of common schools. Graded schools are common schools. *Riggs v. Stevens*, 92 Ky. 393, 17 S. W. 1018, 13 Ky. Law Rep. 631; *Trustees Harrodsburg v. Harrodsburg Ed. District*, 7 S. W. 312, 9 Ky. Law Rep. 605; *Williamstown Graded F. S. District v. Webb*, 89 Ky. 264, 12 S. W. 298, 11 Ky. Law Rep. 456. In 1908 the Legislature adopted new provisions concerning the establishment of district schools. Act March 24, 1908 (Acts 1908, p. 133, c. 56). Much of the confusion in this case has arisen out of what is conceived to be the different methods of holding elections in common school matters, and the qualifications of voters at elections affecting graded schools. We will consider that question first. The statute does

not define the qualifications of the voters at graded school elections. They are alluded to merely as "the legal white voters in said proposed graded common school district." In section 4469, Ky. St. (Carroll's), it is provided: "The graded common schools, when organized as aforesaid, are hereby incorporated, and each of them shall be under the management and control of a board of six trustees. The first board to be elected at the same time and place, and by the same persons who vote at the election for the tax, as provided in sections 4464 and 4467 of this law, and the six persons receiving the highest number of votes shall be declared elected trustees." The allusion to the qualifications of voters contained in section 4464 has already been quoted above. In section 4467 the reference is merely to "each voter who may vote." Under these provisions it was held, in *Sisk v. Gardiner*, 74 S. W. 686, 25 Ky. Law Rep. 18, that women who were spinsters or widows were legally qualified voters in graded school elections. Nothing in the article concerning graded common schools expressly gave women the right to vote in those elections. The provision of section 4458, Ky. St., was looked to. That provision is contained in the subdivision of article 94 of chapter 113, relating to "district taxation" (Russell's St. § 5672).

In *Lee v. Trustees Shepherdsville Graded Common School District No. 4*, 88 S. W. 1071, 28 Ky. Law Rep. 55, it was held that an election for graded school trustees and for voting a bonded indebtedness, held between the hours of 1 o'clock p. m. and 6 o'clock p. m., was a literal compliance with the law, yet there is nothing in article 10 on that subject. Section 4434, Ky. St., being part of article 8 of chapter 113, dealing with "district trustees," and as to the time and manner of their election, provides that the election should be viva voce, and held at the schoolhouse of the district between the hours of 1 o'clock p. m. and 6 o'clock p. m. on the day fixed, and that "at this election the qualified voters of the district shall be the electors; and any widow having a child between six and twenty years, and any widow or spinster having a ward between the ages of six and twenty years may also vote." Russell's St. § 5710. See, also, *Moss v. Riley*, 102 Ky. 1, 43 S. W. 421, 19 Ky. Law Rep. 993. It will thus be seen the qualification of voters in graded school elections is that of the electors in common school elections; the term "common schools" being used to designate those common schools which are not graded or high schools. The act of March 24, 1908, supra, entitled "An act for the government and regulation of the common schools of the state," establishes in some particulars a radical departure from the pre-existing system. It relates more especially to the formation and changing of districts, to the unification of

the system, to its centralization, and to the maintenance of the schools by county taxation, as well as local and district taxation. It is a revision of important parts of the old system, but without any design to render the system as a whole inharmonious or unnecessarily complicated. In this view we are to consider this proviso in the second section of the act of 1908: "Provided, that any graded common school district that may exist in any educational division or that may hereafter be established according to law, whether operating under special charter, or established by popular vote, as provided for in the laws relating to the graded common schools, and school districts now operating within municipal districts established and incorporated under special charter and supplementing the state school fund by a local tax of not less than twenty cents on each hundred dollars of assessed valuation of property, shall retain their present boundaries and be exempt from the provisions of this act." That means, we think, that in their boundaries, government, and regulation they are to be unaffected by the new statute. There is no qualification of voters provided for in graded school districts, except by reference to the qualification provided generally for school electors. When the Legislature changed the qualification in the revision of the law governing common schools in 1908, it must be deemed to have done so deliberately, and upon a careful study of the whole system. The effect of the proviso quoted above is the same as if the article on graded common schools (article 10, c. 113, Ky. St.) had been re-enacted as part of the act of 1908—and the special acts referred to in the proviso, also re-enacted, though their construction is not here involved. Sutherland on Statutory Construction, § 154, thus states the rule: "A revision is intended to take the place of the law as previously formulated. By adopting it the Legislature say the same thing, in effect, as when a particular section is amended by the words 'so as to read as follows.' The revision is a substitute. It displaces and repeals the former law as it stood relating to the subjects within its purview. Whatever of the old law is restated in the revision is continued in operation as it may operate in the connection in which it is re-enacted."

The act of 1908 prescribes the qualifications of voters thus: "All male persons over 21 years of age, who shall have resided in a school subdivision for sixty days next before an election, shall have the right to vote at such election." Whatever other construction may be placed upon that language, it leaves no doubt that women are no longer entitled to vote in the general common school elections, however just might appear their claim to the right of suffrage. By the same act it is also provided: "All elections for

school trustees shall be by ballot. * * * The officers of said election shall be a clerk and two judges, and shall be appointed by the regular election commissioners in each county." On the subject of voting upon the question of establishing a graded common school and a tax to maintain it, section 4467, Ky. St. (part of art. 10, supra) reads: "The said sheriff or other officer shall appoint a judge and a clerk of said election, who shall take and subscribe to an oath for the faithful performance of his duties. On the day set apart for the election the officers shall open a poll, and shall propound to each voter who may vote the question: 'Are you against or for the graded common school tax?' and his vote shall be recorded for or against the same as he may direct." It was held, in *Lee v. Trustees*, supra, that that section required a viva voce vote on the subject of taxation. While the act of 1908 provides for a vote in school districts on the subject of local taxation, nothing is said as to how the vote shall be taken—whether by ballot or otherwise. In the election for trustees, voting by official ballot and the manner of preparing and furnishing the ballot are all provided for. From this, and the omission in the same act as to voting a tax, we infer that the Legislature intended the latter election should be viva voce. So, as there is nothing in the new act in conflict with the provision of section 4467, and particularly as the latter provides for a viva voce election on all questions except that of trustees, we must conclude that the elections in this case were regularly held, in the respect as to the manner of voting.

The act of 1908 provides that officers of election, two judges, and a clerk shall be appointed by the county election commissioners. Section 4467, Ky. St., provides for only one judge and a clerk. In this proceeding the sheriff appointed a judge and clerk. The county election commissioners met and ratified those appointments, and appointed one judge in addition. The latter failing to act, his place was filled by another. It is the last-named person whose presence it is claimed by appellants invalidated the election. We think he was properly there for the purpose of holding the trustee election. Even if he participated under a mistaken notion of authority in the other election, it is not averred that the regular judge and clerk did not of their own judgment and action do all that the outsider is claimed to have attempted to do. Nothing that he did affected the result. At most it would be a harmless irregularity.

The statute required (section 4464, supra) that the petition for the election shall indicate "with exactness" the "location and site of said schoolhouse," meaning the schoolhouse that will be provided for the proposed graded common school. The petition in this

secured upon terms satisfactory to the trustees who may be elected in said proposed district, or at some other suitable point within the corporate limits of the town of Columbia." The graded district proposed in the petition for the election embraced territory not within the town of Columbia, and included all the town. The Columbia M. & F. High School building is the Columbia Male and Female High School building in the town of Columbia, and is a well-known point, the location of which the voters and the court will take notice. In the nature of things it is impossible to designate finally any point to be selected as the schoolhouse site, as it may not be possible to procure it at all, or upon reasonable terms. The idea is to settle as nearly as may be done the location of the proposed building. It is not contended by appellants that, if the designation had stopped at "M. & F. High School," it would not have been sufficient. That which was added was no more than what would have been implied if it had not been added, except that it indicated that in no event was the building to be located outside the corporate limits of the town. It is now insisted, as one of the grounds of this defense, by appellant, that the "M. & F. High School building" cannot and could not have been acquired by purchase, because the title is held in trust by the Transylvania Presbytery in special trust, the legal title being in divers individuals, some of whom are infants, and the reversion in still others. If, then, the designation had been of that building as the site, which would confessedly have fulfilled the statute, it would have followed that the trustees could have procured another site as near as they could to the one indicated. Indeed, section 4481, Ky. St., requires: "Said board of trustees shall provide funds for purchasing suitable grounds and buildings, or for erecting or repairing suitable buildings, and for other expenses needful in conducting a good graded common school in their graded common school district; and to this end they may use such part of the proceeds of the said tax as they may deem necessary." The trustees are proceeding to acquire the identical building named, and we have no doubt have the power to do so. Unless insuperable obstacles arise, they must do so, unless the people in the manner pointed out by the statute require otherwise. If the title is held as appellants say, still it may be acquired by condemnation, it seems, if the proper parties are not competent and willing to act in the premises. The other words of the description may be treated as surplusage.

The petition for election contained this

erecting, purchasing, leasing, and repairing suitable buildings therefor if necessary." The language of the statute allowing the tax to be valid is (section 4464, supra): "For erecting, purchasing or repairing suitable buildings therefor if necessary." It will be seen that from a reading of section 4481, Ky. St., quoted above, it is made the duty of the trustees to provide a suitable building and to maintain a good graded common school in their district. We think the expression "and for other expenses needful in conducting a good graded common school" implies the power to rent a suitable building temporarily, and until one may be bought or built by the trustees. Section 4481 expressly allows the tax voted to be so applied. Its inclusion in the petition for the election was nothing more than the two sections (4464 and 4481) read together authorized. It meant that the trustees were to buy a building, the one named, if they could, if not, to buy a lot and build a house in that vicinity; to repair any building bought or built by them; and in the meantime to lease a suitable building for the accommodation of the school. We conclude that the election was valid.

Prior to 1860, under the old seminary grants then in vogue in this commonwealth, there was established a school in Columbia known as "Robertson Academy." It was built with public funds, and for the purpose of public education. In 1860, by an act approved February 27th, of that year (Sess. Acts 1859-1860, p. 328, c. 674), the trustees of the town of Columbia were authorized to sell the Robertson Academy property and apply the proceeds to grading, graveling, and paving the public square of the town. On March 12, 1869, the Legislature passed another act (Acts 1869, p. 220, c. 1954), reciting the foregoing facts, and that the town had sold the Robertson Academy property for \$346, and used the proceeds as authorized in the act of 1860, empowered the town to raise by taxation and appropriation of its public funds not exceeding \$600 to the purchase of a lot and the building of a schoolhouse in the town "for common school purposes." The act authorized the trustees of the town to take the title to the lot "to them and their successors in office as and for a common school house for said Columbia district." On April 23, 1869, C. J. Taylor and wife by deed referring to the above act conveyed to the persons named as trustees of the town of Columbia a lot in the town, in consideration of \$140, "to have and to hold said lot of ground with all the appurtenances thereunto belonging to said persons, named as trustees, and their successors in office as and for the uses and purposes stated in said act." The common school district comprising the town

of Columbia was then known as "District No. 29" in Adair county. The Legislature, by an act approved February 16, 1870 (Acts 1869-70, p. 274, c. 307), authorized the citizens of district No. 29 in Adair county to vote a tax to build a schoolhouse for said district.

Whether the house on the lot now in question (which is the lot conveyed by Taylor and wife) was built by the town as a municipal corporation under the act of 1869, or whether it was built by the tax authorized to be raised by school district No. 29 by the act of 1870, does not appear. Nor do we deem it material. The maintenance of public schools is a state question, done in the exercise of the state's sovereign power. When it authorized the appropriation of public lands to build an academy for public education, and subsequently let the town sell the academy lot and use the proceeds in paving its streets, it was competent for the Legislature to require the town to reimburse the state by buying another lot for common school purposes; and as the town did so, without complaint, its subsequent holding of the title as required by the act was a naked trust which the Legislature could end at its will. This was done when the Legislature enacted section 4484, Ky. St., reading: "The title to all common school and all county seminary property, the county court and the board of trustees of said seminary consenting, in the limits of any graded common school district organized under the provision of this law, shall be, and the same is hereby vested in the board of trustees of said graded common school district, and they are hereby empowered to sell and convey same, or to use same for graded common school purposes, as to them shall seem best; but when county seminary property shall be appropriated, all pupils of the county shall be permitted to attend such school at such reduced tuition from what is ordinary as shall be equitable and made good to them their interest in said seminary property. It is further provided, that when any graded school district shall embrace any school property owned or held in trust by trustees, said trustees, by a majority of their board, are hereby authorized and empowered to convey their school property to the trustees of the graded school, at such price and on such conditions as may be agreed upon by the trustees of both parties."

This is not county seminary property, as that term is used in the statute. It was at one time, it seems; but the Legislature, in the exercise of its power many years ago, changed it into common school property. It was not necessary then for the trustees (appellees) to have the consent of the county court or of the seminary trustees (there were none, so far as appears) to the vesting of the title in appellees. The town, as a cor-

poration, had no beneficial interest in the property. Whether the trustees can or ought to buy the M. & F. High School property from Transylvania Presbytery, or any other owner, if there are others, is not presented in this record for decision. The elections complained of being valid, the discretion of the trustees will not be interfered with by the courts, certainly not upon less than such abuse of it as would be tantamount to fraud. No such case is presented. There need not have been a resort to a sale by the court's commissioner; but of that unnecessary act appellants cannot complain.

We perceive no prejudicial error in the record, and the judgment is affirmed.

COMMONWEALTH, to Use of CONLEY & ROGERS v. BLACKBURN et al.

COMMONWEALTH, to Use of KENNON et al. v. SAME.

(Court of Appeals of Kentucky. Nov. 24, 1909.)

INTOXICATING LIQUORS (§ 61*)—COUNTY CLERK—LIABILITY FOR REFUSAL TO ISSUE LIQUOR LICENSE.

Though it was the duty of defendant county clerk, when persons, who had obtained a license from a city in the county to sell liquor, presented such license and the requisite license fee, to issue a state license, yet, as they could, on his refusal, sell liquor without violating the law, it was not necessary that they bring mandamus to compel him to issue a license, and his refusal did not subject them to any penalty for selling liquor without a license, so that they cannot recover on his bond the cost of maintaining the mandamus suit and defending a prosecution for selling without a license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 60; Dec. Dig. § 61.*]

Appeal from Circuit Court, Powell County. "Not to be officially reported."

Two actions, both for the Commonwealth, one for the use of Conley & Rogers, the other for the use of Kennon and others, both against Robert Blackburn and others. From judgments for defendants, plaintiffs appeal. Affirmed.

Henry Watson, for appellants. C. F. Spencer, for appellees.

CARROLL, J. These two cases involving the same question of law will be disposed of together. The appellee was the county clerk of Powell county. These two actions were brought on his official bond to recover damages for his alleged failure to perform a ministerial duty, thereby subjecting the appellants to unnecessary cost and expense. The appellants had been awarded license by the council of Clay City, situated in Powell county, to retail spirituous, vinous, and malt liquors for a year. When the license was granted, they presented it to the county clerk and tendered the full amount of the license fee required by the state for the sale of such liquors and demanded a

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

state license, which the county clerk refused to issue; he being of the opinion that the council of Clay City had no authority to grant license. Thereupon Kennon, for the purpose of testing the right of the clerk to refuse license, brought a mandamus suit against him to compel him to accept the license fee and issue the license. His suit was dismissed by the circuit court, that court also being of the opinion that the council had no right to issue license; but, upon appeal to this court, the judgment of the circuit court was reversed, and it was held that Kennon was entitled to license, and the clerk was directed to issue it upon the presentation of the license from the city council and tender of the fee. The opinion in *Kennon v. Blackburn*, 127 Ky. 39, 104 S. W. 968, 31 Ky. Law Rep. 1256, was handed down on the 31st day of October, 1907, and on the 4th day of November following, and before the judgment of this court had become effective, the appellants again tendered to the clerk the license fee and demanded license, which he again refused to issue. Soon after this, the appellants, without having obtained any license from the county clerk, proceeded to retail liquor under the license granted them by the city council. Afterwards they were indicted for selling liquor without license; but the indictments were dismissed. In these suits, after setting out the above facts, appellants aver that the arbitrary and wrongful action of the county clerk compelled them to go to the expense and cost of bringing the mandamus suit, and also subjected them to the annoyance and cost of defending the indictments brought against them. Claiming that they had been damaged in the sum of \$1,000, they prayed judgment for this amount against the appellee and his sureties. The lower court sustained general demurrers to the petitions, and, the appellants declining to amend, their suits were dismissed, and they have appealed.

In our opinion the lower court properly

ruled that the petitions did not state a cause of action. There can be no doubt that where a clerk, by his arbitrary and wrongful failure to perform a mere ministerial act, such as the issuing of license in a proper state of case, necessarily subjects the person who in proper time and manner demands a performance of the act to loss or damage, an action may be maintained against the clerk and his sureties upon his bond to recover damages that have directly resulted from his failure to perform the ministerial duty. *McFarland v. Burton*, 89 Ky. 294, 12 S. W. 336, 11 Ky. Law Rep. 499; *Bates v. Foree*, 4 Bush, 430. But, in the case before us, although it was the duty of the clerk to have issued the license, his failure to do so did not necessarily subject the appellants to any loss or damage. Having obtained from the city council of Clay City license to sell liquor, the only duty the clerk had to perform in connection with it was to issue a state license upon the presentation of the city license accompanied by the requisite amount of money, and when the appellants tendered to the clerk the city license and the amount of the license fee, and demanded that he issue license to them, they had done all that they could do and all that the law required them to do, and the failure of the county clerk to perform his duty did not render them guilty of violating the law, if thereafter they sold liquor during the time mentioned in the license issued by the city. This point was expressly decided in the case of *Koch v. Commonwealth*, 119 Ky. 476, 84 S. W. 533, 27 Ky. Law Rep. 122.

It follows from this that it was not necessary that appellants should have brought suit against the clerk to compel him by mandamus to issue license, and, further, that his failure to issue license did not subject them to any penalties for selling liquor without license.

Wherefore the judgment in each case is affirmed.

In an action for injuries in a crossing accident, whether plaintiff was negligent in standing on one track while a freight train was passing on another *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1183; Dec. Dig. § 350.*]

2. RAILROADS (§ 327*)—ACCIDENTS AT CROSSINGS—DUTY TO STOP BEFORE CROSSING.

One having a right to cross a railroad track need not stop to look or listen, before crossing, in order to discover whether a train is approaching.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1050; Dec. Dig. § 327.*]

3. RAILROADS (§ 351*)—CROSSING ACCIDENT—INSTRUCTIONS.

Where, in an action for injuries in a crossing accident, the whistle of the engine was not sounded, so that plaintiff could hear it, until the engine was within a few feet of, and in fact on, plaintiff, an instruction confining the signals to the ringing of the bell, which the evidence showed was rung long before the engine struck plaintiff, was proper.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1201½; Dec. Dig. § 351.*]

4. TRIAL (§ 296*)—CURE BY OTHER INSTRUCTION.

Error in an instruction, which is corrected in another instruction given, is cured.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 705; Dec. Dig. § 296.*]

Appeal from Circuit Court, Boyd County.
"To be officially reported."

Action by Wardie L. Patrick, by his next friend, against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Worthington, Cochran & Browning, for appellant. Dinkle & Prichard, for appellee.

SETTLE, J. This is an appeal from a judgment of the Boyd circuit court, entered upon a verdict against the appellant, Chesapeake & Ohio Railway Company, in favor of the infant appellee, Wardie L. Patrick, for \$2,000, in damages for injuries to his person from a collision with one of appellant's trains, alleged to have been caused by the negligence of its agents and servants in charge thereof. At the time of receiving his injuries appellee was 16 years of age, and the action was instituted by himself and next friend. The facts were that in December, 1905, appellee and a companion, Charles Picklesimer, a year his junior, went to the city of Ashland from their home in Magoffin county, seeking employment. After a few days' search they found work at the mill of the Herman Lumber Company. On account of a sleet and snow that fell, they were denied work one day at the mill, and upon again going to the mill in the afternoon, about 1 o'clock, they were advised that there would be no work for them there that

ty-second street, going up what is known as Railroad alley, the usual and nearest route. On Railroad alley, which is a public street of Ashland, appellant has a double track, called the east-bound and west-bound tracks. The former, lying next to the hill, is used by appellant's trains running to Huntington, W. Va., and other points east, and the latter, lying next to the Ohio river, is used by its trains running to Cincinnati. Appellee and his companion, after passing Thirty-First street, and upon reaching a point half way between that street and Thirty-Second street, saw approaching them on the west-bound track a long freight train, running at considerable speed and making a loud noise. They thereupon swerved their course sufficiently to keep out of the way of the freight train on the west-bound track, and proceeded in the direction of the boarding house on Thirty-Second street to which they had started; Thirty-Second street being then about 20 feet distant. When they got to Thirty-Second street, the engine and a few cars of the freight train on the west-bound track had passed them. Upon appellee and his companion reaching Thirty-Second street, and while they were yet facing the east and in the act of turning to cross that street to get to the boarding house, a half square distant, an extra passenger train on the east-bound track, going at a high rate of speed, ran upon and against them, and dragged them under the engine and tender some distance, thereby killing Picklesimer and permanently injuring appellee upon his head and other parts of the body.

Appellant complains that the trial court improperly refused to peremptorily instruct the jury to find for it. We do not understand, from the brief of its able counsel, that it is claimed the peremptory instruction should have been given on the ground that appellee was a trespasser upon its track, for, when struck by the train, he and Picklesimer were on the crossing at Thirty-Second street, but because, it is insisted, he was guilty of contributory negligence in being upon the crossing and east-bound track at the time of the collision. Upon the facts furnished by appellee's testimony, the court could not, as a matter of law, hold that he was guilty of contributory negligence. Even before reaching the crossing at Thirty-Second street, he and his companion were walking along Railroad alley, a street or public way of the city, in constant use by its inhabitants, and when they got to Thirty-Second street, and on the crossing, they had, according to appellee's testimony, to stop until the freight train on the west-bound track passed them and the crossing to enable them

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Rehearing denied December 17, 1906.

to cross the west-bound track to get to the boarding house. They had barely stopped, and were in the act of turning toward the freight train, but without having gotten their faces in line to see the approaching passenger train, when it struck them. Under the circumstances, the mere fact that he was momentarily standing on the east-bound track was not of itself such evidence of contributory negligence on the part of appellee as would authorize the court to take the case from the jury. Whether, in thus situating himself, appellee exercised ordinary care for his own safety, was a matter to be determined by the jury. In view of the noise made by the freight train, to which his attention was particularly directed, because it was passing between him and the house to which he was going, and of the fact that the passenger train was an extra train, and, therefore, not expected, and the further fact that it was running, according to the testimony of three witnesses near by, at from 20 to 30 miles an hour without ringing its bell or giving other signal of its approach, it is not difficult to understand why the jury reached the conclusion that in the matter of receiving his injuries appellee was not guilty of such negligence as should defeat a recovery.

We do not overlook the fact that appellant's train crew, and other witnesses introduced in its behalf, furnished much evidence conducing to prove contributory negligence on the part of appellee, that he suddenly and unexpectedly to the engineer and fireman of the passenger train got upon the track in front of it, that the train was running at a moderate and reasonable rate of speed when the accident occurred, and that its approach was signaled by the usual and constant ringing of the bell; but, however contradictory this evidence may have been of appellee's, it all, with his, went to the jury, and we have no right to say that they should have given it more weight than appellee's was entitled to receive, or to direct that the verdict be set aside because they gave appellee and his witnesses the greater credence. Although repeatedly urged to do so, this court has never given its approval to the doctrine that one having a right to cross or go upon a railroad track shall, before doing so, stop, look, or listen, to discover whether a train is approaching or is so near at hand as to make it unsafe to himself to do so; for, as said in *Ramsey v. Louisville, Cincinnati & Lexington Railway*, 89 Ky. 104, 20 S. W. 163, 12 Ky. Law Rep. 559: "It would be unreasonable to require of persons passing daily on foot or in vehicles along a public street in a populous, busy city or town, to stop at a railroad crossing in order to listen or look up and down a track, sometimes visible but a short distance, to ascertain whether a train is approaching, when they can without doing

so have comparative security against inconvenience and injury by a reduction of the speed of trains, and easily and certainly warned of its approach by the bell or whistle." *L. & N. R. R. Co. v. Lucas*, 93 S. W. 308, 30 Ky. Law Rep. 359; *Ky. Central Ry. Co. v. Smith*, 93 Ky. 449, 20 S. W. 392, 14 Ky. Law Rep. 455, 18 L. R. A. 63; *L. & N. R. R. Co. v. Price's Adm'r*, 76 S. W. 836, 25 Ky. Law Rep. 1033. We do not mean to be understood as holding that one, in crossing or going upon a railroad track, where he is entitled to go or be, should neglect the use of his faculties or fail to exercise any reasonable precaution that would enable a person of ordinary prudence under the circumstances to discover the approach or presence of a moving train and thereby prevent injury to his person, but simply to declare that he need not stop to look or listen before thus venturing, in order to discover whether a train is approaching.

The instructions of the circuit court gave to the jury the law applicable to the facts of this case, and were as follows:

"The court instructs the jury that it was the duty of the agents in charge of defendant's passenger train to use ordinary care to prevent collision with and injury to persons traveling the street where it intersects with defendant's railroad track by keeping a lookout in approaching said crossing, and in giving reasonably sufficient signals by ringing the engine bell to warn travelers of the approach of the train, and by running at such a rate of speed as was reasonably consistent with the safety of persons traveling the street. And if the jury believe from the evidence that on the occasion in controversy the defendant's agents in charge of its train failed in the performance of any or all of these duties, and by reason of such failure the collision occurred, then the jury should find for the plaintiff, unless they believe from the evidence the plaintiff failed to exercise ordinary care for his own safety."

No. 2: "The court instructs the jury, that it was the duty of the plaintiff, Wardie Patrick, on approaching the crossing mentioned in the evidence, to use such care as would be usually expected of an ordinarily prudent person to learn of the approach of the train and keep out of its way; and if he failed to exercise such care, and but for such failure would not have been injured, then the law is for the defendant and the jury should so find, even though they may believe from the evidence that the agents of defendant in charge of its train were negligent, as set out in instruction No. 1."

No. 3: "The court instructs the jury that if they believe from the evidence that, at the time and place of his injury, the plaintiff, Wardie Patrick, was not upon or traveling the Thirty-Second street crossing, but was walking upon defendant's tracks east

of said crossing, then the law is for defendant, and the jury will so find."

No. 4: "If the jury find for the plaintiff under instruction No. 1, they will allow him such reasonable sum in damages as they may believe from the evidence will fairly compensate him for any suffering, mental or physical, which he has suffered as the direct result of said injury, and for any suffering they may believe from the evidence it is reasonably certain he will experience in the future as the direct result of said injury, and for all permanent reduction, if any of his power to earn money in the future as the direct result of said injury, not exceeding in the aggregate the sum of \$2,000, the amount claimed in the petition."

No. 5: "Ordinary care is that degree of care which ordinarily prudent persons are expected to use under similar circumstances. Negligence is the failure to use ordinary care."

No. 6: "Nine or more of the jury concurring may return a verdict; but, if it is made by a less number than the entire jury, it must be signed by all the jurors thereto."

We do not think the instructions open to the objections made to them by appellant's counsel. It was not error for instruction No. 1 to confine the signals of the approach of the train by which appellee was injured to the ringing of the bell; for, according to appellant's evidence, no sounding of the engine whistle that could have been heard by appellee was done until the engine was within a few feet of, and in fact upon, him, which was too late to give notice of the coming of the train. Besides, nearly all of appellant's servants in charge of the passenger train testified that the bell rang as the train approached, and for a long distance before it struck, appellee. We fail to see that appellant was

prejudiced by the instruction. The second objection to instruction No. 1 was removed by instruction 3, which in substance advised the jury that there could be no recovery unless appellee was upon the Thirty-Second street crossing when struck by the train. Instruction 2 could have been in no sense misleading or prejudicial, as the evidence showed that appellee was struck by the train upon reaching the Thirty-Second street crossing and as he was in the act of turning to cross the west-bound railroad track.

We have found no error in the admission or exclusion of evidence; and as, on the whole record, no reason has been shown for disturbing the verdict, the judgment is affirmed.

CHESAPEAKE & O. RY. CO. v. PICKLESIMER'S Adm'r.†

(Court of Appeals of Kentucky. Nov. 23, 1909.)

Appeal from Circuit Court, Boyd County.

"To be officially reported."

Action by Charlie Picklesimer's administrator against the Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Worthington, Cochran & Browning, for appellant. Dinkle & Prichard, for appellee.

SETTLE, J. This case is a companion to that of Chesapeake & Ohio Railway Company v. Wardie Patrick, by, etc., 122 S. W. 830, the opinion in which was this day handed down. The questions of law and fact in the two cases are the same, except that the collision with appellant's train only resulted in great bodily injury to Patrick, whereas appellee's intestate was killed. The opinion in the Patrick Case, supra, being conclusive of this case, an opinion herein, containing a further elaboration of our views upon the questions involved, is deemed unnecessary.

Wherefore the judgment in this case is also affirmed.

† Rehearing denied December 17, 1909.

CITY OF BOWLING GREEN v. McMULLEN.

(Court of Appeals of Kentucky. Nov. 11, 1900.)

INTOXICATING LIQUORS (§ 134*)—LOCAL OPTION—SALE OF NONINTOXICANTS—"SPIRITUOUS, VINOUS, OR MALT LIQUORS."

Ky. St. 1900, §§ 2557 (Russell's St. § 3635), making it unlawful, after a local option election resulting in a vote against sale of "spirituous, vinous, or malt liquors," to sell any such liquors, is not, in view of prior judicial construction of the words in prior statutes on the subject, violated by sale of malt liquor containing less than 2 per cent. of alcohol, and nonintoxicating in the largest quantity in which it may be drunk.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 142; Dec. Dig. § 134.*

For other definitions, see Words and Phrases, vol. 7, pp. 6610-6615; vol. 8, pp. 7325, 7326; vol. 5, pp. 4314, 4315.]

O'Rear, J., dissenting.

Appeal from Circuit Court, Warren County.
"To be officially reported."

W. H. McMullen was convicted in the city court of a violation of the prohibition law, but on appeal to the circuit court the case was dismissed and the City of Bowling Green appeals. Affirmed.

H. H. Denhardt, W. B. Gaines, James Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for appellant. Sims, Du Bose & Rodes, Wright & McElroy, and John B. Grider, for appellee.

BARKER, J. The appellee, W. H. McMullen, was charged with a violation of the prohibition law. He was tried in the city court of Bowling Green, and a fine of \$60 inflicted, from which he appealed to the Warren circuit court, where the appeal was tried upon an agreed statement of facts. The case was submitted to the circuit judge, Hon. John M. Galloway, a jury being waived, with the result that he found the defendant had not been guilty of an offense against the prohibition law, and delivered his reason therefor in the following opinion, which we adopt as the opinion of the court on this appeal:

"These five cases all involve practically the same question, and they are all submitted upon appeal by the defendants from judgments in the city court against each defendant for \$60, upon conviction for selling by retail malt liquors in local option territory. This court is asked to determine whether or not defendants are guilty of violating the local option law as found in section 2557, Ky. St. (Russell's St. § 3635), under the following agreed statement of facts, to wit: 'It is agreed that defendant, McMullen, sold a bottle of next-to-beer in Bowling Green, Ky., as charged in the warrant. Next-to-beer is a malt liquor or liquid, that is to say, containing malt as an ingredient, and used as a beverage, and is nonintoxicating, that is

to say, that in the largest quantities in which it may be drunk it will not intoxicate. It is agreed that it contains less than 2 per cent. of alcohol and more than one-half of 1 per cent. Defendant has United States government license for the sale of malt liquors, and the agreement filed in the other cases is in substance the same as the one quoted.'

"It thus appears in the evidence that the liquor sold by defendants is what is termed 'malt liquor,' or a liquid containing malt, and that such liquor is a nonintoxicant, and will not intoxicate in the largest quantities in which it may be imbibed. It is insisted upon by counsel for the plaintiff that under and by virtue of section 2557, Ky. St., no spirituous, vinous, or malt liquors can be legally sold by retail in such prohibited districts, whether or not such liquor or liquid contains enough alcohol to intoxicate the drinker, and that it is not material whether the liquid is an intoxicant or will produce intoxication, if it may be called or termed a spirituous, vinous, or malt liquor. While defendants contend that, in order to convict them under this law, the liquor sold must be an intoxicant, and that, as it is agreed that the drinks they sold or are charged with selling were not intoxicants, they have not violated the statute, or, in other words, that the intent and purpose of this law is to make it unlawful and penal to vend such liquors as will intoxicate in local option precincts, and only such as will intoxicate. Counsel for both plaintiff and defendant have cited decisions of other states, based in the main upon their statutes, none of which appear to be entirely alike or similar to our law, and in this, as well as many other instances, these decisions run counter to each other; some tending to support the contention of the prosecution herein, and others looking to defendant's side or claims, so these citations are far from convincing either way.

"The first general local option law in the state was enacted in 1874 (see Gen. St. 1879, p. 946), and in it the same term is employed, to wit: 'A prohibition of the sale of spirituous, vinous or malt liquors.' The force and validity of this act (Acts 1873-74, p. 10, c. 117) was passed upon by the Kentucky Court of Appeals in *Anderson v. Commonwealth*, 13 Bush, 485, and in its opinion, written by Chief Justice Lindsay, the court said: 'We unanimously hold that the sale by retail of intoxicating liquors may be constitutionally regulated, and that in any locality where, in the opinion of the Legislature or of its constitutionally organized agencies, the peace and good order of society so requires, license to carry on the retail traffic may be refused altogether.' Our present Constitution (section 61) provides that the General Assembly shall, by general law, pro-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

vide a means of taking the sense of the people in any county, etc., as to whether or not spirituous, vinous, or malt liquors shall be sold, etc. And such was the expression of the act of 1892 (Laws 1891-92-93, p. 214, c. 89); and the same words defining what may or may not be sold was written in the act of 1894 (Laws 1894, p. 125, c. 52, § 4), which is found in section 2557, Ky. St. So from 1874 to 1898 there was no change in the nomenclature of the liquors whose sale was forbidden in local option localities. Then in 1898 the law now found in section 2557a, Ky. St. (Russell's St. § 3636), was enacted. This law, it will be seen, prohibits the sale, barter, or loan of any beverage, liquid mixture, or decoction of any kind which intoxicates in local option territory. And in *Rush v. Commonwealth*, 47 S. W. 586, 20 Ky. Law Rep. 775, it was held that the act of 1898 (Acts 1898, p. 84, c. 30), which provides a different penalty for the violation from the one found in section 2557, Ky. St., did not, as contended for, repeal or affect the law contained in said section 2557, but was intended to reach violations not covered by section 2557. In this *Rush* opinion the court says, 'It is further insisted that the act of 1898, being now in force, repeals the penalty, or rather reduces it, for the sale of intoxicating liquors in local option precincts or localities,' and that such contention is erroneous, and that the intention of the Legislature in passing the act of 1898 was to declare that to be an offense that theretofore had not been, or to clear the matter of doubt. And further, in the same opinion, the court says: 'The clear meaning and intention of this act [of 1898] was to provide a penalty for the sale in prohibited districts of the various nostrums, bitters, and such like intoxicants sold, and of which it is difficult to show the ingredients, or whether it comes under the strict definition of spirituous, vinous, or malt liquors.' So they held that this act was made to embrace and cover all other intoxicants not found to come within the terms spirituous, vinous, or malt liquors. And in *Edmonson v. Commonwealth*, 110 Ky. 510, 62 S. W. 1018, 22 Ky. Law Rep. 1902, the court, in its opinion, said that the amendment of March 15, 1898, fixing the penalty under it, applied only to beverages, liquid mixtures, or decoctions, or, in other words, substitutes for spirituous, vinous, or malt liquors, and hence its enactment did not repeal or affect section 2557 or the act of 1894. In *Mitchell v. Commonwealth*, 106 Ky. 602, 51 S. W. 17, 21 Ky. Law Rep. 222, defendant was convicted under a charge of selling intoxicating liquors in local option territory. The proof was that he sold a phial of Jamaica ginger, and it was claimed there was a variance; but the court said not, if Jamaica ginger was a spirituous liquor, and the jury found that it was. And the court further said: 'But the objection is urged that there was no evidence to sup-

port this finding, as both the vendor and vendee swore it was not intoxicating. Evidence of a druggist was introduced that the regulation requirement of Jamaica ginger was 96 per cent. alcohol and 4 per cent. ginger. If the jury believed this testimony, and believed that the phial contained Jamaica ginger (and it was bought and sold as such), they were authorized to conclude that it was intoxicating.' The court further said: 'Moreover, we think that, without the druggist's evidence, it is matter of common knowledge that Jamaica ginger is an intoxicant, and a spirituous liquor, and it is hardly more necessary to introduce testimony of that fact than it would be of whisky.' The act of 1906, known as the 'Cammack Law' (Laws 1906, p. 86, c. 21), which is an amendment to section 2500, Ky. St., describes or defines the inhibited liquors by the term 'spirituous, vinous, malt, or other intoxicating liquors.'

'With these aids or helps found in our judicial and legislative expressions from time to time since 1874, when the first law was put upon our statute books upon this subject-matter, we are to interpret and determine what is the meaning, scope, and purpose of these words, 'spirituous, vinous, and malt liquors' as found and used for so long in our statutes. Does it mean that these liquids may not be legally vended in prohibited localities, whether they contain or have in their makeup a sufficient quantity of alcohol to cause the drinker, in the largest quantity in which it may or might be imbibed, to become intoxicated? Or was it the intent, purpose, and scope of this legislation, by the use of these common and general terms therein, to prohibit the sale of intoxicants, and not drinks, whatever they may contain, that will not intoxicate, such as it is agreed that the defendants sold or are charged with selling, and admit they did sell, in these prosecutions? It seems clear that in the *Mitchell* Case, supra, it was regarded as essential, in order to convict for a violation of the law for selling liquor in local option territory, that the liquid sold should be an intoxicant. Two defenses were made by defendant—one, that Jamaica ginger was not what is known as a 'spirituous liquor,' and the other, that it was not intoxicating; and under the evidence the jury found that it was a spirituous liquor, and that it was an intoxicant, and upon appeal the case was affirmed. And if such is the required rule as to what may be termed spirituous liquor, would not the same rule and construction apply to a sale of malt liquor, to wit, that it must be shown, upon a plea of not guilty, that the liquor was a malt liquor and that, as such, it was intoxicating? And the two cases cited in which the court construed the act of 1898, now section 2557a, Ky. St., it was certainly held that the enactment of that law did not in any wise repeal or affect section 2557, but that it was an amendment to said last-named section, intended to en-

large its scope, so as to embrace or include all other intoxicants not falling under the inhibition of section 2557, such as the court said it was difficult and often impossible to find out the ingredients contained in the liquid. As intimated in the Anderson Case, supra, there is grave question as to the power of the Legislature to enact a law prohibiting the sale of liquids that are not intoxicants, and not in their makeup detrimental to health or the peace or good well of society, although they may contain malt or spirituous or vinous liquors. The Legislature, when framing the Cammack law, put this construction upon these words 'spirituous, vinous, or malt liquors,' as found in the law, by using in reference thereto the words 'spirituous, vinous, malt, or other intoxicating liquors,' meaning plainly that the inhibition was to cover and include all intoxicating drinks. If not, why use the words 'or other intoxicating liquors'?

"So, while the question here presented has not been considered by our highest court in its present form, we have both judicial and legislative sanction which clearly indicate that these words, as found in section 2557, were intended to prohibit the use of intoxicants, and as spirituous, vinous, and malt liquors are as a general rule intoxicants, these terms were used in the several statutes and the Constitution as a name to designate intoxicating liquors; and when in 1898 it was found that other intoxicants were being sold which could not be shown or proven to be either spirituous, vinous, or malt liquors, the legal horizon was enlarged by the act of that year, which provides a penalty for vending intoxicants whose makeup was unknown or shown to be other than the intoxicants already prohibited under section 2557. In construing statutes, the cardinal rule is to ascertain the legislative intent, and when it is ascertained, it controls, and in all cases the mere letter must yield to the spirit of the enactment. As is said in the Bible, 'The letter killeth, but the spirit maketh alive.' Certainly the purpose of the law-makers in enacting the local option law was to prohibit and prevent the evils of intemperance caused and coming from the use of intoxicating liquors as a beverage. This being, as we view it, the correct construction or exposition of what is meant and included in and by the words 'spirituous, vinous, or malt liquors,' as used in section 2557, Ky. St., and it being agreed that the defendants did not sell liquors that would or will intoxicate, the cases against them will be dismissed."

Judgment affirmed.

O'REAR, J., dissents.

CITY OF BOWLING GREEN v. BORRONE.

(Court of Appeals of Kentucky. Nov. 11, 1909.)

Appeal from Circuit Court, Warren County.
"Not to be officially reported."

Joe Borrone was convicted in the city court of a violation of the prohibition law, but on appeal to the circuit court the case was dismissed, and the City of Bowling Green appeals. Affirmed.

H. H. Denhardt, W. B. Gaines, Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for appellant. Sims, Du Bose & Rodes, Wright & McElroy, and John B. Grider, for appellee.

BARKER, J. The questions of law arising upon this appeal are similar to those involved in City of Bowling Green v. W. H. McMullen (this day decided) 122 S. W. 823; and upon the authority of that opinion the judgment herein is affirmed.

CITY OF BOWLING GREEN v. McINTEER.

(Court of Appeals of Kentucky. Nov. 11, 1909.)

Appeal from Circuit Court, Warren County.
"Not to be officially reported."

W. T. McInteer was convicted in the city court of a violation of the prohibition law, but on appeal to the circuit court the case was dismissed, and the City of Bowling Green appeals. Affirmed.

H. H. Denhardt, W. B. Gaines, Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for appellant. Sims, Du Bose & Rodes, Wright & McElroy, and John B. Grider, for appellee.

BARKER, J. The questions of law arising upon this appeal are similar to those involved in City of Bowling Green v. W. H. McMullen (this day decided) 122 S. W. 823; and upon the authority of that opinion the judgment herein is affirmed.

CITY OF BOWLING GREEN v. HIGGINS et al.

(Court of Appeals of Kentucky. Nov. 11, 1909.)

Appeal from Circuit Court, Warren County.
"Not to be officially reported."

T. M. Higgins and others were convicted in the city court of a violation of the prohibition law, but on appeal to the circuit court the case was dismissed, and the City of Bowling Green appeals. Affirmed.

H. H. Denhardt, W. B. Gaines, Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for appellant. Sims, Du Bose & Rodes, Wright & McElroy, and John B. Grider, for appellees.

BARKER, J. The questions of law arising upon this appeal are similar to those involved in City of Bowling Green v. W. H. McMullen (this day decided) 122 S. W. 823; and upon the authority of that opinion the judgment herein is affirmed.

STAPLES et al. v. SHIVER et al.

(Court of Appeals of Kentucky. Nov. 30, 1909.)

1. JUDGMENT (§ 486*)—COLLATERAL ATTACK—VOID JUDGMENT.

Only a void judgment is subject to collateral attack.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 920-923; Dec. Dig. § 486.*]

2. COURTS (§ 223*)—JURISDICTION.

The Court of Appeals has jurisdiction on appeal from a judgment denying relief in a suit to enjoin the enforcement of a void judgment for less than \$200, though it is without jurisdiction of an appeal from the void judgment.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 223.*]

3. MORTGAGES (§ 559*)—FORECLOSURE—ASSIGNMENT—RIGHTS OF ASSIGNEE.

Under Civ. Code Prac. § 20, providing that, if the claim of plaintiff be assigned pending the action, the court may allow the assignee to be substituted in the action, an assignee of a note secured by mortgage pending suit to enforce the mortgage and for a personal judgment against the maker and his sureties, and after the rendition of judgment enforcing the lien, is entitled to a personal judgment in his favor against the maker and the sureties.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 559.*]

4. JUDGMENT (§ 486*)—VOID JUDGMENT—COLLATERAL ATTACK.

A personal judgment in favor of the assignee of a note secured by mortgage pending suit to foreclose the mortgage and for a personal judgment against the maker and the sureties, and after the rendition of a judgment enforcing the lien against the maker and his sureties by a court having jurisdiction of the subject-matter and the parties, is not void, though the court errs in adjudging that the assignee is entitled to a personal judgment.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 486.*]

5. COURTS (§ 1*)—JURISDICTION.

Jurisdiction is the right to hear and determine.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 1.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3876-3885; vol. 8, pp. 7697, 7698.]

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Action by J. T. Staples and others against R. H. Shiver and another. From a judgment dismissing the petition on sustaining a general demurrer thereto, plaintiffs appeal. Affirmed.

Vance & Hellbronner and W. P. McClain, for appellants. F. M. Hutcheson, for appellees.

BARKER, J. One D. L. McCain, being indebted to Mrs. Elizabeth Harding in the sum of \$350, on the 10th day of December, 1903, executed and delivered to her his promissory note for that sum, with the appellants as sureties, by which he promised and agreed to pay to her the amount of her debt on January 1, 1905. As additional security he executed and delivered to her a mortgage on certain horses and mules named therein.

The maker of the note paid all of it off except \$151.90, with interest from April 8, 1907. Afterwards Mrs. Harding assigned and transferred the note for the unpaid balance and the mortgage to J. H. Tillotson. On April 13, 1907, Tillotson, as holder of the note, instituted an action in the Henderson circuit court to enforce his mortgage lien upon the stock, and also for a personal judgment against the maker and his sureties, the appellants here. On the 25th of February, 1908, the cause coming on to be heard, a judgment was rendered enforcing the mortgage lien upon the stock. On May 2, 1908, the holder of the note, J. H. Tillotson, assigned the judgment in his favor to R. H. Shiver, and on June 3, 1908, the court rendered a personal judgment in favor of R. H. Shiver, for \$195.91 against the sureties, the appellants here. On June 17, 1908, Shiver caused an execution to be issued on the judgment, which was placed in the hands of the sheriff of Henderson county, who was proceeding to execute it when this equitable action was instituted against R. H. Shiver and Ed Melton, sheriff of Henderson county, for an injunction to prevent its execution. A general demurrer to the petition as amended was filed by the defendants and sustained by the court, and, the plaintiffs (appellants) declining to plead further, their petition was dismissed; and of this ruling they are now complaining.

This being a collateral attack upon a judgment, it can only be upheld upon the theory that the judgment was void. The plaintiffs in this action could not have appealed from the judgment complained of, because, it being for less than \$200, this court would have had no jurisdiction to entertain an appeal. But, if the judgment is void, its enforcement should be enjoined, and we have jurisdiction of the judgment of the trial court dismissing the petition seeking such an injunction. We are unable to perceive, however, upon what theory the judgment complained of is void. The Henderson circuit court had jurisdiction of the subject-matter, and the appellants here were properly before the court there, and, this being true, however erroneous the judgment may be, it is not void. Jurisdiction is the right to hear and determine, and it certainly was within the competency of the circuit court to adjudge whether or not R. H. Shiver had been assigned the whole claim of J. H. Tillotson, or only the judgment in rem, and it was evidently determined that the whole claim had been assigned to him. With this question, however, the appellants have nothing to do, as they are not interested in it. If the court by its judgment gave R. H. Shiver more than he was entitled to as between him and J. H. Tillotson, this is a matter of which Tillotson might complain, but not appellants. Appellants do not pretend that they have now, or ever had, a just

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defense to the note on which they were sureties. As to whether they are required to pay to R. H. Shiver or to J. H. Tillotson is to them a matter of indifference. They can only be required to pay once. R. H. Shiver, as assignee of the claim of J. H. Tillotson against appellants, was entitled to have a personal judgment entered in his favor. Civ. Code Prac. § 20; *Western Bank v. Colde-way's Ex'r*, 94 S. W. 1, 29 Ky. Law Rep. 651; *Cantrell v. Hewlett*, 65 Ky. 811; *Dougherty v. Smith*, 61 Ky. 279; *Warner v. Turner*, 57 Ky. 759. But, even if we were to assume that he was not so entitled, the judgment would only be erroneous, and not void. This being true, the court properly sustained the demurrer as amended, and, upon the failure of the appellants to further amend, the court properly dismissed the petition.

Judgment affirmed.

ROLAND v. O'NEAL.

(Court of Appeals of Kentucky. Oct. 19, 1909.)

1. EASEMENTS (§ 18*)—WAYS OF NECESSITY.

Where there was no outlet to the public highway from land sold, the law implied a grant of a reasonable right of way over the remainder of the vendor's land to the vendee, and subsequent grantees of the vendor took subject to such right of way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 50-55; Dec. Dig. § 18.*]

2. EASEMENTS (§ 48*)—WAYS OF NECESSITY.

Where a purchaser of land was entitled to a way of necessity over the vendor's land, if the vendor permitted the use of a certain way, he could not afterwards withdraw his permission; but the purchaser would be thereafter confined to the way so used.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 107; Dec. Dig. § 48.*]

3. EASEMENTS (§ 8*)—ADVERSE POSSESSION—PERMISSIVE USE.

A private way could not be acquired by adverse possession if the use was permissive.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 23, 24, 33; Dec. Dig. § 8.*]

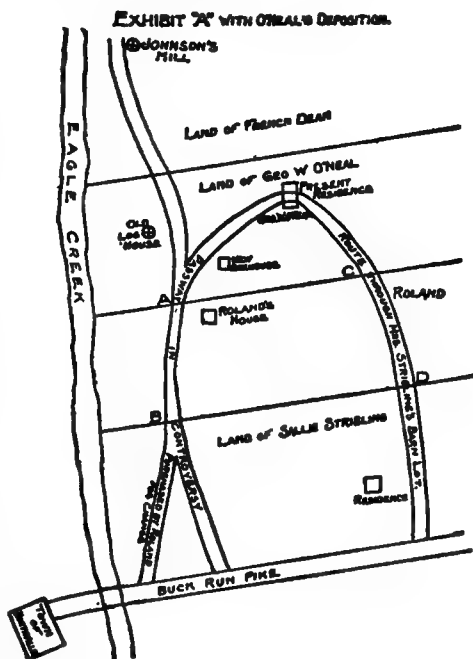
Appeal from Circuit Court, Owen County.
"Not to be officially reported."

Suit by M. R. Roland against G. W. O'Neal. From a judgment for defendant, plaintiff appeals. Affirmed.

Jas. H. Settle, for appellant. Winslow & Howe, for appellee.

BARKER, J. This action was instituted by M. R. Roland to enjoin the appellee, G. W. O'Neal, from using a private right of way across the farm of appellant. The litigation originated as follows: Many years ago one Octave Salve owned both the farms of appellant and appellee, and that of Sallie Stribling. Some 25 years ago he sold to G. W. O'Neal the farm now owned and occupied by him. Afterwards he sold to Sallie Stribling the farm now occupied by her. About 5 years ago he sold to D. J. Gaines the farm now owned and occupied by Roland, and Gaines subsequently sold and trans-

ferred it to Roland. When Salve sold the farm to O'Neal there was no outlet from it to the Buck Run pike, except over the farms now occupied by Roland and Mrs. Stribling. Under these circumstances the law implied a grant of a reasonable right of way from Salve to his vendee, O'Neal, over the remainder of his land to the public pike, and when he afterwards conveyed to Mrs. Stribling and to Gaines (Roland's vendor) they took the lands purchased subject to this private right of way in O'Neal. This, as we understand the record, is not disputed; the real dispute here being which of two routes O'Neal is entitled to use. The situation can be better understood by a reference to the subjoined map, which was filed as part of O'Neal's deposition, and the correctness of which is not disputed:



Roland contends that the route through Mrs. Stribling's barn lot, and which runs through his place from "C" to "D" on the plat, is the easement to which appellee is entitled. On the other hand, O'Neal contends that the easement marked "passway in controversy," and which runs through Roland's farm from "A" to "B" on the plat, is his right of way. The evidence shows that O'Neal used the passway claimed by him continuously and without objection either by Roland's vendor, Gaines, or by Roland, himself, until this present controversy arose. Roland admits this, but says that this use was permissive. We fail to see how this alters the case. While O'Neal pleads a right of way by adverse user of 15 years or more, it may be conceded that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

plat, he could not afterwards withdraw his permission. O'Neal does not claim a right of way along the route marked "through Mrs. Stribling's barn lot," and the proof shows that this route is so steep as to be practically impassable for loaded wagons.

The chancellor, after all the evidence was in and the case submitted, found, in favor of O'Neal, that the easement marked "passway in controversy," and which runs through Roland's farm from "A" to "B," is the passway to which appellee is entitled. A careful reading of the record convinces us that his conclusion on the mooted issue was correct. It may be true, as contended for by appellant's counsel, that, as an original proposition, he would have had the right to select a reasonable passway over his farm for the use of appellee; but, when his vendor acquiesced in appellee's using the passway in controversy, that permission could not be withdrawn, and the appellee forced to choose another route. The fact that he at other times or occasions used another route does not militate against the conclusion we have reached. That was permissive also. Hereafter O'Neal will not have the right to use the route through Mrs. Stribling's barn lot in so far as it crosses Roland's place, without his permission; nor will he be entitled to use the new passway over Mrs. Sallie Stribling's farm purchased by Roland, which is shown on the plat, unless Roland consents thereto. He will be confined, of course, to the old right of way so far as Roland is concerned. Of course, the question as to whether he has a right of way across Mrs. Stribling's farm, between the points he claims, is not before us, and we do not therefore decide it. For the present, all that we decide is that the conclusion of the court that appellee had a right of way across appellant's farm, as indicated on the map, between the points "A" and "B," is correct, and that he has no right to use the right of way, shown on the map, over Mrs. Stribling's land, which was purchased by him.

It will be borne in mind that we are not discussing here the acquisition by O'Neal of an easement over Roland's land by adverse user for the statutory period. Of course, if this principle was involved, O'Neal would acquire no right to an easement by user so long as the use was permissive. The question we have is merely the location of a right of way which the law gave O'Neal, and when once located by permissive use the permission could not be withdrawn.

Judgment affirmed.

ing an application for license to sell liquor, under Ky. St. 1909, § 4205 (Russell's St. § 6147), authorizing a license to merchants, druggists, etc., on satisfactory evidence that the applicant is in good faith a merchant, druggist, etc., is a bar to a renewal of the application within a year therefrom, and an application made within a year is properly dismissed.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 71.*]

Nunn, C. J., dissenting.

Appeal from Circuit Court, Warren County.

"Not to be officially reported."

Application by F. C. Schoenthaler, for a license to sell liquor under Ky. St. 1909, § 4205 (Russell's St. § 6147). From a judgment of the circuit court granting the application, the Commonwealth appeals. Reversed, with directions.

Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth. Thos. W. Thomas and W. B. Gains, for appellee.

CARROLL, J. In February, 1909, the appellee applied to the county court of Warren county for license to sell liquor under section 4205 of the Kentucky Statutes (Russell's St. § 6147), reading in part: "License to merchants, druggists or distillers shall be granted only upon satisfactory evidence that the applicant is in good faith a merchant, druggist or a distiller, and that the applicant has not assumed the name or the business for the purpose of retailing liquors." The county court rejected his application upon the ground that he was not a merchant in good faith. At the May term, 1909, he again made application, and the court, being of the opinion that its judgment entered in February, 1909, was a bar to a renewal of the application at any time within a year from that day, dismissed the application, and the appellee prosecuted an appeal to the circuit court. That court held that the February judgment was not a bar, and ordered that the case be remanded to the judge of the Warren county court to dispose of. From the judgment of the circuit court holding that the February judgment of the county court was not a bar, this appeal is prosecuted.

The precise question here involved was before us in *Hensley v. Metcalfe* County Court, 115 Ky. 810, 74 S. W. 1054, 25 Ky. Law Rep. 204. In that case it was held that the judgment of the county court refusing license was conclusive determination against the granting of license for the year covered by the first application, and that it was not error for the court on a second application

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Wherefore the judgment of the lower court is reversed, with directions to proceed in conformity with this opinion.

NUNN, C. J., dissenting.

McHENRY COAL CO. v. PHELPS.

(Court of Appeals of Kentucky. Dec. 3, 1909.)

1. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

Whether one had the right to rely on assurances of his boss as to the safety of the roof of a mine, rather than on the warnings of his associates, is a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.*]

2. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

Where the gist of the case was defendant's failure to use ordinary care to ascertain if the roof of its mine was safe, and no precautions had been taken to make it safe, a charge permitting a recovery for injuries by the fall of overhanging slate if defendant by ordinary care might have known of the unsafe condition, and failed to use ordinary care "to brace or prop the roof," was not erroneous for its omission to predicate liability on failure to scale the roof.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

3. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

Where there was no evidence of negligence on the part of one injured by the fall of the roof of a mine except his continuing to work after his associates warned him of danger, a charge that he could not recover if he knew of the danger, or could have discovered it by using ordinary care, was sufficient.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 296.*]

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by Orville Phelps against the McHenry Coal Company. From a judgment for plaintiff, defendant appeals. Affirmed.

H. P. Taylor, for appellant. Heavrin & Woodward and Otto C. Martin, for appellee.

HOBSON, J. Orville Phelps was a laborer in the service of the McHenry Coal Company. A portion of the mine of the McHenry Coal Company was abandoned some 12 or 15 years ago, and during this time dirt and slate fell from the roof above to the floor, making a heap of debris some four or five feet high. The company undertook to clean this away for the purpose of using the space again in operating another part of the mine. On the afternoon of August 16, 1907, while hands were at work removing the debris and taking down the overhanging slate, Orville Phelps, who was driving the mule car and hauling the debris off, called the

be ten years. You go back to your own entry." This Phelps did, but later he was put to work with another shift of hands cleaning out this debris; and while he was at work this slate in the roof fell, catching him and inflicting painful injuries. He brought this suit to recover for them; and a judgment having been rendered in his favor for \$800, the coal company appeals.

There was evidence on behalf of the plaintiff tending to show that the roof was, in fact, in a dangerous condition, and that ordinary care had not been used by the master to furnish the servant a reasonably safe place to work. There was also evidence on behalf of the defendant to the effect that the plaintiff was warned of the danger by his fellow associates, and that with full knowledge he put himself in the way of it. There was sufficient evidence to take the case to the jury; for, if the plaintiff had been assured by the boss that the roof was safe, he was not required to make an examination of it himself, and whether he had the right to rely on what the boss said as to the safety of the roof rather than on what his associates said would be a question depending upon all the facts and circumstances, and properly to be determined by the jury.

The court among other things gave the jury this instruction: "The court instructs the jury that if they believe from the evidence that while plaintiff was an employé for the defendant and engaged at work for it at a point in its mines at McHenry, Ky., called No. 6 South, and while acting in the scope of his employment in obedience to the commands of Tom Gaddis or Marion Maddox, the defendant's agents and boss in the mine, and while in the exercise of ordinary care for his own safety was injured by the fall of the roof of the mine at that point, and if the jury further believe from the evidence that the roof at that point was dangerous and unsafe, and the defendant or its agents, Tom Gaddis or Marion Maddox, knew, or by the exercise of ordinary care might have known, of such dangerous and unsafe condition, and that the defendant failed to exercise ordinary care to brace or prop the roof overhead at the place where plaintiff was working, and by reason of such failure the place where he worked was not reasonably safe, and the plaintiff did not know of such danger, and could not discover same by the exercise of ordinary care in performing the duties of his employment, and that the plaintiff was injured as set out in the petition, the jury should find for him the damages he sustained thereby as a direct and proximate result thereof, not exceeding the amount sued for, \$9,800." It is earnestly in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the roof before the men were sent underneath to shovel out the débris. But if the instruction, instead of using the words "the defendant failed to exercise ordinary care to brace or prop the roof overhead," had added thereto "or to scale the roof," the result of the trial would have been precisely the same; for there was no evidence at all that it had scaled the roof, or attempted in any way to make it safe. The gist of the case was that the master had failed to exercise ordinary care for the safety of the servant, and, under the evidence, this depended solely on the question whether ordinary care had been used to ascertain if the roof was reasonably safe; for no precautions had been taken to make it safe, and when the jury concluded that the place was not reasonably safe, and that ordinary care had not been used to ascertain the danger, they would have found for the plaintiff as readily under the instruction indicated as under that given by the court. The jury were in effect told by the instruction quoted that the plaintiff could not recover if he knew of the danger or could have discovered it by the exercise of ordinary care in performing the duties of his employment.

In view of the instruction quoted, the jury could not have been misled by instruction 3. By that instruction also, among other things, they were told: "If they believe from the evidence the plaintiff knew of the danger, or could have discovered it by the exercise of ordinary care in the duties of his employment, then the jury should find for the defendant." There was no effort to show negligence on the part of the plaintiff except his continuing to work after his associates warned him of danger; and we do not well see how this question could have been more clearly submitted to the jury than by the instructions quoted. On the whole record, the defendant had a fair trial on the merits of its case. It at least has no ground to complain of the instructions.

Judgment affirmed.

LEXINGTON RY. CO. v. JOHNSON.

(Court of Appeals of Kentucky. Dec. 2, 1909.)

1. CARRIERS (§ 319*)—NEGLIGENCE—GROSS NEGLIGENCE—PUNITIVE DAMAGES.

The act of street car men in knowingly operating on a steep incline a car with a useless brake, and relying entirely on the reverse electric current to control the car, is gross negligence, authorizing punitive damages for injuries to a passenger in a runaway because the electric current was cut off while the car was descending the incline.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1341; Dec. Dig. § 319.*]

gence" is the absence of slight care.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

For other definitions, see Words and Phrases, vol. 4, pp. 3168-3173; vol. 8, p. 7675.]

3. CARRIERS (§ 319*)—PERSONAL INJURIES—PUNITIVE DAMAGES—EXCESSIVE DAMAGES.

Where street car men knowingly operated on a steep incline a car with a useless brake, and relied entirely on reverse electric current, and a collision occurred because the current was cut off while the car was descending the incline, a verdict awarding \$1,000 as punitive damages was not excessive.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1341, 1344; Dec. Dig. § 319.*]

4. TRIAL (§ 25*)—RIGHT TO OPEN AND CLOSE.

Where, in an action for injuries to a street car passenger, plaintiff sought to recover punitive damages because of gross negligence, and the street railroad offered to confess judgment for a sum less than was claimed in the petition without confessing its guilt of gross negligence, the burden of proof was on plaintiff, and he was entitled to open and close.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.*]

5. DAMAGES (§ 143*)—PERSONAL INJURY—SPECIAL DAMAGES.

In an action for personal injuries, special damages, to be recoverable, must be specifically alleged.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 410, 433; Dec. Dig. § 143.*]

6. DAMAGES (§ 153*)—SPECIAL DAMAGES—PLEADING.

An allegation of special damages in a blank sum amounts to no allegation of special damages and affords no basis for a judgment therefor.

[Ed. Note.—For other cases, see Damages, Dec. Dig. § 153.*]

7. JUDGMENT (§ 251*)—ERRONEOUS JUDGMENT—CORRECTION.

Where, in an action for personal injuries, the jury awarded a specified sum for compensation and another for punitive damages and another for medical attention, the error in awarding the latter sum, arising from the insufficiency of the petition, would be cured by disregarding that portion of the verdict, and judgment should be rendered for the other two sums, as directed by Civ. Code Prac. § 386, providing that judgment shall be given for the party whom the pleadings entitle thereto.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 251.*]

Appeal from Circuit Court, Fayette County. "To be officially reported."

Action by Samuel N. Johnson against the Lexington Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, with instructions.

Stoll & Bush and Morton, Webb & Wilson, for appellant. Allen & Duncan, for appellee.

BARKER, J. The appellee, Samuel N. Johnson, while a passenger upon one of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on Broadway street in Lexington, Ky. To recover damages for his injuries he instituted this action against the Lexington Railway Company, alleging that the collision in which he was hurt was the result of the gross negligence of the employes of appellant in charge of the car upon which he was riding. The railway company filed an answer admitting the negligence of its employes, and offering to confess judgment for \$500, to be in full of the damages sustained by the plaintiff. It denied, however, gross negligence, and that plaintiff was entitled to recover damages for his injuries for a greater sum than \$500. The trial of the case resulted in a verdict for the plaintiff in the sum of \$1,600, which the jury divided as follows: \$100 for medical attention; \$500 for compensation; and \$1,000 for punitive damages. Upon the return of this verdict, the trial judge entered judgment for \$1,600, and the defendant (appellant) is here on appeal.

The salient facts of the injury complained of are as follows: The car upon which appellee was riding is known as the "train car," because it meets the trains coming in on the Cincinnati, New Orleans & Texas Pacific Railway at its station near the southern limits of the city of Lexington. On the day of the accident, the employes knew that the brake by which the speed of the car was regulated was entirely useless because of some defect which is not explained in the record, and, as a result of this defect, it was necessary, in order to stop the car, to reverse the current of electricity which constituted the motor power. Between the railroad depot and the main part of the city of Lexington there is a steep incline on Broadway street, at the foot of which the trains of the Louisville & Nashville and the Chesapeake & Ohio Railroads cross the street. Appellee had come in on the Cincinnati, New Orleans & Texas Pacific Railway, and boarded the street car with several other passengers, for the purpose of riding into town. The car started, and it was at once apparent that the brake was entirely useless, and that, in order to control the speed of the car while going down the steep incline on Broadway, it was necessary to rely entirely upon the reverse current of the electricity. This, as said before, was well known to those in charge of the car, and they also knew that at the bottom of the hill they were liable to encounter the crossing trains of the Louisville & Nashville and Chesapeake & Ohio Railroads. They further knew that, if anything occurred by which the current was cut off while the car was descending the hill, they had no means by which to stop its headlong passage, or by which they could protect the

passengers. It seems not even to have occurred to them to notify those in charge of the power house of their precarious condition, so that extra precaution might be taken to keep the current strong and regular. As soon as the car started down the hill on Broadway street, for some reason not explained the current was cut off, and the car at once started, under the influence of the law of gravitation, to run swiftly down the incline; those in charge having no power to control its rapid descent. At this time the passenger train of the Chesapeake & Ohio Railroad was crossing Broadway street at the foot of the incline, and appellant's flying car crashed into it, overturning the baggage car of the crossing train, and more or less injuring all of the passengers on board appellant's car. It seems to us that this conduct on the part of the employes of appellant was not only grossly negligent, but criminally negligent. To conceal from the passengers the defect in the brake, and then run the car down a steep incline, depending upon the uncertain current of electricity as the only protection against danger to life or limb, cannot be correctly characterized by any term less than "gross negligence." This being true, the appellee was entitled to an instruction that the jury might award punitive damages.

The court, on the subject of punitive damages, instructed the jury as follows: "Gross negligence is that kind of negligence which evinces a reckless disregard of, or a reckless indifference to, the safety of another or others." Of this instruction appellant complains. "Gross negligence" has often been defined as the absence of slight care, and, if there be any substantial difference between this definition and the instruction given by the court, it is a difference of which the plaintiff might complain, but not the defendant. It seems to us that the instruction of the court accurately defines the degree of negligence of which the appellant's employes were guilty. Appellant insists that the court should have defined "gross negligence" in this case as in *L. & N. R. R. Co. v. McCoy*, 81 Ky. 413, which is as follows: "In the management of a railroad, or any department thereof, 'gross negligence' is the failure to take such care as a person of common sense and reasonable skill in like business, but of careless habits, would observe in avoiding injury to his own person or life under circumstances of equal or similar danger to those which may be under investigation." A comparison of the instruction complained of with that which appellant insists should have been given will show that the difference was in favor of appellee, and not against it, and, while appellee might have complained of the instruction given, appellant cannot.

tive damages.

The appellant did not have the burden of proof upon the trial, and was not entitled to open and close the case. It is true, it offered to confess judgment for \$500; but this was not as great a sum as that claimed in the petition, nor did the petition confess to the guilt of gross negligence, and therefore the burden of proof was upon plaintiff to prove the disputed part of the claim in the petition. *Louisville & Eastern Ry. Co. v. Mann*, 104 S. W. 362, 31 Ky. Law Rep. 986; *Southern Ry. in Kentucky v. Steele*, 123 Ky. 262, 90 S. W. 548, 28 Ky. Law Rep. 764; *Id.*, 123 Ky. 262, 94 S. W. 653, 29 Ky. Law Rep. 690.

The appellant also insists that the court erred in giving judgment for the sum of \$100 awarded in the verdict for medical services. This objection is based upon the fact that the petition alleges, in regard to his outlay for medical services, as follows: "That plaintiff has been compelled to pay for medical services on account of said injuries the sum of \$—— and the further sum of \$—— for medicine." We have uniformly held that, in order to recover special damage, it must be specifically alleged;

114 S. W. 295; *Central Ky. Traction Co. v. Chapman*, 113 S. W. 438; *C. & O. R. R. Co. v. Crank*, 128 Ky. 329, 108 S. W. 276, 32 Ky. Law Rep. 1202, 16 L. R. A. (N. S.) 197; *L. & N. R. R. Co. v. Dickey*, 104 S. W. 329, 31 Ky. Law Rep. 894; *Macon v. Paducah Street Ry. Co.*, 62 S. W. 496, 110 Ky. 687; *Jesse v. Shuck*, 12 S. W. 304, 11 Ky. Law Rep. 463. As the jury in its verdict specifically set forth the amount alleged for medical services, the plaintiff was not entitled to a judgment for that amount on the verdict. The court should have disregarded that portion of the verdict and entered judgment only for \$1,500. Section 386 of the Civil Code of Practice is as follows: "Judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him." See, also, *Chaney v. Bevins*, 96 S. W. 1129, 29 Ky. Law Rep. 1219.

Inasmuch as the court entered a judgment for \$1,600, when it should have entered one for only \$1,500, the judgment must be reversed, with instructions to the court below, when the case returns, to enter a judgment in favor of the plaintiff for \$1,500; and it is so ordered.

LOUISVILLE & N. R. CO. v. ENGLEMAN'S ADM'R.

(Court of Appeals of Kentucky. Dec. 3, 1909.)

1. RAILROADS (§§ 312, 316, 350*)—SPEED OF TRAIN PAST PRIVATE CROSSINGS—SIGNAL—QUESTION FOR JURY.

A railroad company may run its trains at any speed it pleases over private crossings, and it is not required to give notice of their approach to such crossings, unless it has been customary for signals to be given which are relied on by persons using the crossing, and whether, in a given case, the custom of giving signals for a crossing prevailed to an extent that persons using the crossing could rely on the signals being given, is for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 992, 994, 1006, 1007; Dec. Dig. §§ 312, 316, 350.*]

2. RAILROADS (§ 350*)—DEATH AT CROSSING—CONTRIBUTORY NEGLIGENCE — PRESUMPTIONS.

There is no presumption that a person killed at a private railroad crossing is guilty of contributory negligence; that question being for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1167-1192; Dec. Dig. § 350.*]

3. RAILROADS (§ 350*)—DEATH AT CROSSING—SIGNALS — RELIANCE UPON—QUESTION FOR JURY.

In an action for death of a person killed at a private railroad crossing, whether the custom of giving signals for a crossing prevailed to an extent that persons using the crossing could rely on the signals being given *held*, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 350.*]

4. RAILROADS (§ 351*)—DEATH AT CROSSING—INSTRUCTIONS.

In an action for death of a person killed at a private railroad crossing, an instruction that it was the duty of defendant's employes in charge of the train, when approaching the crossing, to keep a lookout for persons traveling over the crossing, and to give reasonable signals of the movement of the train, and if defendant's employes negligently failed to perform these duties, and by reason thereof plaintiff's intestate was killed, etc., was erroneous; a proper instruction being that if it was customary for trains to give signals of their approach to the crossing, and this custom prevailed to an extent that persons using the crossing had reason to rely on such signals being given, and the train in question failed to give such signals, and by reason of such failure decedent was struck, the jury should find for plaintiff.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 351.*]

5. TRIAL (§ 252*)—INSTRUCTIONS — CONFORMITY TO EVIDENCE.

In an action for death of a person killed at a private railroad crossing, it was error to charge that, although the jury believed that the employes on the train gave reasonable signals of the approach of the train, yet, if the employes discovered deceased's peril in time to have avoided the collision by the use of the available means and appliances at hand, to find for plaintiff; there being no evidence to support it.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 252.*]

6. RAILROADS (§ 312*)—CROSSING ACCIDENT—DUTY OF ENGINEER IN APPROACHING CROSSING.

The engineer of a train approaching a private road crossing in the country is not bound

to look away from the track to see if he can discover the top of any vehicle above the sides of the cut through which the road runs, but, on the contrary, is bound to watch the track before him.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 312.*]

Nunn, C. J., dissenting in part.

Appeal from Circuit Court, Lincoln County.
"To be officially reported."

Action by Bessie Kay Engleman's administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Benjamin D. Warfield and J. W. Alcorn, for appellant. Robert Harding, E. V. Puryear, M. C. Saufley, and Greene, Van Winkle & Schofield, for appellee.

HOBSON, J. Bessie Kay Engleman, while driving a phaeton across the Louisville & Nashville railroad track at a private crossing known as "Woods' crossing," about 2½ miles north of Stanford, Ky., was struck by the north-bound passenger train and killed. This action was brought by her administrator to recover for her death, and, a recovery having been had in the sum of \$10,000, the railroad company appeals.

The pike ran on the opposite side of the railroad from the home of the decedent. To get out to the pike from her home, she used a private road, and was struck where this road crossed the railroad. The road was used as an outlet by persons living on the farms of Samuel Harris and Eph Woods, including their tenants and persons going to or from their places on business or pleasure. There was a gate at the edge of the railroad right of way, 62 feet from the track. The private road passed through a cut just before it reached the railroad, so that a person driving a vehicle could not see an approaching train until he was within a few feet of the track, and those in charge of the train would be equally unable to see him until about the same time, unless the top of the vehicle was high enough to be visible above the cut as it approached the track. The evidence for the plaintiff tended to show that the crossing was especially dangerous, that the railroad trains were accustomed to give signals of their approach to the crossing, and that no warning of the approach of this train was given. There was also much evidence tending to show that the trains sometimes gave signals of their approach, and sometimes did not, although the engineer of this train testified that he regarded it a dangerous crossing, and always gave the usual crossing signals as he approached it. The evidence for the defendant tended to show that the decedent drove on the crossing without looking or listening when the train was very close to it, and when it was too late for those in

charge of the train to avert the injury to her. It also showed that the train gave the usual crossing signals as it approached.

On this evidence, the court, refusing to instruct the jury peremptorily to find for the defendant, gave the jury the following instructions:

"No. 1. If you believe from the evidence that the railroad crossing over the private passway, known and spoken of in the testimony as the 'Woods crossing,' is a dangerous crossing for persons traveling thereover in buggies in an ordinarily prudent manner, then it was the duty of the employes of defendant in control of the train that struck the deceased, when moving the train on that part of the track approaching said crossing, to keep a lookout for persons traveling over same in a vehicle or vehicles, and to give reasonable signals and warnings of the movement of its train when approaching said crossing, and if you believe from the evidence that the defendant's employes in charge of said train negligently failed to perform any of these duties in the movement of said train, and that by reason thereof the plaintiff's intestate while crossing, or attempting to cross, said crossing, was run against and killed by said train, and that the deceased was at the time using ordinary care for her own safety, then you will find for the plaintiff in damages such a sum as you believe from the evidence will reasonably compensate the estate of the deceased for the destruction of her power to earn money, not exceeding the sum of \$30,000.

"No. 2. Although you may believe from the evidence that the employes on the train gave reasonable signals of the approach of the train to the Woods crossing, yet if you further believe from the evidence that the employes in charge of the movements of the train discovered the peril of the deceased in time to have avoided the collision by the use of the available means and appliances at hand, then you should find for the plaintiff."

"No. 5. Unless the defendant's employes in charge of the train were negligent as defined in instruction No. 1 then you will find for the defendant; and although you may believe from the evidence that there was such negligence on the part of said employes, yet, if, in going on the track as she did, the deceased failed to use ordinary care for her own safety, and but for this would not have been injured, then you will find for the defendant, notwithstanding such negligence on its part."

It has been held by this court in a number of cases that the railroad company may run its trains at such speed as it pleases over private crossings, and that it is not required to give notice of the approach of the trains to such crossings, unless it has been customary for these signals to be given, and they were relied on by persons using the crossing. *Johnson v. L. & N. R. R. Co.*, 91 Ky. 651, 25 S. W. 754; *Louisville, etc., R. R. Co. v. Surv-*

ant, 96 Ky. 197, 27 S. W. 999, 16 Ky. Law Rep. 545; *Davis v. C. & O. Ry. Co.*, 116 Ky. 144, 75 S. W. 275; *Hoback v. Louisville, etc., R. R. Co.*, 99 S. W. 241. On the other hand, it has been held that where it has been customary for signals to be given of the approach of trains to a private crossing, and these were relied on by persons using the crossing, and a traveler on the crossing was struck by reason of a failure to give the customary signals, a recovery may be had. *L. & N. R. R. Co. v. Bodine*, 109 Ky. 509, 59 S. W. 740, 23 Ky. Law Rep. 147, 56 L. R. A. 506; *Early's Adm'r v. Louisville, etc., R. R. Co.*, 115 Ky. 13, 72 S. W. 348, 24 Ky. Law Rep. 1807. There was some evidence here that the trains were accustomed to give the usual signals of their approach to this crossing, and that persons using the crossing relied thereon. This evidence was sufficient to submit the case to the jury under the rule referred to. No one saw the decedent as she approached the crossing. No one knows whether she stopped, looked, or listened, or what precautions she took. This being true, under a long line of decisions of this court, it is not presumed that she was guilty of contributory negligence, and the question is for the jury. The court therefore did not err in refusing to instruct the jury peremptorily to find for the defendant.

The rule that where it has been customary to give signals at a private crossing, and persons using the crossing have come to rely upon them, the signals may not be omitted without notice, obtains in other jurisdictions. *Westaway v. Chicago, etc., R. R. Co.*, 56 Minn. 28, 57 N. W. 222; *Nash v. N. Y. Cent. R. R. Co.*, 117 N. Y. 628, 22 N. E. 1128; 33 Cyc. 946, and cases cited. But there was in this case evidence that the train failed to whistle or give any signals for the crossing as often as they gave such signals. In view of this evidence, it was a question for the jury whether the custom of giving signals for this crossing prevailed to such an extent that persons using the crossing had a right to rely on the signals being given. It is not material that some trains passed this crossing without giving the usual signals, for some trains fail to give signals at public crossings. The case turns on whether there was such a custom to give the signals that persons using the crossing had the right to rely on it. In lieu of instruction No. 1, the court should have told the jury, in substance, that if it had been customary for trains to give signals of their approach to the Woods crossing, and this custom had prevailed to such an extent that persons using the crossing had reason to rely on such signals being given, and the train in question failed to give reasonable signals of its approach to the crossing, and by reason of such failure the decedent was struck and hurt, they should find for the plaintiff as set out in the instruction; otherwise for the defendant.

There was no evidence in the case to war-

K. R. Co. v. Onan, 110 S. W. 381, 33 Ky. Law Rep. 462. An instruction of this sort should never be given, unless there is evidence to warrant it. L. & N. R. R. Co. v. Joshlin, 110 S. W. 383, 33 Ky. Law Rep. 513.

In Southern R. R. Co. v. Winchester, 127 Ky. 154, 105 S. W. 167, where we had before us an instruction similar to No. 5, we said: "In lieu of the third instruction on another trial, the court will tell the jury that it was the duty of the intestate, on approaching the crossing, to use such care as may be usually expected of an ordinarily prudent person to learn of the approach of the train and keep out of its way; that, if the crossing was especially dangerous, it was incumbent on him to exercise increased care commensurate with the danger; and that if he failed to exercise such care, and but for this would not have been injured, then the law is for the defendant, and the jury should so find, even though they may believe from the evidence that the defendant or its employes were negligent as set out in No. 1 and No. 2." Instruction No. 6 given by the court, practically conformed to the rule thus laid down, but, for brevity, on another trial the court will give the one instruction indicated.

The two instructions we have outlined, with instruction Nos. 4 and 8, given by the court, defining "reasonable signals" and "ordinary care," cover the whole law of the case. The other matters complained of will not, perhaps, occur on another trial.

Judgment reversed, and cause remanded for a new trial.

NUNN, C. J. I agree to the reversal, but do not assent to the opinion wherein it relieves the appellant from giving warning of the approach of the train to a known unusually dangerous private crossing. As decided by this court in the case of L. & N. R. R. Co. v. Bodine, 109 Ky. 509, 59 S. W. 740, 23 Ky. Law Rep. 147, 56 L. R. A. 506, the effect of the opinion is to give notice to railroad companies to cease to give warnings of the approach of their trains in such cases.

CITY OF COLUMBUS v. BANK OF COLUMBUS.

(Court of Appeals of Kentucky. Dec. 1, 1909.)

1. TAXATION (§ 840*)—PENALTIES FOR NON-PAYMENT.

Where a bank paid a personal property tax unlawfully assessed, instead of a franchise tax assessed, but of which it had no notice, it is not liable for a penalty for nonpayment of the franchise tax.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1656; Dec. Dig. § 840.*]

it had no notice, it is only liable for the difference between such taxes, as it is entitled to credit for the amount paid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 972; Dec. Dig. § 527.*]

3. TAXATION (§ 528*)—INTEREST ON TAXES UNPAID.

Where a city could not legally demand a franchise tax until after the commencement of the action therefor by the passage of an ordinance authorizing it, interest on the tax before judgment is not recoverable.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 981; Dec. Dig. § 528.*]

4. COSTS (§ 51*)—PREMATURE ACTION—EFFECT OF AMENDMENT.

Plaintiff, who was not entitled to maintain an action at the commencement thereof, and before filing an amended petition, is liable for costs accruing before such amendment.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 218-220; Dec. Dig. § 51.*]

5. APPEAL AND ERROR (§ 1171*)—DETERMINATION OF CAUSE—REVERSAL—TRIVIAL MATTERS.

A judgment will not be reversed where the only error was the award of a trivial amount of costs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4549; Dec. Dig. § 1171.*]

6. PLEADING (§ 252*)—AMENDMENT—EFFECT—NEW DEMAND.

A new demand, after filing an amended petition, is not necessary, where demand was made before action, and the allegations in the amended petition do not create a new cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 736, 739; Dec. Dig. § 252.*]

7. TAXATION (§ 593*)—VALIDITY OF TAX—PRE-SUMPTION.

The levy of a tax by the proper authorities is presumed to be legal and correct, and the burden of proving its illegality is on a person resisting collection thereof.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1215; Dec. Dig. § 593.*]

Appeal from Circuit Court, Hickman County.

"Not to be officially reported."

Action by the City of Columbus against the Bank of Columbus. From a judgment for plaintiff granting partial relief, it appeals, and defendant prosecutes a cross-appeal. Affirmed.

Shelbourne & Smith, for appellant. J. M. Brumel, for appellee.

SETTLE, J. The appellant by suit in the court below sought to recover of appellee a franchise tax and penalty for each of the years 1902, 1903, 1904, 1905, and 1906, aggregating \$475.77. Appellee filed a demurrer to the petition, which the court sustained upon the ground that the ordinances, under which appellant was attempting to collect the tax for each of the years named, were violative of the state Constitution, and therefore void, because they failed to specify the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

forming to the provisions of the Constitution, and therefore valid, by which another and legal levy of the franchise tax, for each of the years mentioned sought to be recovered of appellee, was made. To the petition as thus amended, appellee filed an answer traversing all the averments of the petition and amendment, and attacking affirmatively the validity of the tax ordinances in question, also the validity of all steps taken by appellant looking to the collection of the taxes claimed. It appears from the agreed facts found in the record that, though not called on during any of the years indicated to pay a franchise tax, appellee had paid each year a tax to appellant upon its tangible and intangible property, capital stock, etc., amounting in the aggregate to \$300. The assessment of the tax paid by appellee for each of the years mentioned was made by the local assessor. Appellee owned no real estate during these years. During the same years, and for each of them, the state board assessed all of appellee's property in arriving at the value of its franchise tax; the aggregate of the franchise taxes covering the series of years being \$371.18. The assessments made each year were duly certified by the state board to the clerk of the Hickman county court, but were never applied for nor used by appellant. On the hearing the circuit court gave appellant judgment against appellee for the difference between the total amount of the taxes paid by appellee during the years in controversy, and the total of franchise taxes assessed against it by the state board for the same years; such difference being \$71.18. The judgment allowed appellant no penalties and only allowed interest on the amount recovered from the date of the judgment. From that judgment appellant has prosecuted an appeal, and appellee a cross-appeal.

Appellant complains that the circuit court erred in refusing to allow it judgment for the entire amount of taxes sued for, and penalties. There is no just ground for this complaint. Appellee paid in each of the several years for which taxes were claimed all the tax demanded of it, and what it thus paid each year was but a little less than the franchise tax assessed against it by the state board. It does not even appear that appellee did not know it was paying each year the amount assessed against it by the state board. During the whole of that time it made its regular reports as provided by law, and from these reports the state board assessed it for a franchise tax from year to year. These assessments were in every instance certified by the board to the clerk of the Hickman county court, and from them appellant could have gotten, but by its own fault failed to obtain, the tax for each

appellee the penalties which, under other circumstances, it might properly have been required to pay. It was also right that appellee should have had credit for the tax it paid from year to year. Indeed, it was only justly liable for the difference between what it paid in taxes for the years in question and what it should have paid under the assessment of the state board for the same time; that difference being \$71.18.

Appellant has no right to complain that the circuit court refused to allow it interest upon the tax for each year from the time it claims it should have been paid, as it had the use of what was paid each year by appellee and did not put itself in position to collect of appellee what it should have received until about 30 days before the institution of this action, and even then it could not legally demand or collect the additional tax until the enactment of valid ordinances authorizing it, which ordinances were not passed until after suit was brought and just before the amended petition was filed. The court therefore did right in only allowing interest on the amount of tax recovered from the date of the judgment. As a matter of law appellant should have been made to pay the costs of the action accruing down to the time of the filing of the amended petition. This is the only error in the judgment; but, as the amount of such cost is so small, we will not disturb the judgment on that account.

Appellee complains that no demand was made of it for the taxes after the filing of the amended petition. We have concluded that this complaint is not well founded. Appellee knew, from the demand made of it before the institution of the action, that it was owing the taxes claimed, or a part thereof, and the subsequent steps taken by appellant to authorize its collection did not create a new demand, as after the filing of the amended petition appellee owed the same amount of tax that it did when the demand therefor was made, for the assessment for each year made by the state board remained all the while unsatisfied.

Appellee's further contention, that the ordinances last enacted by the city authorities were never published as required by law, would have constituted just ground for attacking their validity, if it had made proof of such failure; but such proof was not made by appellee, nor does it appear in the agreed statement of facts, although its answer alleged that the ordinances were not published. In other words, the burden of showing that fact rested upon appellee, for this court has repeatedly declared that the creation or assessment and levy of a tax by the proper authorities must be presumed to be legal and correct, and that the burden of

proving its illegality, if any, is upon the party resisting its payment. *Morgan v. Board of Councilmen*, 121 S. W. 1033.

Finding no legal ground for disturbing the judgment the same is affirmed on the original appeal and cross-appeal.

KEENEY et al. v. WATERS et al.

(Court of Appeals of Kentucky. Dec. 2, 1909.)

1. APPEAL AND ERROR (§ 1039*)—HARMLESS ERROR—AMENDMENT OF PLEADING.

Where a party gets the full benefit of a defense attempted to be pleaded by him, he cannot complain, on appeal, that the answer pleading the defense was not permitted to be filed.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 1039.*]

2. FRAUDS. STATUTE OF (§ 140*)—PAROL RESCISSION—CONTRACTS REQUIRED TO BE IN WRITING.

Though a contract is required by statute to be in writing, it may be rescinded by parol.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 342; Dec. Dig. § 140.*]

3. CONTRACTS (§ 350*)—PAROL RESCISSION—CLEARNESS OF EVIDENCE.

Where two witnesses testified to the parol rescission of a contract, neither of them being impeached, and where it was shown that a suit between the parties on the contract had been permitted to remain upon the docket without action ever being taken thereon by either party, the evidence of the oral rescission was sufficiently clear to authorize its admission in evidence by the trial court, and to warrant an instruction as to its effect if found to have been agreed on.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 350.*]

4. CHAMPERTY AND MAINTENANCE (§ 4*)—CHAMPERTOUS AGREEMENTS.

Though a champertous agreement to sell land is void under the statutes, the cause of action which is the subject of the champertous agreement is not destroyed thereby.

[Ed. Note.—For other cases, see *Champerty and Maintenance*, Dec. Dig. § 4.*]

Appeal from Circuit Court, Wayne County. "To be officially reported."

Action by Frank Waters and others against J. H. Keeney and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

T. J. Morrow, Cook & Jones, and Harrison & Harrison, for appellants. O. H. Waddle & Son, Jos. Bertram, and J. N. Sharp, for appellees.

CLAY, C. The appellees, Frank Waters and others, instituted this action against J. H. Keeney and others to recover a tract of land in Wayne county, Ky., consisting of 50 acres. J. H. Keeney and others denied the title of appellees and pleaded title in themselves by adverse possession. The jury returned a verdict in favor of appellees. From the judgment based thereon, this appeal is prosecuted.

The 50-acre tract of land was patented by James Coffey on the 27th day of June, 1841. Coffey, in his lifetime, sold this land

to G. W. Troxell, but did not convey the same by deed or other writing. On January 27, 1881, four out of the five heirs of James Coffey, who was then dead, together with his widow, made a deed to G. W. Troxell conveying the land in question. The deed recited that it was made in consideration of \$200 paid to James Coffey in his lifetime. Before procuring this deed, G. W. Troxell, on October 3, 1880, sold by title bond to James H. Davis 300 acres of land in Wayne county, including the land in controversy. On April 26, 1888, G. W. Troxell instituted an action against James H. Davis, wherein he sought to recover a balance of \$50 due as part of the purchase money for the land sold to Davis. To this action Davis filed an answer, in which he pleaded inability of Troxell to make title to a large part of the 300 acres mentioned in the bond. This action was never tried. The last order was made at the May term, 1889, of the Wayne circuit court. In the year 1881 James H. Davis, who then held the title bond referred to, requested one John M. Foster, whom he had employed in removing the timber, to move upon the land and remain there until Davis told him to get off. Foster first moved upon the 50-acre tract in controversy. He remained there for about two years. He then built a house on an adjoining tract. A small portion of his garden extended into the 50-acre tract. At the time Foster moved upon the land, Davis was indebted to him in the sum of \$70. Foster claims that, as Davis failed to pay this amount, he then began to claim the lands as his own. In the year 1905 appellants purchased the land in controversy from Foster. On July 31, 1906, Sallie Smith, the only remaining heir of James Coffey, deceased, together with her husband, conveyed her one-fifth interest in the land in question to appellees, Frank and Lille Waters. After the issues were made up, appellants became aware of the institution and pendency of the action of G. W. Troxell against James H. Davis. On January 28, 1909, they tendered an amended answer, in which they pleaded the outstanding title bond from G. W. Troxell to James H. Davis as a bar to a recovery by appellees. The court did not permit the amended answer to be filed. After the discovery of the record in the case of G. W. Troxell against James H. Davis, appellants went to the heirs of James H. Davis and purchased from them all their right, title, and interest in the 300 acres of land, including the land in controversy. Appellees are the only heirs of G. W. Troxell, deceased. They introduced evidence to the effect that the written contract of sale between G. W. Troxell and James H. Davis was rescinded.

Upon the trial of the case, the court instructed the jury to find for appellees the undivided one-fifth of the 50-acre tract of

land in controversy under the title conveyed to them by the deed of Sallie and J. M. Smith. As to the remaining four-fifths of said tract of land, the court directed the jury to find for appellants, unless they believed from the evidence that an agreement was entered into between G. W. Troxell and James H. Davis, whereby the title bond from Troxell to Davis, introduced in evidence, should be canceled and said tract of land remain the property of Troxell, in consideration of Troxell releasing Davis from the payment of the balance of the purchase money due him from Davis for the land and in settlement of the controversy between them as to the payment of said purchase money and of the title to the lands referred to in the title bond. If they so believed, they were told to find for appellees.

It is first insisted by appellants that the court erred in refusing to permit the amended answer to be filed. It is perfectly manifest, however, that appellants were not prejudiced by this action of the court. They were permitted to offer in evidence the title bond from Troxell to Davis and all the record of the action instituted by Troxell against Davis. Appellants not only received the benefit of this evidence, but the court told the jury, in effect, to find for the appellants unless they believed the contract of sale was rescinded. No instruction more favorable to appellants could have been asked by them. Where a party gets the benefit of a defense pleaded by him, he cannot complain that the answer pleading the defense was not permitted to be filed.

But it is insisted that the court erred in admitting evidence of the parol rescission of the written contract of sale between Troxell and Davis. While there is some conflict of authority upon the question whether or not a contract in writing, and which is required by the statute to be in writing, can be rescinded by parol agreement, this question has been decided in the affirmative by this court and by many other courts of this country. *Davis v. Benedict*, 4 S. W. 339, 9 Ky. Law Rep. 200; *Hall v. Wright*, 124 S. W. —; *Stearns v. Hall*, 9 Cush. (Mass.) 31; *Beach v. Covillard*, 4 Cal. 315; *Morrill v. Colehour*, 82 Ill. 618; *Howard v. Gresham*, 27 Ga. 347; *Long v. Hartwell*, 34 N. J. Law, 116; *Wulschner v. Ward*, 115 Ind. 219, 17 N. E. 273.

It is also insisted by appellants that the evidence of the parol rescission in this case does not come up to the standard set in the case of *Davis v. Benedict*, supra, where it is held that the proof must be clear and convincing. Two witnesses testified upon this point. Neither one of them is impeached. Their evidence is to the effect that, after the institution of the suit by Troxell against Davis, they agreed to leave the matter to Joe Roberts and Isaac Foster to set-

tle. They compromised the matter by permitting Troxell to take back the 50-acre tract and Davis to keep the timber which he had gotten from the land. Both Troxell and Davis agreed to this settlement. Furthermore, the very fact that the suit instituted by Troxell against Davis was permitted to remain upon the docket without action ever being taken by either party is a circumstance tending to support the testimony of the two witnesses. We therefore conclude that the evidence of the oral rescission and compromise was sufficiently clear and convincing to authorize its admission by the court and to justify the instruction complained of.

There was some evidence to the effect that W. A. Kinnie, agent of the Stearns Lumber Company, desired to purchase the Davis lands. He secured from Frank Waters and wife, two of the appellees, a contract empowering him, as their agent, to employ lawyers and institute suit for the purpose of establishing title to the land in controversy. By this contract Frank Waters and wife were to convey their interest in said lands to Kinnie in the event of a recovery. It also appears that Kinnie secured from Smith and wife a deed to their one-fifth interest in the lands in controversy. It is insisted by appellants that the above contract with Kinnie was champertous. However that may be, the law is well settled in this state that, by the terms of the statute, the champertous agreement to sell is rendered null and void—not the cause of action which is the subject of the champertous agreement. *Cumberland Telephone & Telegraph Co. v. Maxberry*, 121 S. W. 447; *Wehmhoff v. Rutherford*, 93 Ky. 91, 32 S. W. 288, 17 Ky. Law Rep. 659.

Upon the whole case, we are unable to find any error in the record prejudicial to the substantial rights of appellants, and the judgment is therefore affirmed.

CITY OF MAYFIELD v. HUGHLEY.

(Court of Appeals of Kentucky. Nov. 30, 1909.)

1. MUNICIPAL CORPORATIONS (§ 788*)—DEFECTS IN SIDEWALK—LIABILITY FOR—KNOWLEDGE OF.

The duty of a municipality to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon extends to cases where the obstruction or unsafe condition of the street is brought about by persons other than the agents of the city; but the party seeking to recover for failure to perform such duty must show that the city had knowledge of the defect, or might have had knowledge thereof by the use of reasonable care.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1641; Dec. Dig. § 788.*]

2. MUNICIPAL CORPORATIONS (§ 759*)—CHARACTER—TAXATION—LIABILITY FOR DEFECTIVE SIDEWALKS.

It is no defense to an action against a city of the fourth class for personal injuries from

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

falling on a defective sidewalk that the territory where the accident occurred had been annexed too late to be subject to taxation that year, and that the taxes for subsequent years were insufficient to improve streets or sidewalks, since the charter of such cities gives them the right to build sidewalks and assess the cost against the abutting property, so that it was unnecessary for the city to levy any general tax for such purposes.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 759.*]

3. MUNICIPAL CORPORATIONS (§ 791*)—DEFECTS IN SIDEWALKS—NOTICE.

Where it was shown that an excavation, which lowered a sidewalk and allowed an obstruction to protrude, over which plaintiff fell, was made about three months prior to the accident, the city was chargeable with notice of the obstruction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1648; Dec. Dig. § 791.*]

Appeal from Circuit Court, Graves County.
"To be officially reported."

Action by W. F. Hughley against the City of Mayfield. Judgment for plaintiff, and defendant appeals. Affirmed.

M. B. Hollifield, for appellant. Hester & Martin, for appellee.

CLAY, C. This action was instituted by appellee, W. F. Hughley, to recover damages for personal injuries occasioned by his falling over an obstruction in one of the streets of the city of Mayfield. The jury returned a verdict in favor of appellee for the sum of \$250, and the city appeals.

In the year 1907 the street on which appellee received his injuries, which is known as South First street, was annexed to the city of Mayfield. At the time appellee received his injuries, he was on his way from his home to a union labor meeting. It was a dark night, and there were no street lights in the immediate neighborhood. At the time he was engaged in conversation with a friend. The accident occurred in front of the residence of Caroline Armstrong. Having determined to build a sidewalk in front of her property, she made an excavation in order to make the grade of her walk conform to the grade of the other walks which had been built. In doing this, she lowered the ground and caused the stop box belonging to the Mayfield Water & Light Company to project above the ground to a height of about six inches. While appellee had a general knowledge of the location of the stop box, he momentarily forgot its presence and stumped his toe against it and fell to the ground. Appellant filed an answer containing four paragraphs. The first paragraph contained a general denial. The second paragraph contained a plea of contributory negligence. The third paragraph contained a plea to the effect that Caroline Armstrong, without any

notice to, or any order, permission, or authority from, the city of Mayfield, undertook to build a sidewalk in front of her premises, and made the excavation which caused the stop box to project high and thus cause the injuries complained of. The fourth paragraph contained a plea to the effect that the annexed territory where the accident occurred was taken into the city when it was too late to subject the same to taxation for the year 1907, and that in the years 1907 and 1908 all the taxes were levied upon property in the city that were permissible under the charter of the city and the laws and Constitution of the Commonwealth, and that the city could not in either of said years improve the street or walkway in question without expending more money than was levied for public improvements.

It is first insisted by appellant that the court erred in sustaining a demurrer to the third and fourth paragraphs of the answer. This contention, however, is without merit. The rule is well settled that the duty and consequent liability of a municipality to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon extends to those cases where the obstruction or unsafe condition of the street is brought about by persons other than the agents of the city; but, to impose liability upon the municipality in such cases, it devolves upon the party seeking a recovery to show that the city had knowledge of the defect, or might have had knowledge thereof by the use of reasonable care and watchfulness. 28 Cyc. 1353. Another statement of the rule is as follows: "A municipal corporation is liable for injury resulting from an excavation or obstruction in one of its public streets, made by an abutting owner for his own purposes, if the corporation had actual or constructive notice of the dangerous condition of the street for a sufficient length of time to enable it to guard the public safety." 28 Cyc. 1354.

Nor did the fourth paragraph present any defense. The charter of cities of the fourth class gives to the city the right to construct or reconstruct its sidewalks and assess the cost thereof against the property of the abutting landowners. It was unnecessary for the city to levy any general taxes for such purposes, and the fact that it did not have any funds levied for the purpose furnished no reason for not proceeding to have the sidewalk constructed or reconstructed as authorized by the charter. The evidence shows that the excavation by Caroline Armstrong was made about three months prior to the accident. Thus the city had plenty of time to order the work done.

While it is not shown that appellee's injuries were at all serious, we cannot say that the sum of \$250 is excessive.

The instructions are not complained of,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and there was sufficient evidence to justify the submission of the case to the jury.

For the reasons given, the judgment is affirmed.

**AMERICAN CREDIT-INDEMNITY CO. OF
NEW YORK v. NATIONAL
CLOTHING CO.**

(Court of Appeals of Kentucky. Nov. 30, 1909.)

**1. APPEAL AND ERROR (§ 302*)—REVIEW—
GROUNDS OF MOTION FOR NEW TRIAL.**

The ground of a motion for new trial: "Error of law occurring at the trial and excepted to at the time by this defendant"—is so general that the action of the trial court cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1744; Dec. Dig. § 302.*]

**2. APPEAL AND ERROR (§ 1003*)—REVIEW—
VERDICT AGAINST WEIGHT OF EVIDENCE.**

The only issue of fact in an action on an indemnity policy being whether plaintiff reported, in its application for the policy, that its net loss for the year and a half it had been in business prior to the application was only \$1,500, and such representation, while appearing in the application when introduced in evidence, being in the handwriting of defendant's agent, and plaintiff agent, who made the application, having testified that he made no such representation, but that he told defendant's agent that plaintiff had no way of ascertaining what its loss had been, and plaintiff having exhibited what purported to be a copy of the application, which had been left with it, and which had no representation on the subject, it cannot be said on appeal that the verdict is so flagrantly against the weight of evidence as to authorize its being set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3938-3943; Dec. Dig. § 1003.*]

Appeal from Circuit Court, Graves County.
"Not to be officially reported."

Action by the National Clothing Company against the American Credit-Indemnity Company of New York. Judgment for plaintiff. Defendant appeals. Affirmed.

Moorman & Warren, for appellant. Robbins & Thomas, for appellee.

BARKER, J. This action was instituted by the appellee to recover judgment upon a policy of indemnity issued by appellant to it. The defense was that the appellee had fraudulently misrepresented the amount of its net loss upon the business done by it prior to the time of the application for the policy in question. It was agreed upon the record that, if the plaintiff (appellee) was entitled to recover at all, it was entitled to the sum of \$2,913.00. After the issues were made up, the case was submitted to a jury, and a verdict rendered in favor of the appellee for the sum of \$2,913.09. The defendant filed a motion and grounds for a new trial, which were overruled, and it is here on appeal.

The first question presented is the scope of our power to review the rulings of the lower court under the motion and grounds for

a new trial filed by appellant. These are as follows: "The defendant, the American Credit-Indemnity Company, of New York, comes and moves the court to set aside the verdict herein, and grant it a new trial of this action, and in support of its said motion it assigns the following reasons: (1) That the verdict is not sustained by sufficient evidence, and is against the weight of the evidence, and is contrary to law. (2) Error of law occurring at the trial and excepted to at the time by this defendant." The second assignment of error is so general in its character that we cannot consider under it any of the errors of law discussed in the brief. This court has often held that, in order that we may review the errors complained of, they must be set forth specifically in the grounds for a new trial. This rule is only complied with when the errors complained of are so specifically set forth that the attention of the trial court is definitely directed to them. *Thompson v. Commonwealth*, 122 Ky. 501, 91 S. W. 701, 28 Ky. Law Rep. 1137; *McLain v. Dibble & Co.*, 76 Ky. 297; *Slater v. Sherman*, 68 Ky. 206; *Commonwealth v. Williams*, 77 Ky. 297; *Ohio Valley Ry. Co. v. Kuhn*, 5 S. W. 419, 9 Ky. Law Rep. 467; *Jones v. Wocher*, 90 Ky. 230, 13 S. W. 911, 12 Ky. Law Rep. 105; *Meaux v. Meaux*, 81 Ky. 475; *L. & N. R. R. Co. v. McCoy*, 81 Ky. 403.

It follows from this principle that the only question which we are authorized to examine under the motion and grounds for a new trial under discussion is whether or not the evidence supports the verdict. The issue of fact presented was simply whether or not the appellee reported to the appellant, in its application for a policy of indemnity, that its net loss for the time it had been in business prior to the application was only \$1,500. Undoubtedly the words constituting this representation appeared in the application when that paper was introduced in evidence; but they were in the handwriting of appellant's agent, and appellee's agent, who made the application, testified positively that he made no such representation, but, on the contrary, told the agent for appellant that his company had no way of ascertaining what the net loss in their business had been during the year and a half they had been in business prior to the application. Appellee also exhibited what purported to be a copy of the application which had been left with it, and this had no representation in regard to the net loss as is claimed by appellant.

Upon the whole, we think the jury had a right to find the issue of fact submitted to them in favor of appellee; certainly we would not be justified in saying that the verdict is so flagrantly against the weight of the evidence as to authorize its being set aside.

Judgment affirmed.

WALKER v. CORNETT et al.

(Court of Appeals of Kentucky. Dec. 1, 1900.)

1. TRESPASS TO TRY TITLE (§ 44*)—TRIAL—DIRECTION OF VERDICT.

Where plaintiff showed title of various patents and surveys by oral testimony introduced without objection, one of which defendant relied on, and also recorded agreements as to lines, the refusal to direct a verdict for defendant, on the ground that plaintiff failed to show a record title, was proper.

[Ed. Note.—For other cases, see *Trespass to Try Title*, Dec. Dig. § 44.*]

2. FRAUDS, STATUTE OF (§ 70*)—AGREEMENT RELATING TO LAND—BOUNDARIES.

A verbal agreement between adjoining landowners, fixing the boundary between their land so as to avoid litigation, is not within the statute of frauds, but is valid and enforceable.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 112; Dec. Dig. § 70.*]

3. BOUNDARIES (§ 46*)—ESTABLISHMENT BY AGREEMENT.

An agreement between adjoining landowners fixing their boundary, executed either by a marked line or by actual possession, is notice to all the world of such boundary.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.*]

Appeal from Circuit Court, Perry County.
"Not to be officially reported."

Action by Jason Cornett and others against Jerry Walker. Plaintiffs had judgment, and defendant appeals. Affirmed.

Eversole & Eversole, Greene, Van Winkle & Schoolfield, and Wootton & Morgan, for appellant. John L. Dixon, for appellees.

CLAY, C. Appellees, Jason Cornett and others, instituted this action against Jerry Walker in trespass to try title. Appellant, Jerry Walker, denied the title of appellees and pleaded title in himself. The issues were completed by a reply. Evidence was heard and the case submitted to the jury, which returned a verdict in favor of appellees. From the judgment based thereon, appellant, Walker, appeals.

Many years ago Jackson G. Combs, who was surveyor of Perry county, made a survey on Second creek in that county for Andrew Combs. Previous to making this survey, he had made a survey in the name of William V. Lusk for several hundred acres of land. A patent was issued to Lusk in the year 1845. The Lusk survey embraced and covered a portion of the land embraced in the survey made for Andrew Combs. It appears that Jackson G. Combs was the real owner of the survey made for William V. Lusk. On May 19, 1852, Jackson G. Combs and Andrew Combs entered into a written agreement, by which they fixed an agreed line between their tracts of land. This agreement was signed by both parties and recorded in the Perry county court. By the agreement it was stipulated that the line between the lands of the parties thereto should begin at the stepping rock at the head of Jerry Combs' Branch and run the divide to the

head of Raccoon. Thereafter Jackson G. Combs died, and all his interest in the survey was sold to J. H. Combs and William V. Lusk. On May 4, 1887, William V. Lusk, J. H. Combs, and Andrew Combs entered into a written agreement fixing the division line between their lands. By that agreement it was stipulated that the division line was to run as follows: "Beginning at the top of the mountain at the head of Big Branch, running with the divide to the Big Piney Knob at the head of Winder Rock; thence down the top of the short brushy point to the conditional line between Andrew Combs and Shade Stacy on Second creek; thence running with the line to the top of the divide between the forks of Second creek." The evidence for appellees tends to show that by this agreement Andrew Combs was to get all the land in the William V. Lusk patent on Second creek, while J. H. Combs was to have all the land that Andrew Combs had patents for on the river side. John S. Combs had surveys for land adjoining the land of Andrew Combs. Andrew Combs and John S. Combs agreed on a division line, and the same was marked out about 17 years prior to the institution of this action. According to the testimony for appellees, by the agreement thus made between John S. Combs and Andrew Combs, John S. Combs was to have all the land Andrew Combs owned on Big Branch, and Andrew Combs was to have all the land John S. Combs owned on what was called "Deaden Branch." On February 17, 1891, John S. Combs and his wife, Rebecca Combs, conveyed the land in controversy to appellees, Jason Cornett and others, by deed duly recorded in the Perry county clerk's office. The evidence for appellees tends to show that Mille Cornett, the mother of appellees, and appellees, had lived upon the land in controversy for 20 or 25 years. The land was a part of the William V. Lusk patent and survey, and appellees obtained the same by the deed from John S. Combs and the several conditional line agreements made between the former owners thereof. The testimony for appellant was to the effect that he and Robert F. Fields obtained title to the land in question by deed from Josiah Combs and wife and William V. Lusk, dated September 22, 1893, and recorded in the Perry county clerk's office. The evidence for appellant also tends to show that the land in controversy was not affected by any of the agreed lines relied upon by appellees.

Appellant insists that the court erred in failing to give a peremptory instruction in his favor, on the ground that appellees failed to show any record title. While the various patents and surveys relied upon by appellees were not introduced, witnesses were permitted to testify to them without objection, and appellant, himself, relies for title

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

showing this fact, and the further fact that they obtained the land by the division lines referred to, appellees connected their title with the Lusk patent, the existence of which seems to have been admitted by all the parties, including appellant. That being the case, the court did not err in refusing to instruct the jury to find for appellant.

It is next insisted that the court erred in admitting evidence of the oral agreement as to the division line between Andrew Combs and John S. Combs, and that, even if it was valid between the parties, it was not binding on William V. Lusk, who was not a party thereto, and was not binding on appellant, who had no notice thereof. It is well settled in this state that a verbal agreement, entered into between the owners of the adjoining tracts of land, fixing the division line between their lands, so as to avoid litigation, is valid and enforceable, and is not within the statute of frauds. *Fields v. Sizemore*, 105 S. W. 438; *Grider v. Davenport*, 60 S. W. 866. It has further been held that an agreement between adjoining owners, fixing their boundary, executed either by a marked line or by actual, adverse possession, carries notice to all the world of the fact. *Warden v. Addington*, 115 S. W. 241. While it is true that Lusk was not a party to the conditional line agreement between Andrew Combs and John S. Combs, yet he was a party to the conditional line agreement by which Andrew Combs got all of the land in the Lusk patent on Second creek. If by that agreement William V. Lusk parted with his title to the land on Second creek, he could not thereafter convey to appellant the land to which he had no title. Appellant obtained only that which Lusk owned at the time. It is immaterial that Lusk was not a party to the oral agreement between Andrew Combs and John S. Combs, for he had parted with his title to the land in question.

The issue in the case was properly submitted to the jury, and, while there is a sharp conflict in the evidence, we cannot say that the finding of the jury is flagrantly against the evidence.

Judgment affirmed.

STRAIGHT CREEK COAL MINING CO. v. STRAIGHT CREEK COAL & COKE CO.

(Court of Appeals of Kentucky. Dec. 3, 1909.)

1. CARRIERS (§ 4*)—"COMMON CARRIERS"—SWITCH TRACK OF COAL COMPANY.

One who constructs a railroad switch, under Ky. St. 1909, § 815 (Russell's St. § 5352), authorizing the owner of a coal mine within three miles of a railroad to condemn a right of way for a railroad switch to get his product to market, and providing that the owner of such

contravention of Const. § 210, providing that no corporation engaged in the business of common carrier shall own a mine, so that it can either ship or permit to be shipped by the lessees of its mine all products thereof free of charge.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 4.*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1313-1319; vol. 8, p. 7607.]

2. CARRIERS (§ 199*)—DISCRIMINATION IN RATES.

A coal company, which constructs a railroad switch to its mine and allows the hauling over it of coal of its lessees and others, does not discriminate against such others, whom it charges five cents a ton trackage, by charging its tenants only eight cents a ton royalty; such charge to also cover transportation over the track.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 199.*]

3. CARRIERS (§ 199*)—DISCRIMINATION—LINES OPERATED.

A railroad company, which has a mortgage on the switch road of a coal company coming into its road at P., and without charge puts its empty cars on the switch for the various mine-owners along it, and when they are loaded hauls them over the switch to P., making its charges from P., only, the same to all shippers, does not operate the switch as part of its general system, so as to be subject to the charge of discrimination on account of the trackage charges made by the coal company owning the switch.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 199.*]

4. CARRIERS (§ 200*)—EXTORTIONATE CHARGES.

A coal company, which constructs a switch to its mine, and which is, under Ky. St. 1909, § 815 (Russell's St. § 5352), subject to the general railroad laws, to the extent that it cannot make extortionate track charges to others, cannot, till it has been repaid its outlay for construction, be claimed by others to make such extortionate charges; the charges being such as were agreed on with them before the construction of the track as a consideration for the right of way.

[Ed. Note.—For other cases, see *Carriers*, Dec. Dig. § 200.*]

5. INTEREST (§ 66*)—RECOVERY—PLEADING.

No claim of interest having been made in the pleadings by plaintiff, it cannot complain that none was allowed, even from the filing of the suit.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. § 147; Dec. Dig. § 66.*]

Appeal from Circuit Court, Bell County.
"To be officially reported."

Suit by the Straight Creek Coal & Coke Company against the Straight Creek Coal Mining Company. Judgment for plaintiff, and defendant appeals; plaintiff also bringing a cross-appeal. Affirmed.

T. G. Anderson, for appellant. D. B. Logan and Kohn, Baird, Sloss & Kohn, for appellee. Benjamin D. Warfield and Charles W. Metcalf, for Louisville & N. R. Co.

LASSING, J. The Straight Creek Coal & Coke Company is a corporation owning large bodies of coal and timber lands in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Bell county, Ky. For more than 10 years it has operated a coal mine on a tract of its land on the waters of Straight creek, about $2\frac{1}{4}$ miles eastwardly from Pineville. It also has a coke plant and a sawmill there. In order to get its products to the market, it owns and operates a railroad switch running from its mines and coke plant to the Louisville & Nashville Railroad at Pineville. The corporation owns no rolling stock except a few logging cars on which it brings its logs to its sawmill. It rents an engine from the Louisville & Nashville Railroad Company with which to do the necessary switching of coal cars on the yards at its mines. In 1905 the corporation desired to develop a large body of its land which lays some four miles northwardly of its coal and coke plant. In order to do this, it entered into a contract with the Louisville & Nashville Railroad Company to build this four miles of additional switch from its mining camp to the property to be developed; the expenditure to be repaid to the Louisville & Nashville by the coal company's paying five cents per ton for every ton transported over the new switch. To further secure the payment of the cost of building the switch, the coal company executed and delivered to the railroad company a mortgage upon its whole railroad switch, and the railroad company agreed to maintain the switch during the existence of the mortgage, and to haul the coal company's coal from its mines to Pineville free of charge. In order to secure the right of way for the new switch, the coal company entered into contracts with the various landowners through whose lands it was proposed to run, by which it was agreed, among other things, that the owner conveyed a right of way 50 feet wide to the coal company, and the latter agreed that the landowner might have the use of the switch for transporting his coal to market at a trackage charge of five cents per ton. Along the line of the proposed new switch, the Howards owned a tract of land, and they (except one infant to be hereafter noticed) conveyed to the appellee by deed a right of way through their land. The deed contains the agreement between the owners of the land and appellee concerning the trackage charges to be paid by the vendors to appellee for the use of its switch. So far as it is necessary to notice this contract, it may be stated that, as a consideration for the right of way, the owners of the land and their assignees were to have the use of the switch at a trackage charge of five cents per ton. One of the Howards was an infant, and, although his guardian offered to convey to appellee for the ward his interest in the right of way, it was thought better that a friendly condemnation suit should be instituted and carried to judgment in order to fully bind the infant; and this was done. With this exception the record shows that the appellee obtained its entire

right of way for the new switch by contract.

During the pendency of the negotiations between appellee and the Howard heirs for the right of way, certain individuals, who afterwards organized themselves into a corporation called the Straight Creek Coal Mining Company, were negotiating with the Howards for a lease of their property for the purpose of opening and operating a coal mine thereon. This corporation is the appellant in this action. After the switch was built, the appellant opened its coal mine, and for some time shipped coal over the switch to Pineville under the contract made by appellee and the Howards, and during this period paid the trackage charges in accordance with the terms of the contract between appellee and appellant's lessors, the Howards. Afterwards, however, appellant refused to pay further trackage charges, asserting that appellee was a common carrier and was discriminating against it by not charging other coal miners on its switch anything for trackage, and that therefore it was not required to pay anything for the use of the switch. This position is based upon the following state of facts: In order to induce the Louisville & Nashville Railroad Company to build the four miles of switch involved here, the appellee company found it necessary to insure the railroad company against loss by reason of its outlay in building the switch; and to do this it entered into a contract with the railroad that it would make certain developments of coal mines upon its land, which would insure a large haulage over the road and furnish to the railroad company a large quantity of freight from Pineville to the various coal markets of the country. In order to make good this contract with the railroad company, the appellee leased parts of its land, which was to be developed by the switch, to two coal mining companies, and agreed, among other things, that in consideration for the payment by its tenants of eight cents royalty on each ton of coal mined, it would haul, or cause to be hauled, the coal of its tenants to the Louisville & Nashville Railroad for the purpose of being transported to the market; it being especially agreed that the eight-cent royalty was to cover both payment for the coal and the transportation of it from the mine to the Louisville & Nashville Railroad. So that the real questions here are: (1) Is the appellee, in the use of its switch, a common carrier? (2) If it be such, does the effect of the contract between it and its tenants result in an illegal discrimination in the trackage charges as between appellant and the tenants? It is not disputed by any of the parties to this record that, if appellee is a common carrier, it may not discriminate in trackage charges between its patrons, and that, if it allows any of its patrons to haul over its switch free, then it cannot charge trackage against any of its patrons; and therefore, if it be ascertained that appellee

is a common carrier, the question at once arises: Is the contract with its tenants a discrimination in freight or trackage rates between them and the other patrons along its line?

Appellee, being a corporation engaged in the coal mining business, points out that under the Constitution it cannot be a common carrier; and in support of this position relies upon the provision of section 210 of that instrument, which is as follows: "No corporation engaged in the business of common carrier shall, directly or indirectly, own, manage, operate, or engage in any other business than that of a common carrier, or hold, own, lease or acquire, directly or indirectly, mines, factories or timber, except such as shall be necessary to carry on its business; and the General Assembly shall enact laws to give effect to the provisions of this section." It is obvious that the foregoing provision of the Constitution prohibits appellee, if it be a common carrier, from owning or operating a coal mine. Section 815 of the Statutes (Russell's St. § 5352) authorizes, among other things, the owner of a coal mine within three miles of any navigable stream or railroad to condemn a right of way, not to exceed 50 feet wide, for the purpose of building a switch or track in order to get his produce to market. We cannot presume that the Legislature intended by section 815 to authorize a coal mining corporation to violate the Constitution by becoming a common carrier, and therefore we must assume that when the owner of a coal mine or stone quarry, in order to develop his property, builds a railroad switch or track, he does not thereby become a "common carrier" within the meaning of section 210 of the Constitution. But under section 815 of the Statutes "the owner or operator of such road shall be, so far as they are applicable, governed and controlled by the laws relating to other railroads, and shall have the same rights and privileges granted to corporations owning and operating lines of railroad." Assuming, then, for the purposes of this case (but not deciding), that appellee built, or caused to be built, its railroad switch under the provisions of section 815 of the Statutes, does the contract with its tenants discriminate against appellant and the other independent mining companies along its lines who are charged five cents per ton trackage? We think not. In the first place, the very object and end of building the switch was to develop appellee's land, and for this purpose it obligated itself to lay out the round sum of about \$90,000, and upon which it pays interest until the principal sum is repaid to the Louisville & Nashville Railroad Company. Appellee's tenants represent appellee and stand upon the same plane in the use of its switch, if appellee so desires, as does the appellee itself. The leases which appellee made to its tenants are the

instrumentality for the development of the land and rendering it productive. If the appellee cannot lease its land, and is unable to open and operate mines for itself, then the whole purpose of the switch is frustrated. We therefore conclude that, as the switch was built to develop appellee's land, it has a right to either ship, or permit to be shipped by its tenants, all products of the land over the switch, free of charge.

But even if we felt less certain of this view than we do, there is nothing in this record to show that appellant has been discriminated against in favor of appellee's tenants. The tenants pay to appellee eight cents per ton, which by contract covers both royalty and trackage or freight charges. It must be conceded that it has the right to make its royalty as low as it pleases, even to giving its tenant the coal for the mining of it; and, this being true, appellant cannot claim to be discriminated against as long as the tenant is required to pay as much as five cents per ton for both trackage and royalty. Upon this view appellant cannot say that it is discriminated against until the tenant is required to pay less than five cents per ton for the coal and its transportation to Pineville. It is not disputed that the independent miners along the line of appellee's switch are required to pay precisely the same trackage, five cents per ton; and the only claim of discrimination is in regard to the two mining companies which are the tenants of appellee. It is not disputed that appellee owns the switch in question; that is, it is not disputed that it has obligated itself to pay the Louisville & Nashville Railroad Company for building it the round sum of \$90,000, that it pays part of this principal sum annually, and pays legal interest on the unpaid balance until the whole of the principal sum is finally discharged.

One of the contentions of appellant is that appellee has leased its switch to the Louisville & Nashville Railroad Company, and therefore that company is operating it as a part of its general system, and that it is discriminating against appellant. But the evidence in this case indubitably shows that, while the first written contract drawn up between the Louisville & Nashville Railroad Company and appellee used the word "lease," afterwards it was changed, and a new writing drawn, which showed the real contract between the parties to be that the Louisville & Nashville Railroad Company had a mortgage upon the switch of appellee in order to more fully secure the repayment of the funds expended by the railroad in the building of the switch; and the evidence further shows that the railroad company puts in its empty cars on the switch for the various mineowners along its line, and when these are loaded hauls them over the switch to Pineville free of charge. In other words, it makes no charge to any of

the mining companies for what it does in the operation of the switch. The Louisville & Nashville Railroad Company has adopted Pineville as the general distributing point for all of the mines in that neighborhood, say, in a radius of 15 or 20 miles, and it has one common freight charge from that point to the various markets which it enforces against all the shippers alike. This is called in the record the "Pineville rate," and it is clearly established that this rate is enforced upon all shippers without any discrimination whatever.

The appellant also complains that the trackage rate of five cents per ton is extortionate. The evidence, however, does not bear out this contention. All of the evidence in the case bearing upon this point tends to show that five cents per ton is a reasonable rate under the circumstances. Moreover, it is the rate that was agreed upon by the lessors of the appellee company as a consideration for the grant of the right of way. This is fully set forth in the deed from the Howards to the appellee. The deed also contains a provision that the contract for the use of the appellee's switch redounds to the benefit of all assignees of the owners of the land. It was under this contract that appellant began the use of the switch, and it paid the charges in accordance with the terms of the contract for some time. We conclude therefore that, under the conditions now prevailing, five cents per ton is a reasonable trackage charge. If, after the appellee company has been repaid its whole outlay, it should be ascertained that five cents per ton is too great a charge, then, upon a proper showing, the rate may be reduced. The appellee, while not a common carrier, is regulated by the general laws concerning railroads in so far as they are applicable, and therefore the appellee cannot prevent persons along its line from using its switch upon the payment of a proper charge; nor can it make this charge so great as to be either prohibitive or extortionate. But as the rate of five cents was agreed upon in advance, and, acting upon this agreement, appellee has built the switch and incurred a large indebtedness therefor, those who use it cannot be heard to say that this charge is too great or extortionate until appellee has been reimbursed for its outlay. It has to repay the railroad company the original cost price and pay interest on the unpaid balance until the whole is paid. It must also pay all taxes that are assessed against the switch. And certainly it would be inequitable to permit those along the line, who have contributed nothing to the building of the switch, who have no money invested in it, and who do not have to keep it in repair, to use it free of charge. This position would put the owner of the switch in a worse position towards its use than a stranger, because, if the stranger may use the switch without charge as freely as the

owner, and pay nothing for the cost of building it, or taxes or repairs, this position is infinitely preferable to that of the owner. We conclude therefore: That the payment of the trackage charges is a condition precedent to the use of the switch; that the amount of five cents per ton, under present conditions, is not too great; and that appellant must pay it before it has a right to use appellee's property.

None of the cases cited by appellant are apposite to the question in hand. The appellee does not dispute that, if it is a common carrier, it may not discriminate between its patrons, and therefore it is not necessary to discuss any of the numerous cases cited to show that common carriers cannot discriminate in favor of, or against, any of those who ship over their lines. The case of Bedford Stone Co. v. Oman, 115 Ky. 369, 73 S. W. 1038, 24 Ky. Law Rep. 2274, did not involve the question we have here. There the Louisville & Nashville Railroad, under the evidence, owned the switch, and had absolute control of it as a part of its general system, and it was refusing to permit Oman to ship stone over the switch at any rate; in other words, it was refusing to serve him as a common carrier at all. And it was there held that the Louisville & Nashville Railroad, while it had such control and ownership of the switch, could not refuse to haul Oman's freight. That is not the question here. The Louisville & Nashville Railroad hauls the freight of appellant from the mine to Pineville without any charge to it, and from Pineville to the market it charges appellant the same rate that it charges all other shippers to the same place under the same conditions. The question is not between appellant and the Louisville & Nashville Railroad, but between appellant and the Straight Creek Coal & Coke Company, the owner of the switch; that company being perfectly willing for appellant to use its switch, but asking from it a fair remuneration for its use. The Oman Case is the exact opposite of the case at bar. The case of Greasy Creek Co. v. Jelkico Co., 116 S. W. 1189, involved the constitutionality of section 815 of the Kentucky Statutes, which authorizes the condemnation of private property for coal switches. There was no question of freight rates involved or discussed. All that was decided there was that switches built under section 815 are governed by the railroad law in so far as it is applicable. The court said nothing in that case which would intimate that one mining company might use the switch of another mining company without paying a fair remuneration for its use.

There was no dispute between appellant and appellee of the proper amount which the latter should receive, if it had a right to recover at all; in other words, the number of tons shipped were not disputed, and applying the trackage charge of five cents for each ton

would show the proper amount of recovery.

Upon the trial of the case before the circuit judge, he decided the issues herein involved in favor of the appellee, and gave judgment for the sum of \$2,247.70, and this judgment is affirmed, both as to the Straight Creek Coal & Coke Company and the Louisville & Nashville Railroad Company.

On the cross-appeal brought by plaintiff, complaint is made that the court erred in failing to allow interest on its claim, at least from the date of the filing of the suit; plaintiff's suit being upon an open, running account. It was clearly within the discretion of the chancellor to allow interest or not; but, inasmuch as no claim for interest was made in the pleadings by plaintiff, it is in no position to complain that none was allowed, and for this reason the judgment is affirmed on the cross-appeal.

BARKER, J., not sitting.

SPECHT v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. Nov. 30, 1909.)

1. TAXATION (§ 40*)—ENFORCEMENT—UNIFORMITY.

Ky. St. 1909, § 2998 (Russell's St. § 947), providing that uncollected tax bills shall be deemed a debt and may be enforced as such, except those against persons under disability, by the remedies given for the recovery of debt, and that all unpaid tax bills shall draw a specified rate of interest, etc., exempts infants, married women, and lunatics from the method of procedure prescribed for the collection of unpaid tax bills, but makes all tax bills liable to the specified rate of interest, and is not invalid as making any difference in the levy of taxes, and the fact that it authorizes a personal judgment against an adult under no disability does not render the act unconstitutional.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 40.*]

2. USURY (§ 16*)—DELINQUENT TAXES—PENALTY—VALIDITY—USURY.

Ky. St. 1909, § 2998 (Russell's St. § 947), providing that unpaid tax bills shall for the first year bear interest at the rate of one-half of 1 per cent. for every month or fraction thereof, and thereafter, of 1 per cent. for every month or fraction thereof until paid, imposes a penalty on delinquent taxpayers, and is not invalid as seeking to enforce the collection of a rate of interest in excess of 6 per cent. established as the legal rate, by section 2218 (section 1814), and is not in violation of section 2219 (section 1815), providing that contracts and assurances made for the loan or forbearance of money at a greater rate than the legal rate of interest shall be void as to the excess of the legal rate, since a tax is neither a contract nor a loan, nor a forbearance of money, though it is treated as a debt for the purpose of defining its mode of collection.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 30, 91; Dec. Dig. § 16.*]

3. STATUTES (§ 93*)—CLASSIFICATION—VALIDITY.

The laws providing for the organization and powers of the various classes into which cities may be divided under the Constitution, requiring the Legislature to assign the various

cities to the classes in which they belong, are general laws, where they are made applicable alike to all cities falling within the designated class, and the laws governing cities of the first class are general laws, though they are applicable in fact to only one city.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.*]

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

"To be officially reported."

Action by the City of Louisville against William Specht. From a judgment for plaintiff, defendant appeals. Affirmed.

Harrison & Harrison, for appellant. Clayton B. Blakey and Joseph S. Lawton, for appellee.

LASSING, J. This litigation calls in question the constitutionality of section 2998, Ky. St. 1909 (Russell's St. § 947). Its validity is assailed upon two grounds: First, that it affects only adult persons and does not apply to the property of infants, persons under the disability of coverture, or insane persons; and, second, because the rate of interest charged on tax bills is usurious and in violation of sections 2218 and 2219, Ky. St. (Russell's St. §§ 1814, 1815). Section 2998 of the Statutes, which is as follows: "All tax bills, uncollected in whole or in part, and which remain in the hands of the tax receiver on the first day of May succeeding the date on which they were listed with him for collection against any person owning property in his own right, shall be deemed a debt from such person to said city arising as by contract and may be enforced as such (except those against the persons under the disability of infancy, coverture or unsound mind) by all remedies given for the recovery of debt in any court of this commonwealth otherwise competent for that purpose; and those bills assessed against an administrator, executor or trustee shall be a charge against the whole succession of trust estates and may be in either case enforced accordingly, this being in addition to the other remedies hereinafter given. All tax bills remaining unpaid on the first day of May, succeeding the date on which they were listed with the tax receiver for collection shall bear interest at the rate of one-half of one per cent. for every month, or fraction of a month, from date until the first day of the next succeeding May, and thereafter shall bear interest at the rate of one per cent. for every month, or fraction of a month, until paid"—was, prior to its adoption in 1906, section 2998 of the Kentucky Statutes of 1903, and from a comparison of the two acts it will be observed that, so far as the first objection raised by appellant is concerned, the acts are identical, in that in each act there is an express provision that the tax owing by the property owner shall be deemed a debt

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

compotent for that purpose. There is an express provision in each act exempting from this method of procedure infants, married women, and lunatics. This exemption, however, is in their favor merely as to the method of procedure; whereas, the tax and interest charged for delay in its payment are the same against all property, whether owned by adults or infants, women, married or single, and persons sane or insane. The statute makes no difference whatever in the levy of taxes or the rate of interest that shall be charged. The only difference is that a personal judgment may be taken against an adult under no disability; whereas, infants and persons under disability can, under the express provisions and terms of the act, have no personal judgment rendered against them, and the remedy must be a proceeding against the property itself. There is no provision that the property of an infant, or a married woman, or insane person should not be held liable to the payment of the same taxes and rate of interest as that of an adult.

In the cases of *Walston v. City of Louisville*, 66 S. W. 385, 23 Ky. Law Rep. 1852, and *Woolley v. City of Louisville*, 114 Ky. 556, 71 S. W. 893, 24 Ky. Law Rep. 1357, this court passed upon the constitutionality of this act prior to its amendment in 1906, and held it to be constitutional, and, so far as the first objection raised by appellant is concerned, the acts are identical. No complaint can justly be made because the Legislature saw fit to define a different mode of procedure in enforcing the payment of tax claims against the property of infants and persons under disability from that which should be applied in enforcing similar claims against adults under no disability, so long as the tax sought to be collected against each is the same; and the act in question is undoubtedly so drawn as to apply equally to all property, for, in its concluding sentence, we find the following: "All tax bills remaining unpaid on the first day of May, succeeding the date on which they were listed with the tax receiver for collection shall bear interest at the rate of one-half of one per cent. for every month, or fraction of a month, from date until the first day of the next succeeding May, and thereafter shall bear interest at the rate of one per cent. for every month, or fraction of a month, until paid." This is the only portion of said act which fixes the rate of interest that shall be paid, and it will be observed that it applies alike to all property without exception. We therefore conclude that the objection raised by appellant to the validity of this act, on the ground that it is not uniform in its application, is not well taken.

collection of a rate of interest thereon in excess of 6 per cent., which by section 2218 of the statutes is established as the legal rate, it is in direct violation of section 2219, which provides that all contracts and assurances made for the loan or forbearance of money or other thing of value at a greater rate than the legal rate of interest, as provided for by section 2218, shall be void as to the excess of the legal rate. The trouble with this argument is that a tax is neither a contract nor a loan nor a forbearance of money in the sense in which these terms are used in the statute referred to. It remains a tax, and it is treated as a debt merely for the purpose of defining its mode of collection. The interest charge is upon taxes remaining unpaid at a designated date and is in the nature of a penalty for their nonpayment, and it has frequently been held that it is a matter of legislative discretion as to what penalty shall be imposed by the Legislature for the nonpayment of taxes, and this legislative will has never been disturbed or interfered with so long as the penalty has not been fixed at a figure that could be considered unreasonable, unjust, or confiscatory. In the two cases above referred to, of *Walston v. City of Louisville*, and *Woolley v. City of Louisville*, it was expressly held that the collection of an interest charge upon overdue taxes was in the nature of a penalty. It is true that the act in force when passed upon in those cases did not authorize the imposition and collection of 12 per cent. interest, but it did authorize the imposition and collection of interest at the rate of one-half of 1 per cent. for each month, or fractional part thereof, that the tax remained unpaid, which was a higher rate than authorized by section 2218, and the principle contended for by appellant in this case would therefore apply with equal force in those cases. The court having upheld the validity of the act, even though it authorized an interest charge in excess of 6 per cent., settled the principle for which the city here contends, to wit, that the imposition of an interest charge on overdue taxes is in the nature of a penalty, imposed upon the delinquent taxpayer because of his delinquency, and, being a penalty, the amount thereof is clearly a matter of legislative discretion. Nor does the fact that the act authorizes the imposition and collection of 12 per cent. interest on taxes remaining unpaid at a certain day in cities of the first class justify the charge that the act is special legislation, for the Constitution, by express provision, requires that the General Assembly shall assign the various cities and towns in the state to the classes in which they properly belong. For governmental purposes, the organization

the designated class, they have uniformly been held to be general in their application. Louisville is a city of the first class, and is the only city in that class in this commonwealth. Hence, while all laws governing cities of the first class must necessarily be applicable to the city of Louisville alone, they are nevertheless general laws, and this court has so recognized and held in the case of *Walston v. City of Louisville*, supra.

In framing these general laws for the regulation and government of the various classes into which the cities and towns of the state are divided, the members of the General Assembly realized that it was necessary to impose upon the taxpayer a burden in excess of the legal rate of interest, in order to enforce the speedy payment by the taxpayer of the taxes, for it can readily be seen that, if only the legal rate of interest were imposed upon the taxpayer for the nonpayment of his taxes when due, it would merely have the effect of making the city a lender of money to the various taxpayers until such time as suited their convenience to pay, and the city would be without means to carry on the various departments of its government. Hence there is incorporated in the charters of the cities of the various classes a provision whereby the taxpayer is called upon to pay an interest charge in the nature of a penalty upon all taxes that remain due and unpaid after a given period. This interest charge varies. In cities of some classes it is more, while in others it is less, than in cities of the first class; but, being uniform in each class, it meets the requirements of the Constitution calling for uniformity.

The only appreciable difference between the act here complained of and the act which it amended and superseded is that in the act under consideration the rate of interest for the second year's delinquency is increased from one-half of 1 per cent. for each month, or fractional part thereof, that the tax remains unpaid, to 1 per cent. This change was found to be absolutely necessary in order to enable the city to collect its revenue. So long as the penalty for failure to pay amounted to but little more than the rate at which money could be borrowed, the taxpayer did not pay his taxes, and the city was without means necessary to enable it to run its government. It became apparent that a more severe penalty would have to be imposed in order to speedily collect the taxes, and hence the increase in the rate of the interest charge; but this increase in rate called into play the application of no new principle, for the old rate was in excess of the legal rate, and the only complaint is that this present rate is usurious, not that it is

LOUISVILLE & N. R. CO. v. CAMPBELL (Court of Appeals of Kentucky. Dec. 1, 1909.)

1. CARRIERS (§ 331*)—INJURIES TO PASSENGERS—PASSENGERS ON FREIGHT TRAINS.

Where plaintiff was injured while riding in a freight car, he assumed the risks incident to the movement of such trains carefully managed, including the necessary bumping and coupling, but did not assume the risk of any unnecessary bumping, particularly when resulting from the negligence of train operatives; the carrier being required to exercise the utmost care consistent with the prudent ordinary operation of such trains.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1374; Dec. Dig. § 331.*]

2. DAMAGES (§ 167*)—EVIDENCE—LIFE TABLES.

Where plaintiff's evidence indicated that he was permanently crippled and disabled, and that while his injury had improved, and would probably continue to improve, his ankle was permanently weakened and his capacity to labor permanently impaired, the court did not err in admitting life tables to show plaintiff's expectancy.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 487-489; Dec. Dig. § 167.*]

3. DAMAGES (§ 132*)—EXCESSIVENESS—PERSONAL INJURIES.

Where plaintiff's ankle was permanently injured and his capacity to labor permanently impaired owing to defendant's negligence, and he had expended \$125 for medical services, a verdict allowing him \$1,125 was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 178, 372-385, 396; Dec. Dig. § 132.*]

Appeal from Circuit Court, Warren County.
"Not to be officially reported."

Action by Eldon L. Campbell against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Benjamin D. Warfield, and Sims, Du Bose & Rodes, for appellant. Greene, Van Winkle & Schoolfield, B. F. Proctor, and G. H. Herdman, for appellee.

O'REAR, J. Appellee was taken by appellant as a passenger on one of its freight trains from Louisville to Bowling Green. The former was accompanying a car load of horses, and was riding in the freight car containing them. After the horses were loaded, and just before the car was attached to the remainder of the train with which it was to be conveyed, appellee went into the car, which was the place set apart to him by appellant. His presence and purpose were known to appellant's servants who were engaged in switching the car. Appellee claims that, whilst he was so situated, the switch engine and other cars of appellant were backed violently and negligently against the car in which he was, throwing him down, break-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ing and spraining his ankle. He brought this suit for the damage done him.

The evidence shows the manner of the movement of the cars, as well as appellee's position. While it is conflicting, appellee testifying that the concussion was violent and unusual, and appellant's servants in charge of the switching testifying to the contrary, it was clearly a question for the jury whether the claim of the plaintiff was sustained. The verdict was for the plaintiff, and his damages were assessed at \$1,125, \$125 of which was for his medical bill, the amount and value of which was undisputed in the evidence. That appellee was injured in his ankle is not questioned. The extent of the injury was controverted in the evidence. It was appellant's theory that the injury was sustained by appellee while crossing the railroad yard in getting to the car, and from causes undisclosed but disconnected with any act of the railroad company. The weight of the testimony, as it appears to us, and doubtless appeared also to the jury, is that the injury was inflicted as the result of the bumping of the cars, and while appellee was in the car. Having taken appellee as a passenger on its freight train, and suffering him to ride in the freight car with the horses, appellant was bound as a carrier of passengers to the exercise of the utmost care and skill consistent with the prudent, ordinary operation of such freight trains. On the other hand, appellee assumed the risks incident to the movement of such trains, carefully and prudently managed, including the jerking, bumping and coupling of its cars and locomotives; but unusual and unnecessary bumping and jolting were not assumed by the passenger as risks, particularly when they were the result of the negligence of the train operatives. These views were fairly submitted to the jury in the court's instructions.

The contention made in appellant's brief that its theory of the cause of the injury was not submitted to the jury is not well taken. Although the evidence in appellant's behalf in that respect was meager, the court did submit the question to the jury. The instruction, not contained in the original bill of exceptions as brought up, was identified in a supplemental bill made by the court, and which has been filed in an additional transcript.

Another ground for reversal urged by appellant is that the court erred in admitting life tables in evidence in plaintiff's behalf as tending to show the probable duration of his life, or expectancy. It is argued that this evidence was inadmissible, upon the theory that appellee's injury was curable, and that the impairment of his money-earning capacity was temporary. The evidence for the plaintiff conduced to show, and, if believed, did establish, that his injury was one that

permanently crippled and disabled him; that while it had improved, and would probably continue to improve, the effect of it, as weakening the ankle and reducing his strength and capacity to labor, was permanent. The medical men introduced as witnesses for the defendant took a less serious view of the matter; but the evidence on that point, about equally balanced, left the question for the determination of the jury, who in their verdict seem to have taken rather a middle ground. The relevancy of the life tables depended upon the nature of the plaintiff's claim, and the evidence in support of it as to the permanency of his impairment. We perceive no reason why in such cases life tables are not relevant. It is admitted in argument by appellant that in case of death, in suit to recover damages for the destruction of the power of the decedent to earn money, such evidence is admissible, under the authorities. So is it, we think, when the impairment produced by the injury is permanent. The question for the jury is: What damage has the plaintiff sustained by reason of the injury? The measure is, rather one element of the measure is, the extent to which the plaintiff's money-earning capacity has been reduced. If the reduction is permanent, then what length of time will it probably affect the plaintiff is a relevant inquiry. A very old person similarly injured would not, probably, sustain the same pecuniary loss as a young man would. The probable duration of the life of the injured person, if shown, enables the jury to more justly estimate the loss inflicted.

The remaining ground urged for reversal is that the verdict is grossly excessive. Even if the injury is curable, the evidence shows that it would probably be a long time before it would be accomplished. The loss or reduction of the plaintiff's earning capacity for even a year or so, coupled with the great pain and suffering caused by such an injury—one of the most painful—are enough to redeem a verdict for \$1,000 from being classed as so excessive as to indicate passion or prejudice on the part of the jury. Indeed, we cannot say that it is excessive at all.

Judgment affirmed.

LOUISVILLE & N. R. CO. v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. Dec. 2, 1909.)

1. APPEAL AND ERROR (§ 1195*)—FORMER APPEAL—OPINION—LAW OF THE CASE.

Where, on a prior appeal of a proceeding for the assessment of damages to a railroad company for the construction of a street over its right of way, the Supreme Court directed that the jury be instructed to allow the difference between the value to the railroad company of the right to the exclusive use of the land occupied by the street and the value after the city acquired a crossing, such decision constituted the law of the case, and the court did not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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therefore err in refusing to charge on new trial that the jury should award such sum as would, at 6 per cent. interest, produce an income sufficient to represent the increased cost to the railroad company of maintaining its tracks, cross-ties, and roadbed directly resulting from the establishment of the crossing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.*]

2. EMINENT DOMAIN (§ 128*)—CROSSING OVER RAILROAD—DAMAGES.

In proceedings by a city to acquire a crossing over a railroad right of way, additional cost of maintenance of the railroad after the construction of the street was a proper element in determining the damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 351; Dec. Dig. § 128.*]

3. EMINENT DOMAIN (§ 205*)—STREET CROSSING OVER RAILROAD—CONDEMNATION—DAMAGES—EVIDENCE.

Where, in proceedings to acquire a street crossing over a railroad's right of way, a witness testified that the damage to the railroad company would be only nominal, a verdict adopting such view was not contrary to the evidence.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 544; Dec. Dig. § 205.*]

4. EMINENT DOMAIN (§ 203*)—DAMAGES—NATURE OF USE—EVIDENCE.

Where, in a proceeding by a city to condemn a street crossing over railroad right of way, there was no proof that the railroad company would ever desire to lay a third track over the crossing, evidence that the grade established for the street would prevent such use, and that the damage on that account would be from \$15,000 to \$25,000, was properly rejected.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 542; Dec. Dig. § 203.*]

5. RAILROADS (§ 96*)—CROSSINGS—STREET GRADE—CHANGE.

Where the grade established by a street laid out over a railroad track would prevent the use of the ground by the railroad company for a third track, it would be the duty of the city to change the grade so as to make it possible for the railroad company to lay an additional track or tracks whenever it became reasonably necessary to do so for the accommodation of its business.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 289; Dec. Dig. § 96;* Highways, Cent. Dig. § 145.]

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

"Not to be officially reported."

Proceeding by the City of Louisville against the Louisville & Nashville Railroad Company to obtain a street crossing over defendant's right of way. From a judgment assessing nominal damages in favor of defendant railroad company, it appeals. Affirmed.

Benjamin D. Warfield and Helm & Helm, for appellant. E. C. Underwood and Clayton B. Blakey, for appellee.

CLAY, C. This is the second appeal of this case. The opinion on the former appeal may be found in 114 S. W. 743. In remanding the case for a new trial, this court used the following language: "The only instruction that should be given is one saying to the jury that

they must find for the railroad company such a sum as will amount to the difference between the value to the railroad company of the right to the exclusive use of the land occupied by the street for the purpose for which it was being used, and the value after the city acquires the privilege of participating in such use by the opening of the street across it, and the evidence should be confined to this point." Upon the return of the case, the trial court instructed the jury as directed in our former opinion, and a verdict was returned awarding appellant damages in the sum of \$1. From the judgment based thereon, this appeal is prosecuted.

The court did not err in refusing to instruct the jury to award appellant such sum as would, at 6 per cent. interest per annum, produce an income sufficient to represent the increased cost to appellant of maintaining its tracks, cross-ties, and roadbed, directly resulting from the establishment of the street over them. The former opinion directed that but one instruction be given. That opinion is the law of the case. Evidence tending to show that after the construction of the street it would cost more to maintain the tracks was permitted to go to the jury. Such evidence bore upon the question submitted in the instruction given. The jury had the right to consider it, and doubtless did consider it in reaching a verdict.

Nor can we say that the verdict is flagrantly against the evidence. One witness testified that by reason of the extension of the street it would cost \$40 more per year to maintain the tracks. Another witness testified that the difference in the value of the use would be \$200. He arrived at this conclusion, however, by saying that the land was worth \$2,000 per acre, and that the proposed street would occupy one-tenth of an acre, which was worth \$200. According to this method of calculation, this witness made the diminution in the value of the use of the land equal to the value of the land itself. Another witness testified that the damages would be only nominal. This is the view adopted by the jury. They evidently believed that the use of the land would be none the less valuable because of the street. The court refused to permit appellant's witnesses to testify that the grade established for the street would prevent the use of the ground by appellant for a third track, and that the damage on this account would be from \$15,000 to \$25,000. The court did not err in excluding this testimony. The avowals did not show a present necessity for a third track and a fixed purpose to lay such a track. The railroad company might never desire to use the strip for a third track. That being the case, there would be no diminution in the value of the use of the land because the laying of a third track was rendered impossible by the grade adopted for the street. It would not

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

be fair to the city to require it to respond in damages for an injury which, as a matter of fact, might never take place. Inasmuch, however, as the ground belongs to appellant and was acquired for railroad purposes, and its right to use it for its reasonable necessities is superior to the right of appellee, we conclude that, if at any time it becomes reasonably necessary for appellant to lay an additional track or tracks for the accommodation of its business, and this is rendered impossible by the grade established for the street, it will then be the duty of the city to change the grade of the street so as to render it possible for the railroad company to make such reasonable use of the ground in question as could have been made prior to the construction of the street. In this way the rights of the railroad company will be fully protected.

Judgment affirmed.

COMMONWEALTH v. EWING.

(Court of Appeals of Kentucky. Dec. 2, 1909.)

INTOXICATING LIQUORS (§ 71*)—LICENSES—MERCHANTS—EVIDENCE.

Evidence, on application for a retail liquor license, *held* to show, notwithstanding applicant's testimony to the contrary, that he was not in good faith a merchant, and that he had assumed the business for the purpose of retailing liquor; so that under Ky. St. 1903, § 4205 (Russell's St. § 6147), authorizing such a license only on satisfactory evidence to the contrary, the county court did not exercise reasonable discretion in granting him a license.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 71, 72; Dec. Dig. § 71.*]

Appeal from Circuit Court, Warren County.

"To be officially reported."

Clarence Ewing applied for a liquor license, and, from a judgment of the Circuit Court affirming the judgment of the County Court in granting the license, the Commonwealth appeals. Reversed, with directions.

T. W. Thomas, W. B. Gains, Jas. Breathitt, Atty. Gen., and Tom B. McGregor, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. This appeal is prosecuted by the commonwealth from a judgment of the Warren circuit court affirming a judgment of the county court granting Ewing a merchant's license to sell liquors under section 4205 of the Kentucky Statutes (Russell's St. § 6147), reading, in part, as follows: "License to merchants, druggists or distillers shall be granted only upon satisfactory evidence that the applicant is in good faith a merchant, druggist or a distiller and that the applicant has not assumed the name or the business for the purpose of retailing liquors." We are asked to reverse the judgment upon the ground that Ewing was not, at the time he applied for license, a merchant in good faith, and that he assumed the

business of being a merchant for the purpose of obtaining a license to retail liquors.

The only evidence in the record is that of Ewing, and two other witnesses who testified that they had never heard anything against his moral character. From Ewing's testimony we gather the following facts: Delafield precinct, in Warren county, adjoins the city of Bowling Green, and is the only precinct in the county in which license to sell liquors may be granted. The remainder of the county, including the city of Bowling Green, has voted against the sale of liquor. In this precinct a short distance from the city there is a place called the "boat landing" on Barren river, and in the immediate neighborhood of this boat landing there are several groceries and a few people. In the entire precinct there are 230 voters. Ewing some time in February, 1909, leased a lot 40x50 feet near the boat landing for a term of one year with the privilege of renewing the lease. On this lot he put up, at a cost of some \$300, a plain room 20x40 feet, and on March 1, 1909, opened a grocery store in it with a stock of goods worth about \$250. Previous to this time he had never engaged in the grocery or any mercantile business. His principal occupation seems to have been clerking in places where whisky was sold. On March 1st there were four other grocery stores in the immediate neighborhood of Ewing's place, and all of them had license to sell liquor under the statute supra. Twelve days after he opened his grocery, he put up notices that he would apply for license, and on the 22d of March made the application. In the course of his examination, he said that he was a merchant in good faith and did not engage in the business for the purpose of getting license to sell liquor; but his statement is not corroborated by any other fact or circumstance in the record. On the contrary, we should say that it appears at first blush that his sole purpose in opening the grocery was to engage in the sale of liquor, and that it affirmatively appears that Ewing was not a merchant in good faith, and that he had assumed the name and the business for the purpose of retailing liquors. There is no evidence that the place had any business attractions whatever for a person who wished to engage only in the sale of merchandise, and it is inconceivable that a person of ordinary intelligence, as we assume Ewing to be, should attempt to establish himself in the grocery business at this point unless his intention was to use his pretense of a grocery for the purpose of getting license to engage in the more profitable business of selling whisky. That he was not a merchant in good faith, and that he did assume the business as a mere subterfuge behind which to hide his real purpose, is apparent in almost

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

every line of his evidence. We are not concluded by his statement that he was a merchant in good faith, nor are we estopped by it from looking into the truth of the matter as it appears in the record. Courts, in the interest of justice and truth, may, and often do, look beneath the surface of things to discover the real nature of the transaction under investigation, and are frequently justified in putting aside as unworthy of serious consideration statements which, although apparently candid, are really used as mere forms of expression to bring the actor within the protecting circle of some rule of law or statutory phrase. In the enactment of this statute, the Legislature was careful to provide not only that the applicant for license should establish by satisfactory evidence that he was a merchant in good faith, but also that he had not assumed the name or the business of a merchant for the purpose of obtaining license. A person may be a merchant in good faith in the sense that he is engaged in the business at a place and under circumstances indicating his intention to follow it as a business; but proof of this fact alone would not entitle him to license to sell liquors. He must, in addition, show that he did not engage in the business for the purpose of obtaining license. It was the legislative purpose that the evidence in support of both these propositions should be clear and convincing, and, when a person applies for license to sell liquor, the question of his good faith and intent should be carefully inquired into in order that the statute may not be used as an instrument to enable persons not bona fide merchants to sell liquor. It is manifest that, in cases like this, no rule of general fitness can be laid down by which the lower court may be guided in granting or refusing license. Each application must stand or fall on the evidence introduced concerning it; but it may safely be said that in every case the previous occupation, as well as reputation of the applicant, the length of time he has been engaged in the business at the place where he applies for license, the value of his stock of goods, the probability of it being a good location from a business standpoint, the volume of business done by him, the number of people in the neighborhood, and its proximity to other similar places of business, are matters pertinent to be inquired into and considered by the court in arriving at a conclusion, and the burden is upon the applicant to establish that he comes within the class to whom license may be granted.

In disposing of this case we have not overlooked or underestimated the weight that should properly be given to the judgment of the court granting the license. In more than one like case we have held that the discretion vested in tribunals authorized to grant license will not be interfered with unless it

has been abused, or, in other words, not reasonably exercised. And this well-settled practice we have no disposition to modify or depart from; but, in the case before us, we feel obliged to say that in our opinion the county court did not exercise a reasonable discretion in granting Ewing license.

Wherefore the judgment is reversed, with directions to proceed in conformity with this opinion.

POSTAL TELEGRAPH-CABLE CO. v. LOUISVILLE COTTON OIL CO.

(Court of Appeals of Kentucky. Nov. 30, 1909.)

1. EXCEPTIONS, BILL OF (§ 6*)—CONTENTS.

The office of a bill of exceptions is to bring before the court the record, authenticated by the trial judge, of things that transpired in the trial court, that do not appear on the record book of the trial court, and it is not necessary to put in the bill of exceptions the pleadings, orders of court, or any motion or paper that is mentioned in the orders of court which have been offered or filed as a part of the record, though it may not be copied on the record book, as the fact that it is there mentioned is sufficient identification to make it a part of the record.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 8, 12; Dec. Dig. § 6.*]

For other definitions, see Words and Phrases, vol. 1, pp. 783, 784.]

2. APPEAL AND ERROR (§ 523*)—RECORD—CONTENTS—DEPOSITIONS.

The bill of exceptions spoke of depositions for plaintiff, after naming the witnesses who gave evidence by deposition, and recited that the depositions would follow immediately after the bill of exceptions in the clerk's transcript, and the depositions so followed. As to the depositions for defendant, the bill recited that the depositions of the witnesses named were set out in the transcript of the evidence, which was not true; but they were copied by the clerk in his record. The stenographer's transcript of the evidence, approved by the trial judge, stated that the depositions of the designated witnesses were read. *Held*, that the depositions were in the record on appeal and could be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2372; Dec. Dig. § 523.*]

3. APPEAL AND ERROR (§ 523*)—RECORD—CONTENTS—DEPOSITIONS.

While depositions filed with the clerk should be copied in the record he makes for the court on appeal, and should not be embodied in the transcript made by the official stenographer, under Ky. St. § 4639 (Russell's St. § 3110), which contemplates that the stenographer shall only take notes of and make a transcript of the oral testimony, yet where the depositions appear in the stenographer's transcript, signed by the judge, or where the bill of exceptions shows that the depositions of named witnesses were read as evidence, and they are copied by the clerk in the record made out by him, or where the stenographer's transcript shows that the depositions of named witnesses were read, and they are copied by the clerk in the record, the depositions will be considered as a part of the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2372; Dec. Dig. § 523.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fer is not accepted, and no contract is made.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 42, 47; Dec. Dig. §§ 22, 23.*]

5. CONTRACTS (§ 168*)—TERMS IMPLIED.

What is mutually understood and agreed to by the parties enters into and becomes a part of the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 751; Dec. Dig. § 168.*]

6. CUSTOMS AND USAGES (§ 10*)—AS PART OF CONTRACT.

A well-established custom of the trade to which a contract relates enters into and becomes a part of it when the custom is known and understood by the parties and the contract is made with reference to it.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 11-21, 35-39; Dec. Dig. § 10.*]

7. SALES (§ 23*)—MUTUAL AGREEMENTS.

Where an offer was to buy 10 tanks of bleachable prime summer oil at 27 cents, and the acceptance added the words, "Memphis Exchange rules and arbitration," and there was evidence that the quoted words did not impose any condition not contemplated by both parties, there was a binding contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 47; Dec. Dig. § 23.*]

8. TELEGRAPHS AND TELEPHONES (§ 67*)—DELAY IN DELIVERY OF MESSAGES—DAMAGES—KNOWLEDGE OF PROBABLE CONSEQUENCES.

A telegraph company is not liable for damages for negligent delay in the delivery of a message that it could not reasonably know or contemplate, when it received the message, would follow from its failure to transmit and deliver with reasonable diligence.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 65; Dec. Dig. § 67.*]

9. DAMAGES (§ 23*)—CONTRACTS—SPECIAL DAMAGES.

Parties contracting contemplate that a failure to perform it will result in some damage to the party not in default; but special damages are not recoverable unless they were within the contemplation of the parties when the contract was made, or the defaulting party had notice that such damages would result from its breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 58, 62; Dec. Dig. § 23.*]

10. TELEGRAPHS AND TELEPHONES (§ 67*)—NEGLIGENT DELAY IN DELIVERY OF MESSAGES—SPECIAL DAMAGES—KNOWLEDGE OF CONSEQUENCES OF DELAY.

Where a message, partly in cipher, furnished to a person of ordinary prudence notice that it was important and its prompt delivery essential, or where the telegraph company or its operator receiving it had notice of the importance of the message, special damages are recoverable for the failure to promptly deliver it; but where the message does not convey any information of its importance, and the company or its operator receiving it has no information of its importance, only the price paid for sending the message may be recovered for negligent delay in the delivery of it.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 65; Dec. Dig. § 67.*]

ligent delay in delivery of a message, denied that it had notice that the message was important and its prompt delivery essential, and the evidence leaves the matter in doubt, the question is for the jury.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 76; Dec. Dig. § 73.*]

12. TELEGRAPHS AND TELEPHONES (§ 67*)—NEGLIGENT DELAY IN DELIVERY OF MESSAGE—SPECIAL DAMAGES—KNOWLEDGE OF CONSEQUENCES OF DELAY.

Where a telegraph company, or its operator receiving a message, had notice from the sender, obtained directly, with reference to the message, or received in the course of business dealings with him, or information from other sources, of the importance of the message, the company is liable for special damages, reasonably following as a consequence of its negligent delay in delivering the message, though the message is wholly unintelligible to the operator.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 65; Dec. Dig. § 67.*]

Nunn, C. J., dissenting in part.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"To be officially reported."

Action by the Louisville Cotton Oil Company against the Postal Telegraph-Cable Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Lawrence S. Leopold, Richard & Ronald, and Wm. W. Cook, for appellant. Henry W. Sanders and Morton K. Yonts, for appellee.

CARROLL, J. At 4:16 p. m. on September 11, 1905, R. D. Winship & Co., a firm of brokers in Chicago, sent the following telegram to the Louisville Cotton Oil Company: "Accclimate can sell handsome Bleachable fasten bastille Chicago September Answer." This cipher telegram, when translated, means: "On firm offer can sell 10 tank cars Bleachable prime summer yellow oil 27c. Chicago September Answer." At 4:40 p. m. on the same day, the Louisville Cotton Oil Company answered this telegram in the following message: "Absurdity Bastille Car Chicago handsome Bleachable Fasten Memphis Exchange rules and arbitration Obedient buyers name"—which, when translated, means: "Telegram received and offer accepted 27 cents Chicago 10 tank cars Bleachable prime summer yellow Memphis Exchange rules and arbitration. On receipt of this please telegraph buyers name." This telegram was received at the Chicago office of the cable company at 4:55 p. m., and sent by a messenger boy to the office of Winship & Co. The boy, finding the office closed, left the telegram under the door, where it was found by Winship & Co. the next morning, when they reached their office. The failure on the part of Win-

ship & Co. to receive the telegram on the day it was sent resulted in the cancellation of the order, as the offer contained in the telegram of Winship & Co. was good only if accepted by the cotton oil company on September 11th, and notice of such acceptance delivered to Winship & Co. on that day. Thereupon the cotton oil company brought this suit for damages against the cable company, charging that by its negligence in failing to deliver the telegram it lost the sale of the oil, and that on the following day the market price of such oil declined, and the highest price thereafter obtainable was 24 cents per gallon, at which the oil was sold, making a loss to the cotton oil company of \$1,875. In its answer the cable company set up: (1) That the telegram it failed to deliver was a cipher message, the meaning of which was unknown to it, and the damages claimed by the cotton oil company were not, and could not reasonably have been, contemplated by it at the time it received the telegram for transmission as the probable result of a failure to deliver it; (2) that the telegram sent by the cotton oil company was not an acceptance of the offer made in the telegram of Winship & Co., and therefore no contract would have been completed between the parties if the telegram had been received by Winship & Co. The trial before a jury resulted in a verdict in favor of the cotton oil company for \$1,500.

Before coming to the merits of the case, we will dispose of a question of practice raised by counsel for the cotton oil company, who insists that we cannot consider the evidence in the case because all of it is not embraced in a properly certified bill of exceptions. On the trial of the case several witnesses testified orally in behalf of each of the parties, and there was read the depositions of R. D. Winship, Clarence Wimpenny, L. C. Doggett, W. E. Griffith, George J. Harding, and Charles A. Stearns. In the official stenographer's transcript of the evidence, attested by the stenographer and examined and approved by the trial judge, is contained the evidence of all the witnesses who testified in person, and also a statement that the depositions of certain witnesses, naming them, were read in evidence to the jury. The depositions are not included in the stenographer's transcript of the evidence, but are found in the record made by the clerk. In the bill of exceptions, examined and approved by the trial judge, there appears the following: "The plaintiff introduced as evidence in its behalf John G. Cafferty, Charles B. Finck, Charles A. Ludwig, and read in evidence the depositions of R. D. Winship, Clarence Wimpenny, and L. C. Doggett, as shown by said transcript of evidence. Said depositions will follow immediately after this bill of exceptions in this transcript."
* * * The defendant introduced L. R. James, F. J. Welsh, Ruby Melchels, and J. S. Wright, and read to the jury the depositions

of W. E. Griffith, George J. Harding, and Charles A. Stearns; all of which is fully set out in said transcript of evidence."

Reading together the bill of exceptions, incorporated in the record made by the clerk, and the stenographer's official transcript of the evidence, it is shown beyond question that the depositions of the persons named were read in evidence; but the point is made that, as the evidence of the witnesses who testified by deposition does not appear in the bill of exceptions or in the transcript of the evidence, it cannot be considered, and, this being so, we must presume that the omitted evidence supported the averments of the petition and was sufficient to sustain the verdict. The sole purpose and office of a bill of exceptions is to bring before this court a record authenticated by the trial judge of things that transpired in the trial court that do not appear on the record book of the trial court. It is not necessary to put in the bill of exceptions the pleadings, orders of court, or any motion or paper that is mentioned in the orders of court as having been offered or filed as a part of the record, although it may not be copied on the record book, as the fact that it is there mentioned is sufficient evidence of its identification to make it a part of the record for this court when copied by the clerk accompanied by his certificate.

Under the old system, and before the advent of the official stenographer, it was the practice for attorneys to write out a bill of exceptions containing the substance of what the witnesses said and the exceptions and objections thereto, and when any deposition, instruments of writing, or record was introduced, to recite in the bill, in substance, that the plaintiff (or defendant, as the case may be) read in evidence a deed from A. to B., or the deposition of H., followed by the words "here insert," which was a direction to the clerk to insert the document or deposition at that place when he came to prepare a transcript for this court. And so, in reference to instructions, the bill to illustrate would usually read: The plaintiff offered and the court gave instruction A, reading as follows, "here insert." Occasionally a bill is made up in this way now, although, with few exceptions, the oral evidence is taken down by the official stenographer, who makes out a transcript for use in this court as provided in section 4639 of the Kentucky Statutes (Russell's St. § 3110). Under the new practice that has come into vogue with the official stenographer, it occasionally happens that the depositions read on the trial will appear in the transcript made out by the stenographer, and also in the record made out by the clerk, and often the depositions will appear in the stenographer's transcript of the evidence and not in the record made out by the clerk, and sometimes in the record and not in the transcript of the evidence. Indeed,

pear, so that it is authenticated by the trial judge as having been read on the trial, as the Civil Code of Practice provides, in section 335, that "no particular form of exception or bill of exceptions is required."

The bill of exceptions in this case, in speaking of the depositions for the cotton oil company, after naming the witnesses who gave evidence by deposition, recites that "the depositions will follow immediately after this bill of exceptions in the clerk's transcript," and they do. In reference to the depositions read in behalf of the cable company, it recites that the depositions of the witnesses in its behalf, naming them, are set out in the transcript of the evidence; but they are not, although they are copied by the clerk in his record. It thus appears from the stenographer's transcript, signed by the judge, as well as from the bill of exceptions, signed by the judge, that the depositions were read, and the mere fact that they do not happen to be copied in the record or transcript at the place they should be will not be allowed to overturn the conclusive fact that they were read on the trial, or justify us in refusing to consider them as a part of the record in this court. While upon this point we may say that, although it is right that depositions and other papers that are filed with the clerk should be copied by him in the record he makes for this court, as a part of the legitimate emoluments of his office, and that they should not be embodied in the transcript made by the official stenographer, as the statute (section 4639) contemplates that the stenographer shall only take notes of and make a transcript of the oral testimony offered or introduced, yet, if the depositions appear in the stenographer's transcript, and it is signed by the judge, or if the bill of exceptions shows that the depositions of certain witnesses, naming them, were read as evidence, and they are copied by the clerk in the record made out by him, or if the stenographer's transcript shows that the depositions of certain witnesses, naming them, were read in evidence, and they are copied by the clerk in the record, they will be considered by this court as a part of the record. As said in *Sinclair's Adm'r v. I. C. R. Co.*, 100 S. W. 236, 30 Ky. Law Rep. 1040: "In fact, when the evidence is taken by the official stenographer, and his transcript contains all the evidence introduced and offered, and all exceptions, objections, and avowals concerning same, and is certified to as correct by the stenographer and approved by the judge before whom the trial was had, and made a part of the record by an order of court, no bill of exceptions is necessary unless it be to make a part of the record the instructions and other matter not contained in the transcript of the official

the objections and exceptions relating thereto, and when it shows that it contains all the instructions and all the evidence and the exceptions, objections, and avowals, and is properly certified and approved, it becomes a complete bill of exceptions, when filed by an order of court, although another bill of exceptions may be prepared containing matter that for any cause has not been presented in a bill of exceptions." To the same effect is *McGeever v. Kennedy*, 42 S. W. 114, 19 Ky. Law Rep. 845. Neither the cases of *L. & N. R. Co. v. Finley*, 86 Ky. 297, 5 S. W. 753, 9 Ky. Law Rep. 660, *McAllister v. Connecticut Mutual Life Ins. Co.*, 78 Ky. 531, and *C. & O. S. W. R. Co. v. Smith*, 101 Ky. 107, 39 S. W. 832, 18 Ky. Law Rep. 1079, nor the line of cases in reference to instructions which are referred to in *Gambrell v. Gambrell*, 113 S. W. 885, are in conflict with the views we have expressed. An examination of them will show that, when the court refused to consider the depositions and instructions as not properly a part of the record, it was because they were not identified by the attestation of the trial judge.

Getting back to the merits of the case, the right of the cotton oil company to recover damages rests altogether on the proposition that, if the message sent by it had been received in due time, a valid contract would have been made between the parties; or, in other words, a contract that either of them might have brought an action in damages for a breach of. Unless such an action could be successfully maintained, the cotton oil company cannot recover more than nominal damages for the failure of the cable company to deliver the message. If no valid enforceable contract would have been made by the two telegrams, it necessarily follows that the cotton oil company cannot recover damages from the cable company that would only have resulted if the contract had been made. The question then comes up: Did the telegrams make a contract between the parties sending them? The cable company insists they did not, because the acceptance contained a qualifying clause; in other words, was not an unconditional acceptance of the offer. If this position is well taken, no more than nominal damages can be recovered, as the authorities in this state and elsewhere are uniform that to close a contract the proposition to sell or buy, as the case may be, must be accepted in the very terms in which the proposition is made. If any qualifications or conditions are added to the acceptance, the offer is not accepted, and hence no contract is made. In *Ellison v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556, the law upon this point is thus stated: "It is an undeniable principle of the law of contracts that an offer by a bargain of one person to another imposes no obligation upon

ture from, those terms, invalidates the offer, unless the same be agreed to by the person who made it. Until the terms of the agreement have received the assent of both of the parties, the negotiation is open and imposes no obligation upon either." This was approved in *Provident Savings Society v. Elliott*, 93 S. W. 659, 29 Ky. Law Rep. 552, and again in *New York Life Ins. Co. v. Levy*, 122 Ky. 457, 92 S. W. 325, 29 Ky. Law Rep. 6, 21, 5 L. R. A. (N. S.) 739, in which last-mentioned case the question is elaborately discussed and many authorities are cited sustaining the rule announced.

It will be observed that the offer was to buy 10 tanks of bleachable prime summer yellow oil at 27 cents, while the acceptance, although it agreed to the offer of 27 cents, for 10 tank cars bleachable prime summer yellow oil, followed this by the words "Memphis Exchange rules and arbitration," and from a mere reading of the telegrams it would seem that these words did annex a condition, and that the message of the cotton oil company was only a qualified acceptance of the offer, and one that would require an answer accepting the added condition before the contract could be said to be closed; but there is evidence that these apparently qualifying words did not in fact impose any condition or add any terms that were not contemplated and agreed to by both of the parties at the time the telegrams were sent and received. The president of the cotton oil company, as well as Winship, testifies that the message of the cotton oil company was an acceptance of the offer, and, although the evidence is not satisfactory, there is more than one suggestion in it that, in contracts like the one in question, it is understood by the parties that the Memphis Exchange rules and arbitration apply to all contracts of this kind. If it is true that it was mutually understood by the parties and within their contemplation, at the time the telegrams were sent, that the Memphis Exchange rules and arbitration should apply to the contract, or there was in existence at the time a well known and established custom entering into contracts like this that the Memphis Exchange rules and arbitration should apply, or, to put it in another way, if when Winship & Co. sent the telegram they understood and agreed that the Memphis Exchange rules and arbitration should apply to it, the fact that these words were used in the message of acceptance would not modify or qualify the offer, but, on the contrary, would make a complete contract between the parties. What is mutually understood and agreed to by the parties will enter into and become a part of a contract, as will a well-established custom of the trade enter into and become a part of it when the custom is known and understood by the parties

duce evidence to show that this message was an acceptance of the offer, and the custom of the trade in reference to such contracts, and likewise competent for the cable company to introduce evidence to show that it was not an acceptance and that there was no such custom. If there is conflict in the evidence on these points, the court should, in addition to other instructions, tell the jury, in substance, that, if the telegram sent by the cotton oil company to Winship & Co. changed or modified the terms upon which Winship & Co. offered to buy the oil, the cable company was not liable for any damages exceeding the cost of the telegram, although it may negligently have failed to deliver it within a reasonable time.

As to whether or not a telegraph company is liable in more than nominal damages for its failure to transmit and deliver in reasonable time a cipher message, there is some conflict in the authorities, and the question has never been directly passed on by this court, although it was mentioned in *Western U. Tel. Co. v. Eubanks*, 100 Ky. 591, 38 S. W. 1068, 18 Ky. Law Rep. 995, 36 L. R. A. 711, 66 Am. St. Rep. 361. The weight of the adjudged cases undoubtedly is that where the message is in cipher and unintelligible, except to the sender and addressee, and the company has no information or notice except that gathered from the telegram itself as to the importance of its delivery, the injured party cannot recover more than nominal damages. *Primrose v. Western Union Telegraph Co.*, 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; *Thompson on Negligence*, § 2472; *Jones on Telegraph & Telephone Companies*, §§ 531-538; *Am. & Eng. Ency. of Law*, vol. 27, p. 1062; *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452. But, on the other hand, there are a few courts that hold that the company is liable for all special damages the complaining party suffered by its negligence, although the message was wholly in cipher or couched in language that did not convey its real meaning or importance. *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715. Although a telegraph company is a public servant and owes to the public duties that it cannot contract against or avoid responsibility for, nevertheless it should not be held liable for any loss or damage that it could not reasonably know or contemplate, when it received the message, would follow from its failure to transmit or deliver it with reasonable diligence; or, in other words, loss that it had no notice or information of when it entered into the contract of carriage. The whole doctrine of liability for breach of contract is based upon the proposition that, when parties enter into a valid contract, it is within the contem-

damage the delinquent party must make good if it was a reasonable and natural consequence of his breach. But special or extraordinary damages cannot be recovered unless it can be shown that they were within the contemplation of the parties when the contract was made, or that the defaulting party had notice that such damages would result from his breach, and, in the absence of notice, it cannot be said that it was contemplated by the parties that this class of damages would result from a failure to perform the contract according to its terms.

This rule in reference to special damages has been applied by us in actions against common carriers of goods, and we have held that, whenever a person damaged by unreasonable delay in the transportation of freight seeks to recover more than nominal damages, or to recover special or extraordinary damages, such as loss of profit or loss of custom, or the like, it must be shown that the carrier was either notified of the importance of prompt delivery, or the nature of the goods furnished in themselves such notice. *L. & N. R. Co. v. Mink*, 126 Ky. 337, 103 S. W. 294, 31 Ky. Law Rep. 833; *Illinois Central R. Co. v. Nelson*, 97 S. W. 757, 30 Ky. Law Rep. 114. This rule we think it fair and just to apply to telegraph companies. If the message on its face, although partly in cipher or unintelligible, would furnish to a person of ordinary prudence notice that it was important and its prompt delivery essential, or if the company or its operator receiving it has notice of its importance, then special damages may be recovered for the failure to promptly transmit or deliver it. On the other hand, if the message is of such a character that it does not convey any information of its importance or the necessity for its prompt transmission or delivery, and if the company or its operator receiving it has no information or notice of its importance, only nominal damages, or, in other words, the price paid for sending the message, can be recovered if the company is negligent in its transmission or delivery. Whether special damages can be recovered is not dependent upon the proposition that the message on its face is intelligible. If the company or the operator receiving it has notice from the sender, obtained directly with reference to the particular message, or received in the course of business dealings with him, or information from other sources, of the importance of the message, it will be liable for the special damages that reasonably and naturally followed as a consequence of its negligence, although the message may be wholly unintelligible to the operator, and no person excepting the sender and addressee have knowledge of its meaning. The essen-

sage. It is a matter of secondary moment how this notice is obtained. If the company denies that it had notice, and the evidence leaves the matter in doubt, it is a question for the jury, and the complaining party may introduce in evidence such facts and circumstances as throw light upon the question of whether or not the company, at the time it received the message, did have notice of its importance. *Jones on Telegraph & Telephone Companies*, § 538; *Postal Tel. Co. v. Lathrop*, 131 Ill. 575, 23 N. E. 583, 7 L. R. A. 474, 10 Am. St. Rep. 55.

Under this view of the law, the court on another trial may permit the cotton oil company to introduce evidence showing its course of dealings with the cable company, the number and kind of messages sent by and received from it, and any other facts or circumstances tending to show that the company or its operator receiving the message had notice at the time of its importance; and the jury should be instructed, in substance, that if they believe from the evidence that the cable company knew, or in the exercise of reasonable prudence should have known, from the message or other facts within its knowledge, that the message related to a commercial transaction of importance, then it had such notice as would make it liable in special damages if it negligently failed to deliver in a reasonable time the message.

Wherefore the judgment is reversed, with directions for a new trial in conformity with this opinion.

NUNN, C. J. I dissent from that part of the opinion which establishes the doctrine that it is necessary for the sender of a message to expose his trade or other secrets to the telegraph company, a public service corporation, before it can be made to respond in damages for its negligence in the transmission and delivery of the message.

ULRICH et al. v. KOUSTMER et al.

(Court of Appeals of Kentucky. Nov. 30, 1909.)

1. MUNICIPAL CORPORATIONS (§ 195*)—POLICE AND FIRE COMMISSIONERS—HOLDING OVER.

Ky. St. 1900, § 3137 (Russell's St. § 1144), part of the charter of cities of the second class, provides that four persons shall be appointed as police and fire commissioners for a term of one, two, three, and four years, respectively, and thereafter yearly, as their terms of office expire, respectively, there shall be one appointed for a term of four years. *Held*, that such a commissioner does not hold over after expiration of his term till his successor is appointed and qualified, there being no provision therefor, and there being no such provision in section 3118 (section 1216), part of such charter, relative to the term of the superintendent of public works, while there is such provision in sections 3126 and 3143

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. MUNICIPAL CORPORATIONS (§ 177*)—POLICE AND FIRE COMMISSIONERS—VACANCY IN OFFICE—APPOINTMENT.

Under Ky. St. 1909, § 3137 (Russell's St. § 1144), part of the charter of cities of the second class, providing that the mayor, subject to the approval of the board of aldermen, shall appoint four persons as police and fire commissioners; that they shall be appointed for a term of one, two, three, and four years, respectively, and every year thereafter as their terms of office shall expire, respectively, there shall be one appointed for a term of four years, and the mayor shall fill all vacancies—the mayor in making an original appointment (that is, appointing one, after the terms of the first four appointees have expired, to serve for four years) must submit the name of the appointee to the board of aldermen for its approval, and, it having refused to approve the appointee, a vacancy, such as the mayor may fill without the approval of the board of aldermen, does not arise on expiration of the term of the outgoing member, but the mayor must submit another name for its approval.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 177.*]

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Action by Julius H. Ulrich and others against Frederick Koustmer and others. Judgment for defendants. Plaintiffs appeal. Affirmed in part and reversed in part, and remanded for further proceedings.

R. W. Nelson, Thos. P. Carothers, Aubrey Barbour, Brent Spence, and Nelson & Gallagher, for appellants. Samuel E. Anderson, Wm. A. Burkamp, C. T. Baker, Geo. H. Ahlering, and Harry Webber, for appellees.

NUNN, C. J. This controversy depends upon the construction of section 3137, Ky. St. (Russell's St. § 1144), which is as follows: "The mayor, subject to the approval of the board of aldermen, shall appoint four citizens and freeholders of the city, who shall have been electors of the city for five years preceding their appointment, and who shall not be less than thirty years of age, and not related to the mayor by blood or marriage, who, together with the mayor, shall compose a board of police and fire commissioners. The mayor shall be ex officio chairman of said board. Said commissioners shall be appointed for a term of one, two, three and four years, respectively, upon the taking effect of this act; and every year thereafter, as the terms of office of said commissioners shall expire, respectively, there shall be one commissioner appointed for a term of four years, and the mayor shall fill all vacancies that may occur in said board," etc. This section is contained in the charters of second-class cities. The city of Newport being one of that class, the mayor on April 27, 1894, after the act became a law,

according with the statute, and on the same date each year thereafter the mayor named a person to act in the place of the one whose term expired, and sent the name to the board of aldermen for confirmation. There seems to have been no friction in the naming and confirming a person to hold the position until April, 1909, when the mayor, Edward L. Krieger, named one Bowman to fill the position, and sent his name to the board of aldermen for confirmation, which the board refused to do. The mayor failed to name another person in lieu of Bowman until after the term of Richard Pfingstag expired. He then declared a vacancy in the office, and appointed one Lindsay to fill the unexpired term.

This action was instituted, in which it was alleged, in substance, that Pfingstag was still a member of the board and had a right to hold the position until his successor was duly appointed, approved, and qualified; that the appointment by the mayor of Lindsay to fill the alleged vacancy was void, and that he, Pfingstag, had a right to act as a member of said board; that the mayor and one Koustmer, a member of the board, were threatening and about to induct Lindsay into office, and an injunction was sought to prevent it. The case was tried in the lower court, and judgment was rendered to the effect that Pfingstag's term of four years had expired, and that he had no right to hold the office until his successor was duly appointed and qualified, and that there was a vacancy in the position when the mayor appointed Lindsay and that the appointment of Lindsay was legal; that it was not necessary in such a case to submit his name to the board of aldermen for its confirmation. The injunction was dissolved, and this appeal prayed. Immediately thereafter, and within the time fixed by law, the appellants moved a judge of this court to reinstate the injunction, and on June 9, 1909, W. E. Settle, at that time Chief Justice of this court, entered the following order, to wit: "It is the opinion of this court, in which a majority of its members and all who are present concur, that the injunction granted appellants should have been continued in force until a hearing of the case is had in this court upon the appeal and on the merits. It is, therefore, adjudged that the injunction dissolved by the circuit court be, and it is, re-instated to continue in force during the pendency of the appeal, and until the case shall be decided by this court upon its merits." Counsel cite several authorities which seemingly support their contentions as to each of the questions involved. We will not take the time, however, to consider and discuss them in this opinion, as they construe statutes dif-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

second class came from the Legislature as a whole, and it is not the province of the court to add to it when the meaning is plain. The statute, in so many words, fixes the term each of the persons appointed is to hold. It was in the province of the General Assembly to determine whether or not they should hold until their successors were appointed and qualified. Sections 3118, 3126, 3137, and 3143 of the Statutes (Russell's St. §§ 1216, 1028, 1144, 1060) throw much light upon the question as to whether Pfingstag is authorized to hold the office of police and fire commissioner until his successor was duly appointed and qualified. Section 3118 relates to the appointment by the mayor of a superintendent of public works, and says that he shall be appointed, "for a term of two years," subject to the approval of the board of aldermen. Section 3126 provides that the mayor shall appoint an auditor, subject to the approval of the board of aldermen, to serve for two years, or until his successor is duly appointed and qualified. Section 3137, the one under consideration, provides that four persons shall be appointed as police and fire commissioners, their term to expire in one, two, three, and four years, respectively, and thereafter, yearly, there shall be one appointed for a term of four years. Section 3143 fixes the term of the commissioner of the waterworks. "Their terms of office shall be three years and until their successors are duly appointed and qualified." Here we have two instances expressly stating that the officers shall hold over until their successors are duly appointed and qualified, and in the other two no such power or right is conferred. The expression in the two instances that they should hold over and in the other two a failure to confer the right shows plainly that the General Assembly did not intend that the right to hold over should exist. This court has no power to add words to a statute when it is unambiguous. We are therefore of the opinion that Pfingstag's power as a police and fire commissioner ceased at the expiration of his term of four years.

The other question is also easy of solution. The statute unquestionably authorized the mayor to fill all vacancies in the office without submitting the names of such appointees to the board of aldermen for its approval. See the case of *Watkins v. Mooney*, 114 Ky. 646, 71 S. W. 622, 24 Ky. Law Rep. 1469. It was also decided in that case, with equal definiteness, that the mayor in making original appointments—that is, in appointing some one to serve for four years—should submit the name of the appointee to the board of aldermen for its approval, and this is in accord with the express terms of the statute.

The General Assembly, when it enacted the statute. The term of office succeeding Pfingstag had never been filled, so that it could become vacant, and the statute requires the mayor to appoint some one for the term and submit his name to the board of aldermen for approval. In our opinion there must have been some one duly appointed and qualified filling the office before a vacancy can occur as contemplated by the statute. It was the duty of the mayor to have submitted the name of Lindsay as his appointee to the board of aldermen for its approval before he could have been legally inducted into office. In the case of *Watkins v. Mooney*, supra, this court said: "It is argued, and this we conceive to be the main argument for the appellee in his behalf, that there is no apparent reason, and, in fact, none, why the legislators should require the mayor's appointees, original and for full terms, always to be confirmed by the board of aldermen, and yet allow him to fill vacancies in the same board without such confirmation. The argument seems to us to be almost irresistible when presented to that body who make the law. But the consequences are not so much to be regarded in the construction of the statutes as the language employed, where the language is unambiguous. In fact, as long as the language of the statute is not ambiguous, the courts have no discretion as to the meaning they will give to it. * * * A distinction is obviously intended to be made between original appointments of members of the board and appointments to fill vacancies; otherwise, there is no sense or meaning in the provision directing and authorizing the mayor to fill all vacancies. If the Legislature had intended that appointments to fill vacancies should be submitted for confirmation to the board of aldermen, it would doubtless have put in after the word 'mayor,' as it expressly did when providing for the original appointment, 'subject to the approval of the board of aldermen.'" Evidently the General Assembly intended that in selecting police and fire commissioners for a term of four years the mayor and board of aldermen should exercise their judgment in the matter, and the mayor alone could not have the power. To give the statute the construction contended for by appellees would thwart this object, as the mayor could fail to appoint and send in the name until after the term of the outgoing member had expired, or send in the name of a person that he knew was unfit, and that the board would reject, and then wait until the term of the outgoing member expired and declare a vacancy and appoint a person without submitting his name to the board for confirmation, and in this way govern and control the matter himself, and obtain a board of police

right to hold over beyond his term is affirmed, and that part declaring Lindsay duly appointed to fill the vacancy is reversed and remanded for further proceedings consistent herewith.

SCHWALK'S ADM'R v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. Dec. 1, 1909.)

1. MUNICIPAL CORPORATIONS (§ 747*)—LIABILITY FOR NEGLIGENCE—GOVERNMENTAL DUTIES.

A municipal corporation in maintaining a city hall for the use of its officers and agents as a place for transacting its business performs a public and governmental duty, and is not liable for the negligence of its agents and servants in the transaction of such business.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 747.*]

2. TAXATION (§ 217*)—EXEMPTIONS—PUBLIC PROPERTY USED FOR PUBLIC PURPOSES—CITY HALL.

Under Const. § 170, which declares that public property used for public purposes shall be exempt from taxation, the city hall maintained by the city of Louisville is exempt.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 355, 356; Dec. Dig. § 217.*]

3. MUNICIPAL CORPORATIONS (§ 733*)—LIABILITY FOR NEGLIGENCE—GOVERNMENTAL DUTIES.

In exempting municipal corporations from liability for defects in its public buildings used for public or governmental purposes, or the negligence of its employees in their care, the law places them on the same footing with the state and counties thereof as to buildings owned and used by them in aid of government.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 733.*]

4. MUNICIPAL CORPORATIONS (§ 733*)—LIABILITY FOR NEGLIGENCE—GOVERNMENTAL DUTIES—EXCEPTION TO RULE.

That municipalities are liable for negligence in not keeping their streets in repair affords an exception to the general rule exempting municipalities from liability for negligence in the performance of a public, governmental duty imposed upon them for public benefit, and for which they in their corporate capacity derive no pecuniary profit.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 733.*]

5. MUNICIPAL CORPORATIONS (§ 747*)—PERSONS EMPLOYED IN CITY HALL—LIABILITY FOR NEGLIGENCE—RESPONDEAT SUPERIOR—"PUBLIC OFFICERS."

Persons employed in a city hall in managing and conducting the affairs of the municipality are public officers, charged with the performance of public duties; and the doctrine of respondeat superior does not apply to such employments.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 747.*]

For other definitions, see Words and Phrases, vol. 6, pp. 4933-4951; vol. 8, pp. 7737, 7771-7773.]

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313-321, 351; Dec. Dig. § 90.*]

Nunn, C. J., dissenting.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

"To be officially reported."

Action by S. J. Schwalk's administrator against the City of Louisville. Judgment for defendant, and plaintiff appeals. Affirmed.

Bennett H. Young, Marion W. Ripy, and E. C. Walde, for appellant. Huston Quin, Clayton B. Blakey, and Elmer C. Underwood, for appellee.

SETTLE, J. On August 30, 1906, Simon J. Schwalk lost his life while going to some part of the city hall in Louisville upon an elevator used in the building. The city hall is owned by the appellee, city of Louisville, and practically the whole of the city's business is conducted within its walls.

The appellant, Columbia Finance & Trust Company, was appointed and duly qualified as administrator of Schwalk's estate, and on March 27, 1907, instituted this action in the court below to recover of the appellee city damages for his death; it being, in substance, alleged in the petition as finally amended that the death of its intestate was caused by the negligence of appellee, its agents, and servants in failing to maintain the elevator in a reasonably safe condition for use, and in permitting it to be operated by an inexperienced and incompetent negro boy. After the petition had been twice amended, the circuit court sustained a demurrer to it, and, appellant refusing to plead further, judgment was rendered dismissing the action. Appellant's dissatisfaction with that ruling and judgment resulted in this appeal.

The judgment of the circuit court is bot-tomed upon the theory that the duty of the city of Louisville to provide and maintain a city hall for the use of its officers and agents and as a place for transacting its business affairs is a public and governmental duty and obligation for the negligence of its agents and servants, in the performance of which the city is not liable in an action for damages. This court is fully committed to the doctrine thus announced. As said in Taylor v. Owensboro, 98 Ky. 271, 32 S. W. 948, 17 Ky. Law Rep. 856, 56 Am. St. Rep. 361: "Municipal governments are auxiliaries of the state government. They are created principally to aid in securing a proper government of the people within the boundaries of such municipalities, and to make more effectual the maintenance of public order." Louisville Bridge Co. v. City of Louisville, 81 Ky. 189; City of Louisville v. Commonwealth, 1 Duv. 295,

85 Am. Dec. 624. The Constitution of the state gives full recognition to municipal corporations, and that they are to be treated as parts of the government machinery and necessary auxiliaries in carrying out the ends of government. Under section 170 of the Constitution, which declares that "public property used for public purposes" shall be exempt from taxation, it has been held by this court that waterworks, a park, public wharf, and even bonds owned by a city and applied exclusively to governmental or public uses cannot be subjected to taxation. *City of Louisville v. Commonwealth*, 1 Duv. 295, 85 Am. Dec. 624; *City of Owensboro v. Commonwealth*, 105 Ky. 344, 49 S. W. 320, 20 Ky. Law Rep. 1251, 44 L. R. A. 202; *Board of Councilmen City of Frankfort v. Commonwealth*, 94 S. W. 648, 29 Ky. Law Rep. 699; *Commonwealth v. City of Covington*, 128 Ky. 36, 107 S. W. 231, 32 Ky. Law Rep. 837, 14 L. R. A. (N. S.) 1214. Under the rule stated by the foregoing authorities, appellee's city hall is exempt from taxation. As the maintenance of a city hall for the use of the court, officers, and employes of a municipality, as well as for the transaction of its business, is but the exercise of a purely governmental function, it would seem to follow that the city cannot be held liable for acts of negligence on the part of its officers or agents engaged in its work or business therein.

The general rule on this subject is well stated in *Burdick's law of Torts* as follows: "Nonliability of City—There is a substantial agreement that it is not liable for the torts of its fire or police departments, nor for those of its boards of health or education; nor for those of any other officers, agents, or servants in the discharge of functions which primarily belong to the state, but the performance of which it has delegated to the municipality. Neglect of officers in guarding prisoners, or in caring for jurymen, or in keeping courthouses, townhouses, jails, or other public buildings in repair, will not subject the corporation to legal liability. Nor will the negligence of an employe of a charity hospital render the city which maintains it, liable to damages." The doctrine thus stated by *Burdick* has been applied by this court to relieve cities and towns of responsibility for the torts or negligence of their agents in the following cases: *Twyman's Adm'r v. City of Frankfort*, 117 Ky. 518, 78 S. W. 446, 25 Ky. Law Rep. 1620, 64 L. R. A. 572; *Pollock's Adm'r v. City of Louisville*, 13 Bush, 221, 26 Am. Rep. 260; *Jolly's Adm'r v. Hawesville*, 89 Ky. 279, 12 S. W. 313, 11 Ky. Law Rep. 477; *Prather v. Lexington*, 18 B. Mon. 559, 56 Am. Dec. 585; *Having v. Covington*, 78 S. W. 431, 25 Ky. Law Rep. 1617; *Ernst v. Covington*, 116 Ky. 830, 76 S. W. 1089, 25 Ky. Law Rep. 1027, 63 L. R. A. 652, 105 Am. St. Rep. 241; *Clark v. Nicholasville*, 87 S. W. 300, 27 Ky. Law Rep. 974; *Jones v. City of Corbin*, 96 S. W. 1002, 30 Ky. Law Rep. 874; *Board Park Com'rs v. Prinz*, 127 Ky. 460,

105 S. W. 948, 32 Ky. Law Rep. 359. And also held in the cases further cited to exempt state and city eleemosynary institutions from such liability. *Leavell v. Western Ky. Asylum*, 122 Ky. 213, 91 S. W. 671, 28 Ky. Law Rep. 1129, 4 L. R. A. (N. S.) 269; *Williamson v. Industrial School of Reform*, 95 Ky. 251, 24 S. W. 1065, 15 Ky. Law Rep. 629, 23 L. R. A. 200, 44 Am. St. Rep. 243. In respect to such nonliability for defects in its public buildings, such as a city hall, prison, schoolhouse, or other structure used for public or governmental purposes, or the negligence of its employes in their care, cities seem to be placed by the law on the same footing with the state and the counties thereof as to buildings owned and used by them in aid of government; and in the recent case of *Simons v. Gregory*, 120 Ky. 116, 85 S. W. 751, 27 Ky. Law Rep. 509, it was held by this court that neither Jefferson county, the county judge, members of its fiscal court, jailer, nor other of its county officers could be made liable in damages for injuries received by one through the fall of an elevator in the Jefferson county courthouse. According to the great weight of authority, cities and towns are not liable for negligence in the performance of a public, governmental duty imposed upon them for public benefit, and from which they in their corporate or proprietary capacity derive no pecuniary profit. However, the universally recognized liability of such municipalities for negligence in not keeping their streets in repair affords an exception to the general rule, which, as said in *Snider v. City of St. Paul*, 51 Minn. 466, 53 N. W. 763, 18 L. R. A. 151 (a case almost identical in point of fact with this): "We think the courts would do better to rest either upon special consideration of public policy or upon the doctrine of stare decisis than to attempt to find some strictly legal principle to justify the distinction. * * *"

It is, however, insisted for appellant that a municipality is charged with the performance of duties of a private and corporate character as well as those of a political or governmental nature, and that, as to the former, the municipality stands upon the same footing with a private corporation and may be held to the same responsibility with a private corporation for injuries resulting from its negligence. This is undoubtedly true, but unfortunately for this contention in maintaining a city hall appellee does not act in its capacity as a private corporation, but, as we have attempted to show, in the performance of a purely governmental function, because of which no liability resulted to it from the death of appellant's intestate. If it could be demonstrated by allegation and proof that the building in which the intestate met his death is maintained by appellee merely as an investment for profit, expected to be realized by its sale or in the way of rents from private persons occupying it as tenants, or it were devoted to any other use for which

be sound. But appellee has not put the building in question to such a use as any of those mentioned, but, on the contrary, erected, and has always used it, as and for a city hall, within and from which to manage and conduct the affairs and business of the municipality. It is, in brief, a building wholly devoted to public and governmental uses. This being true, we deem it our duty to adhere to the doctrine announced by past deliverances of this court, that a municipal corporation is not amenable to actions for negligence in the performance of public duties incident to the exercise of its governmental functions; that persons employed in the performance of such duties by the municipal corporation act as public officers, charged with a public service, and, being mere agencies or instruments by which such public duties are performed, that the doctrine of respondeat superior does not apply to such employments. To hold otherwise and impose upon the municipality responsibility for the negligence of such employees would indirectly fasten upon it a liability from which it is by law on consideration of public policy exempt.

We will not enter upon a discussion of the authorities from the courts of other states relied on in argument by counsel in support of their respective contentions, as we should be and are controlled in the conclusions we have reached by this court's several previous adjudications of the questions herein involved. Being of opinion that the law exonerates appellee from responsibility for the death of appellant's intestate, the judgment is affirmed.

NUNN, C. J., dissenting.

WARREN'S ADM'R v. JEUNESSE.

(Court of Appeals of Kentucky. Dec. 2, 1906.)

1. EVIDENCE (§ 513*)—OPINION EVIDENCE—SUBJECTS FOR EXPERT TESTIMONY—REASONABLY SAFE APPLIANCES.

In an action for death of a servant, where an issue is made whether an appliance, alleged to have caused the death, was reasonably safe, competent and experienced persons may, as experts, give their opinion based upon actual experience, observation, or technical knowledge, with their reasons therefor.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2318; Dec. Dig. § 513.*]

2. MASTER AND SERVANT (§ 270*)—INSTRUMENTALITIES—SUFFICIENCY—EVIDENCE—CUSTOMARY USE.

The fact that an appliance is in customary use is not the correct test of its sufficiency; but evidence that a master, charged with negligence resulting in the death of a servant from an instrumentality, followed the custom of other persons in the same line of business, was compe-

Servant, Cent. Dig. §§ 921, 925; Dec. Dig. § 270.*]

3. MASTER AND SERVANT (§ 270*)—DEATH OF SERVANT—ADMISSIBILITY OF EVIDENCE.

In an action for death of a servant alleged to have been caused by defective instrumentalities, including an engine, testimony of a witness that when he examined the engine months afterwards it was sufficient was inadmissible, where he could not say, except inferentially, that the engine was in the same condition as when the accident happened.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 917; Dec. Dig. § 270.*]

4. MASTER AND SERVANT (§ 293*)—DEATH OF SERVANT—INSTRUCTIONS.

In an action for death of a servant, a charge that if the master negligently failed to furnish reasonably safe machinery, and such an unsafe condition was known to the master, his agents or servants superior in authority to decedent, or whose duty it was to furnish and supervise the place and machinery, etc., and such unsafe condition was unknown to decedent, and he was injured while exercising ordinary care for his safety, he could recover, was not improper as confining to servants superior to decedent the knowledge of the defective appliance to fasten negligence on the master.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 293.*]

5. DEATH (§ 58*)—ACTIONS—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

In a death action brought under Ky. St. § 6 (Russell's St. § 11), passed pursuant to Const. § 241, providing an action for death from negligent act, and that the General Assembly shall provide how the recovery shall go, plaintiff need not prove that decedent exercised ordinary care for his own safety, or did not know of the danger; but proof of contributory negligence as a defense may be made in that decedent was not exercising ordinary care and did know of the unsafe appliance or place.

[Ed. Note.—For other cases, see Death, Cent. Dig. § 78; Dec. Dig. § 58.*]

6. MASTER AND SERVANT (§ 205*)—ASSUMPTION OF RISK.

While a servant assumes the ordinary risks incident to the employment, he does not assume any risk growing out of defects in places and appliances which the master is bound to exercise ordinary care to keep in reasonably safe condition; the ordinary risks assumed covering only such risks as grow out of the employment when the place and appliances furnished are reasonably safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 547; Dec. Dig. § 205.*]

7. MASTER AND SERVANT (§ 295*)—DEATH OF SERVANT—INSTRUCTIONS.

In an action for death of a servant alleged to have resulted from defective instrumentalities, as to which defective condition there was some evidence, a charge that, in entering upon the work in which he was employed, decedent assumed the ordinary risks incident thereto, and, if his injury was received because of one or more of the ordinary risks incident to the work, plaintiff could not recover, was misleading in failing to exclude risks of the place or appliances being unsafe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1168-1179; Dec. Dig. § 295.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant, and plaintiff appeals. Reversed for new trial.

Morton K. Yonts and J. Morgan Chinn, for appellant. Trabue, Doolan & Cox, Stanley E. Sloss, F. J. Canty, and H. M. McConnell, for appellee.

CARROLL, J. The appellee was a contractor engaged in the construction of a large building in Louisville. In lifting lumber and other material from the ground to the upper floors of the building, a block and tackle was attached to the top of the building, and from this was suspended a long rope that reached to the ground. When it was desired to lift material, a chain would be fastened around it, and attached to the rope, and the material lifted by power furnished by a gasoline engine 15 feet away, on which there was a drum around which the rope would be wound as the material was pulled up. There was also what was called a guide or "tag" rope attached to the chain at the point where it was wrapped around the material. This rope was intended to be used by the person who looked after the lifting of the material, and by means of it he could steady the package as it was being pulled up and keep it from striking the walls of the building and clear of obstructions. William A. Warren, an intelligent, capable young man, about 18 years of age, who was engaged in attending to the hoisting of material, was killed by being struck on the head by a long slender strip of iron that slipped out of a bundle containing a number of such strips as it was being lifted to the top of the building, by means of the machinery mentioned. The deceased had been working about the building in various capacities for some two months, and frequently during this time had fastened the chain around lumber and other material and guided it on its upward journey by the tag rope. When he was first put at this work, and at different times afterwards, he was warned by the foreman to fasten the chain around whatever was being carried up as tightly as could be, and keep a close watch on the package as it went up, so that if any of the pieces slipped out and fell he could get out of the way, as it was a common occurrence for pieces of material to slip out of the bundle and fall.

In this action to recover damages for his death, three grounds of negligence were set up: (1) That the place where the deceased stood while engaged in his work was unsafe; (2) in failing to provide a safe and proper contrivance for tying and keeping in a bundle the material to be hoisted; (3) in allowing the gasoline engine and appliances

risks incident to the work were open and obvious and well known to the deceased, who voluntarily assumed the labor. In reference to the first cause of alleged negligence, there was evidence conducing to show that the deceased, in tying the chain around the bundles and in looking after the guide rope, was required to stand on a narrow plank platform, on either side of which were openings into a deep cellar; but the evidence is not clear upon the question as to how or in what manner the openings in the cellar floor contributed to the accident or resulting injury. As to the second cause, a number of experienced contractors and builders were introduced to testify as experts concerning the safest and most secure way of fastening the chain around the bundle to be lifted. Some of these witnesses testified that two chains should be wrapped around it, some little distance apart, and both of them attached to the rope by which it was pulled up, thus holding the material in a horizontal position, while others said that the proper method was to tie one chain around it as was directed to be done by the persons in charge of the work at the time appellee was killed. Others said it was safer to wrap the bundle with a rope than with a chain, although the chain was used by many experienced contractors. Upon the third point, the engine was being operated by a brother of the deceased, who testified that, on account of defective construction or insufficient repair, it would stop or jerk occasionally, and this contributed to loosening the material being hauled up, and increased the probability of pieces slipping out. He also said that the wire rope, as it wound around the drum in lifting, would sometimes, on account of the engine not being properly set, wind up on one side of it, in place of winding evenly over the whole surface, and this had a tendency to cause the rope to slip, and that the engine brake was out of repair. Other witnesses testified that the engine and appliances were in good working order. In short, we may say that there was some evidence for and against each allegation of negligence. From a judgment entered upon a verdict in favor of the defendant below, now appellee, this appeal is prosecuted.

The errors assigned consist in giving and refusing instructions, and the admission of incompetent evidence. The instructions complained of are instructions Nos. 1 and 2, reading:

"No. 1. It was the duty of the defendant to exercise ordinary care to furnish deceased a reasonably safe place in which to do the work for which he was employed and in which he was engaged at the time of his

and machinery, and such unsafe condition, if there were any unsafe condition, was known to the defendant, his agents or servants, superior in authority to the deceased, or whose duty it was to furnish and supervise the place and machinery, or could have been known to them or any of them by the exercise of ordinary care, and was unknown to the deceased, and while exercising ordinary care for his own safety he was injured thereby, then the law is for the plaintiff, and you should so find; but, unless you believe from the evidence that the place or machinery or appliances were not reasonably safe for the work, and unless you further believe from the evidence that such unsafe condition, if it was unsafe, was known to the defendant or his agents or employees superior in authority to the deceased, or whose duty it was to supervise and direct the place and appliances, and unless you further believe from the evidence that such unsafe condition, if it was unsafe, was not known to the deceased, and you further believe that he was injured by reason of such unsafety, then the law is for the deceased, and you should so find.

"No. 2. In entering upon the work in which he was engaged and for which he was employed, the deceased assumed the ordinary risks incident to the work; and if you believe from the evidence that the injury which he received was received by reason of one or more of the ordinary risks incident to the work in which he was engaged, then and in that event the law in the case is for the defendant, and you should so find."

Taking up first the errors pointed out in the admission of evidence. It is insisted that, in substance and manner, the questions and answers of the witnesses introduced to show that the method employed in hoisting the material at the time the deceased was killed was in general use by the trade and regarded as reasonably safe were objectionable. It is clearly competent, in cases like this, where an issue is made as to whether or not an appliance is reasonably safe, to introduce competent and experienced persons to testify as experts. In *Louisville Veneer Mills Co. v. Clements*, 109 S. W. 308, 33 Ky. Law Rep. 106, we said on this point: "Whether the appliances furnished are reasonably safe or not is a question of fact to be determined by the jury from the evidence, and, to the end that the jury may intelligently consider and dispose of this question, it is competent for the parties to show by evidence the character of appliances furnished, as well as the character of appliances in general use in similar employments, so that the jury may determine whether or not the

and advisability of each of them. One person may use one kind of appliance or method in the performance of his work and regard it as being the safest and best, while another may have a different method or appliance and think it the safest and best; and so, when the question comes up whether or not the master has furnished the servant with reasonably safe appliances, it is entirely proper to permit experienced persons to give their opinion regarding the safety of the appliance, and this opinion may be based upon actual experience, or observation, or technical knowledge of the matter. In inquiring of witnesses upon this subject who have qualified themselves to give evidence, they should be asked whether or not, in their opinion, the appliance in use is reasonably safe for the purpose intended, and be permitted to give the reasons why they think it is or is not, as the case may be. If this character of evidence was not admissible, the jury in many cases would be unable to say whether or not the machinery or appliance in question was reasonably safe or not, as it might concern a matter entirely outside of the ordinary and common knowledge of the jury. *Ford v. Providence Coal Co.*, 124 Ky. 517, 99 S. W. 609, 30 Ky. Law Rep. 698. The fact, however, that an appliance or instrumentality is in customary use is not the correct test of its sufficiency. A thing might be used by a great many people, and yet be entirely unsafe and insufficient. *Columbus & Hocking Coal & Iron Co. v. Tucker*, 48 Ohio St. 41, 26 N. E. 630, 12 L. R. A. 577, 29 Am. St. Rep. 528. But evidence that the person charged with negligence followed the custom of other persons in the same line of business may be received when it is introduced in connection with evidence of the safety of the appliance or method for the purpose of showing that the thing is in customary use because it is regarded as safe, and has been found to be so by experience, observation, or technical knowledge, as the case may be. *Thompson on Negligence*, § 7882. The evidence of Stoddard as to the sufficiency of the engine was not competent. He did not know, and could not say, except inferentially, that it was in the same condition when the accident happened as it was when he examined it months afterwards.

In the criticism of instruction No. 1, the argument is made that the words limiting the knowledge of the unsafe condition to superior servants, or to such servants as were charged with the duty of supervising the place and machinery, should have been omitted. In support of this contention, we are cited to the case of *Van Dyke v. Memphis Packet Co.*, 71 S. W. 441, 24 Ky. Law Rep. 1283, and *Cooper v. Oscar Daniels Co.*, 96

place was known "to the defendant, his agents or servants superior in authority to the deceased, or whose duty it was to furnish and supervise the place and machinery;" whereas, in the cases mentioned the instruction was confined to knowledge on the part of the defendant or any of its agents or employés superior in authority. And it was held that this limitation was erroneous; the court saying in the Van Dyke Case that the master is responsible not only for the acts and omissions of the servant superior to the one injured, "but is responsible to the servant who is injured from a want of proper care in the person to whom the duty is delegated without regard to the rank or title of the agent entrusted with its performance." And so we do not think the objection well taken, as the knowledge to fasten negligence on the master was not confined to the servants superior to the deceased, but extended to any servant or employé "whose duty it was to furnish and supervise the place and machinery."

This instruction is also assailed upon the ground that it made the fact that the deceased was exercising ordinary care for his own safety, and his ignorance of the unsafe condition of the place and machinery, conditions precedent to a right of recovery in behalf of his administrator. As the action was brought under section 6 of the Kentucky Statutes (Russell's St. § 11), enacted in pursuance of section 241 of the Constitution, to recover for death, it was not necessary that the plaintiff should prove that the deceased exercised ordinary care for his own safety, or did not know of the danger. *Cumberland Tel. & Telegraph Co. v. Graves*, 104 S. W. 356, 31 Ky. Law Rep. 972; *Lexington & Carter Co. Mining Co. v. Stephens*, 104 Ky. 502, 47 S. W. 321, 20 Ky. Law Rep. 696. But it has never been ruled by this court that in an action under this statute the plea of contributory negligence was not available. On the contrary, it has always been recognized as a defense. *Passamanek v. Louisville Ry. Co.*, 98 Ky. 195, 32 S. W. 620, 17 Ky. Law Rep. 763; *Clarke v. L. & N. R. R. Co.*, 101 Ky. 34, 39 S. W. 840, 18 Ky. Law Rep. 1082, 36 L. R. A. 123. The personal representative of a servant whose life is lost by his own negligence or want of ordinary care can no more recover damages in an action under the statute than could the servant if he had only been injured and had brought suit in his own name to recover for the injuries. The only difference in the two states of case is that, where the action is brought by the injured servant, he must generally allege and prove that he was exercising ordinary care for his own safety and was ignorant of the unsafe condition of

that the deceased was exercising ordinary care or was ignorant of the danger. But, nevertheless, the defendant may show, to establish contributory negligence, that the deceased was not exercising ordinary care, and that he did know of the unsafe appliance or place. In neither case can there be a recovery if the injury was due to the negligence or want of care on the part of the injured person. It would be better practice to put the whole law of contributory negligence in a separate instruction; but often this is not done, and we have more than once approved instructions similar to the one given in this case. *Cumberland Tel. & Telegraph Co. v. Graves*, 104 S. W. 356, 31 Ky. Law Rep. 972; *Cumberland Tel. & Tel. Co. v. Ware*, 74 S. W. 289, 24 Ky. Law Rep. 2519; *C. & T. P. R. R. Co. v. Evans*, 110 S. W. 844, 33 Ky. Law Rep. 596; *Mead v. Ashland Steel Co.*, 125 Ky. 114, 100 S. W. 821, 30 Ky. Law Rep. 1164.

The objection to instruction No. 2 is put upon the ground that it failed to point out that the deceased did not assume the risk of the place or appliances being in an unsafe condition. The rule in this state is that, while the servant assumes the ordinary risks incident to the employment, he does not assume any risk growing out of defects in places and appliances that it is the duty of the master to exercise ordinary care to keep in reasonably safe condition. The ordinary risks assumed by the servant only cover such risks as grow out of the employment when the place and appliances furnished the servant are reasonably safe. This view of the law was fully declared in *Pfisterer v. Peter*, 117 Ky. 501, 78 S. W. 450, 25 Ky. Law Rep. 1605, *Brent v. L. & N. R. Co.*, 104 S. W. 961, 31 Ky. Law Rep. 1216, and many other cases.

Counsel for appellee argue that the facts of this case are so different from those appearing in the *Pfisterer* and *Brent* opinions that, conceding the instruction to be erroneous, it was not prejudicial. It is a rare thing that the facts in two cases are exactly alike; but, when a principle is deliberately announced by this court as the law upon a given statement of fact, the principle so declared should be followed and applied in other cases presenting like questions of fact until it is authoritatively adjudged not to be the law. Attempts to make refined and obscure distinctions between cases as to the law applicable, when a substantial and common-sense view of the facts does not justify it, not only leaves the final decision of cases in doubt, but confuses the law and renders it difficult for trial judges to correctly understand and apply it. Having this view of the matter, we do not feel authorized to differentiate this case from the

ones mentioned. In each of them the action was brought by the servant to recover damages on account of the failure of the master to furnish for his use reasonably safe appliances and places, and this court held that an instruction in all respects similar to the one we are considering was prejudicial error. In the Brent Case, as in this, the argument was made that the error in the instruction as to assumed risk was cured by an instruction in which the court told the jury that it was the duty of the master to furnish a reasonably safe place; but the court, declining to follow the argument, said: "The employe does not assume such risks as arise from the negligence of the employer in failing to furnish him a reasonably safe place in which to work, and reasonably safe instruments and materials with which to work, and, where this failure is the only negligence complained of, any instruction as to ordinary risks assumed by the employe must be misleading. * * * A jury of laymen were bound to conclude that the court's instructions were directed to the question in issue, and that there was some risk attendant on the use of the defective hand car, if it was defective, which appellant assumed. They would naturally conclude that the breaking of a defective pin was one of the risks included within the meaning of instruction No. 5. It may be admitted that a lawyer could take the instructions, and by reading them in pari materia conclude that the court intended to exclude danger in using the defective pin from the risk referred to in instruction No. 5; but a jury of laymen would perhaps not be able to do this, and would conclude, to the manifest prejudice of the appellant, that the consequences of the use of the defective pin was one of the risks to which instruction No. 5 is directed." In that case it is true the only negligence complained of was a defect in the hand car; whereas, in this case the appliances or instrumentalities with which deceased was required to work were alleged—and the allegation was supported by some evidence—to be unsafe. If we could say that instruction No. 2 was limited to the risk of pieces of the material being lifted falling out of the bundle, and did not have reference to defective or unsafe appliances, the cases could be distinguished; but the jury, in reading the instructions together, had the right to infer that the deceased assumed all the risks through or by which he might be injured. Of course, this was not what the court intended, and a lawyer would be able to read the instructions as a whole and understand that the court, in saying that the deceased assumed the ordinary risks incident to the employment, meant such risks as did not grow out of unsafe appliances or places. If the jury construed the instructions, as they might well have done, to mean that the de-

ceased assumed all risks incident to his labor, they would be fully justified under the evidence in returning a verdict for the appellee, although they might have believed that the appliances used in connection with the work were not reasonably safe.

For the reasons given, the judgment must be reversed, with directions for a new trial in conformity with this opinion.

GRAYSON COUNTY v. ROGERS.

(Court of Appeals of Kentucky. Dec. 1, 1909.)

1. JUDGES (§ 22*)—SALARY OF OFFICERS—CHANGE DURING TERM.

Under Const. § 161, providing that the compensation of county officers shall not be changed after their election or during their term, and section 235, providing that the salaries of public officers shall not be so changed, if the fiscal court does not fix the salary of the county judge before his election, it may do so afterward; but, if such salary is fixed before election, it cannot be changed during the term.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 76; Dec. Dig. § 22.*]

2. COUNTIES (§ 53*)—RECORDS—CORRECTION.

A mistake in the entry of an order of the fiscal court may be corrected by that court summarily during the term at which it was made, or after the term, on reasonable notice to persons affected.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 70; Dec. Dig. § 53.*]

3. COUNTIES (§ 42*)—DISQUALIFICATION—PROBATIONARY INTEREST.

Neither a county judge nor his son can act as member of the fiscal court in fixing the salary of the county judge.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 50; Dec. Dig. § 42.*]

4. COUNTIES (§ 46*)—SALARY OF COUNTY JUDGE—AUTHORITY OF FISCAL COURT.

As the county judge cannot also hold the office of supervisor of roads, the fiscal court has no authority to make such judge an extra allowance of salary as such supervisor.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 54; Dec. Dig. § 46.*]

5. COUNTIES (§ 57*)—COLLATERAL ATTACK—PROCEEDINGS OF FISCAL COURT.

Under Ky. St. §§ 1835, 1842, 1843 (Russell's St. §§ 2971, 2976, 2977), requiring the clerk of the fiscal court to keep a record of the proceedings, which shall be publicly heard, approved, and signed before adjournment of the court, an alleged error in an order of that court fixing the salary of the county judge cannot be shown in a collateral action.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 75; Dec. Dig. § 57.*]

6. EVIDENCE (§ 433*)—PAROL EVIDENCE—JUDICIAL RECORDS.

Parol evidence is inadmissible to show an error in the entry of an order of the fiscal court fixing the salary of the county judge.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1991; Dec. Dig. § 433.*]

Appeal from Circuit Court, Grayson County.

"Not to be officially reported."

Action by Grayson County against H. C. Rogers, Sr. From a judgment for defendant, plaintiff appeals. Reversed.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

HOBSON, J. H. C. Rogers, Sr., was county judge of Grayson county for the term beginning on the first Monday in January, 1902, and expiring on the first Monday in January, 1906. During the term he was paid a salary of \$650 a year. After the expiration of his term, this suit was filed against him by Grayson county to recover \$400; it being alleged that he had been paid \$100 for each year of his term more than he was entitled to. The circuit court dismissed the petition, and the county appeals.

The facts of the case are these: A. L. Wells was the judge of the Grayson county court for the term beginning on the first Monday in January, 1898. At the March term, 1898, the fiscal court entered the following order: "It is ordered that the salary of A. L. Wells, the judge of the Grayson county court, be and the same is hereby fixed at \$550 per annum, payable quarterly in equal installments, to be paid on the order of the county judge." The usual order was made for the payment of the salary for each of the succeeding years of Wells' term. At the March term, 1902, which was the first term after Rogers qualified as county judge, he asked the court to make him an allowance of \$750 a year. Some discussion ensued. A vote was taken. The majority were in favor of making him an allowance of \$650 a year. But at this point a discussion arose between the county attorney and Z. T. Proctor, a member of the bar, in which the latter insisted that the fiscal court was without authority to allow more than \$550, the amount which had been allowed Wells during the preceding term. The court, being in doubt, entered the following order, which was regularly approved and signed: "It is ordered that the county judge's salary be fixed at \$550 per year, payable quarterly." On the same day the court made this order: "It is ordered that John E. Stone pay out of any money he has in his hands left after paying claims he has heretofore been ordered to pay the following: H. C. Rogers, Sr., \$137.50, J. C. Graham, \$100, J. R. Coyle, \$181.25, being the first quarter of their salaries as county judge, county attorney, and school superintendent for the year 1902." Also on the same day it made this order: "It is ordered that the following persons be, and they are hereby, allowed the following amounts, and the sheriff of Grayson county is hereby ordered to pay the same out of the county levy for the year 1902: * * * H. C. Rogers, Sr., \$412.50; this being the second, third, and fourth quarters of his salary as county judge." On a subsequent day of the same term this order was entered: "It is ordered that Judge H. C. Rogers, Sr., be and he is hereby appointed county supervisor of roads." On the same day the following or-

of Grayson county is hereby ordered to pay the same out of the county levy for the year 1902: * * * H. C. Rogers, Sr., salary as county supervisor of roads, year 1902, \$100." The court then adjourned for the term. A special term of the court was called for April 29, 1902, at which there were present the county judge and three magistrates; one of them being his son. At this special term an order was made, which is as follows: "It is ordered that the order heretofore made, appointing H. C. Rogers, Sr., supervisor of roads, be and the same is now set aside, and that the salary allowed him as supervisor shall be paid to him for extra services he will have to perform as county judge growing out of the working of the roads by taxation." At the March term, 1903, orders were entered similar to those made at the March term, 1902, allowing Rogers as county judge a salary of \$550, and allowing him as supervisor of roads \$100. At the March term, 1904 and 1905, orders were made allowing him as county judge a salary of \$650. These allowances were all paid, and this action by the county is based upon the idea that he was only entitled to a salary of \$550 a year.

The first question arising in the case is as to the effect of the orders made during the preceding term, allowing A. L. Wells, as county judge, annually a salary of \$550. In *Butler Co. v. James*, 116 Ky. 577, 76 S. W. 403 (25 Ky. Law Rep. 801), where we had the question before us, we said:

"Before the adoption of the present Constitution, it was customary for the court of claims to make allowances annually to the county judge and county attorney, and it is apparent from the above orders that the fiscal court of Butler county has been proceeding in the same way since the adoption of the present Constitution, not observing its provisions:

"The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment or during his term of office; nor shall the term of any such officer be extended beyond the period for which he may have been elected or appointed." Section 161.

"The salaries of public officers shall not be changed during the term for which they are elected; but it shall be the duty of the General Assembly to regulate by a general law, in what cases and what deductions shall be made for neglect of official duties. This section shall apply to members of the General Assembly also." Section 235.

"Under these provisions it has been held that the fiscal court cannot make any change in the salary of the county judge during his term of office, and that, while it is the duty of the fiscal court to fix the salary of the

county judge for his entire term before his election or qualification, yet, if it shall fail to do so, it may fix his salary thereafter. *Marion County Fiscal Court v. Kelley*, 22 Ky. Law Rep. 174, 58 S. W. 815; *Barrett v. Falmouth*, 109 Ky. 151, 58 S. W. 520, 22 Ky. Law Rep. 667.

"The purpose of the constitutional provision is to leave the officials, whose duty it is to fix the salary, free from the importunity and personal influence of the incumbent of the office, and to secure for him for his term, when his salary is once fixed, the amount so agreed to be paid him, and thus make him more independent in the discharge of his official duty. Under these provisions of the Constitution, it is the duty of the fiscal court to fix the salary of the county judge, and other county officers, to be allowed by it before their election—that is, there should be a general order fixing the salaries, and not an allowance each year for that year—and when the salaries are once fixed, they cannot be changed to affect those already elected or appointed, and any change will not take effect until the next election or appointment."

The rule thus declared has been followed by the court in several subsequent cases. Under it, if the fiscal court has not made an order fixing the salary of the county judge before the election of the incumbent of the office, it may make such an order after his election. But if the court, prior to his election, has made an order fixing the salary of the office, then this cannot be changed after his election and during his term of office. The orders of the Grayson fiscal court, made previous to the year 1902, are somewhat different from those before us in the cases referred to, and, whether they should be construed as fixing the salary of the office we need not determine; for, if the salary of the county judge had not been fixed by a previous order, the order which the court made at the March term fixed the salary at \$550 in accordance with the rule above laid down, and this order of the fiscal court is, nothing else appearing, conclusive of the amount of salary the county judge should receive, not only for that term, but for all subsequent terms, unless changed by the fiscal court before the election of the officer to be affected.

It is earnestly insisted for the county judge that the court really voted to fix the salary of the county judge at \$650 a year; that the order fixing the salary at \$550 was entered as it was because the court was in doubt as to its power to allow more, but intended later, if it could, to increase the allowance \$100, and this it undertook to do by the subsequent order; that the county judge was not appointed supervisor of roads, and no allowance was made to him as such, but he was allowed \$100 additional as county judge; that the orders as they appear on the record were so entered by clerical misprision; and that when this mistake was discovered,

a special term of the court was held at which the order was corrected so as to read as the court intended. The weight of the evidence sustains the county judge on the question of fact, and the circuit court, being of opinion that a mistake had been made in the entry of the orders, and that the county judge had received no more than the fiscal court intended to allow him, dismissed the petition.

There is no doubt that if a mistake is made in the entry of the orders of the fiscal court, it may be corrected by the court that made it, summarily during the term at which it is made, or after the term, upon reasonable notice to the persons affected. But the order made by the fiscal court at its special April term is void for the reason that the county judge could not sit in his own case. For the same reason his son could not act in a matter in which his father was interested. Beside the judge and his son there were only two magistrates present, and there being no quorum of the court present, the order of the court made at the special term was void. The order of the fiscal court made at the March term, allowing the county judge \$100 as supervisor of roads, was also void, as the fiscal court was without authority to make such an allowance. *Davless Co. v. Goodwin*, 116 Ky. 891, 77 S. W. 185, 22 Ky. Law Rep. 1081. The case therefore comes to the question, May parol evidence be heard in this proceeding to show that there was a mistake in the orders of the fiscal court, and may the court in this collateral proceeding correct the mistake? The fiscal court is created by section 144 of the Constitution: "Counties shall have a fiscal court, which may consist of the judge of the county court and the justices of the peace, in which court the judge of the county court shall preside, if present; or a county may have three commissioners, to be elected from the county at large, who, together with the judge of the county court, shall constitute the fiscal court. A majority of the members of said court shall constitute a court for the transaction of business."

Among other things, the statute regulating the court provides:

"The clerk of the county court of each county shall, by virtue of his office, be clerk of the fiscal court. He shall attend its sessions and keep a full and complete record of all its proceedings, with a proper index." Section 1835, Ky. St. (section 2971, Russell's St.).

"Not less than a majority of the members of the fiscal court shall constitute a quorum for the transaction of business, and no proposition shall be adopted unless by the concurrence of at least a majority of the members of the court present." Section 1837 (section 2973).

"Before every adjournment the minutes of the proceedings of said court shall be publicly read by the clerk of the court, and corrected, if necessary; and the same shall be

No minute or order of the fiscal court shall be valid until the same be read and signed as aforesaid, nor unless the record shows by whom the court was held." Section 1843 (section 2977).

It is manifest from these provisions, not only that the court must keep a record of its proceedings, but that it can only speak by its records. If, by clerical misprision or otherwise, the record does not speak the truth, the court may correct it; but, unless the court does correct it, it is conclusive in collateral proceedings. To allow proof as to how the magistrates voted to contradict the record, which has been read and signed as provided by the statute, would be to determine what the court did, not from its record, but from parol evidence. The purpose of the statute, in requiring that before every adjournment, the minutes of the proceedings shall be publicly read and corrected if necessary, and then signed when approved by the justices of the peace present, is to make the record, when thus made, the only evidence of the action taken by the court, unless it is corrected by

as such supervisor, is to allow him to impeach by parol the record of the court over which he presided, after the record has been approved by the justices of the peace present, and signed by him as county judge. To allow such evidence would be to make the action of the fiscal court depend, not upon what was shown from the record, but upon the recollection of those present as to what had taken place; and this was the evil the statute was designed to guard against.

We, therefore, conclude that the order of the fiscal court made at the March term, fixing the salary of the county judge at \$550, is the only legal allowance made by the fiscal court at that term to the defendant, that the salary of the county judge, having been fixed at that term, could not be changed thereafter during his term so as to affect him, and that the orders of the court made for the subsequent years, in so far as they allowed him more than \$550 a year, were void.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

CAMERON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1909.)

CRIMINAL LAW (§ 595*)—CONTINUANCE—ABSENCE OF WITNESSES.

An indictment of accused for assault to murder was returned April 21st, and process for a witness for accused was issued on the 24th, and the return on the same day showed that the witness was out of the county, and judgment of conviction was entered on the 29th. Accused made a first application for a continuance to procure such witness, who, he claimed would testify that the prosecuting witness told him, shortly before the alleged assault, that he expected to kill accused if he got a chance, and that he communicated such threat to accused. *Held*, that as sufficient diligence was shown, and as the evidence of the absent witness would have been important in corroborating accused's testimony, as to the threats, etc., and as affecting the punishment, it was error to deny the continuance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1323-1327; Dec. Dig. § 595.*]

Appeal from District Court, Medina County; R. H. Burney, Judge.

T. R. Cameron was convicted of assault to murder, and he appeals. Reversed and remanded.

James H. Robertson and John R. Storms, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault to murder, and his punishment assessed at five years' confinement in the penitentiary.

The assault was alleged to have been committed upon Milford Berry. The evidence, in brief, shows that there had been an ill feeling between the parties, and that Berry had been insulting, and grossly so, to appellant. The witness Woschlegel stated that Berry came to his store and told him he wanted to see appellant, because appellant had been telling lies on him, and he would make appellant take them back or he would take it out of him; that he was tired of his talking about him, and left the store with the remark that he would go look for appellant; that Berry was mad. Clements testified that Berry had been unfriendly towards appellant for more than a year prior to the difficulty. Mask testified that on one occasion in June, 1908, Berry came to his store and asked him if he had seen appellant. He stated he wanted to see appellant, as appellant had been telling lies on him, and he wanted to make him take them back or he would take it out of him. He seemed to be very angry. The witness Hurt testified that the evening before the difficulty appellant was walking along the sidewalk, but said nothing to Berry. Berry said to appellant: "Go to hell; see if you can hear that." Appellant looked around and walked on. Berry, on cross-examination, stated that on the evening be-

fore the difficulty appellant passed him, and he asked appellant if he (appellant) wanted a job. Appellant made no reply. Witness then said to him: "Come; help me carry brick up there." Appellant made no reply, and Berry said: "Go to hell; see if you can hear that." He admitted being unfriendly towards appellant for a long time, and denied none of the statements imputed to him.

Appellant testified in his own behalf, and stated that the statements testified by the other witnesses were communicated to him, and, further, that prosecuting witness, Berry, had been angry with him, and used insulting language towards him, for a long time, and on one occasion in front of the Mercantile Company Berry had cursed him, and he (appellant) did not reply to it, but passed on, and again at Holloway's gin Berry had cursed him in the presence of Frank Holloway, but on that occasion appellant passed on and made no reply; that he (appellant) went down to Woschlegel's store one time, and he told him (appellant) that Berry had been there, and he (appellant) went home in order to avoid trouble; that at the Mercantile Company Berry cursed him and said to him, "Go to hell, you damn skunk;" that at the gin Berry asked him if he "had them spells often," and appellant made no reply, and Berry then said, "Go to hell; see if you can hear that;" that on one morning he passed the building where Berry was at work, and Berry asked him if he wanted a job, and to this appellant made no reply; that Berry then said, "Go to hell; I guess you can hear that;" that appellant moved on, and did not stop; that on the day following the incident just mentioned appellant passed along and Berry said to him, "Good morning, you damn old son of a bitch; I wonder if you can hear that;" that appellant then told him he could not take that, and struck him; that he did not intend to kill him, but wanted to make him leave him alone; that this conduct continued from June, 1908, down to the time of the difficulty. Appellant says he had been informed by Holloway that Berry had stated to him (Holloway) that he intended to kill appellant. Appellant is a man 54 years of age, and Berry is a young man.

The question discussed is the refusal of the court to grant a continuance. The alleged absent witness is Frank Holloway, mentioned in statement above. It was the first application, and the diligence, we think, is ample. The indictment was returned on the 21st of April. The process was issued on the 24th of April, and the return was made by the sheriff on the same day, showing that Holloway was at the time out of the county. The judgment was entered on 29th of April. The facts expected to be shown by the absent witness are thus stated: Frank Holloway would swear that prosecuting witness,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Milford Berry, told him that he expected to kill defendant, if he ever got a chance, and that said threat was communicated to appellant by Holloway; that this threat was made just a short time before appellant is alleged to have committed the assault upon Berry; that at another time this witness will swear that he heard Berry curse and abuse defendant in hearing of defendant a short time prior to the alleged assault, and subsequent to the threat to take defendant's life; that the language used by the prosecuting witness was as follows: "Damn you, do you have them spells often," and that appellant then started to walk on, and that the prosecuting witness further said, "Then go to hell, damn you." The immediate facts attending the assault are about these: Appellant was passing near where Berry was at work, carrying bricks to be placed in a building that was being erected, and Berry made the remarks testified to, such as, "Go to hell, you God damn son of a bitch," etc., and that he (appellant) immediately stuck his knife in him. Berry ran, appellant threw a brick or a piece of brickbat at Berry, and Berry threw brick at him (appellant). The knife is not shown to have been a deadly weapon, but is a pocketknife.

We are of opinion, under the circumstances, a continuance should have been granted. Threats to take the life of appellant under the circumstances of this case might have had a considerable bearing in the minds of the jury, and were material testimony, especially in view of the extreme insulting language used by Berry at the time of the assault upon him. Appellant testified, it is true, that the threat had been communicated to him; but Holloway would have corroborated appellant upon that phase of the testimony, as well as in regard to the other remark that Berry is charged with having made in the presence of Holloway. Holloway was, therefore, a very important witness. The testimony places the case within very close lines as to whether it could be an assault with intent to murder. The evidence sought would have been important, as affecting the punishment which the jury would assess. We are, therefore, of opinion this application for continuance should have been granted.

The judgment is reversed, and the cause is remanded.

BROOKS, J., absent.

YELL v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1909.)

CRIMINAL LAW (§ 1064*)—APPEAL—OBJECTIONS—MOTION FOR NEW TRIAL—GENERAL ASSIGNMENTS OF ERROR.

Accused's motion for a new trial, which merely quoted several paragraphs of the charge

and complained of harmful error in giving them, without pointing out the defect, was too general to warrant consideration of the assignment on appeal.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1064.*]

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Frank Yell was convicted of burglary, and he appeals. Affirmed.

F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted in the district court of Palo Pinto county on March 10th of this year on a charge of burglary, and his punishment assessed at confinement in the penitentiary for a period of two years.

1. In his motion for a new trial appellant complains of two or three paragraphs of the court's charge, in which he says, quoting the paragraphs, that the court erred to his injury, without in any manner undertaking to set out wherein the charge complained of was error, or what the supposed defect was. In the absence of motion for a new trial pertinently pointing out the defect in charges given, we are not authorized to consider same. That the complaints to the charges of the court in this case are too general is undoubtedly sustained by the authorities. *Thompson v. State*, 32 Tex. Cr. R. 265, 22 S. W. 979; *Reynolds v. State*, 17 Tex. App. 413; *Shelton v. State*, 54 Tex. Cr. R. 588, 114 S. W. 122. In the last-named case we held that where, upon appeal from a conviction of murder, the complaint was that the charge of the court was too general and uncertain, and was well calculated to confuse and mislead the jury, the exception could not be considered, as it failed to point out in what way the charge was objectionable. The exception in that case was much more specific than the one in the motion here.

2. It is further complained that the evidence is insufficient to sustain a conviction. We cannot accede to the correctness of this contention. On the contrary, a careful inspection of the record convinces us that the testimony is abundantly sufficient to sustain the conviction.

Finding no error in the judgment, it is hereby in all things affirmed.

BROOKS, J., absent.

MASON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1909.)

1. CRIMINAL LAW (§ 594*)—CONTINUANCE—ABSENCE OF WITNESSES.

Accused was indicted January 19th for perjury committed seven days before. A copy of the indictment was served on the day it was returned into court, and on the following day he

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment of the trial within the term. *Held*, that the denial of an application for a continuance was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1321; Dec. Dig. § 594.*]

2. PERJURY (§ 37*)—EVIDENCE—INSTRUCTIONS.

Where, on a trial for perjury, accused testified that he had been sick some time before he gave his testimony, that if he had ever received the money which the witnesses testified he did receive, and which he denied receiving, he did not remember it, that his memory was not good, and that it was more than four years since the money was claimed to have been paid him, the refusal to charge the substance of Pen. Code 1895, art. 202, that a false statement, made through inadvertence, or under agitation, or by mistake, is not perjury, was error.

[Ed. Note.—For other cases, see Perjury, Cent. Dig. § 135; Dec. Dig. § 37.*]

Appeal from District Court, Delta County; R. L. Porter, Judge.

D. M. Mason was convicted of perjury, and he appeals. Reversed and remanded.

W. E. Sharp and Patteson & Patteson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted on January 23d of this year in the district court of Delta county on a charge of perjury, and his punishment assessed at confinement in the penitentiary for a period of 2 years and 6 months.

1. We think the judgment of conviction must be set aside, and the cause reversed, for several reasons. In the first place, we think appellant's application for a continuance should have been granted. The record shows that he was indicted herein on the 19th day of January of this year, on account of testimony given before the grand jury on the 12th day of the same month, that service of copy of the indictment was made on him on the same day it was returned into court, and that on the following day he made application to take the deposition of his wife, who was alleged to reside in the city of Hugo, Choctaw county, Okl. In the light of the entire record, we think the testimony was material, and that the court should have granted the application. The record shows that court adjourned on the 23d day of January, and that the testimony could not have been procured by any postponement of the trial for any time within the then term of court.

2. Again, we think the court erred in not giving in charge to the jury the substance of article 202 of our Penal Code of 1895. This article is as follows: "A false statement made through inadvertence or under agitation or by mistake is not perjury." The testimony of appellant given on the trial is to the effect, in substance, that he had been sick some time before he gave his testimony be-

does not now remember having received same. He also testifies his memory is not very good, and that it had been more than four years since the \$4 was claimed to have been paid him, that he had been confined in jail for a long time, and had been sick the past month almost the entire time, and was sick when carried before the grand jury and was now sick. In this connection counsel for appellant requested the court to give the following special instruction: "You are charged by the court that if you believe from the evidence that the defendant did receive the \$4 in money as alleged by the indictment in this case, but you further believe that the defendant had forgotten at the time he testified before the grand jury, or if you have a reasonable doubt as to his having forgotten at the time he is alleged to have testified before said grand jury, the receipt of said money, then in either event you will acquit the defendant." This special charge, or its substance, should have been given, in connection with article 202 of our Penal Code of 1895. These issues were in no manner submitted to the jury by the court, and in view of the evidence it was the right of appellant to have his defense submitted in a clear and explicit manner to the jury. *Brookin v. State*, 27 Tex. App. 701, 11 S. W. 645.

The other questions raised on the appeal are not likely to occur on another trial. We have considered the exception to the indictment, and think it sufficient.

The judgment is reversed, and the cause remanded.

BROOKS, J., absent.

CABRAL v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1909.)

1. CRIMINAL LAW (§ 1091*)—BILL OF EXCEPTIONS—FORM.

A bill of exceptions, grouping all the matters complained of on the trial, is improper, and will not be reviewed.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1091.*]

2. LARCENY (§ 59*)—EVIDENCE.

Evidence held to sustain a conviction of theft of personal property over the value of \$50.

[Ed. Note.—For other cases, see Larceny, Dec. Dig. § 59.*]

Appeal from District Court, El Paso County; James R. Harper, Judge.

Melquiades Cabral was convicted of theft, and he appeals. Affirmed.

Wycliffe J. Bryan, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

RAMSEY, J. This appeal is prosecuted from a conviction of theft of personal property over the value of \$50, had in the district court of El Paso county on June 23d of this year, wherein appellant's punishment was assessed at confinement in the penitentiary for a period of two years.

There is no bill of exception in the record, except a general one, grouping all the matters complained of on the trial, and which is too general to be considered; and the complaint of the court's charge is of the most general character, being to the effect, in substance, that the court erred materially in failing in his charge to the jury to instruct them as to what standard of value they should be guided by in determining the reasonable value of the articles alleged to have been stolen, and in failing to peremptorily instruct the jury to find the defendant not guilty as requested. An examination of the charge of the court does not disclose to us any error therein. The property alleged to have been stolen consisted of one saxophone, of the value of \$64, two bracelets, of the value of \$90 each, and eight neckties, of the value of 50 cents each. A short time after the theft, appellant was found in possession of and offering the saxophone for sale. To the witness Jaffa, who was a secondhand dealer, he explained that the saxophone had been sent to him by an uncle or brother in California to be sold. To the officer, Hinkley, he stated that this instrument had been sent him for sale by his brother. Appellant claimed to have found the saxophone, and introduced several witnesses to this effect. He denied that he had ever stated that a sick musician had sent it to him to sell, or that his uncle or brother had sent it to him to sell.

The jury were fully instructed with reference to the effect of recent possession of stolen property, as well as reasonable explanation thereof. The testimony, while not entirely satisfactory, is, as we believe, under the authorities, sufficient; and we do not think we would be authorized to set aside the verdict of the jury so determining, or put ourselves in opposition to the action of the trial court, which permitted such verdict to stand.

The judgment is affirmed.

BROOKS, J., absent.

LINDLEY v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1909.)

1. CRIMINAL LAW (§ 1144*)—APPEAL—PRESUMPTIONS—FORMER CONVICTION—SPECIAL PLEA.

Where there is no special plea in the record on appeal, the court cannot assume that such a plea of former conviction was interposed as

would require a submission of the issue to the jury.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1144.*]

2. CRIMINAL LAW (§ 739*)—FORMER CONVICTION—SPECIAL PLEA—RECORD.

Where the evidence did not show that the judgment of conviction pleaded in bar was final, or whether an appeal had been taken therein, or a motion for new trial therein granted, the court properly refused to submit the issue of former conviction, notwithstanding Code Cr. Proc. 1895, art. 750, providing that, where a special plea is interposed, the jury must in their verdict say whether the matters therein alleged are true.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 739.*]

3. CRIMINAL LAW (§ 739*)—FORMER CONVICTION—SPECIAL PLEA—RECORD.

Where, under the conceded facts, the judgment of conviction relied on in bar is no defense, the evidence and plea of former conviction may be disregarded; but, where there is any view of the evidence under which the plea amounts to a bar, the issue must be submitted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 739.*]

Appeal from Titus County Court; W. E. Riddle, Judge.

Ollie Lindley was convicted of unlawfully selling intoxicating liquors, and he appeals. Affirmed.

Rolston & Ward, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant prosecutes this appeal from a conviction had in the county court of Titus county on March 9th of this year, wherein he was convicted of unlawfully selling intoxicating liquors in violation of the local option law.

The sole question presented, in different forms, is that the judgment ought not to be sustained for the reason that the court erred in refusing appellant's special instruction touching his plea of former conviction, and that the verdict of the jury is insufficient, in that it does not dispose of such plea. These contentions cannot be sustained, among other things, for the following reasons: First, there is no special plea contained in the record, and we cannot assume that such a plea was interposed as would have required a submission of this issue to the jury. In the next place, the record does not show that the judgment of conviction, pleaded in bar in this case, was a final judgment, or whether an appeal had been taken therein, or a motion for new trial therein granted. While article 750 of the Code of Criminal Procedure of 1895 requires and provides that, where a special plea is interposed, the jury must in their verdict say whether matters therein alleged are true or untrue, it has been uniformly held that, where no evidence has been introduced in support of such plea, the court is neither required, nor is it its duty, to submit such plea to the jury. Johnson

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

on in bar is no defense, the evidence and plea of former conviction may be wholly disregarded. Of course, where a special plea is interposed, and there is any evidence, or any view of the evidence, under which such special plea would constitute a bar, it should be submitted. As stated in this case it does not appear by any evidence whether judgment relied on was or not final. In the case of *Dupree v. State*, 120 S. W. 871, it was held that the trial court would take judicial notice of a conviction there, which, if final, would be available as former conviction, and of the fact that an appeal therefrom is pending. As stated, in this case there is no evidence at all as to whether a motion for new trial was yet pending, whether an appeal had been prosecuted, or whether the judgment was in full force and unsatisfied. As presented in the record before us, we think the point made is not available as a defense. Finding no error in the record, the judgment is in all things affirmed.

BROOKS, J., absent.

BALES v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1909.)

BREACH OF THE PEACE (§ 4*)—INDICTMENT—REQUISITES.

An indictment, charging that defendant and two others unlawfully met together with the intent to aid each other to repair to the vicinity of the residence of V. and there disturb her and two others, inmates thereof, by loud and unseemly noise, and that they did then and there by such means disturb V. and the other inmates of such residence, in the enjoyment of her and their right to peace, etc., was fatally defective, for failure to allege that V. owned any residence, or occupied a house as a residence, and that defendants went to her residence.

[Ed. Note.—For other cases, see *Breach of the Peace*, Cent. Dig. § 5; Dec. Dig. § 4*]

Appeal from Somervell County Court; Jno. A. Herring, Judge.

Jess Bales was convicted of a breach of the peace, and he appeals. Reversed.

F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The charging part of the indictment is as follows: "Jess Bales, John Connally, and W. B. Prewett * * * did then and there unlawfully assemble and meet together, with the intent and purpose to aid each other to repair to the vicinity of the residence of Mrs. Ann McVicker, and there disturb the said Mrs. Ann McVicker, Mrs. Laura Shook, and Mrs. W. L. Hudspeth, inmates thereof, by loud, unusual and unseemly noise; and they did then and there

from disturbance."

Appellant moves in arrest of judgment, alleging the insufficiency of the indictment, and especially pointing out the fact that it does not allege that Mrs. McVicker had or owned the residence, and that the pleading is vague and inferential. We are of opinion that the motion should have been sustained. See *Follis v. State*, 37 Tex. Cr. R. 535, 40 S. W. 277; *Luter v. State*, 32 Tex. Cr. R. 69, 22 S. W. 140; *Blackwell v. State*, 30 Tex. App. 672, 18 S. W. 672. It will be noticed, from a reading of the indictment, that it does fail to allege that Mrs. McVicker owned any residence, or occupied a house as a residence; and it further fails to allege that they went to the residence of Mrs. McVicker. Under the authorities cited, we are of opinion that the motion should have been sustained.

The judgment is reversed, and the prosecution is ordered dismissed.

BROOKS, J., absent.

MUNGER v. STATE.

(Court of Criminal Appeals of Texas. Nov. 17, 1909. On Rehearing, Dec. 8, 1909.)

1. CRIMINAL LAW (§ 1093*)—BILL OF EXCEPTIONS—CONSTRUCTION—REFERENCE TO STATEMENT OF FACTS.

Where a bill of exceptions, setting forth accused's objection to a 7 year old boy as a witness because he did not understand the nature of an oath, merely stated that the objection was overruled and the boy allowed to testify, without giving any of the proceedings had in regard to testing his competency, it cannot be aided by going to the statement of facts or other parts of the record.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2828-2833; Dec. Dig. § 1093.*]

2. CRIMINAL LAW (§ 1172*)—HARMLESS ERROR—INSTRUCTIONS.

In a rape case, where the offense was alleged to have been committed on or about March 24, 1909, a charge that if accused, as charged, on or about the 23d day of March, 1909, as alleged, had carnal knowledge, etc., was not reversible error, where there was no question of limitation.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 1172.*]

3. RAPE (§ 64*)—PUNISHMENT.

Upon conviction of a boy under 17 years old of rape, the punishment is imprisonment for life or for not less than 5 years; the maximum punishment of death provided by White's Ann. Pen. Code, art. 639, not applying where accused is under 17 years old.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. § 105; Dec. Dig. § 64.*]

4. INFANTS (§ 69*)—PUNISHMENT—IMPRISONMENT—PERSON OVER SIXTEEN.

Where accused at the commission of the offense was over 16 years old, his imprisonment would be in the penitentiary; and there was no error in not submitting the issue of his age, that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

DENCE.

Evidence held to show that accused, charged with rape, was not the husband of prosecutrix. [Ed. Note.—For other cases, see Rape, Dec. Dig. § 51.*]

6. CRIMINAL LAW (§ 304*)—EVIDENCE—JUDICIAL NOTICE—MARRIAGEABLE AGE.

The court knows judicially that a girl just over 12 years of age could not marry in Texas; 14 years being the youngest age at which a marriage could occur.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700-704; Dec. Dig. § 304.*]

7. CRIMINAL LAW (§ 304*)—EVIDENCE—JUDICIAL NOTICE—LAW AGAINST MISCEGENATION.

The court knows judicially that in Texas a marriage between a white man and negro woman could not be had.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 304.*]

On Motion for Rehearing.

8. WITNESSES (§ 45*)—COMPETENCY—CHILDREN.

Where a 7 year old boy testified that he knew that he would be punished if he testified falsely, and that to hold up his hand and swear meant that he would be punished if he did not tell the truth, he was a competent witness, though he testified that he did not know the nature of an oath, or what it meant to swear.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 104-107; Dec. Dig. § 45.*]

9. CRIMINAL LAW (§§ 1033, 1051*)—REVIEW—NECESSITY FOR EXCEPTIONS.

To take advantage, on appeal, of insufficient proof of venue, there must have been a contest over it in the trial court and the matter preserved by bill of exceptions, except where the issue is fought out on the trial as to whether the offense was in the county where the venue was laid, when it will be noticed without bill of exceptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2629, 2630; Dec. Dig. §§ 1033, 1051.*]

Appeal from District Court, Austin County; L. W. Moore, Judge.

Willie Munger was convicted of rape, and appeals. Affirmed.

Bell, Johnson, Matthaël & Thompson, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for rape upon a girl under 15 years of age; the punishment being assessed at 5 years in the penitentiary.

The state's case shows rape upon a little negro girl, Lovey Green, who was about 12 years of age. She swears positively to the rape. Her little brother was in company with her, and she and he both testify that appellant jumped out of the bushes on the side of the road, and carried the little girl out in the bushes. The girl testified to the rape, and they both testified that the boy ran home to tell their father and mother,

the mother examined her and found evidence of sexual intercourse. Other witnesses testify to seeing appellant riding in the direction of where the rape is said to have occurred, and a very short time before it occurred. These witnesses also testify to seeing the two children not far away from the same place and going in the same direction in which appellant was traveling, and just a few moments before the alleged offense occurred.

Appellant, testifying in his own behalf, denies the entire transaction, but stated that he saw the two little negro children at or near the place designated, and told them to get out of the road, and, if they did not, he threatened to run over them with his horse. It is shown by his own, as well as other, testimony introduced in his behalf, that he had been at his father's blacksmith shop in the little village of San Felipe; that he and his father left the blacksmith shop about 6 o'clock to go home; that on reaching home he saddled a horse to hunt for a cow, and while hunting the cow he saw the two little negro children, prosecutrix and her little brother. The age of defendant is put down at 16 years on the 16th of August, 1908; his father and mother testifying that he would be 17 on the 16th of August, 1909. When the little 7 year old witness was tendered, appellant reserved the following bill of exceptions: "Be it remembered that on the trial of this cause Olivet Green, a boy 7 years of age, was called as a witness for the state, and, upon being examined by the court and counsel as to his being competent to testify, defendant, through his counsel, objected to the said witness being permitted to testify because the said witness did not understand the nature of an oath and had not sufficient intelligence to give testimony, which objection thus made by counsel for defendant was overruled by the court and the said witness permitted to testify," etc. None of the proceedings had in regard to testing the competency of this witness is stated in the bill of exceptions. The bill cannot be aided by going to the statement of facts or other parts of the record; but, if we were authorized to do this, we are of opinion that the evidence bearing on this question, as well as the evidence of the witness himself, shows there was no error on the part of the court in this matter.

In the motion for new trial the charge of the court is criticised because the court, in submitting the case, used this language: "If you believe * * * that the defendant did, as charged in the indictment, on or about the 23d day of March, 1909, as alleged, in the county of Austin and state of Texas,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

have carnal knowledge of said Lovie Green," etc.—the criticism being that the offense is not alleged to have been committed on the 23d of March. The indictment alleged it was committed on or about the 24th of March. This is not of sufficient importance to require a reversal of the judgment. There is no question of limitation in the case. Some of the witnesses state that the transaction occurred on the 23d. In any event it is a matter of no moment, and this exception to the charge is without merit.

It is complained that the court's charge in respect to the punishment is incorrect. The court charged the jury that, if they should find defendant guilty, they should assess his punishment by confinement in the penitentiary for life, or, in the discretion of the jury, at any term of years not less than five. The punishment is correctly given. See article 639, White's Ann. Pen. Code. While article 639 provides that the punishment may be by death, life imprisonment, or for any term of years in the penitentiary not less than 5 years, that portion of the penalty with reference to death was not authorized in this particular case, inasmuch as defendant was under 17 years of age. Our statute prohibits the infliction of the death penalty where the alleged offender is under 17 years of age. The charge, therefore, as given, correctly states the law of punishment.

It is contended that the court erred in not submitting the issue of the age of appellant, to the end that the jury might assess the punishment at confinement in the reformatory or the penitentiary. There is nothing in this contention. Appellant was 16 year of age in August, 1908, and this offense was committed on the 23d or 24th of March, 1909. He was more than 16 years of age at the time of the transaction, as well as at time of trial.

A reversal is asked because the evidence fails to show that the alleged injured female was not the wife of the defendant. Singular to say, but the statement of facts does not show positively, or, rather, by positive statement, that she was not the wife of appellant. However, the circumstances show that she was not his wife. She was a negro girl, 12 years of age on the 4th of February before the occurrence in the latter part of March. Appellant, from the testimony, seems to have been a white boy in his seventeenth year. He speaks of the children as two little negroes, and threatened to run over them with his horse if they did not give him the road, and in fact, the testimony shows they were negroes, and that prosecutrix was just over 12 years of age. The testimony shows that appellant lived with his father and mother, who, from the testimony, evidently are white people. The little negro girl, prosecutrix, lived with her father a mile and a half away from appellant's place of residence. This court knows

judicially that a girl of that age could not marry under the Texas law; 14 years being the youngest age at which a marriage could occur. This court would also judicially know that under the laws of Texas a marriage between a white man and a negro woman, or a white boy and negro girl, could not be had. While, as before stated, the evidence is not positive that they were not married, yet the circumstances show beyond any question they were not husband and wife.

There being no error of sufficient importance to require a reversal of the judgment, it is affirmed.

On Motion for Rehearing.

The judgment herein was affirmed at the present term of the court. Motion for rehearing is based upon the following grounds: (1) that the court erred in not holding that Olivet Green was incompetent as a witness by reason of his youthful age; (2) that the state failed to prove that appellant and prosecutrix were not husband and wife; (3) that the venue was not shown; and (4) that the court should have submitted the issue to the jury that, if appellant was not more than 16 years of age at the time of the trial, the jury should have been given the option of sending him to the reformatory or penitentiary.

This is practically a submission on rehearing of the salient features of the case decided in the original opinion. We held, and still adhere to the statement, in the original opinion, that the bill of exceptions, which is therein set out, fails to comply with the requirements of the law, in that it does not set out the facts and circumstances which show or tend to show that the witness Green was incompetent to testify by reason of his age; but the opinion went further, and held that, if all the evidence had been incorporated in the bill, still the court did not err in permitting the witness to testify. In regard to this witness we find in statement of facts practically the following: "My name is Olivet Green. I am seven years old. My papa's name is Ed Green. I do not know the nature of an oath, or what it means to swear. I do know that it means that I will be punished. Nobody told me that. I knew it myself. I knew that to hold up my hand and swear meant that I would be punished. I know what will happen to me if I don't tell the truth. If I don't tell the truth, I will go to Huntsville. Papa and mamma haven't talked to me about this since that time. They didn't tell me anything about going to court. I didn't know anything about where we were going last night when we left home. Nobody told me that, but I knew it. Nobody told me that at all. I knew that we were coming up to Bellville, when we started up here last night. I just found it out. Nobody told me what we were coming up here for. I knew for a good

while, if we swore a lie, we would go to Huntsville. Nobody told me that. I just knew it myself. I have known that since I was four years old. I don't know what we would go to Huntsville for." This and similar testimony was drawn out from the witness in testing his competency. If we were permitted to go outside the bill of exceptions, and look to the record in the statement of facts, we are of opinion that this witness was shown to be sufficiently competent to testify in regard to the facts of the case, and this is strengthened by reference to the witness' testimony delivered before the jury. We, therefore, are of opinion that on this question the conclusion reached in the original opinion is correct.

Nor is there any merit in the second contention; that is, that the state failed to show that appellant and the little negro girl were married. We are still of opinion that the evidence is sufficient to show that appellant was a white boy 17 years of age, and the 12 year old girl was a negro; but if they were both white, or both negroes, the status would not be changed, because under the laws of Texas the girl could not be a married woman at that age. She could not under any circumstances be married under 14 years of age, and this question has been expressly decided by this court in *Hardy v. State*, 37 Tex. Cr. R. 55, 88 S. W. 615. Intercourse or attempted intercourse with a girl of that age would constitute rape or attempt to rape, as the facts might show the offense to be. Therefore she could not be the wife of appellant.

The venue, we think, was sufficiently proved; but, if it was not directly and positively proved, our statute provides, in order to take advantage of this question, there must be a contest over it in the trial court, and the matter preserved by bill of exceptions, in order to take advantage of it on appeal. This question has been frequently so decided under the terms of that statute. Therefore there could be no error in regard to that matter. However, there is one exception to the above statement, and that is: Where the issue was fought out upon the trial as to whether the offense was in the county where the venue was laid or not, we would notice it without requiring a bill of exceptions.

The remaining contention of appellant is that the jury should have been instructed that they could exercise the discretion of sending him to the penitentiary or to the reformatory. This question was fully decided in the original opinion. Appellant was over 16 years of age at the time of the alleged offense, and was, of course, over that at the time of the trial.

There being no sufficient merit in the grounds of the motion for rehearing, it is ordered that it be overruled.

JOHNSON v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1909.)

1. LARCENY (§ 72*)—VALUE OF GOODS—INSTRUCTIONS.

In a prosecution for theft, under Pen. Code 1895, art. 869, declaring that theft of property of the value of \$50 or over shall be punished by confinement in the penitentiary not less than 2 nor more than 10 years, a charge failing to require the jury to find the value of the property taken was erroneous.

[Ed. Note.—For other cases, see *Larceny*, Dec. Dig. § 72.*]

2. CRIMINAL LAW (§ 830*)—INSTRUCTIONS—REQUEST TO CHARGE—EFFECT.

Defendant was charged with the theft of property over the value of \$50, in violation of Pen. Code 1895, art. 869, declaring such theft punishable by imprisonment. Defendant requested the court to charge that, when theft of property by the same person and from the same owner is committed on different occasions, each occasion constitutes a distinct offense, and that unless property of the value of \$50 was taken at one and the same time defendant must be acquitted. Held that, though such instruction was erroneous in so far that it directed an acquittal if the jury found the value of property taken at any one time to be less than \$50, it was sufficient to call the court's attention to error in omitting to require the jury to find the value of the property taken, and to consider such value as an ingredient of the offense.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 830.*]

3. LARCENY (§ 40*)—ISSUES AND PROOF—NATURE OF PROPERTY—GRADE OF OFFENSE.

Whenever punishment is affixed by law to the theft of a particular kind of property, it is unnecessary to either allege or prove the value thereof, the offense being made per se a felony; but with respect to all other classes of property value must be both alleged and proved, as the value determines the grade of the offense and the punishment.

[Ed. Note.—For other cases, see *Larceny*, Dec. Dig. § 40.*]

4. LARCENY (§ 23*)—SEPARATE OFFENSE—STEALING DIFFERENT ARTICLES AT DIFFERENT TIMES.

Where different articles are alleged to have been stolen, and the values are fixed of each separate article, the evidence must show the taking of articles of the value of \$50 or over at one time to sustain a conviction for felonious theft, under Pen. Code 1895, art. 869, making the theft of property of the value of \$50 or over punishable by imprisonment in the penitentiary.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. § 50; Dec. Dig. § 23.*]

Appeal from District Court, Hunt County; R. L. Porter, Judge.

Worth Johnson was convicted of theft, and he appeals. Reversed and remanded.

H. B. Mock, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. The appellant, Worth Johnson, was convicted in the district court of Hunt county on a charge of theft of property over the value of \$50, and his punishment assessed at confinement in the penitentiary for a period of four years. From this conviction he appeals to this court, and seeks

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a reversal on many grounds, which are quite fully set out in his motion and presented in a brief filed in his behalf.

In the view we have taken of the matter, we deem it unnecessary to notice many of the questions presented, since, in the nature of things, most of them will not likely arise upon another trial. The testimony shows, in substance, that one W. M. McBride was a merchant—a dealer in dry goods—in Greenville, Hunt county, Tex., and that on the second floor of the building occupied by him was located the office of the Southwestern Telephone Company, and that they had a large storage room in the rear of the offices; that between this storage room of the telephone company and McBride's store an opening had been made for light and ventilation to the store below, which opening was covered with a screen wire on a banistering about three feet high; that this wire screen had been there about 3½ years, and during all this time employes of the telephone company had been around and about it. It seems that about the 1st of March, 1909, information came to McBride that certain of his goods were missing. This led to an investigation, and it was discovered that the lacing of the strips of screen wire at one place was laced in a different manner from the other lacing, and that same was loose, or not fastened securely; that this point was directly over the iron safe in the office of the store below. It seems that appellant was an employe of the telephone company and had access to the room in which this screen was located. The state proved by Minnie Smith that she at one time lived in Greenville; that she was an habitué of the Griffin Flats in Dallas, where women of questionable character received their male guests at unseemly hours; and that one night, about March 1st of this year, appellant, who was her guest, had and exhibited to her six new suits of men's clothing, three ladies' skirts, a pair of shoes, some ties, some hose, suspenders, and other sundry articles, all of which were new, which he told her he had won from a dry goods clerk. Some of these articles, which she could use, appellant gave her. The articles which appellant had in his possession, and which this witness says were exhibited to her, were worth largely more than \$50. No single one of the articles, however, was worth as much as \$50, or anything like it. There is nothing in the evidence to indicate when the articles were taken, or whether they were taken at the same time or at different times. Appellant had opportunity to have taken them on many different occasions.

In this condition of the proof the court gave the following instructions:

"Theft is defined to be fraudulent taking of corporeal personal property belonging to another, from his possession, without his consent, with intent to deprive the owner of

the value of the same, and appropriate it to the use or benefit of the person taking.

"If you believe from the evidence, beyond a reasonable doubt, that the defendant, in the county of Hunt and state of Texas, on or about the day alleged in the indictment, did fraudulently take from the possession of W. M. McBride the property described in the indictment, without the consent of the said W. M. McBride, and with the intent to deprive the said W. M. McBride of the value of the said property, and to appropriate the same to the use and benefit of him, the defendant, and you further believe, beyond a reasonable doubt, that the said W. M. McBride was at the time the owner of said property, you will find the defendant guilty as charged, and assess his punishment at confinement in the penitentiary for not less than two nor more than ten years."

The remaining part of the court's charge was devoted to the matter of explanation of recently stolen property, circumstantial evidence, presumption of innocence, that the jury were the exclusive judges of the facts proved, and including directions as to the form of verdict.

On the trial appellant requested the court to give in charge to the jury the following instruction:

"That theft of property by the same person and from the same owner is committed on different occasions, each occasion constitutes a distinct offense. Therefore, even though you believe that the defendant did take from the possession of W. M. McBride property belonging to him, and that the taking constituted theft, yet, unless you believe beyond a reasonable doubt that property to the value of \$50 was taken at one and the same time, you must acquit the defendant; and the burden of proof is upon the state to prove this fact."

In this connection appellant also requested the court to give the following special instructions:

"That theft of property by the same person, and from the same owner, if committed on different occasions, each occasion constitutes a distinct offense.

"Therefore, even though you believe that the defendant did take from the possession of W. M. McBride, property belonging to him, and that the taking constituted theft, yet, unless you believe beyond a reasonable doubt that property to the value of \$50 was taken at one and the same time, you must acquit the defendant of theft of property of the value of \$50; and the burden of proof is upon the state to prove that the property so taken at one time was of the value of \$50.

"Should you find that defendant is not guilty of taking property of the value of \$50, but believe that on an occasion as alleged in the indictment, did take property from the possession of the said W. M. McBride of value less than \$50, you will find defendant

guilty of theft of property under the value of \$50.

"Should you find defendant guilty of theft of property, as alleged in the indictment, under the value of \$50, the punishment for such offense is by imprisonment in the county jail for any term not exceeding two years, and by fine in any amount not exceeding \$500, or by such imprisonment as you may agree upon without fine."

Both of these instructions were by the court refused.

It will be observed that the charge of the court does not require the jury to find the value of the property taken, or to have treated the question of value as an ingredient of the offense. The first special instruction above referred to should not, of course, have been given, since it directs an acquittal in the event the jury find the property taken at any one time to be less than \$50. It was sufficient, however, to call the attention of the court to the oversight and error in his charge. The last special instruction requested was correct, and should, in substance, at least, have been given. Article 869 of the Penal Code of 1895 is to this effect: "Theft of property of the value of fifty dollars or over shall be punished by confinement in the penitentiary not less than two nor more than ten years." It is the settled law in this state that, whenever a punishment is affixed by law to theft of a particular kind of property, it is unnecessary to either allege or prove the value of same, because theft thereof is made per se a felony. But in respect to all other classes of property it is both necessary to allege and prove the value, because the value characterizes the grade and the punishment for the theft thereof.

It has been further held that where different articles are alleged to have been stolen, and the values are affixed to each separate article, in order to sustain the conviction for a felonious theft, the evidence must show a taking of articles of \$50 or over in value at one and the same time. *Lacey v. State*, 22 Tex. App. 657, 3 S. W. 343; *Clark v. State*, 26 Tex. App. 486, 9 S. W. 767; *Stallings v. State*, 29 Tex. App. 220, 15 S. W. 716; *Cody v. State*, 31 Tex. Cr. R. 183, 20 S. W. 398; *White v. State*, 33 Tex. Cr. R. 94, 25 S. W. 290; *Hilliard v. State*, 37 Tex. 359; *Flynn v. State*, 47 Tex. Cr. R. 26, 83 S. W. 206; *Barnes v. State*, 43 Tex. Cr. R. 355, 65 S. W. 922; *Keipp v. State*, 51 Tex. Cr. R. 417, 103 S. W. 392. In this case there was abundant evidence that appellant had opportunities to have taken these goods on many occasions, and there is little direct evidence that he took all of the articles at the same time, and it was peculiarly necessary and important that this issue should have been submitted to the jury.

As stated, the other matters are not likely

to occur on another trial, and need not be noticed.

For the errors pointed out, the judgment will be reversed, and the cause remanded for proceedings in accordance with law.

BROOKS, J., absent.

CALLAGHAN v. STATE.

(Court of Criminal Appeals of Texas. Nov. 24, 1909.)

1. BAIL (§ 89*)—SCIRE FACIAS ON BOND—STATING OFFENSE.

Under Code Cr. Proc. 1895, art. 479, subd. 4, providing that a citation in proceedings on a forfeited bail bond shall be sufficient if it state the date of the bond and the "offense with which the principal is charged," the offense "swindling," being one which by statute is made a distinct offense eo nomine, it is enough to state the offense in the scire facias as "swindling," without reciting whether it is a felony or misdemeanor, though under Code Cr. Proc. 1895, art. 309, subd. 3, as amended in 1899 (Laws 1899, p. 111, c. 74), the latter recital would also be necessary in the bond.

[Ed. Note.—For other cases, see *Bail*, Cent. Dig. §§ 384-400; Dec. Dig. § 89.*]

2. BAIL (§ 93*)—SCIRE FACIAS ON BOND—JUDGMENT.

It is not necessary that the judgment in scire facias on a forfeited bail bond recite the date of the bond or of rendition of the judgment nisi, so that misrecitals thereof are surplussage and immaterial.

[Ed. Note.—For other cases, see *Bail*, Dec. Dig. § 93.*]

Error from District Court, Jasper County; W. B. Powell, Judge.

Scire facias on a forfeited bail bond by the State against J. R. Callaghan and others. From the judgment, said Callaghan brings error. Affirmed.

Dougherty, Conley & Gordon, for plaintiff in error. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. On the 8th day of July, 1907, J. R. Callaghan, with others, became surety on the bond of Joe Davis, who was charged by indictment, duly presented to the district court of Jasper county, with an offense which is thus described in such bond: "With the offense of a misdemeanor, to wit: Swindling property acquired value \$15.00." Their principal failing to appear on December 2, 1907, judgment nisi was rendered against Davis and all the sureties in proper form. On the 4th day of May, 1908, scire facias issued to the sureties to show cause why such judgment nisi should not be made final. This scire facias in every respect conformed to the law, unless it be in the description of the offense. It recites that sureties therein named went upon the bond conditioned for the appearance of Davis in a charge wherein said Davis "is charged with the offense of swindling." Thereafter, on the 9th day of Decem-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ber, 1908, the cause came on for trial, and on said day judgment final was rendered against Davis as principal, and all of his sureties, as such, for the sum of \$300, the amount of the bond aforesaid. This judgment contains a number of misrecitals; for instance, the date of the bond is alleged to have been July 8, 1908, and that the judgment nisi was rendered on the 2d day of July, 1908.

1. The principal contention of plaintiff in error is that, inasmuch as the scire facias does not in terms set out whether the offense of which appellant was charged was a felony or misdemeanor, it is insufficient; and they rely in support of this contention principally upon the case of *Nichols v. State*, 47 Tex. Cr. R. 406, 83 S. W. 1113. We do not believe their contention is sound. They seem to overlook the fact that the terms of the statute touching the description of the offense, where such description is required in the bond itself, are different from the language of the law where it is required to be named in the scire facias. In the *Nichols Case*, supra, it was held that under article 309, subd. 3, of the Code of Criminal Procedure of 1895, as amended, a bail bond which recites that the principal is charged with embezzlement does not show whether the offense is a felony or a misdemeanor. It is stated in that case that under the old law this would have been sufficient.

Article 309, as provided by the amendment of April 17, 1899 (Laws 1899, p. 111, c. 74), is as follows: "A bail bond shall be sufficient if it contain the following requisites: * * *

(3) If the defendant is charged with an offense that is a felony, that it state that he is charged with a felony. If the defendant is charged with a misdemeanor, that it state that he is charged with a misdemeanor." The old article of the statute, as it theretofore stood, was to this effect: "(3) That the offense of which the defendant is accused be distinctly named in the bond, and that it appear therefrom that he is accused of some offense against the laws of the state." Now, article 479 of the Code of Criminal Procedure of 1895 provides: "A citation shall be sufficient if it contain the following requisites: * * *

(4) It shall state the date of such recognizance or bail bond and the offense with which the principal is charged." Under this article it has been uniformly held that, if the offense charged against the accused be one which is by the statute made a distinct crime eo nomine, it is sufficient to state it by its name, both in the recognizance or bail bond and in the writ of scire facias. *Brown v. State*, 28 Tex. App. 65, 11 S. W. 1022; *La Rose v. State*, 29 Tex. App. 215, 15 S. W. 33. This was before the amendment of 1899 touching bail bonds. It will be observed, however, that no corresponding amendment was made in the article of the Code of Crimi-

nal Procedure touching the requisites of scire facias.

We can readily understand the importance of bail bonds reciting whether the offense is a misdemeanor or a felony, as that might give direction and control as to the court in which such bond should be returned, and in which the accused would be answerable. There would seem to be little or no reason why in a scire facias such provision should be required, since the scire facias itself gives notice of the court from which it issues and to which answer is to be made. In any event the change was not made, and in line with the unbroken decisions of this court, the offense being described as one known to the law, and one in terms denominated as an offense eo nomine in the decision relied on in the *Nichols Case*, supra, we think it must be held the scire facias was sufficient.

2. We attach no importance to the fact that in the judgment there are a number of misrecitals as to dates. It is not required that these matters should be recited in the judgment at all. It does by its terms adjudicate and distinctly determine the liability of the parties. The fact that the date of a bond is not correctly recited is a matter of no consequence and importance, and will be treated as mere surplusage. *Woods v. Allen*, 122 Iowa, 695, 98 N. W. 499.

Finding no error in the proceedings, it is ordered that the judgment be, and same is hereby, in all things affirmed.

BROOKS, J., absent.

WELCH v. STATE.

(Court of Criminal Appeals of Texas. Oct. 27, 1909. Motion for Rehearing Dismissed Dec. 1, 1909.)

1. CRIMINAL LAW (§ 681*) — RECEPTION OF EVIDENCE—PRELIMINARY PROOF.

As the state should not be called on to establish a negative as a predicate for the introduction of testimony, the state may prove by a witness the position of the body of decedent, without first showing that it had not been disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1611; Dec. Dig. § 681.*]

2. HOMICIDE (§ 171*) — EVIDENCE — ADMISSIBILITY.

Where it was shown that the body of decedent, when seen by a witness, had been practically undisturbed, it was not error to permit the witness to prove the position of the body.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 352; Dec. Dig. § 171.*]

3. CRIMINAL LAW (§ 1169*)—APPEAL—HARMLESS ERROR — ERRONEOUS ADMISSION OF EVIDENCE.

The error, if any, in allowing evidence to prove a fact established by evidence uncontradicted and not objected to is not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. CRIMINAL LAW (§ 478*)—EVIDENCE—OPINION EVIDENCE—COMPETENCY OF WITNESS.

One who has had experience in handling firearms and in killing hogs and cattle, and who has made frequent observations as to the appearance of bullet wounds of entry and exit, and from such experience can tell which is the wound of entry and which the wound of exit, and he testifies that the wound where the bullet enters is smaller than where it comes out, and that on entering the bullet pushes the flesh inward, and where it comes out it pushes the flesh with its ragged parts outward, is competent to testify which one of the bullet wounds on the body of decedent was the place of entry.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1064, 1065; Dec. Dig. § 478.*]

5. CRIMINAL LAW (§ 670*)—TRIAL—EXCLUSION OF EVIDENCE.

Where the court was not informed as to what a witness would testify to in response to a question objected to, there was no error in sustaining the objection.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1593-1596; Dec. Dig. § 670.*]

6. WITNESSES (§ 370*)—CREDIBILITY—INTEREST—EVIDENCE—ADMISSIBILITY.

Excluded testimony as to the friendship between a state's witness and decedent is immaterial, especially where the witness states that he was friendly with decedent, but afterwards explained that he thought the question related to accused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1189; Dec. Dig. § 370.*]

7. CRIMINAL LAW (§ 1144*)—APPEAL—EXCLUSION OF EVIDENCE—REVIEW—PRESUMPTIONS.

Where the court excluded a conversation introductory to impeaching matter testified to, and the record did not contain a statement of the purport of the introductory conversation, the ruling would not be disturbed, as the court could not assume that the introductory conversation was of such a character as to refresh the memory of the witness or to make more certain his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3026-3031; Dec. Dig. § 1144.*]

8. WITNESSES (§ 318*)—IMPEACHMENT—SUPPORT OF WITNESS.

Where a witness for accused testified to her recollection of a statement made by accused, without giving the exact words, which she could not remember, and the state on cross-examination only proved her relationship to accused, evidence to support her testimony was inadmissible, as there had been no effort to impeach her.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1084-1086; Dec. Dig. § 318.*]

9. WITNESSES (§ 377*)—IMPEACHMENT—SUPPORT OF WITNESS.

A witness for accused may not be supported by proof that on a former trial she had been summoned as a state's witness and had testified for the state.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1207; Dec. Dig. § 377.*]

10. CRIMINAL LAW (§ 729*)—IMPROPER CROSS-EXAMINATION—WITHDRAWAL.

Where counsel for the state withdrew the question asked accused as to whether the testimony of his mother and wife, contradicting his testimony, was correct, and requested the court to instruct the jury not to consider the matter, but did not admit that accused's wife had not testified as indicated by the question,

and the court gave the requested charge, the conduct of the state's attorney was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1692; Dec. Dig. § 729.*]

11. CRIMINAL LAW (§ 721*)—CONDUCT OF COUNSEL—COMMENT ON FAILURE OF ACCUSED TO TESTIFY—CROSS-EXAMINATION OF ACCUSED.

Where accused, relying on self-defense, testified that decedent cut him across the breast with a knife, cutting through his two top shirts and an undershirt and grazing the skin, and a witness for him merely testified that she had noticed his shirt on the night of the murder, and noticed a place torn in the shoulder of it, questions asked accused on cross-examination as to what persons he had exhibited his clothing, and as to whether at the examining trial his clothing was in the same condition as immediately after the killing, and whether he had ever produced the clothing, or offered it in evidence, were proper, and not open to objection that they alluded to the failure of accused to testify or make any statement at the examining trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1672; Dec. Dig. § 721.*]

12. HOMICIDE (§ 299*)—INSTRUCTIONS—PREVENTION OF ROBBERY.

Where accused testified that, while he and decedent were discussing the sale of a pistol, accused took out his purse, and thereupon decedent grabbed it, or knocked it out of his hands, and that accused remonstrated with decedent, and asked him what he meant, that decedent rushed on accused and struck him with a knife, and that accused immediately ran to his horse, seized his gun, and killed decedent, a correct charge on self-defense, followed by the statement that if the jury believed that, while accused and decedent were discussing the sale of the pistol, accused took out his purse, and that thereupon decedent grabbed it, and that, on accused remonstrating with him, decedent rushed on accused and struck at him with a knife, and that accused immediately ran to his horse, and seized his gun, and killed accused, they should acquit him, sufficiently charged on the issue of robbery, within Pen. Code 1895, art. 675, subs. 1-3, 5, providing that a homicide which takes place in preventing a robbery is justifiable, etc.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 299.*]

13. CRIMINAL LAW (§ 1159*)—APPEAL—VERDICT—CONCLUSIVENESS.

While the trial court should not hesitate in a proper case to set aside the verdict of the jury, though it is for them to determine the facts, the court on appeal is justified in setting aside the verdict only where it is without any evidence to support it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.*]

14. HOMICIDE (§ 254*)—EVIDENCE—SUFFICIENCY.

Evidence held to justify a conviction of murder in the second degree.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 254.*]

Appeal from District Court, Uvalde County; R. H. Burney, Judge.

Ed Welch was convicted of murder in the second degree, and he appeals. Affirmed.

W. C. Linden, for appellant. F. J. McCord, Asst. Atty. Gen., for the State.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

RAMSEY, J. On the 5th day of March, 1907, the grand jury of Edwards county returned an indictment against Ed Welch, charging him with the murder of one Ben Tanner. Quite a while thereafter the case was transferred on change of venue to Uvalde county, and a trial there had on April 10th of this year resulted in a conviction of murder in the second degree; the jury assessing appellant's punishment at 25 years' confinement in the state penitentiary.

While not so voluminous, the record in the case contains references to so many points and places that we are not sure that we have wholly and fully comprehended or understood all of them. However, the essential facts are that for some little time before the homicide, which occurred on the 28th day of January, 1907, deceased was making his home at the residence of one W. F. McCulloch, in Edwards county, and had been living there for some little time. He left the McCulloch house early in the morning of January 28, 1907, and did not return. Shortly after dark of that day his body was found near a river or creek, referred to as "Hackberry," some 2½ miles from where McCulloch lived. His body, when found, was lying across the road. There was a shot, evidently a wound of entry, in the back of his head, a larger wound in the forehead, and one near the top of his head. The testimony of the physician called convinces us that these wounds were made by one and the same shot. This witness, on direct examination, gives it as his opinion that the bullet entered the back of the head, ranged downward, and that its course was deflected by it striking a hard bone near the base of the skull, probably splitting the bullet, and causing the wound in the forehead, as well as the wound in the top of the head. By his side, and in the crook of his arm, was found a black-handled knife. There was no evidence showing that this was the knife of deceased; but, on the contrary, the evidence renders it practically certain that he had no such knife. When found, deceased had on a pair of brogan shoes, one of which was on, but unlaced, and the other shoe was only partly on his foot. Witnesses differ somewhat as to just how far the shoes were on; but this probably is a fair summary of all the testimony. The evidence also tended to show that the inside of the pockets of his trousers had been slightly pulled up, and also tended to show that his coat was pulled up somewhat under his back. There was a pocketbook found lying near where the body was found, and also a cartridge which had not been exploded, and near by the shell of an exploded cartridge. The testimony of McCulloch and his wife tends to show that the pocketbook found was the pocketbook of deceased. Appellant's testimony was to the effect that it was his pocketbook. In this pocketbook there were \$2 or \$3 in silver, a finger ring, which had belonged to appellant,

and also two checks payable to him, one for the sum of \$35, payable to appellant, and dated on the day of the homicide, and another check for \$4, executed by one Hocker to George Welch, and indorsed by him. The evidence also shows, when found, the \$35 check, payable to appellant, was at the time indorsed by him. Appellant and deceased were seen by several parties on the day named in company with each other, riding around in the neighborhood close to the place of the killing. About 3 o'clock on this day they were seen by one witness, at which time the deceased had on a pair of boots evidently belonging to appellant, and appellant had on the shoes which undoubtedly belonged to deceased. About a half hour before the body of deceased was found, as stated by F. A. Waddell, appellant came to his house, near where the shooting occurred, and borrowed a Winchester gun from him, and stated that he wanted a gun to go deer hunting. Jim Waddell let him have the gun, in which at the time there were two cartridges. He returned with the gun just about dark, and said he had killed a man. Since, under the contention of appellant, the particular character of this statement becomes important, we will set out at length the testimony of the witnesses whose testimony relates to this matter.

F. A. Waddell testified on this question as follows: "I saw Ed Welch again that afternoon, or evening, after dark. He just walked in, opened the door, and stepped in with the gun in his hand, and he just said, 'Uncle, I have killed a fellow,' and I told him, 'Well, I guess not,' and he said, 'Yes, he is dead all right,' and I said, 'Where did you kill him,' and then he said, 'Up on Beef,' and I didn't know who it could have been, and said, 'I don't know who it could have been,' and then my wife said, 'Who is it that you have killed—Bill McCulloch?' and he said, 'No, it is that other God damn son of a bitch that stays up there.' And then Ed left us. He went out with the gun and started off with the same, and I hollered to him, and told him that I wanted the gun, and then I got the gun from him." Jim Waddell, on this matter, gave the following testimony: "I was present when he came back there, and I heard the conversation where he said that he had to kill a man. I was not in the house when he first came in. I was in the kitchen at that time. I heard him say what he said about it. He said that he hated to kill a man, and my father asked him where he had killed him, and he said up there on 'Beef,' and mother said that it must be Bill McCulloch, and he said, 'No; it is that other fellow that stays up there.' He said that he hated to kill a man, but that he had to do so. He said that the fellow tried to get him, but that he finally got him. I walked out on the gallery at the time he was leaving our house. After the defendant had made the statement in our house, and he walked

out on the gallery, I followed him out there, and out there he made more statements with reference to the killing. He said that that fellow tried to sell him an automatic pistol, and that he told the fellow that he did not have enough money to buy it with, and he said that he would sell it to him so damn cheap that he would think he had found it, and then he pulled out his purse, and he grabbed it—that is, Tanner grabbed it. That was all the statement that I remember that he made about it out there on the gallery, and he then left right away.”

Mrs. F. A. Waddell, on the same matter, testified as follows: “I was at our home on the night that Ed Welch came in there. It was the night that Ben Tanner was killed, and I heard him make statement in regard to the killing, and it was made while he was in the house—our house. He said that he had to kill a fellow up on ‘Beef,’ and asked his Uncle Phil to go after him. His uncle said, ‘Maybe you didn’t kill him,’ and he said, ‘Yes; he is dead.’ I told him that I guess it was Bill McCulloch, and he said it was not Bill McCulloch, but that it was that other fellow that stayed down there at McCulloch’s. He said that he hated to kill a fellow, but that he tried to run it over him, and before he would be run over by him he would kill him. He said that he had to kill a fellow; that is, he said that he hated to kill a fellow, but that before he would be run over he would kill him. I do not remember the exact words that were spoken there. He also said that he tried to get him first, but that he finally got him.”

Appellant in his testimony gave a statement much more in detail of the transaction, and his account of it, as taken from his direct examination, is in these words: “When we got down, he pulled off the boots and threw them to me, and then I give him the shoes, and I put on the boots, and was standing up, and he didn’t quite have the shoes on, when he said to me, ‘Kid, let me sell you a damn good automatic pistol,’ and I told him that I could not afford it, and he said that he would sell it to me so cheap that I would think that I had found it, or that I would think that he had given it to me. He said that he would sell it to me so cheap that I would think that he had given it to me. I didn’t ask him what he would take for it, when he told me that he would sell it so cheap. I told him that I would give him \$5 for it, and he said, ‘You have not got any money,’ and I told him that I did have some money, and then I pulled out my purse, and he made a grab at it. I pulled a cartridge out with it, out of my pocket. When I pulled out the purse, and he made a grab for it, it was knocked out of my hand, and I never did see it any more, nor did I ever see the cartridge that had fell out. When he grabbed at the purse, I asked him what did he mean, and he said, ‘God damn you, I will show you what I mean,’ and then

he made a stab at me with a knife, and then I jumped back and said, ‘Don’t you cut me with that knife,’ and he said, ‘God damn you, I will cut your heart out.’ And then I started for the horses. He hit me one time with the knife, and cut my clothes with same. I didn’t have on a coat, but two over-shirts and an undershirt, and he cut through them all, and just grazed the skin a little bit with the knife. I think that this all was done with just one lick with the knife. I had these shirts with me at the examining trial of this case, and I had them at court on the former trial of my case. They were out in the wagon. Since that time my house burned up, and these clothes were burned with the house. This house was burned up when I was at Rock Springs at court (at the fall term, 1908), at the last time this case was called for trial—last term of court. When I saw that Tanner was after me with a knife, I just jumped back, and when he saw that I was getting near the horse he just jumped back, and started to pick up a rock. I had started for the horse before he picked up the rock. He saw that I was going to get the gun, and just as I got it he got a rock and started up with it. The horses were back about 10 feet from where I was standing when he first cut me. When I had put on the boots and was standing up there, and when I started to get the gun, he jumped back about 10 feet, and there is where he got the rock, and when he just had gotten the rock, he said, ‘God damn you, I will knock your brains out.’ One side of this road there is the south side, and the other the north side. I was on the south side of the road, and Tanner was on the north side of the road. I got the boots on before he got the shoes on. He threw the boots to me, and I put them on, and was standing up, and he was sitting down pulling the shoes on, and we were about in this position when the conversation came up about the pistol. I had a purse with me, and when I pulled the same out he grabbed it. (Witness handed purse.) This is the purse that I had that day. He was sitting down pulling his shoes on, and when I pulled out the purse he just made a grab at it, and knocked it out of my hand. When he jumped and knocked this purse out of my hand, and I said, ‘Tanner, what do you mean?’ is when he said, ‘God damn you, I will show you what I mean,’ and then it was that he struck at me with a knife. He cut through my coat and two shirts, and just grazed the skin a little bit. I said, ‘Tanner, don’t you cut me with that knife,’ and he said, ‘God damn you, I will cut your heart out,’ and then I went back towards the horse. The gun was on the horse—that is, the saddle; and when I got to where the gun was, he saw that I was going to get it before he could cut me, and he went after the rock. He just went back to about where I was putting on the boots, and stooped down for the rock. He was then

when I shot him. I just shot one time, and when the bullet hit him he fell."

This, perhaps, is a sufficient statement of the facts of the case to make the opinion understood. On the trial, which was stoutly contested, very many questions arose in respect to the admission and rejection of testimony, which we will discuss in order. We feel confident, however, that in respect to none of them was there any error committed by the trial court.

1. The first objection urged is to the testimony of Mrs. W. F. McCulloch. The state sought to prove, and was permitted to prove, by her the position in which the body of deceased was lying at the time she reached it. This was objected to, because the state had not shown by any testimony that the body had not been disturbed, and the position changed after the killing and before witness saw it. There was no error in the action of the court in this matter. In the nature of things, the state would not be called upon to establish a negative as a predicate for the introduction of testimony. Again, it was shown by other testimony that the body of deceased, when seen by Mrs. McCulloch, had been practically, if not wholly, undisturbed, and the evidence of other witnesses was introduced without objection, showing without contradiction practically every fact, in respect to the position of the body, testified to by this witness.

2. The state introduced the witness W. F. McCulloch, and, among other things, asked him the following question: "Mr. McCulloch, please state which one of the wounds on Ben Tanner's body was the place of entry." To this question, and the answer sought to be elicited thereby, objection was made, for the reason it was leading, and because, further, the witness had not testified that he had ever before examined any wounds upon a human being. The witness had testified that he had had a great deal of experience in handling firearms, and in killing hogs and cattle, and had made frequent observations as to the appearance of wounds of entry and exit, and from such experience could always tell which was the wound of entry and which was the wound of exit. He further stated where the bullet entered it was smaller than where it came out; that on entering the bullet pushed the flesh inward, and where it came out it pushed the flesh with its ragged parts outward. It seems to us clearly that this witness had sufficiently qualified as an expert, and that the testimony was admissible. In this connection it should be stated that the testimony of all the witnesses, including the physician, was substantially to the same effect, and leaves in our minds no doubt that the wound of entry was the bullet hole in the back of deceased's head.

affecting his credibility as a witness, he was asked by counsel for appellant the following question: "Didn't you know, when Ben Tanner was at your place the first time, that he was a fugitive from justice?" The bill recites that, had he been permitted to answer, the witness would have testified that he did learn from Ben Tanner, shortly after he came to his house, that he was, at the time, on the dodge, and a fugitive from justice, and would further have elicited from said witness the fact that, notwithstanding his knowledge that Tanner was a fugitive, he kept him in his house. This evidence was offered, in connection with the statement that McCulloch, being a material witness for the state, and having testified to inculpatory facts against appellant, for the purpose of showing animus, bias, and motive, and as affecting the credibility of the witness McCulloch. The bill of exceptions on this question is approved with this qualification: "There was no statement made to the court, nor was it in any way made known to the court, as recited in this bill, that the said witness would have testified that he knew the deceased was a fugitive from justice and on the dodge." Whatever might be our conclusion in respect to this matter, in the absence of this explanation, it is clear that, as explained by the court, it is without merit.

4. Equally without merit, as explained by the court, is the matter raised by the fourth bill of exceptions. This proposed testimony also relates to the friendship or state of feeling between McCulloch and deceased. In explaining the matter the court says that this witness afterwards stated that he was very friendly with deceased, Tanner, and that in responding to the questions of counsel for appellant he thought that they were asking about Welch. The testimony sought to be elicited was, we think, immaterial.

5. While the witness McCulloch was on the stand, and after he had testified that on the morning of the killing, when deceased left his house, he saw him in possession of a pocketbook, similar to the one exhibited in evidence as being found near the body of the deceased; that before leaving the house he saw deceased take a dime out of the pocketbook and drop it back in his purse, and he heard it fall upon and clink against other money in the purse; that he did not know the amount of money in the purse, but knew there was other money in it—he was then asked upon cross-examination if he had not stated, at the body of deceased, on the morning after the killing, in the presence of W. P. Rose and others, that he knew that deceased only had 15 cents, and that 5 cents of that he was going to use to buy stamps to place upon letters to be mailed by him for the wife of witness, and with

the other 10 cents he was going to buy tobacco from Bud Anderson, to which, as recited in the bill, the witness first answered that he did not make such statement, and then stated that he did not remember making such statement. Thereupon W. P. Rose was introduced by appellant, and testified that said witness McCulloch did, at the time and place inquired about, make such statements. The bill further recites that upon cross-examination counsel for the state several times asked said witness Rose if he was not mistaken, and if the statement made by McCulloch was not that deceased had 15 cents and other money, but he did not know how much more he had. To which question the said witness Rose stated that that was not what McCulloch said, but that he had stated, as already claimed by the witness Rose, that he (McCulloch) knew that 15 cents was all the money that deceased had, and the witness Rose further stated: "I know that is what he said, because I remember the conversation and the manner in which the question of deceased's money came up for discussion, and, if you want me to, I can state that conversation, and show you why I know that I am not mistaken." To which state's counsel objected, and said they did not want the conversation. The bill then recites that on redirect examination appellant's counsel offered to prove by said witness Rose, as *res gestæ* of said impeaching statement, the said conversation introductory of said impeaching matter, to which proposed evidence the state objected, because said conversation was not relevant, and not *res gestæ*, and the court sustained same. It will be noticed that the conversation referred to, the introductory statement of McCulloch, and which the witness states enables him to be sure that he is not mistaken, is not given. In this respect the bill is clearly defective, and in the absence of a statement of the purport or substance of the conversation we would not be authorized to assume that it was material, or of such character as to refresh the memory of the witness, or to make more certain his testimony; nor could we tell from the bill whether it was *res gestæ* or not.

6. The next bill complains of the action of the court in refusing to permit appellant to prove by Mrs. Waddell, a witness introduced by him on this trial, that she had been summoned as a witness for the state, and had on a former trial been placed by the state as a witness on the stand in its behalf. Referring to the statement of facts in the case, it appears that the cross-examination of this witness went only to prove relationship, and that she had given in her direct testimony the conversation in the way she heard it, but that she did not remember the exact words; that she had stated all she remembered. There was no effort of impeachment of the testimony of this witness, nor anything in the cross-examina-

tion or the record that would in any event have required or justified, or even rendered valuable to appellant, such support of this witness. Besides, it is not believed it would have been proper to have supported the witness in the manner attempted.

7. Appellant complains that on his cross-examination counsel for the state were permitted to ask him the following question: "If your mother and your wife says, or testified, that you did not come back home from the time that you left that morning until about 4 o'clock, is that correct?" This, it is urged, was inadmissible, for the reason that it is incompetent for one witness to testify as to the truthfulness or falsity of the testimony of any other witness; that the state is not permitted to refer to any evidence given at a former trial by any witness, except the one testifying, and then only for the purpose of laying a predicate; that the statement assumed in the question was not true that either the mother or wife of appellant had so testified; and, further, that the question was improper, for the reason it contained a statement in the presence of the jury to the effect that the wife of the defendant had on a former trial made as a witness a damaging, inculpatory statement against him. The bill also recites, in connection with said objections, counsel for appellant tendered proof that the wife of appellant had not testified at all upon the former trial of the case. The bill thereupon recites that counsel for the state withdrew the question, and the court sustained appellant's objection, and orally instructed the jury not to consider said question for any purpose against appellant. This bill is approved, with the following explanation: "When counsel for the defendant objected to the question asked defendant, counsel for state and defendant entered into a discussion about whether or not the defendant's wife had testified at the former trial at all, and, if so, what her testimony was in this matter, and the court refused to hear discussion on the matter, stating that the defendant's objection would be sustained. Whereupon counsel for the state said they would withdraw the question, and requested the court to instruct the jury not to consider the matter for any purpose, which was done. Counsel for the state made no admission to the effect that the defendant's wife had not testified, as the question indicated, and counsel for the defendant did not request the court to so inform the jury, nor to inform the jury that the wife had not so testified, in the former trial of the case. The defendant's wife did testify on the former trial of the case; but what she testified to was not permitted to be stated, nor was it offered to be proven by counsel for defendant." Under the explanation of the court, there was no error committed of which appellant can complain.

8. The remaining bills of exception com-

should be stated that appellant testified that Tanner cut him across the breast with a knife, cutting through both his top shirts and an undershirt, and grazing the skin, causing him to bleed. This fact was denied by the state, and the truthfulness of appellant's statement vigorously assailed. No witness was produced by appellant sustaining this statement. The only fragment of testimony that in any way supports this statement is the evidence of Mrs. Waddell, who testified as follows: "I noticed his shirt that night, and noticed a place torn in the shoulder of his shirt. It was just a hole in his shirt there on the shoulder." He was asked to name what person, relative, officer, or citizen to whom he had exhibited this cut place. He was asked whether at the examining trial his clothing was in the same condition it was immediately after the killing. He was asked if he had ever produced these clothes or offered them in evidence, and many similar questions. If this statement was true, undoubtedly it was an important fact in his favor. About the only way the state could question and impeach the correctness and truthfulness of this evidence was by cross-examination substantially along the lines adopted. If his statement was true, it would have been an easy matter to have supported his contention by the testimony of other witnesses. If it were true, it was most natural that he should call attention to the fact to some one. In a matter so vital, the clothes themselves would have carried convincing proof in support of his statement. It seems to us that the testimony was so clearly admissible as to admit of no sort of doubt. It was not open, as the learned court below explained, to the objection that it was an allusion to the failure on the part of appellant to testify or make any statement at the inquest hearing, or, indeed, open to any other objection.

9. The next question to be considered, and, as we believe, the most important question, is one not free from difficulty. It was and is the question most insisted on in oral argument, which was presented on appellant's behalf with great earnestness and ability. That question is the failure of the court, as claimed, to charge the jury the substance of article 675 (and subdivisions 1, 2, 3, and 5 thereof) of our Penal Code of 1895. This article, and the subdivisions named are as follows:

"Art. 675. Homicide is permitted by law when inflicted for the purpose of preventing the offense of murder, rape, robbery, maiming, disfiguring, castration, arson, burglary and theft at night, or when inflicted upon a person or persons who are found armed with deadly weapons and in disguise in the

under the following circumstances:

"(1) It must reasonably appear by the acts or by words, coupled with the acts of the person killed, that it was the purpose and intent of such person to commit one of the offenses above named.

"(2) The killing must take place while the person killed was in the act of committing the offense, or after some act done by him showing evidently an intent to commit such offense.

"(3) It must take place before the offense committed by the party killed is actually completed; except that, in case of rape, the ravisher may be killed at any time before he has escaped from the presence of his victim, and except, also, in the cases hereinafter enumerated."

"(5) If homicide takes place in preventing a robbery, it shall be justifiable if done while the robber is in the presence of the person robbed, or is flying with the money or other article taken by him."

From the statement above made, the application and relevancy of this contention will be understood. We think it must be held, in fairness to appellant, that the question of robbery is, in a sense, suggested by the testimony. At the same time, it is not to be denied that all the evidence of robbery is inextricably connected in the testimony of appellant with the issue of either assault to murder or to do serious bodily injury, and the rights of appellant in firing the fatal shot are as inextricably interwoven and connected with his plea of self-defense. The court charged on the doctrine of self-defense, and the charge, as a submission of that issue, is not complained of. If the charge of the court submitted, as well the facts and issues touching robbery, and the existence of the facts out of which robbery could be inferred, it would seem, in reason, that appellant would be without just cause of complaint. Now, then, after instructing the jury in a general way on self-defense, and after applying the doctrine of self-defense to the facts in issue, both as to an actual attack and threatened attack, including the doctrine of reasonable appearances of danger, and the right of appellant to be judged from his standpoint, in connection both with the acts and words accompanying same, considered in connection with the relative size and strength of the parties, the character of deceased, and all the other facts and circumstances known to the defendant, the court then thus instructed the jury: "Or, again, should you believe from the evidence that, while defendant and deceased were discussing some matter about the sale or purchase of a pistol, the defendant took out his money purse, and that thereupon the deceased grabbed at the same, or knocked it out of the

hands of the defendant, and that, upon the defendant remonstrating with or asking the deceased what he meant, the deceased rushed upon defendant and struck at him with a knife, and that defendant immediately ran to his horse, seized his gun, and shot and killed said Ben Tanner, then, in case you so find, or if you have a reasonable doubt that such were the facts, or as to the fact that the deceased so attacked the defendant with a knife, you will acquit the defendant." If the issue of robbery or attempted robbery was in the case at all, it arose, and is based on the existence of all the facts referred to in the court's charge, all of which occurred at the same time and as continuous portions of the same transaction.

It will thus be seen that under this instruction, if the jury believed or had a reasonable belief in their minds that, while appellant and deceased were discussing the matter about the purchase of a pistol, appellant took out his money purse, and thereupon deceased grabbed same, or knocked it out of his hands, and thereupon the defendant, remonstrating with or asking him (deceased) what he meant, the deceased rushed upon defendant and struck at him with a knife, and appellant immediately ran to his horse, seized his gun, and shot and killed Tanner, then in case the jury should so find, or if they had a reasonable doubt that such were the facts, or as to the fact that deceased so attacked defendant with a knife, they would acquit him. This charge applies the very facts relied upon by appellant. It is true, it does not in terms instruct the jury that appellant had the right to kill deceased if he believed that he was attempting to rob him; but it does instruct the jury that if the facts touching said robbery testified to are true, then appellant should go acquitted. It also, in another paragraph, instructs the jury that if deceased had picked up a rock, or defendant believed that he had, and was in the act of making an attack upon him, or if it so appeared to him at the time, and he shot deceased, he should be acquitted. This, we think, was quite as favorable a charge to appellant as he was entitled to receive under the law. The issue in fact of the robbery was based upon all the things done and said at the time. An instruction with reference to robbery disassociated from the facts would have been unnecessary and improper. The issue of robbery, if gathered at all from the testimony, is to be gathered from all the facts testified to by appellant. We think the charge, when examined and measured by the facts in evidence, contained such a submission of the case that the jury could not have misunderstood appellant's rights, and could not have been misled thereby, but, on the contrary, when tested in its entirety, stripped of all legal phraseology, in a plain matter-of-fact way, directed the jury that if appellant took his money purse out of his pocket, and deceased grab-

bed at it or knocked it out of his hands, and when appellant remonstrated with him, and asked him what he meant, deceased rushed upon him with a knife, and appellant immediately ran to his horse, seized his gun, and shot and killed Tanner, he should be acquitted. Nor were the jury in this charge required to find either danger or reasonable appearances thereof. This was appellant's defense. These were the facts testified to by him. Considered as a whole, as stated, we believe the charge of the court is not subject to substantial criticism. In this connection it is to be noted that this statute has not often been construed by the court. The only case in which the matter has been considered, so far as we have been able to find, is the case of *Smith v. State*, 31 Tex. Cr. R. 14, 19 S. W. 252. In that case Judge Davidson, who wrote the opinion, makes this general reference: "Had Isbell fired the first shot, under the circumstances detailed, the defendant being in the perpetration of robbery, and had death ensued from the effect of such shot, such killing upon the part of Isbell would have been no offense against the law, because our statute expressly provides that, if the homicide takes place in the prevention of robbery, it shall be justifiable if the robber is in the presence of the parties robbed, or is flying with the money or other article taken by him. Pen. Code, 1879, art. 570, subd. 5."

10. The only remaining ground of the motion for a new trial is thus stated by appellant: "The verdict of the jury in the case is contrary to and unsupported by the evidence, in that it absolutely fails to disclose, or even to remotely suggest, any motive for the killing of Ben Tanner, other than that of self-defense, or in the prevention of robbery, as shown by the defendant's own testimony, and the testimony of the state's witness, Dr. P. F. Robertson, whom the state qualified as an expert, both in the use of firearms and as a physician, is positive and uncontradicted to the effect that he probed the wound in the back of the head, and traced its course from the point of entry behind the right ear downwards several inches to the base of the skull, that it did not enter the base of the skull, and that in his opinion the two wounds, one in the top of the head, and the other one in the forehead, were made by the same bullet, which entered behind the right ear, and ranged downward to the base of the skull, and was there deflected and made the other two wounds, which evidence is entirely contrary to the state's theory that at the time of the killing deceased was on horseback, and the defendant, also on horseback, shot him from the rear, and is thoroughly consistent with and corroborative of the defendant's statement of the relative position of the parties at the time of the shooting, as is also the testimony of witnesses as to the finding of the purse and cartridge, and the contents of the

purse, found at the feet of deceased." The case is indeed a singular one, and in view of the disparity of the age of the parties, proof of the bad character of Tanner, the deceased, and the lack of clearness of the testimony in respect to motive, we have been led the more carefully to examine the record. We do not believe, however, in view of the entire record, that we would be justified, sitting as a court of appeal, in reversing the judgment on this ground. It will be noticed by the statements heretofore given that the testimony of F. A. Waddell, Jim Waddell, Mrs. F. A. Waddell, and appellant does not wholly agree as to what was the statement made to them by appellant. The testimony of F. A. Waddell contains no suggestion of self-defense or other justification on the part of appellant. It contains such a reference to deceased as a "God damn son of a bitch" as to furnish some evidence of hatred, malice, and ill will. The borrowing of the gun only about a half hour before the fatal shot is strangely at variance with appellant's statement that the parties were intending to go deer hunting. Again, the evidence showed that on the first trial appellant stated that, when he fired the shot which killed Tanner, the "deceased was facing him, and looking him in the face when he shot him"; that "the deceased was in the act of rising up and looking him in the face when he shot him." It is true that the force of this statement is somewhat broken by the cross-examination of the witness as to the meaning of appellant, and that he might have been facing him or had his side to him. It is the peculiar office and duty of the jury to ascertain and determine the facts in every contested case. The trial court should not hesitate, in a proper case, where the jurors have not done their duty, to set aside their verdict. We would only be justified in so doing in a case where the verdict was without any evidence to support it. A careful review of the case has not convinced us that this is such a case.

Finding no error in the record, it is, therefore, ordered that the judgment of conviction be, and the same is, hereby in all things affirmed.

NOTE. This case was decided October 27, 1909, the same being affirmed, and motion for rehearing was filed. While motion for rehearing was pending in this court, the appellant escaped; hence the motion for rehearing was dismissed December 1, 1909.

Ex parte CASSENS.

(Court of Criminal Appeals of Texas. Nov. 3, 1909. Rehearing Denied Dec. 1, 1909.)

1. INTOXICATING LIQUORS (§§ 40, 223*)—OFFENSES—GIFT TO MINORS—EFFECT OF LOCAL OPTION LAW.

A person can be convicted of giving intoxicating liquors to a minor on a complaint

charging the selling and giving of such liquors to a minor, regardless of whether or not the local option law was in force in the county.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. §§ 40, 223.*]

2. HABEAS CORPUS (§ 30*)—NATURE OF REMEDY.

A writ of habeas corpus is not a writ of appeal, and cannot be invoked to question a judgment merely erroneous, and not absolutely void.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 25; Dec. Dig. § 30.*]

3. HABEAS CORPUS (§ 30*)—SCOPE OF REMEDY.

In a prosecution for selling liquors to a minor, the court having jurisdiction of the subject-matter and of the person of accused, its decision as to whether the local option law superseded the law authorizing the prosecution would be, at most, erroneous, and habeas corpus could not be invoked to review it.

[Ed. Note.—For other cases, see Habeas Corpus, Dec. Dig. § 30.*]

Davidson, P. J., dissenting.

Application by Enno Cassens for a writ of habeas corpus. Relator remanded to custody.

Willcox & Graves, for relator. F. J. McCord, Asst. Atty. Gen., and W. H. Nunn, Co. Atty., for the State.

BROOKS, J. This is an original application for a writ of habeas corpus, which was granted by Judge W. L. DAVIDSON of this court.

Relator had a complaint filed against him in the justice court of precinct No. 1 of Williamson county, Tex., on the 19th of August, 1905, which complaint charged relator with the offense of selling and giving intoxicating liquors to a minor in justice precinct No. 5 of said Williamson county. On the 21st day of September, 1905, applicant was by the court convicted and fined the sum of \$25. An appeal was taken to the county court of said county, and the cause was tried by the court on the 13th day of March, 1906, and applicant was found "guilty as charged in the complaint," and his punishment assessed at \$25. Thereupon his appeal was perfected to this court, and was dismissed from this court, on motion of the state, on the ground that a judgment of the justice court, appealed to the county court, is final in the county court, when the amount of the fine is under \$100. See 118 S. W. 546. At the time of this alleged offense, the precinct wherein it was alleged said offense was committed was not under the operation of the local option laws of this state. At the time of the trial of relator in the justice court of precinct No. 1, as above stated, the local option laws of this state were not in effect in said county. Soon thereafter, and some four months before the trial of this cause in the county court of Williamson county, the county of Williamson had legally adopted the local option laws of this state, and same were in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

force and effect in all of Williamson county at the time of the trial of this cause in the county court of said county. At the trial in the county court of relator herein his punishment was assessed at a fine of \$25, the judgment reciting that applicant was found "guilty as charged in the complaint." Subsequent to the dismissal of the case from this court, as above stated, applicant was arrested on a writ of commitment and placed in the county jail of Williamson county. The agreed statement of facts further discloses that the facts adduced on the trial of said case, both in the justice and county courts, show a straight sale by this applicant to a minor of two dozen bottles of beer, same being intoxicating liquor, for which applicant received the sum of \$3 in payment therefor; that said sale was made in the saloon of applicant, and at the request of said minor, said minor tendering the money in payment therefor, and relator receiving the same.

It will be seen, from an inspection of the above statement of facts, which is practically a copy of the agreed statement, that the complaint upon which applicant was convicted charged him with the selling and giving of intoxicating liquors to a minor, and the judgment of the court convicting him states that he was found "guilty as charged in the complaint." We cannot tell, therefore, whether he was convicted of selling or giving the intoxicating liquor. It is true the facts show that it was a sale. If the court convicted him on a gift, then no possible cavil could be indulged in as to the validity of this judgment under any phase of the question, since there would be no conflict between the local option law and the prosecution of relator for giving intoxicating liquor to a minor, as indicated by some of the decisions of this court. Furthermore, we hold that a writ of habeas corpus is not a writ of appeal. Applicant has had his day in court, and under the Constitution of this state he appealed to the last court authorized to pass upon his case. The questions he suggests for our review would be bare irregularities at best, and would not justify the use of the writ of habeas corpus. There is nothing, furthermore, in the statement to indicate that the questions here relied upon were urged before the trial court. If they were, his judgment upon same could barely be erroneous, and not void, and the writ of habeas corpus, therefore, could not be invoked by relator.

The evidence shows, as above stated, that it was the duty of the relator to show that the local option law was in force at the time the county judge rendered his decision finding applicant guilty. In other words, it is a question of fact, and not of law, as to whether or not a local option election has been held in any county in Texas. The county judge may have held that, although an election had been held, some of its necessary steps had not been complied with; or

he may have refused to believe that the evidence warranted the court in concluding there had been a sale of whisky, and believed that the relator had given the prosecuting witness whisky. There is no question but what the county court had jurisdiction of the person and of the subject-matter. Then any effort to review the decision of the county court, it having jurisdiction of the person and of the subject-matter, by habeas corpus, would be using the writ of habeas corpus as a writ of appeal. As early in the history of this court as the case of *Ex parte Boland*, 11 Tex. App. 159, after discussing the writ of habeas corpus at some length, the court uses this language: "From a reasonable application of the rules of law above laid down, we conclude, without further amplification, that the process by which the relator was held when the writ of habeas corpus was sued out was not a void process, and that habeas corpus would not relieve him against its operation. When the original case was before the county court on the defendant's appeal, he then had his day in court, and, for aught that appears from the proceedings before us, all the questions presented by his petition for habeas corpus could then have been presented and decided by the county court, and such a decision would have been within the jurisdiction of the county court. And it appearing that the county court had jurisdiction of the person of the defendant, as well as of the matter in litigation, whatever defense he had it became his duty to submit to that court and at that time; and if by the Constitution and the law he was not entitled to a further appeal he is without remedy, and the writ of habeas corpus cannot be invoked to relieve him from custody, he being confined on account of his failure to pay a pecuniary fine imposed against him on a regular trial before a court of competent jurisdiction."

This decision clearly settles the contention against applicant. The judgment was not void, but merely voidable at best, and we have held repeatedly since the rendition of the above-cited decision that a writ of habeas corpus cannot be used as a writ of appeal, but only in those cases where the judgment is absolutely void. The judgment of the county court in this case was not void, but at best merely voidable. This court cannot review, under a habeas corpus, a judgment of the court below, because the court below erred in construing or applying the facts, or that the court's findings were contrary to the facts. It was a question of fact, as stated above, as to whether the local option law was in force at the place where applicant is alleged to have sold the whisky or given the whisky to the minor, and, being a question of fact, the court passed on the fact and the law incident to that fact, and found applicant guilty. We do not deem it necessary to further elaborate on the question, but cite the following authorities cited

2 Tex. App. 74; Ex parte Dickerson, 30 Tex. App. 448, 17 S. W. 1076; Ex parte Call, 2 Tex. App. 497; Ex parte McGrew, 40 Tex. 476; Griffin v. State, 5 Tex. App. 457; Darrah v. Westerlage, 44 Tex. 389; 21 Cyc. p. 326; Donaldson v. State, 15 Tex. App. 25.

Relator is remanded to the custody of the officers.

DAVIDSON, P. J. (dissenting). I respectfully enter my dissent from the conclusion reached by the majority. The agreed statement of facts shows that local option was and had been in effect for several months at the time the applicant was convicted in the county court, that said conviction was for selling intoxicants to a minor, that it was done in applicant's saloon, and that the minor paid for the beer in the saloon at the time of the purchase. There is no question raised, and no fact suggested, that applicant gave to the minor any intoxicants; but the facts show, as agreed to, that it was a sale, and not a gift. These facts being admitted and agreed to as being true, they are, therefore, binding upon this court and the parties to the record. It is upon the facts made by the record the case can only be tried, and not what might have been the facts.

1. When local option goes into effect in a given territory, it repeals, suspends, or puts out of operation all other laws in regard to the selling of intoxicants in the territory where such local option law is put into effect. No other law in regard to sales, except the local option law itself, could legally exist in the given territory. This is, and has been, the rule in Texas since Robertson v. State, 5 Tex. App. 155. The authorities on this question are unbroken. There has never been a variation from this doctrine, nor is there found in the books a dissenting opinion from the proposition.

2. Where a law has been repealed, under which a prosecution is had, at the time of the trial, the case must go off the docket. A conviction cannot be had, for there is no law authorizing the prosecution, nor is there any statute which would justify the prosecution or the conviction. This is statutory. See White's Pen. Code, art. 16, § 28, for collated authorities. Article 16, supra, reads as follows: "The repeal of a law, where the repealing statute substitutes no other penalty, will exempt from punishment all persons who may have offended against the provisions of such repealed law, unless it be otherwise declared in the repealing statute." The courts have held, construing this statute, that where a case is appealed, and, pending such appeal, the law is changed, the appellate court must dispose of the case under the law in force when the decision is rendered; and, if the law has been repealed, no

v. State, 2 Tex. App. 506; Montgomery v. State, 2 Tex. App. 618; Tuton v. State, 4 Tex. App. 472; Halfin v. State, 5 Tex. App. 212; Chaplin v. State, 7 Tex. App. 87; Monroe v. State, 8 Tex. App. 343; Boone v. State, 12 Tex. App. 184; Fitze v. State, 13 Tex. App. 372; Pinckord v. State, 13 Tex. App. 373; Freese v. State, 14 Tex. App. 31; Prather v. State, 14 Tex. App. 453; Mulkey v. State, 16 Tex. App. 53; Whisenhunt v. State, 18 Tex. App. 491; Woodlief v. State, 21 Tex. App. 412, 2 S. W. 812; Wells v. State, 24 Tex. App. 230, 5 S. W. 830; Dawson v. State, 25 Tex. App. 670, 8 S. W. 820; Robinson v. State, 26 Tex. App. 82, 9 S. W. 61; Lawhon v. State, 26 Tex. App. 101, 9 S. W. 355; Ex parte Oox, 28 Tex. App. 537, 13 S. W. 862; Kenyon v. State, 31 Tex. Cr. R. 13, 23 S. W. 191. This has been held even where the repeal of a civil statute repeals the penalties imposed with regard to its enforcement. There can be no penalty or criminality in violating a repealed statute. State v. Robinson, 19 Tex. 479; Etter v. Ry. Co., 2 Willson, Civ. Cas. Ct. App. § 61.

It will be observed, in this connection, that where, in regard to sales to minors, the local option law has been put into effect in a given territory, there is no provision in the local option law keeping alive pending cases for sales to minors. This being the legal rule, when local option went into effect, the law with reference to sales to minors is abolished. See Atkinson v. State, 48 Tex. Cr. R. 229, 79 S. W. 81. There is, therefore, no predicate under the facts or the law which would justify the county court in trying applicant for a sale to a minor months after the local option law had set aside and superseded the law with reference to sales to minors in the given territory. Referring to this, it is shown by the record that at the time applicant was tried in the justice court local option law was not in effect, but at the time he was tried in the county court the local option law had been in effect for several months. The conclusion, therefore, is inevitable that at the time applicant was tried in the county court the local option law had superseded the law with reference to sales to minors, and therefore he could not be tried or punished for selling to the minor.

3. A writ of habeas corpus will lie to release from custody, when punishment is sought where there is no statute on which to predicate the prosecution, or where the statute has been repealed, unless the prosecutions under the former law are kept alive by some provision of the repealing statute. There must be a law authorizing a prosecution before a citizen of this state can be punished. A repealed statute cannot form the basis of a prosecution, and here there was no substitute punishment for sales to minors

in the local option territory, nor any provision keeping the prior cases in existence, or authorizing their prosecution or punishment. Under such circumstances the judgment is necessarily void, if a conviction is had, for the obvious reason that there was no law under which the party could be tried and punished. This is not a mere irregularity, nor is the judgment simply voidable. If this proposition is not correct, then any citizen can be punished without a law authorizing the punishment, nor would it be an irregularity simply, because he could not for any reason take an appeal from the conviction. The judgment would be void for want of a law authorizing the prosecution and punishment. It is not correct to say, under these circumstances, that the conviction and punishment would be but an irregularity. The question is jurisdictional. The court would not have jurisdiction, under such circumstances, of the subject-matter, and could not render any judgment in the case. Why? First, because there is no law under which the prosecution can be maintained or the punishment inflicted; second, the court could not obtain jurisdiction of the person; third, it could not obtain jurisdiction of the subject-matter, for there is no subject-matter to which the jurisdiction of the court could attach; fourth, it could not render any judgment for want of a law authorizing the prosecution and conviction, and no court ought to punish without having a law under which to try and punish. See White's Ann. Code Cr. Proc., art. 150, subs. 6 and 7 of the notes, for collated authorities.

This has been the invariable rule in this as well as the Supreme Court at least since the case of *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111. It has always been held that on habeas corpus a judgment can be attacked, if void, as well as for the reasons above stated. The want of statutory penal law would render the judgment of conviction necessarily void. Under a writ of habeas corpus the court can look behind the judgment in such cases. Many of these cases will be found collated in applicant's brief. See, also, *Ex parte Parker*, 35 Tex. Cr. R. 12, 29 S. W. 480, 790. An indictment by a grand jury composed of more or less than 12 jurors is violative of the Constitution and laws of this state. Hence the indictment and conviction in that character of case would be void, and an inquiry can be had into this state of case by evidence, and, if the fact is so found, the judgment will be set aside, and the party released on habeas corpus; for in such state of case the indictment and conviction would be void. It would not be a mere irregularity. This is true, although the party may have had the benefit of his appeal, and lost by reason of an affirmance. In other words, if the facts are such as to justify holding the judgment

void, the writ of habeas corpus will authorize going behind the judgment and inquiring into the facts. *Ex parte Parker*, supra; *Ex parte Ogle*, 61 S. W. 122; *Ex parte Reynolds*, 35 Tex. Cr. R. 437, 34 S. W. 120, 60 Am. St. Rep. 54; *Lott v. State*, 18 Tex. App. 627; *McNeese v. State*, 19 Tex. App. 49; *Smith v. State*, 19 Tex. App. 95; and numerous other cases not necessary here to collate.

If the agreed statement of facts is true, and it is conceded to be true by parties to the record, this judgment in the county court was rendered under a law that had been vacated, repealed, or put out of existence by reason of putting the local option law into effect. The local option law, under such circumstances, had superseded the law in regard to selling to minors months before the trial and conviction in the county court, and it is immaterial whether the question was there raised or not, as in the case of a vicious judgment under a void indictment found by more or less than 12 grand jurors.

For the reasons indicated, I cannot agree with my Brethren, and firmly believe that applicant is entitled to be discharged from custody; and this too, although he had appealed to this court, and the appeal had been dismissed for want of jurisdiction.

Ex parte CASSENS.

(Court of Criminal Appeals of Texas. Nov. 3, 1909. Rehearing Denied Dec. 1, 1909.)

Application by G. Cassens for a writ of habeas corpus. Relator remanded to custody.

Wilcox & Graves, for relator. F. J. McCord, Asst. Atty. Gen., and W. H. Nunn, Co. Atty., for the State.

BROOKS, J. This is an original application for writ of habeas corpus, which was granted by Judge W. L. Davidson of this court.

Upon the authority of *Ex parte Enno Cassens* (this day decided) 122 S. W. 883, relator herein is remanded to custody.

DAVIDSON, P. J., dissents.

POSTAL TELEGRAPH CABLE CO. OF TEXAS v. HARRISS.

(Court of Civil Appeals of Texas. Nov. 24, 1909.)

1. PLEADING (§ 378*)—LIMITED LIABILITY OF TELEGRAPH COMPANY—STIPULATIONS—BURDEN OF PROOF.

Under Rev. St. 1895, art. 1193, providing that it shall not be necessary for plaintiff to deny any special matter of defense pleaded by defendant, but the same shall be denied unless expressly admitted, the burden of proving a limited liability stipulation, pleaded by a telegraph company as a defense for delay in transmitting and delivering a telegram, was on the defendant, unless it was expressly admitted by plaintiff.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1233; Dec. Dig. § 378.*]

mental petition, a limited liability stipulation relied on by defendants, such pleading constituted an express admission of the facts pleaded, within Rev. St. 1895, art. 1193, placing the burden of proof of special matter, pleaded by defendant, on it, unless expressly admitted.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 177.*]

3. TELEGRAPHS AND TELEPHONES (§ 54*)—LIMITED LIABILITY—LIABILITY FOR NEGLIGENCE.

A telegraph company cannot contract to relieve itself from liability for its own negligence.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 39-47; Dec. Dig. § 54.*]

4. TELEGRAPHS AND TELEPHONES (§ 54*)—EXCHANGE OF BUSINESS—JOINT ENTERPRISE—LIMITED LIABILITY STIPULATIONS.

Where two telegraph companies, one doing business wholly in Texas and the other outside, contracted to interchange business on a basis of a division of tolls, all messages to points beyond the lines of one being turned over for transmission over the wires of the other, both were responsible to third persons dealing with either as to messages handled by both; and hence a stipulation on the reverse side of a message, attempting to restrict the liability of the Texas Company so that, in transmitting a message over any other line, the Texas Company would act as the sender's agent, and would not be liable for default or negligence on any part of such other line, was not available as a defense by the Texas Company to an alleged liability for the negligence of the connecting company.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Dec. Dig. § 54.*]

On rehearing. Motion overruled.

For former opinion, see 121 S. W. 358.

KEY, J. This motion has received careful consideration, and we have reached a conclusion that this court fell into error when it held that the stipulation on the reverse side of the written message could not be considered because it does not appear from the statement of facts that it was put in evidence. The defendant pleaded the existence of the stipulation referred to, and to the effect that it limited its liability to its own line and relieved it from liability on account of delay or negligence by any other line over which the message might be sent. As stated in the original opinion, the plaintiff in a supplemental petition set up substantially the same facts as to what was printed upon the reverse side of the message. By force of article 1193 of the Revised Statutes the burden rested upon the defendant to make the proof of the stipulation referred to, unless it was expressly admitted by the plaintiff. In our former opinion we held that the mere setting out of the stipulation referred to in the plaintiff's supplemental petition, while constituting an implied admission, did not constitute an express admission. In reaching that con-

Upon further consideration we have reached the conclusion that we committed error in that respect. We are now of opinion that such rigid and narrow construction should not be placed upon the statute referred to, and that it should be held that, when a party has, in clear and unmistakable terms, alleged in his pleading the same facts which have been alleged by his adversary, he thereby expressly admits the existence of such facts. This ruling renders it necessary for us to consider and construe the contract then in force relating to traffic arrangements between the two defendants, and determine whether or not it shows such relations between them as will justify the fourth paragraph of the court's charge.

That contract reads as follows:

"This agreement made and entered into this 19th day of October, 1906, by and between the Postal Telegraph Cable Company, a corporation duly organized and existing under the laws of the state of New York, party of the first part, and the Postal Telegraph Cable Company of Texas, a corporation duly organized and existing under the laws of the state of Texas, party of the second part, hereinafter referred to as the Postal Company and the Texas Company, respectively, witnesseth:

"Whereas, the Postal Company and its allied companies have in operation a system of telegraph lines extending throughout the United States—except that part thereof covered by the lines of the Texas Company as hereinafter specified; and

"Whereas, the Texas Company has a system of telegraph lines extending through the states of Texas, Louisiana (west of the Mississippi river to New Orleans) and Arkansas, and in Oklahoma Territory and Indian Territory, and in Missouri and Kansas south of the existing lines of the Postal Company at St. Louis, Missouri; Kansas City, Missouri; Emporia, Kansas; Wichita, Kansas, and Dodge City, Kansas (said lines being east of the one hundredth meridian of longitude) and extending to a connection with the Postal Company's offices at Memphis, Tennessee, New Orleans, Louisiana, and Wichita, Kansas; and

"Whereas, the parties hereto as independent connecting lines desire a transfer of commercial and other telegraph business between the points composing their respective systems;

"Now, therefore, in consideration of the covenants and agreements hereinafter specified to be performed and observed by each of them and for other valuable considerations moving from each of said companies to the other, receipt whereof is hereby acknowl-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

edged by each of them, the parties hereto agree with each other as follows:

"First. Each of the parties hereto, since neither of them has telegraph facilities in the territory occupied by the other and since to reach such territory it must avail itself of some independent connecting line, agrees to transfer to the other at Memphis, Tennessee, or at New Orleans, Louisiana, or at Wichita, Kansas, for further transmission by the other as an independent connecting line, all telegraph and cable business that it (the party with which the business originates) may be able to obtain or control destined to points on the lines or connections of the other party, including all cablegrams and all telegraph business which shall come to it from any other connecting lines; but this contract is not intended to have such effect as to make either of the parties hereto the agent or representative of the other, nor shall it be so construed.

"Second. The Postal Company agrees to furnish in its offices at Memphis, Tennessee, and New Orleans, Louisiana, the operators necessary in said offices for the proper transmission and receipt upon the Texas Company's wires to and from the offices of the Texas Company of the transferred telegraph messages herein provided for and, also, of telegrams between said cities and offices on the lines of the Texas Company. The Postal Company agrees to also furnish in said cities the messengers and other employees and facilities necessary for the prompt and proper collection and delivery of all telegraph business between said cities and points on the lines of the Texas Company; and the Texas Company in consideration thereof hereby agrees to pay to the Postal Company for maintenance and operating (including the cost of main battery) of the Postal Company's offices in the cities of Memphis, Tennessee, and New Orleans, Louisiana, which the receipts accruing to the Texas Company at the said cities, respectively, shall bear to the receipts therein accruing to the Postal Company. By 'receipts' as last above used is meant receipts from telegrams originating at or destined to New Orleans or Memphis as the case may be.

"Third. It is mutually agreed that the wires of the Texas Company may be connected at said transfer points to such wires of the Postal Company as the latter company may designate, so as to form a direct circuit or circuits between offices on the lines and connections of the Postal Company and offices on the lines of the Texas Company, at such times and in such manner as may be designated by the Postal Company, it being understood and agreed that all telegrams handled on said direct circuits between offices on the lines of the one company and offices on the lines of the other company shall be considered as having been transferred at said transfer points.

"Fourth. (1) It is understood and agreed that all tolls and revenues on telegrams han-

dled between offices of the Texas Company along its own lines shall be fixed by and shall belong to the Texas Company, and all tolls and revenues on telegrams handled between offices of the Postal Company along its own lines shall be fixed by and shall belong to the Postal Company. The offices at Memphis, Tennessee, and at New Orleans, Louisiana, shall be offices of the Postal Company but all tolls and revenues on telegrams between Memphis, Tennessee, and New Orleans, Louisiana, respectively, and points on the Texas Company's lines, shall be fixed by and belong to the Texas Company, and all tolls and revenues on telegrams handled between said cities and points on the lines and connections of the Postal Company shall be fixed by and shall belong to the Postal Company.

"(2) The total tolls on transferred through telegrams shall be computed by adding together the respective local tolls of the parties hereto from the point of origin to the transfer point and from the transfer point to destination in each case, except when the parties hereto shall mutually agree upon a lower through rate than the rate so obtained; provided, however, that nothing in this contract shall prohibit the contracting parties from making by mutual agreement such rates on through telegrams as will enable them to meet competition on said through telegrams, and provided further that if it shall be necessary for any message to pass over the lines of one or more companies other than those of the parties to this contract, then the local tolls of such one or more other parties shall be added to the aggregate of the local tolls of the parties hereto in computing the total through tolls on said message.

"(3) Tolls on said transferred telegrams shall be divided as follows: After deducting from the total tolls on transferred telegrams (including commercial messages, market quotations, newspaper matter and cablegrams) destined to or originating at offices on the lines and connections of the Postal Company located west of the Mississippi river or south of the Potomac and Ohio rivers, and also the cities of Washington, D. C., and Cincinnati, O., the proportion of said total tolls that the Postal Company must pay or account for to other connecting lines, the balance of said total tolls shall be equally divided between the parties hereto one-half to each—except as otherwise herein specifically provided.

"(4) After deducting from the total tolls on transferred telegrams (including commercial messages, market quotations, newspaper matter and cablegrams) originating at or destined to offices on the lines and connections of the Postal Company east of the Mississippi river and north of the Potomac and Ohio rivers, not including said cities of Cincinnati and Washington, the proportion of said total tolls that the Postal Company must pay or account for to other connecting lines, the Texas Company shall have forty

"(5) It is understood and agreed specifically that offices on the lines of the Pacific Postal Telegraph Cable Company, the North American Telegraph Company, and the Canadian Pacific Railway, excepting connecting offices between the Postal Company and the said Pacific Postal, North American and Canadian Pacific Railway, are not to be considered as offices on the lines of the Postal Company herein referred to. The division of tolls between the parties hereto and the Pacific Postal, North American and Canadian Pacific Railway shall be as follows: The Texas Company shall have thirty three and one-third per cent. (33 $\frac{1}{3}$ %) of the total tolls on telegrams between points on its lines and points on the lines of the North American Telegraph Company; thirty three and one-third per cent. (33 $\frac{1}{3}$ %) of the total tolls on telegrams between points on its lines and points on the lines of the Canadian Pacific Railway Company in British North America; and sixteen and one-quarter per cent. (16 $\frac{1}{4}$ %) of the total tolls on telegrams between points on its lines and points on the lines of the Pacific Postal Telegraph Cable Company.

"Fifth. The Texas Company and the Postal Company agree each to render to the other monthly statements of all business transacted between the offices of said companies, respectively, and each party agrees to pay over to the other promptly at the end of each month any balance that may then be due and payable under the terms of this agreement.

"Sixth. (1) Each of the parties hereto hereby assume all responsibility for damages resulting from error, delays, nondelivery or other defaults in the transmission of telegraph business under this agreement that may be occasioned by the fault of its own employes (and in case the responsibility for such default cannot be located, it is mutually agreed that any damages or liabilities resulting therefrom shall be divided and borne by the parties hereto in the same proportion as the tolls were divided from the telegrams defaulted upon).

"(2) Neither party hereto shall be liable to the other for loss or damage resulting from interruptions to lines which could not with reasonable care or promptness have been avoided or repaired, and each party hereto agrees to repair with the utmost diligence any interruption to its telegraph lines herein mentioned.

"Seventh. This agreement shall be binding upon the parties hereto and upon their respective successors and assigns (it being understood and agreed that the Postal Company and its allied companies shall be considered as one and the same company) and shall be and continue in full force and effect from the date hereof until the 11th day of May,

may be terminated forthwith by the Postal Company."

While it is declared in the first subdivision thereof that the contract is not intended to make either party the agent or representative of the other, and that it shall not be construed to have that effect, still we are of opinion that, when all of its terms are considered, it discloses such a joint enterprise between the two companies as will render each responsible to third parties for the negligence of the other. This contract is more than an ordinary traffic arrangement stipulating for a division of tolls. By the second subdivision the two companies share the expense of maintaining offices in Memphis, Tenn., and at New Orleans, La. That, as well as other stipulations, indicates that the two companies were engaged in a joint enterprise when they handled messages passing over both lines, as did the message in this case.

We also attach importance to the first paragraph of the sixth subdivision by which it is stipulated that each company assumed all the responsibility for damages resulting from errors, delays, nondelivery, or other defaults occasioned by its fault, and that if the responsibility for such default cannot be located, any damages or liabilities resulting therefrom shall be divided and borne by the two companies in the same proportion as the tolls are divided from the telegram defaulted upon. If the preceding stipulations in the contract created such relations between the two companies as to render each and both liable to third parties for the negligence of each company, it was not within the power of the two companies to ward off or diminish such liability by stipulating that the one in default should pay the damage; and therefore it is not to be presumed that the stipulation referred to was incorporated in the contract for that purpose, and especially so when another and legitimate purpose can be assigned therefor. Instead of assigning to that stipulation a purpose to affect and curtail the rights of third persons, which the contracting parties had no power to do, it is much more reasonable to assume that it was placed in the contract upon the assumption that both of the companies would be liable to third parties for the default of each, and therefore it was necessary to have an understanding between the two companies as to how much of the damages resulting from such defaults should be charged against each company in settling their own affairs. The testimony shows some delay and default by each company, and it would be difficult, if not impossible, to determine how much of the injury sustained by the plaintiff resulted from the separate default of each company. Hence

It would seem that this case falls within the class of cases contemplated in the latter part of the first paragraph of the sixth section of the contract, wherein it is stipulated that the damages are to be borne by the two companies in proportion to the tolls received from the telegram defaulted upon. It is the settled law in this state that a telegraph company cannot contract so as to relieve itself from liability for its own negligence, and, the two companies in this case being engaged in such a joint enterprise as to render both responsible to persons dealing with either concerning messages to be handled by both, we hold that the stipulation on the reverse side of the message, attempting to restrict the liability of the Texas Company, was not available as a defense, and the trial court properly instructed the jury that the Texas Company would be liable for the failure of the other defendant to exercise proper care in transmitting and delivering the message.

Motion overruled.

ADAMS v. INTERNATIONAL & G. N. R. CO.

(Court of Civil Appeals of Texas. Nov. 12, 1909. Rehearing Denied Dec. 8, 1909.)

1. WITNESSES (§ 410*) — CORROBORATION — PROOF OF GOOD CHARACTER.

A mere contradiction of a witness does not justify proof of good character for truth and veracity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1284; Dec. Dig. § 410.*]

2. MASTER AND SERVANT (§ 330*) — NEGLIGENCE OF SERVANT—HABITS AND REPUTATION.

Where an engineer was charged with negligently operating a train, and thereby causing a horse on a public road to run away, proof that the engineer had the reputation of being a careful and prudent engineer was inadmissible, as no amount of skill could exonerate him from the charge of negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1271; Dec. Dig. § 330.* Negligence, Cent. Dig. § 240; Street Railroads, Cent. Dig. § 232.]

3. RAILROADS (§ 397*) — NEGLIGENT OPERATION OF TRAINS—EVIDENCE—ADMISSIBILITY.

Where, in an action against a railroad for personal injuries resulting from the frightening of a horse on the highway, causing it to run away, there was evidence that the cylinder cocks of the engine were open, and that steam poured out, frightening the horse, it was proper to permit the engineer to testify that he always worked steam until he got started in leaving a town, and then shut it off before he reached the place of the accident, to diminish the probability that he had left the cocks open at the time of the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1344; Dec. Dig. § 397.*]

4. RAILROADS (§ 397*) — NEGLIGENT OPERATION OF TRAINS—EVIDENCE—ADMISSIBILITY.

Where an engineer was charged with negligently operating a train by permitting the escape of steam in unusual quantities, and thereby causing injury to plaintiff from the frightening

of his horse on a public road near the track, it was error to allow the engineer to testify that in his 40 years' experience as engineer he did not recall a single instance of having frightened a horse.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1344; Dec. Dig. § 397.*]

5. RAILROADS (§ 360*) — RUNNING OF TRAINS—FRIGHTENING ANIMALS—CARE REQUIRED.

A railroad need not watch for persons along and near its right of way, but trainmen, becoming aware of the presence of a person on a highway near the track, and that his horse is frightened at noises made by escaping steam, thereby placing such person in peril, must desist from making such noises, if it can be done consistently with their other duties.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1241-1243; Dec. Dig. § 360.*]

6. RAILROADS (§ 360*) — RUNNING OF TRAINS—FRIGHTENING ANIMALS—CARE REQUIRED.

Where a public road ran along a railroad track, and trainmen negligently allowed the engine to make unusual and unnecessary noises in approaching that locality, and such noises were calculated to, and did, frighten the horse of a traveler on the road, causing injury to the traveler, the railroad was liable, though the employees did not see the traveler and did not realize his perilous position.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1241-1243; Dec. Dig. § 360.*]

7. RAILROADS (§ 360*) — RUNNING OF TRAINS—FRIGHTENING ANIMALS—LIABILITY.

A railroad is not liable ordinarily for the frightening of horses by the operation of its trains in the usual manner, but it is liable for the results of such frightening by unnecessary and unusual whistling or letting off of steam, under circumstances amounting to negligence or willfulness.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1241-1243; Dec. Dig. § 360.*]

Appeal from District Court, Anderson County; B. H. Gardner, Judge.

Action by Joe Adams against the International & Great Northern Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Campbell, Sewell & Strickland, for appellant. King & Morris, for appellee.

FLY, J. This is a suit for damages, instituted by appellant, a minor, through his next friend, Maggie Adams, against appellee, which he alleged accrued from injuries inflicted through the negligence of appellee's employees. It was alleged that appellant was riding along a public road near Palestine, which ran along the side of and near appellee's track, and that when a train was passing along the track near him, the employees "did negligently and carelessly cause and permit a great quantity of steam to escape from the lower portion or side of said engine, and on the side upon which plaintiff was riding, causing a great and unusual and unnecessary noise, and causing said steam to be thrown and blown in the direction of the horse upon which plaintiff was riding, and that by reason of such negligence on the part of said railroad company, its servants, agents, and employees, said horse became

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

frightened and unmanageable, and he began to rear, shy, and run, and, notwithstanding defendant's said servants, agents, and employes saw plaintiff and his said horse, and the frightened condition of said horse and the perilous condition of plaintiff, or by the use of ordinary care could have seen them and discovered plaintiff's perilous situation, said engine was permitted to continue the emission of great volumes of steam in the direction of plaintiff and his said horse, and the frightening and unusual and unnecessary noises caused thereby were permitted to continue until said engine reached a point about, if not quite, opposite plaintiff and his said horse, or so near to them as to cause said horse to become badly frightened, and by reason of all of which plaintiff lost control of said horse, and he ran away and plunged madly into a barbed wire fence near said public road, became entangled in said wire, cutting and tearing himself in said wire, so that as a result thereof he died in a few moments thereafter; that when said horse ran into said wire fence, plaintiff was thrown and dragged against said fence with great force and violence, and as a result thereof plaintiff was badly and seriously cut, torn, lacerated, and bruised about his face, head, arms, hands, back, and legs and on the bones and sinews thereof." The cause was submitted to a jury, and a verdict returned in favor of appellee, and upon the judgment based thereon this appeal has been perfected.

It appears from the evidence that there was a cut under the railroad of appellee, near Palestine, through which ran a public road, and which, going in the direction of Palestine, ran from the tunnel or cut directly along the right of way of appellee, and not more than 40 or 50 feet from the middle of the track. Going from Palestine there was a sharp incline of the railroad track from an elevation down towards the tunnel or cut, and it was in evidence that it was unnecessary and unusual "to work steam" in going down that incline. Appellant testified that he was on his way to Palestine, and had passed under the railroad, by way of the cut, and was riding, on a gentle horse, along the public highway close to the fence of the right of way, a barbed wire fence being on the other side of the road, when a train came down the incline working steam, and that his horse became frightened and unmanageable, and jumped into the barbed wire fence and killed himself and injured appellant. No witness directly contradicted the statement of appellant that steam was noisily pouring out of the cylinder cocks of the locomotive on the downgrade towards the cut, not even the engineer and fireman swearing that it was not so escaping; their testimony going no further than as to the habit and custom of the engineer in not emitting steam on the downgrade.

With the facts as stated, appellee was per-

mitted, over the objection of appellant, to prove that Converse, the engineer, had the reputation of being a careful and prudent engineer. No attack had been made upon his competency and skill as an engineer, unless evidence of his negligence on that occasion should be so considered. That it was not is clear, for he might have been an expert engineer and still have been guilty of negligence of the grossest kind. It is the rule in this state that mere contradiction between witnesses will not justify proof of good character for truth and veracity (*Railway v. Raney*, 86 Tex. 363, 25 S. W. 11), and the same rule should prevail in cases like the present, and it is no answer to a charge of negligence to prove that the witness knew all about the business. The engineer was not charged with being ignorant, but with being careless, and no amount of skill could exonerate him from that charge. "When the precise act or omission of a defendant is proven, the question whether it is actionable negligence is to be decided by that act or omission, and not by the character for care and caution that the defendant may sustain." *Tenney v. Tuttle*, 1 Allen (Mass.) 185. The quoted language has been approved by the courts of Texas. *Railway v. Johnson*, 92 Tex. 280, 48 S. W. 563; *Railway v. Finley*, 110 S. W. 531.

In answer to the testimony of appellant that the cylinder cocks were open and steam pouring out, it was proper to allow the engineer to testify that in leaving Palestine, and going north toward the place where the injury occurred, he always worked steam until he got started, and then shut it off before he reached the place of the injury. His habit or custom was permissible in evidence as tending to diminish the probability that he had left the cocks open on the occasion in question. 1 Wigmore, Ev. §§ 92, 93.

It was error to permit the engineer to testify that in his 40 years' experience as an engineer he did not recall a single instance of having scared a horse and caused it to run away and hurt people. The inquiry was as to whether he had scared appellant's horse, and not as to those that he had not frightened. The probabilities are that the testimony had its effect upon the jury.

In view of another trial it may be stated that appellee was under no obligation to watch for persons along and near its right of way; but, if the employes became aware of the presence of appellant, and that his horse had become frightened at noises made by the escape of steam, and that appellant was placed in peril thereby, it was their duty to desist from making such noises, if it could be done consistently with their other duties. *Hargis v. Railway*, 75 Tex. 19, 12 S. W. 953; *O'Dair v. Railway*, 14 Tex. Civ. App. 539, 39 S. W. 242; *Railway v. Carruth*, 50 S. W. 1036.

There is another principle of law that may

become applicable to the facts of this case, and that is that a railway company, knowing that a public highway runs near its track, along which people are constantly traveling, may become liable for damages arising from frightening animals, ridden or attached to vehicles, by causing unusual and unnecessary noises in the operation of its train; or, to apply the principle to the facts of this case, if there was a public road, as testified by appellant, running along the side of the right of way in a few feet of the railroad track, along which people passed in going to and from the town of Palestine, and appellee's employes negligently emitted unusual and unnecessary noises in approaching that locality, which noises were calculated to and did frighten appellant's horse so that he was damaged thereby, appellee would be liable for such damages, although the employes may not have seen appellant and realized his perilous position. The negligence would arise in the one case from a negligent operation of the train, and in the other by reason of discovered peril. If it was unnecessary to have the cylinder cocks open on a down-grade, and steam was being emitted therefrom, and appellee could have reasonably anticipated that horses moving along the public highway would be frightened thereby, such conduct would be negligent, and appellee would be liable for the consequences flowing therefrom. A railroad company is not liable ordinarily for the frightening of horses caused by the operation of its trains in the usual and customary manner, but it is liable for the results of such frightening produced by unnecessary and unusual whistling or letting off of steam under such circumstances as to constitute negligence or willfulness. Elliott, Railroads, § 1264; Shear. & Red. § 428; Lamb v. Railroad, 140 Mass. 79, 2 N. E. 932, 54 Am. Rep. 449; Railway v. Clarke, 35 Neb. 867, 53 N. W. 970, 23 L. R. A. 504; Railway v. Heinrich, 157 Ill. 388, 41 N. E. 860; Presby v. Railway, 66 N. H. 615, 22 Atl. 554; Dunn v. Railway, 124 N. C. 252, 32 S. E. 711; Railway v. Cummings, 24 Ind. App. 192, 53 N. E. 1026.

For the errors herein specified, the judgment is reversed, and the cause remanded.

WILLIAMSON v. CHICAGO, R. I. & G. RY. CO.

(Court of Civil Appeals of Texas. Nov. 13, 1909.)

1. WITNESSES (§ 240*)—EXAMINATION—LEADING QUESTIONS.

The question, in an action for ejecting a passenger: "Did said trainman abuse or lay hands on or otherwise assault plaintiff in any manner, or did he not do so"—is leading, and its answer properly excluded.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 845; Dec. Dig. § 240.*]

2. TRIAL (§ 256*)—INSTRUCTIONS—FAILURE TO GIVE REQUEST.

Where an instruction as to the care due a passenger was correct as far as it went, complaint cannot be made that it did not impose a sufficiently high degree of care, in the absence of a special request for the instruction desired.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 637; Dec. Dig. § 256.*]

3. CARRIERS (§ 282*)—CARE DUE PASSENGERS—FORFEITING RIGHTS AS PASSENGER.

Where, in an action by a mother for injuries inflicted on her by the carrier's employes while ejecting her ten year old son from a train, it appeared that plaintiff wrongfully refused to pay fare for the son and forcibly resisted his eviction, she forfeited her rights as a passenger, and was only entitled to ordinary care for her safety.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1107; Dec. Dig. § 282.*]

4. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The error, if any, in the exclusion of evidence, is harmless, where the witness was afterward permitted to testify to substantially the same facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171, 4172; Dec. Dig. § 1052.*]

Appeal from District Court, Potter County; J. N. Browning, Judge.

Action by Adella Williamson against the Chicago, Rock Island & Gulf Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

L. C. Barrett, J. A. Templeton, J. Marvin Jones, and H. H. Cooper, for appellant. Lasiter & Harrison and Turner & Boyce, for appellee.

CONNER, C. J. Appellant, accompanied by her minor son about ten years old and a minor daughter of six, was a passenger on one of appellee's passenger trains, and appeals from an adverse judgment in a suit instituted by her in the district court of Potter county to recover damages caused by the alleged wrongful ejection of her said son from said train. The suit was defended on the ground that the son was subject to the payment of passenger fare, which the appellant persistently refused to pay, and that no more force was exercised than was reasonably necessary to remove the boy from the train.

Under the second and third assignments it is insisted that the court erred in sustaining objections to the following interrogatories, propounded to the witnesses H. H. Vail and B. Freeland, viz.: "Did said train auditor abuse, or lay hands on, or otherwise assault, plaintiff in any manner, or did he not do so?" To this interrogatory the witness Vail answered: "He did in a rough manner, or I would call it. He jerked the boy away from the woman and shoved her back, and the conductor did not allow her to get off the train." And the witness Freeland answered: "The auditor did not, but

cluded the answers for that reason. The question of whether a given interrogatory is or is not leading is not always easy of solution; but the rules to be applied in the determination have been so frequently and fully set forth and illustrated in the decisions that we hardly feel justified in entering into an elaborate dissection of the interrogatory now before us. We think it sufficient to say that it plainly suggests one of the crucial issues in the case, viz., whether unnecessary force was exercised by appellee's trainmen in the removal complained of, and called for the conclusion of the witness on the issue. It embodied the assumption that the "abuse," or laying on of hands, constituted an assault, and the alternative form in which it was put does not free the interrogatory of its objectionable features. See: *Hanrick v. Alexander*, 51 Tex. 500; *Bryan Press Co. v. H. & T. C. Ry. Co.*, 110 S. W. 99; *F. W. & D. C. Ry. Co. v. Jones*, 38 Tex. Civ. App. 129, 85 S. W. 37, and authorities cited.

Error is also assigned to the following paragraph of the court's charge: "If you find and believe from the evidence that the plaintiff was a passenger on the train of the defendant company, as alleged, but that she refused to pay the fare of her son, Frank, then you are instructed that the defendant company would have the right to eject such boy from said train, and was entitled to the use of such force, if any, as may have been reasonably necessary to make such ejection, if any; but in making such ejection, if any, the defendant company would be bound to exercise ordinary care not to injure the plaintiff, and the failure of the agents and servants of the defendant company to exercise such ordinary care would be negligence." It is insisted that the charge is erroneous "in requiring the defendant in this cause to have exercised no more than ordinary care in the premises, when the degree of care required by law was the highest degree of care." In answering the criticism made of the charge quoted, it may be said that the charge was at least correct as far as it went, and, if appellant desired that a higher degree of care be imposed, that she should have made special request therefor; but, aside from this, we think the charge, in the connection in which it was used, and as to the phase of the evidence to which it related, was correct. In another paragraph of the charge, the jury was instructed to the effect that, if the fare of the son had been paid (as she testified), both plaintiff and her son were passengers, and as such entitled to the exercise of the highest degree of care on appellee's part, and that a failure

fused to pay the boy's fare, and forcibly resisted his eviction from the car, as appellee's testimony tended to show, and as we must find in deference to the verdict of the jury, she forfeited her right as a passenger, and was thereafter only entitled to the care required in the charge objected to. *F. W. & D. C. Ry. Co. v. Gribble*, 46 Tex. Civ. App. 78, 102 S. W. 158.

The evidence sufficiently supports appellee's defense, and the remaining assignment of error entitled to notice needs but a passing reference. This assignment goes to the exclusion of the answer of the witness Vall to the fifth direct interrogatory; but the ruling was at least harmless, in view of the fact that the witness, in answer to other interrogatories, was permitted to testify to substantially the same effect as that of the excluded answer.

We conclude that the evidence supports the verdict and judgment in appellee's favor, and that the judgment should be affirmed.

EDWARDS et al. v. ADAMS.

(Court of Civil Appeals of Texas. Nov. 13, 1900. Rehearing Denied Dec. 4, 1900.)

1. EVIDENCE (§§ 158, 184*)—BEST AND SECONDARY EVIDENCE.

The memoranda kept in a telephone exchange, showing the date and hour when customers put in a call and when they get through talking, are the best evidence of what they contained, and mere proof that the telephone business has been sold, since the memoranda were made, and the papers were delivered to the new owner, is not sufficient to admit secondary evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 638-641; Dec. Dig. §§ 158, 184.*]

2. LIVERY STABLE KEEPERS (§ 12*)—INJURY TO HORSES—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

Where, in an action against a hirer of a livery team for overdriving and negligently killing one of the horses and injuring the other, defendant pleaded contributory negligence, based on failure to properly water the horses prior to the time defendant took charge of them, and there was evidence that the team had not been watered since the evening before it was furnished defendant, and that when defendant reached water one of the horses drank so much as to cause its death, the failure to charge on the issue of contributory negligence was erroneous.

[Ed. Note.—For other cases, see *Livery Stable Keepers*, Dec. Dig. § 12.*]

3. LIVERY STABLE KEEPERS (§ 12*)—INJURY TO HORSES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—INSTRUCTIONS.

The jury, in an action against the hirer of a livery team for overdriving and negligently killing one of the horses and injuring the other, should determine whether a man of ordinary prudence, situated as defendant was, would have continued to drive the team as he did, notwithstanding its condition, and, on the jury finding that defendant acted as a man of ordi-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

nary prudence would have acted, the verdict must be for him.

[Ed. Note.—For other cases, see Livery Stable Keepers, Dec. Dig. § 12.*]

4. JUSTICES OF THE PEACE (§ 191*)—APPEAL—SURETIES—LIABILITY.

The sureties on an appeal bond from a justice's court are only bound by the terms of the bond, and they are not liable in an amount exceeding the amount specified therein, and the appellate court rendering judgment against the sureties must limit it to the penalty stipulated in the bond.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 735-750; Dec. Dig. § 191.*]

Appeal from Limestone County Court; James Kimbell, Judge.

Action by H. D. Adams against C. B. Edwards and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

A. B. Rennolds and Williams & Bradley, for appellants. Doyle, Jackson & Harper, for appellee.

RAINEY, C. J. No brief for appellee has been filed, and the statement of the case made by appellant we take to be correct, which is as follows: "This suit was brought by H. D. Adams against C. B. Edwards, in justice's court, to recover damages of him for the alleged overdriving and negligent killing of one of his livery horses, and resulted in a judgment in that court in plaintiff's favor in the sum of \$125, from which defendant appealed to the county court, and upon a trial in that court on November 30, 1908, before the court and a jury, plaintiff again recovered judgment for \$125 and interest and all costs of both courts, against defendant Edwards, and also against R. A. Edwards, P. D. Lawhorn, Jack Womack, and A. B. Rennolds, as sureties upon the appeal bond from justice's court, from which latter judgment defendant and the sureties upon his said appeal bond have appealed to this court. The pleadings upon which the trial was had consisted of plaintiff's citation and defendant's general denial and a special answer, in effect, that plaintiff had failed and neglected to properly water the team prior to delivering it to defendant, whereby the horse was caused to drink too much water when defendant watered it, and plaintiff was guilty of contributory negligence, contributing proximately to his loss. The citation stated the cause of action substantially: That on February 6, 1907, plaintiff was in the livery business in Coolidge, and on said date he hired defendant a pair of horses, which were well and in good traveling condition; that defendant overdrove them, in that he drove them from Coolidge to near Victoria and thence to Mexia in about 4 hours and 40 minutes, a distance of about 43 miles; that he did not feed said horses at noon, and, when they were very hot, permitted them to drink too much

water, and by reason thereof one horse, of the value of \$125, died, and the other was injured to the extent of \$25, for which sums he sued."

The first assignment of error is: "The court erred in permitting the plaintiff to introduce in evidence, over the objections and exceptions of the defendant, the answer of the witness A. L. Collins to the fifth interrogatory, as follows: 'Int. 5. If in answer to interrogatory 3 you say Mr. Edwards was 'phoning through the Coolidge Telephone Exchange, then if you know, tell exactly, if you can, what time he put in the call, and what time of the day he got through talking, and say in answering the question if you answer from memory, and, if not, then from what source you refresh your recollection?' Answer: 'It was 9:45 o'clock that the connection was made for the conversation and was taken down at 9:50 o'clock'—because the witness said, 'I make this answer from information gained by referring to the daily tickets made of the call,' because the answer shows it is hearsay, because he testifies to a matter he does not know himself and from memoranda made by some one else, of occurrences of which he does not know, because there is nothing to show it is from records required to be kept, or that are correctly kept, of the proceedings of the telephone office, because the testimony was not only hearsay, but the witness, in attempting to testify from data obtained from records, does not give the contents of such records or memoranda, because he did not testify to what the records or memoranda showed, but merely stated that he gained the information from the same, and at the time of testifying he did not have the records before him, and merely gave his version or recollection of what the records were, which was not the best evidence of what the records were."

The evidence shows that the depositions of the witness were taken in June, 1908, and the transaction under investigation transpired in February, 1907. The statement was not made from the personal knowledge of the witness, but from information gained from memorandum made in the telephone office. The memorandum was not produced, nor was its nonproduction duly accounted for. The only evidence on this point being by the witness that "I cannot attach a copy of the record of Mr. Edwards' conversation on account of the fact that I have disposed of the telephone business, and have turned over all papers in connection with same to the parties who own the exchange, and do not know whether it could be found now or not." He further testified that the exchange at Coolidge usually kept correct dates as to hour and minutes when customers put in a call, and when they got through talking; but it is not shown that he made the memorandum. Under those circumstances we think the court erred in ad-

duced on the trial. The evidence was very material in establishing the time defendant left Coolidge on the morning in question in determining whether or not the defendant was guilty of negligence in the manner he drove the horses; there being other and different testimony as to the time he left Coolidge, and the time he made other points on that morning. On the admission of such testimony, see opinion delivered by Justice Talbot of this court at this term in case of *Cathy v. Railway Company*, 124 S. W. —1

The court failed to charge on contributory negligence and refused special instructions requested by appellant. The appellant pleaded contributory negligence on the part of plaintiff, in that plaintiff had neglected to properly water the horses just prior to the time defendant took charge of them. There was evidence tending to show that the team had not been watered since the evening before they were furnished defendant, and that when defendant reached water one of them drank so much it caused the trouble. The evidence was sufficient to raise the issue of contributory negligence, and a charge covering that issue should have been given that the jury might pass upon it. *Railway Co. v. Neff*, 87 Tex. 308; 28 S. W. 283; *Railway Co. v. Sein*, 87 Tex. 310, 28 S. W. 286.

The court refused to give a special charge requested by appellant, which reads as follows: "After considering the time of the day defendant left Coolidge, the distance that he traveled, the condition of the roads, the number and duration of the steps he had made, the condition in which the team appeared to be, the time of day and the place where the horse got sick and defendant became aware of its being sick, and that he was a young man there alone with a young lady, and that he knew of no horse doctor in or near the place where he was, but did know of one at Mexia, and all of the facts and circumstances in evidence, and after giving all of the testimony in the case such weight as you believe it entitled to, if you believe that a man of ordinary care and prudence, situated as defendant was, would have continued to drive the team on to Mexia as defendant did, then, in such event, you will find a verdict for the defendant." The evidence called for the giving of this charge, and the court erred in refusing to give it. *Oil Co. v. Noble* (Sup.) 105 S. W. 318; *Railway Co. v. Foth* (Sup.) 105 S. W. 322.

In appealing from the justice's court, the defendant gave an appeal bond in the sum of \$300, and is in conformity with the statute in all respects. In the county court the plaintiff also recovered judgment for \$125, interest, and all costs against the defendant, and

ment against them, so as not to exceed the penalty in the bond. This the court refused to do. Sureties on an appeal bond are only bound by the terms of said bond, and they cannot be held in an amount exceeding the amount specified in said bond, as that is the extent of their obligation. So it was error in the court in not so limiting the judgment against the sureties to the penalty stipulated in the bond. The judgment in this respect could be reformed by this court; but, for the other errors pointed out herein, the judgment must be reversed, and the cause remanded. *Hendrick v. Cannon*, 5 Tex. 248; *Martin v. Sykes*, 25 Tex. Supp. 197; *Grand Lodge v. Cleghorn*, 20 Tex. Civ. App. 134, 48 S. W. 750.

Reversed and remanded.

KETTLER BRASS MFG. CO. v. O'NEIL.

(Court of Civil Appeals of Texas. Nov. 17, 1909. Rehearing Denied Dec. 8, 1909.)

1. CONTRACTS (§ 284*)—BUILDING CONTRACTS—DECISION OF ARCHITECT—EFFECT.

Where it is agreed between parties to a building contract that all work shall be executed to the satisfaction of the architect, his honest and fair judgment will be binding on the parties, and to go behind such decision there must be allegation and proof of fraud, collusion, or mistake upon his part.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1328, 1330; Dec. Dig. § 284.*]

2. CONTRACTS (§ 322*)—BUILDING CONTRACTS—ACTIONS—ADMISSION OF EVIDENCE.

In an action for refusal to accept certain bronze doors and other articles to be used in the construction of a mausoleum, the contract for the work providing that it should be executed to the satisfaction of the architect, where the architect named never accepted the work nor expressed his satisfaction with it, testimony in behalf of defendant by other architects, qualifying as experts, that the work was not in compliance with the drawings and specifications in the contract, was admissible.

[Ed. Note.—For other cases, see *Contracts*, Dec. Dig. § 322.*]

3. APPEAL AND ERROR (§ 882*)—INVITED ERROR—INSTRUCTIONS.

Where plaintiff's requested charges placed the submission of the case upon the same basis upon which it was submitted by the court, plaintiff cannot on writ of error complain of the court's placing the decision of the case upon those issues.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 8602; Dec. Dig. § 882.*]

4. TRIAL (§ 122*)—CONTRACT—ARGUMENT OF COUNSEL.

In an action for breach of contract in failing to pay for bronze mausoleum doors, which were to be made according to a certain design, where plaintiff admitted that they did not follow the design specified, swore that he had no objection to producing the doors in court, and stated that he had gone to the mausoleum and carried the doors off, it was not im-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1 Motion for rehearing pending.

proper for defendant's counsel to comment on the fact that the doors were not exhibited in court.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 299; Dec. Dig. § 122.*]

5. APPEAL AND ERROR (§ 1060*)—HARMLESS ERROR—ARGUMENT OF COUNSEL.

The impropriety, if any, in the argument of defendant's counsel, was not prejudicial, where the jury, under the evidence, could not have rendered any other verdict than one for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4135; Dec. Dig. § 1060.*]

Error from District Court, Harris County; W. P. Hamblen, Judge.

Action by the Kettler Brass Manufacturing Company against John O'Neil. Judgment for defendant, and plaintiff brings error. Affirmed.

Geo. W. Graves, for plaintiff in error.
John Hamman, for defendant in error.

FLY, J. Plaintiff in error, which will hereinafter be designated "plaintiff," instituted this suit against O'Neil, defendant in error, who will be designated "defendant," to recover damages in the sum of \$1,000 for the breach of a contract in failing and refusing to pay for certain bronze doors and other articles to be used in the construction of a mausoleum. The cause was tried by jury and resulted in a verdict and judgment for defendant.

Plaintiff did not do the work it had contracted to do for defendant in substantial compliance with the terms of the contract. It failed to do the work to the satisfaction of the architect, as it had contracted to do. Other facts are discussed in connection with the different assignments of error.

The first, second, and seventh assignments of error assail the action of the court in permitting architects, who qualified as experts, to testify as to the kind of work done by plaintiff, and to state that the work was not in compliance with the drawings and specifications set out in the building contract. The proposition is that, where parties to a contract have bound themselves to abide by the opinion and decision of a particular architect, fair exercise of his judgment and opinion is binding upon both parties to the contract. While the words "fair exercise of his judgment" might, by a liberal construction, take in the exceptions made to the rule, it may be well to state the rule to be that where it is agreed between parties that the decision of a civil engineer or an architect shall be final and conclusive as to matters relating to the construction of a building or other structure and the compensation to which the builder or contractor is entitled, in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, his action in the premises would be binding and conclusive upon the

parties to the contract. *Railway v. Henry*, 65 Tex. 685; *Boettler v. Tendick*, 73 Tex. 493, 11 S. W. 497, 5 L. R. A. 270; *Railway v. Perkins*, 88 Tex. 67, 29 S. W. 1048; *Kilgore v. Baptist Society*, 89 Tex. 469, 35 S. W. 145; *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Martinsburg & P. Ry. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255.

As a basis to the proposition of law stated, there must be a contract binding the parties to abide by the decision of the architect or other party intrusted with authority to superintend the work. The agreement between plaintiff and defendant in this case as to the action of the architect was: "All work to be executed to the satisfaction of the architect both in finish and design." The plain implication from that clause is that the honest, fair judgment and decision of the architect in the premises would be final and binding on the parties. This construction is fully supported by the decisions of the Supreme Court of the United States hereinbefore cited. In order to traverse and go behind the decision of the architect, there must be allegations and proof of fraud, collusion, or mistake upon the part of the architect, because the party desiring to attack his decision is endeavoring to set aside the contract, and, deriving such equitable relief, he must by his pleadings and proof bring himself within the scope and authority of a court of equity. In the absence of such a plea, defendant would have no authority to question the decision of the architect to whom the parties had submitted all matters of construction. "The owner has no right to complain, since the architect was selected by him and charged by him with this very power; the builder has no right to complain, since he took the work on this very condition." *Whart. Con.* 594; *McAlpine v. Academy*, 101 Wis. 468, 78 N. W. 173.

While the principles of law, as herein enunciated, are well settled, they cannot be invoked in this case, because Green, the architect named in the contract, never accepted the work done by plaintiff, or expressed his satisfaction with it, or stated that it was in compliance with the terms of the contract. He testified: "I saw the completed work done by the Kettler people, and, as I saw it, it was not completed. * * * My relations with Mr. O'Neil, as his architect, ceased about the 24th day of June, as near as I can recollect. Don't think the castings had, at that time, been completed. I know they hadn't, because they haven't been completed yet. * * * I never passed judgment on these doors as they were finally completed and did not accept them for the plaintiff in this case." Plaintiff, having failed to show that the work was done to the satisfaction of the architect, has no just ground for objecting to the testimony of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

other architects as to the condition of the work, and the court did not err in admitting it. Plaintiff proved by Green, the architect named in the contract, that the work was not completed according to the contract.

The court submitted the cause to the jury on the basis of the decision of the architect being final, and there was nothing in the instructions to mislead the jury, and it was not error to refuse the special instructions requested by plaintiff. The jury must have been convinced, under the charge, that the architect had not approved the work done by plaintiff, and that it did not meet the demands of the contract, and made those findings the basis of the verdict. The evidence was ample to sustain the verdict. We do not think the charge could have led the jury to believe that plaintiff could not recover, unless the mausoleum was erected in all its parts to the satisfaction of the architect. The court confined the inquiry to the contract which confined plaintiff's obligation to the doors and matters connected therewith. There was no contradiction between the different parts of the charge.

Green was discharged by the defendant; but there was evidence that it was done with the knowledge and consent of plaintiff, and the appointment of other architects was ratified by plaintiff. There was no effort to show that plaintiff was deprived of any right by the discharge of the architect. All of the architects swore that the work was not in compliance with the terms of the contract.

Through the special charges requested by plaintiff, the submission of the cause was placed upon the same basis upon which it was submitted to the jury by the court; the turning point being that the work was done "agreeable to and in keeping with the drawings, specifications, notes, figures, details, and drawings as prepared by L. S. Green, architect," and executed "to the satisfaction of the said architect, L. S. Green." Plaintiff cannot now complain of the charge of the court placing the decision of the case upon those issues.

In the contract plaintiff agreed to make the doors according to a design in "Winslow Bros. Company's Catalogue, on page 214, plate 2082 & 2083," and the uncontroverted evidence showed that they were not so constructed. Kettler admitted that the doors did not follow the design in the catalogue. He also swore that he had no objection to producing the doors in court, and stated that he had gone to the mausoleum and carried the doors off. Under the circumstances, we do not think that it was improper for defendant's counsel to comment on the fact that the doors were not exhibited in court. If the argument was improper, it could not have injured plaintiff, for the reason that the jury, under the evidence, could not have ren-

dered any other verdict than one in favor of defendant.

We do not think the cross-assignments of error are meritorious, and they are overruled.

The judgment is affirmed.

BARRERA et al. v. GUERRA et al.

(Court of Civil Appeals of Texas. Nov. 17, 1909.)

1. BOUNDARIES (§ 3*)—CONSTRUCTION OF SURVEYS.

Where nothing appears on the face of grants, or from testimony, to indicate that any other course was observed in making the surveys than true north and south lines, and the adoption of magnetic lines would lead to results inconsistent with calls of one of the grants, the true north and south lines should control.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.*]

2. ADVERSE POSSESSION (§ 86*)—PAYMENT OF TAXES—NECESSITY.

Where persons in possession of land have paid no taxes thereon, they have obtained no title by 5 years' limitation.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. § 504; Dec. Dig. § 86.*]

3. ADVERSE POSSESSION (§ 41*)—CLAIM OF TITLE—SOURCE—POSSESSION OF LAND.

Where persons did not hold possession of land under title or color of title from the sovereignty of the soil, their chain of title not extending to the original grantee, they could not claim under 3 years' limitation.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 184-206; Dec. Dig. § 41.*]

Appeal from District Court, Starr County; W. B. Hopkins, Judge.

Trespass to try title by Francisco B. Guerra and others against Cayetano Barrera and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

H. R. Sutherland and W. L. Dawson, for appellants. Jas. B. Wells and G. W. Seabury, for appellees.

JAMES, C. J. The action was instituted in trespass to try title for two tracts of land, one about 1,500 acres, and the other about 1,800 acres, and was brought by appellees, as owners of this land as a part of a grant, known as the Santa Cruz tract, by the Spanish government to Francisco Ignacio Farias, and under patent to him by the state issued September 12, 1877, and claiming title to same also by virtue of the several statutes of limitations, and asking for rents and mesne profits, as well as for restitution of the land. A number of the defendants disclaimed. The present appellants pleaded, by demurrers, not guilty; pleaded, in bar of limitations claimed by plaintiffs, the absence of defendants from the state during the period of their alleged adverse possession. They also set up title in themselves by means of the several statutes of limitations. The cause was tried

by the judge, who filed his conclusions, and gave plaintiffs the land.

The fifth, sixth, seventh, and eighth assignments of error make the point that the conclusions of fact from 3 to 6, inclusive, are not supported by any evidence. These material facts appear in the judge's conclusions: First, that none of the land in controversy is embraced in the San Jose tract or grant as contended for by appellants, either by its grant from the Spanish government, or by the subsequent patent from the state; second, that the land is embraced in the Santa Cruz tract or grant as contended by appellees, both by the original Spanish grant and by the patent; third, that both of said tracts were originally surveyed and granted on true north and south lines, and not on magnetic lines. We ascertain that the evidence amply sustains the above findings. While the lines of junior surveys should not control in ascertaining the boundaries of senior surveys, the findings above are the only conclusions which are consistent with the descriptive calls that appear in the instruments connected with the original grants of these lands. Nothing appears on the face of the grants to indicate that any course was observed in making the surveys but the true meridian, and to apply the magnetic courses would exclude from the Santa Cruz grant objects which appear from its calls to be, or which the court found to be, within its boundaries. The finding that the lagoons called Aqua Sarca and Grangenitos, called for in the Santa Cruz grant to be within its limits, are on the land in controversy is one that we are unable to disturb; it being so indicated by the calls connected with the Santa Cruz grant and by testimony. The conclusion that the lines originally run were on true north and south lines is one which we must sustain; such lines being primarily what were called for, with nothing to suggest any other procedure, and to adopt magnetic lines would lead to results inconsistent with what appears in connection with the granting of the Santa Cruz grant. That the court considered other facts which went to confirm said specific and controlling facts does not tend to undo the latter. This leads us to the point where the land in question is the property of plaintiffs; it being within the Santa Cruz grant, and they having title by conveyance from and under the original grantee. The limitations title of appellee it is therefore not necessary to consider at all. The only question that remains is whether or not the judge's conclusions of fact and law, and his rulings, are to be sustained in reference to a title by limitations in defendants, these appellants.

That appellants have acquired no title by the 10-year statute is clear; no possession by them has existed for that period. Their possession was from the spring of 1808 to the institution of this suit, September 12, 1907.

No title by the 5-year statute has been obtained, as appellants paid no taxes on the land in controversy. As to the 3-year statute, the finding of facts is as follows: "That the chain of title introduced by defendants consists of deeds from various heirs of said Ramon Villareal to themselves and to others, and of deeds from those others to themselves, but that no conveyance out of Alexandro Farias, original grantee of the San Jose tract, or to said Ramon Villareal, was introduced or proved, and that defendants have not held such possession under title, or color of title, from or under the sovereignty of the soil." That each and all of the said deeds under which defendants claim are duly registered, and purport to convey undivided shares and interests in the San Jose tract as originally granted to Alexandro Farias and confirmed to him by the Legislature of the state of Texas; some describing said tract further by reference to its aforesaid patent, and that none of said deeds describes or purports to convey any of the land in controversy in this suit." These conclusions are supported by evidence, in respect to the deeds which defendants were allowed to introduce. Certain deeds which they offered, however, were excluded, and a number of assignments of error are briefed complaining of this ruling. The questions raised by these assignments refer to the sufficiency of the proof of the excluded deeds, or rather certified copies of deeds. But it is evident that the description in these excluded conveyances did not purport to convey land embraced in the Santa Cruz grant, and applied only to the San Jose grant, and in each of them one of the boundaries of the land, an undivided interest of which was purported to be conveyed, were of the San Jose grant. If these instruments had been admitted, appellants, it is conceded, would have shown a consecutive chain of title from the sovereign to the San Jose grant, and that far their proof would have answered the 3-year statute. But as they, like those which were admitted, purported only to convey undivided shares and interests in the San Jose tract as granted, these deeds would manifestly have occasioned no change in the finding of the court, and therefore we conclude that said assignments should be overruled, without discussing the question as to the admissibility of the certified copies. The result necessarily is that defendants showed no title by the 3-year statute.

The only errors alleged in reference to the rulings had at the trial were as to the admissibility of the certified copies just discussed. The findings of the judge on the material and controlling facts being supported by the evidence, there is nothing left for us to do but to affirm the judgment on the legal aspects of the case as above outlined.

Affirmed.

DUNCAN v. HERDER et al.

(Court of Civil Appeals of Texas. Nov. 15, 1909. Rehearing Denied Dec. 9, 1909.)

JUDGES (§ 45*)—DISQUALIFICATION—PARTY.

A judge who is the father-in-law of a daughter of an intestate is disqualified from hearing an action by the widow suing in her capacity as survivor and representative of the community estate on a note executed to the intestate in his lifetime, under Const. art. 5, § 11, prohibiting a judge from sitting in any case where either of the parties may be connected with him by affinity or consanguinity, etc., though the daughter is not named as a party.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 208-212; Dec. Dig. § 45.*]

Appeal from District Court, Fayette County; L. W. Moore, Judge.

Action by John T. Duncan against George Herder and others. From a judgment dissolving an injunction issued as prayed for by plaintiff, he appeals. Reversed, and injunction reinstated.

John T. Duncan, pro se. Brown & Lane, for appellees.

REESE, J. John T. Duncan instituted this suit in the district court of Fayette county against George Herder and others seeking to have set aside and canceled a certain judgment theretofore rendered in said court against one Josef Peter and Barbara Peter in favor of George Herder, the plaintiff in said suit, and also in favor of certain defendants, including Mrs. A. C. Lenert, survivor of the community estate of herself and her deceased husband upon their cross-action against Peter, for the amount of their respective debts against Peter, and foreclosure of their respective liens on certain real estate, and adjusting equities between the parties arising from the different liens. Among other objections urged by plaintiff to the validity of said judgment was the disqualification of the Honorable L. W. Moore, judge of said district court, to try the case. The ground of disqualification was the relationship of said judge, within the prohibited degree, to the wife of his son, J. W. Moore, who, it is contended upon the following facts, was a party to said suit. One of the defendants in said suit was Mrs. A. C. Lenert, who was made a party in her capacity as survivor and representative of the community estate of herself and her deceased husband, A. C. Lenert, the note upon which she recovered judgment and decree for foreclosure upon the land having been executed to the said A. C. Lenert during his lifetime, and being the property of the community estate. Mrs. Moore, the wife of the son of the district judge, was one of the children of the said Lenert, and his wife, Mrs. A. C. Lenert, the said A. C. Lenert having died intestate, was interested as one of the heirs of said A. C. Lenert in the debt, which was the subject-matter of said suit. She was not named as a party in said suit,

which was prosecuted alone by her mother, Mrs. A. C. Lenert, as survivor of the community. In aid of his suit, Duncan, the plaintiff in the present suit, sought and obtained from Hon. E. R. Sinks, judge of the Twenty-First judicial district, adjoining the Twenty-Second judicial district, of which Fayette county is a part, an injunction restraining the execution of said judgment and decree in the case of Herder v. Peters et al. by a sale of the land in question. The grounds for presenting such application to Judge Sinks, instead of the judge of the court in which the suit was brought and to which such injunction was made returnable, was that the Honorable L. W. Moore, judge of said court, was disqualified by reason of the facts aforesaid from making any order in said cause. Under this state of facts, and upon the ground, as stated by him in his order, that Judge Moore was disqualified, Judge Sinks granted the injunction and ordered the writ to issue restraining the sale of the property.

We omitted to state that not only was it alleged that Mrs. Moore was interested in the note sued upon in the Herder Case as one of the heirs of A. C. Lenert, but that there was certain interest due thereon which was community property of herself and her husband, J. W. Moore, in which he was also interested. This, however, we do not think is material, as there is no question made that Mrs. Moore is related within the third degree to the Honorable L. W. Moore. The order of Judge Sinks granting the injunction was made July 27, 1909, and was filed in the district court of Fayette county July 31, 1909, and the writ was served on the sheriff on August 2, 1909. On August 3, 1909, George Herder, by his attorneys, presented to the Honorable L. W. Moore, as judge of the district court of Fayette county, his motion or application to dissolve said writ of injunction on the ground that Judge Sinks had no authority to grant the writ, Judge Moore not being in fact disqualified, not denying, however, the truth of the facts herein set out as grounds for such disqualification. It was further set out in such motion that no grounds for injunction were stated in such petition. The questions presented by this part of the motion are not material to be here considered. On the same day, August 3, 1909, Judge Moore made, and had entered, his order vacating the order of Judge Sinks, dissolving said injunction, and ordering the sheriff to proceed with the sale under said execution. The order of Judge Moore is based solely, as set forth therein, upon the ground that he was not disqualified, and that, therefore, Judge Sinks had no jurisdiction, power, or authority to grant the injunction which was on that account void. It appears from a bill of exception reserved by plaintiff, Duncan, to the action of the court, that he

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

had been notified of the hearing of the motion, and that he had appeared and objected to the hearing of the motion at the time set, or until after 10 days' notice to him as provided by statute, which was overruled, and the court thereupon proceeded at once, and upon the same day of the filing of the motion, to act upon it and to dissolve the injunction. The district judge qualifies the bill by the explanation that he acted solely upon the ground that Judge Sinks' order was void, and interposed no legal obstacle to the sale. This appeal is prosecuted, under the statute, from the order dissolving the injunction.

In the view we take of the questions presented, it will only be necessary to decide the single question: Under the facts shown, was Judge Moore disqualified to hear and determine the application for the injunction and the motion to dissolve? As we understand the position taken by appellee, it is not contended that the judge did not err in hearing the motion on the day it was filed over the objection of appellant, who demanded the 10 days' notice provided by statute (article 3007, Rev. St., 1895), but it is contended that the order of Judge Sinks and the writ of injunction issued thereunder were absolutely void, and therefore the dissolution of such void injunction worked no harm to appellant, that it was unnecessary and of no real legal effect, serving no other purpose than would the mere opinion of the district judge to the sheriff that the injunction was void, and should not be obeyed. Whether such injunction would have been absolutely void, or merely irregular and erroneous, if, in fact, Judge Sinks had been in error as to the disqualification of Judge Moore, is a very troublesome question, which it is not necessary for us to decide. Acts 1st Called Sess. 31st Leg. 1900, p. 354, c. 34.

Passing, then, to the only question we shall discuss or decide, as to whether Judge Moore was disqualified, we are met by what appears to be a conflict between the opinion of the Supreme Court in the case of *Winston v. Masterson*, 67 Tex. 200, 27 S. W. 768, and earlier decisions of the Supreme Court upon this question. The conflict does not arise upon the question decided, but upon the clear and positive grounds upon which the Supreme Court in the later case bases its decision. In this case *Winston* sought in the district court to enjoin the execution of a judgment of the county court against him in favor of one *Davis*. *Davis* had engaged *H. Masterson*, an attorney, to bring suit against *Winston*, and had agreed to give him, for his services, a contingent fee equal to one-half of the amount recovered upon the claim. The county judge was the brother of *H. Masterson*, the attorney. The grounds of attack upon the judgment was that the relationship of the county judge to *H. Masterson*, the attorney for the plaintiff, disqualified him, and rendered the judgment void. This contention was not sustained by the district

court, and on appeal to the Court of Civil Appeals of the First District the judgment was affirmed (27 S. W. 691); that court, in an opinion of Chief Justice Garrett, holding that *H. Masterson* had no such interest in the subject-matter of the suit as would make him a party to the suit within the meaning of article 5, § 11, Const., and article 1090, Rev. St. 1879, as in *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924. Pending a motion for rehearing, the question of the disqualification of the county judge was certified to the Supreme Court. The answer of the Supreme Court was that he was not disqualified. If the opinion had gone no further, it will readily be seen that there is a clear distinction between the question as it arose in that case, and as presented in *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924; *Hodde v. Susan*, 58 Tex. 392; *Jordon v. Moore*, 65 Tex. 366; *Railway v. Terrell*, 69 Tex. 652, 7 S. W. 670, and *Simpson v. Brotherton*, 62 Tex. 170, and as presented in the present case. It seems entirely clear to us that *Mrs. Lenert* stood in the same relation to her daughter *Mrs. Moore*, as regards the community as the husband did towards the wife in the cases referred to. A portion of the very property involved in this case belonged to the daughter, who had not only the beneficial, but the legal title as one of the heirs of *A. C. Lenert*, deceased, and her interest was represented in the suit by *Mrs. Lenert*, in her capacity as survivor of the community, in the same sense that the wife was said to have been represented by the husband, in a suit by or against him with regard to the community estate. But in the opinion in *Winston v. Masterson* it is said in plain and unambiguous language that, as used in the Constitution (article 5, § 11) and the statute (Rev. St. 1879, art. 1090), the word "party" is used in its technical sense as one named as plaintiff or defendant in the record. The court quotes with approval from *Bank v. Cook*, 4 Pick. (Mass.) 411, as follows: "We are to ascertain the true meaning of the Legislature in the use of their statute, and we are to consider them, when legislating upon subjects relating to courts and legal process, as speaking technically, unless from the statute itself it appears that they made use of the terms in a more popular sense. The word 'party' there is unquestionably a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, whether in law or in equity; the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons. They are parties in the writ, and parties on the record, and all others who may be affected by the writ indirectly or consequentially, are persons interested, but not parties." It is further said: "If relationship to one interested in the result of an action would disqualify the county judge, then he would have been disqualified, although the

In *Schultze v. McLeary*, 73 Tex. 92, 11 S. W. 924, the question was as to whether the relationship of the district judge to the wife of Orynski disqualified him to try a case in which Orynski was a party, involving the community estate of himself and wife. In disposing of the case holding that the judge was disqualified, the court says: "It may be that the judge and Orynski were not related by affinity at all, but if the claim represented by the latter was one in which Orynski was but the representative of his wife, who was so related, or if he was the representative of a right claimed by himself and wife in a community right, or if any judgment to be rendered in his favor or against him would affect the right of the wife through her community right even to the extent of costs, then the wife of Orynski, within the spirit and purpose of the constitutional provision to which we have referred, was a party to the suit and the district judge was disqualified"—citing *Hodde v. Susan*, *Jordon v. Moore*, and *Railway Co. v. Terrell*, supra. In passing upon this same question in *Hodde v. Susan*, the Supreme Court uses this language: "A narrow or contracted construction of the term 'party' which confines it to the very person named on the docket as such, and excludes such as stand precisely in the same relation, would often defeat the end had in view, of having justice impartially administered free from the bias and influence produced by the interest held in the cause by the judge or his relations." The opinion in the case of *Schultze v. McLeary* was rendered by Chief Justice Stayton, whose language we have quoted. Although the opinion in *Winston v. Masterson* purports to have been rendered by the present Chief Justice Gaines, it appears from a note at the foot of the opinion that it was, in fact, written by Chief Justice Stayton. It will be noticed that no reference is made therein to any of the cases announcing, it seems to us, a doctrine diametrically contrary to the doctrine there stated. Can it be supposed that the learned Chief Justice intended by what was said to overrule the doctrine established by the previous decisions of the Supreme Court, including the case of *Schultze v. McLeary* so shortly before decided, in which he himself had spoken so positively? We decline to think so, and especially as such a conclusion would inevitably lead to the most extraordinary results. If, in order to disqualify a judge to try a case on account of relationship to one of the parties, it is essential that such person be named in the pleadings as a party plaintiff or defendant, then it would follow that a judge might properly try a case brought by an executor or administrator

administrator without naming the heirs or any of them as parties. We do not think it necessary to go further than the decisions of our own state upon this question. If we were to do so, it would be found that the great weight of authority supports the doctrine of the earlier cases cited.

In the light of the decisions of this state, we are justified in limiting the decision in *Winston v. Masterson* to the facts of that case, in which view there is no conflict with the earlier cases, and to follow the doctrine of those cases as applicable to the facts here presented. We therefore hold that Mrs. Moore was a party to the suit within the meaning of that term as used in the Constitution and statute, and, as it is not questioned that she was related to the district judge within the third degree, that he was disqualified to grant or dissolve the injunction. Such being the case, the order of Judge Sinks granting the injunction must stand until properly overruled. Not only was Judge Moore disqualified to make the order dissolving the injunction, but his action in denying appellant the 10 days' notice provided by statute, and demanded by him, was erroneous.

When we consider the clear, positive, and unambiguous language used by the court in the opinion of *Winston v. Masterson*, we are forced to admit that it is not at all unreasonable that the learned district judge, whose action we have reviewed, concluded that Mrs. Moore was not a party to the suit, and that he was not disqualified. We are constrained to hold otherwise.

The order dissolving the injunction granted by Judge Sinks is reversed, set aside, and annulled, and it is ordered that the injunction be reinstated in full force as though no such order had been made.

ELLWOOD v. STALLCUP.

(Court of Civil Appeals of Texas. Nov. 3, 1909.)

1. PUBLIC LANDS (§ 175*)—DISPOSAL OF STATE LANDS—TEXAS.

Under Rev. St. 1895, art. 4269, providing that vested rights shall not be disturbed by the location of school land in favor of a county, a location of school land for the state under authority of Const. art. 7, § 2, providing that all alternative sections of land reserved to the state or that shall be hereafter made to railroads or other corporations, and one-half of the public domain, etc., shall constitute a public school fund, will prevail over a subsequent location of county school land, although a patent is first issued on the county location.

[Ed. Note.—For other cases, see *Public Lands*, Cent. Dig. § 570; Dec. Dig. § 175.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

2. SCHOOLS AND SCHOOL DISTRICTS (§ 15*)—SCHOOL LANDS—DIVERSION OF USE.

The public domain set aside or located for common school purposes cannot be diverted, and constitutes a trust fund for educational purposes for the entire state.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 17-22; Dec. Dig. § 15.*]

3. PRINCIPAL AND AGENT (§ 101*)—AGREEMENT SUSPENDING LIMITATIONS—AUTHORITY OF AGENT.

Where an agent is in actual possession and control of land, his agreement not to hold adversely, during the pendency of a suit, is sufficient to suspend the running of limitations.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 255; Dec. Dig. § 101.*]

4. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

An admission of an agent's declarations to prove his agency, in order to show an agreement with such agent, suspending the running of limitations on an issue of title to land based on adverse possession, is harmless, where, after eliminating the time affected by such agreement, the time remaining is insufficient to show the running of limitations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4153; Dec. Dig. § 1050.*]

Appeal from District Court, Lubbock County; L. S. Kinder, Judge.

Action by W. J. Stallcup against Isaac L. Ellwood. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. L. Beatty and John R. McGee, for appellant. Geo. R. Bean, for appellee.

FISHER, C. J. This is an action of trespass to try title, brought by appellee against the appellant on the 25th day of November, 1907, for the title and possession of 150½ acres of land, alleged to be in the northwest part of a 640-acre tract, described as school section No. 50, in block 20, in Hockley county, Tex.; the portion of said survey in controversy being described by metes and bounds in plaintiff's first amended petition, and is in conflict with the Donley county school league survey No. 10. On the 4th of May, 1908, the defendant filed his answer, consisting of a general exception, plea of not guilty, general denial, and the statute of limitations of five years, and also a cross-action of trespass to try title against the plaintiff for the land in question. The case was tried in the court below without a jury, and resulted in a judgment in favor of plaintiff for the land sued for, and that the defendant take nothing by reason of his cross-action against the plaintiff, and that the defendant pay all costs of suit. From this judgment appellant has perfected his appeal.

We find the following facts: There is a conflict between school section No. 50, which belongs to the plaintiff, and the Donley county school league No. 10, which is owned by the defendant. Survey No. 50 was state school land, and was located by virtue of certificate No. 652, H. E. & W. T. Railway

Company, in block 20, situated in Hockley county, Tex. Upon the application to purchase said survey, it was duly and legally sold to one Jesse Dalton by the Commissioner of the Land Office on the 14th of September, 1899, and by regular chain of transfers by deeds duly acknowledged and recorded in the deed records of Hockley county, Tex., from Dalton, that title is now in the appellee, W. J. Stallcup. The original field notes of the location of survey No. 50 are prior to the field notes and location of the Donley county school land. Based on the survey of the Donley county school land, there was on the 15th day of December, 1883, a patent issued to Donley county, field notes of which covered 150 acres of school survey No. 50, owned by the appellee, and it is that 150 acres which is now in controversy. Donley county conveyed its school lands to Gregory, Cooley & Hastings, who, with the heirs of some of these parties who are deceased, conveyed to R. C. Lake and T. B. Tomb. All of these deeds were properly acknowledged and filed for record in the office of the county clerk of Lubbock county January 30, 1902, in the deed records of said Hockley county, Tex. On September 5, 1905, by a deed properly executed and acknowledged, R. C. Lake and T. B. Tomb conveyed league No. 10, Donley county school land, to appellant, Isaac L. Ellwood, which deed was filed for record in the deed records of Hockley county on September 15, 1905. The above two deeds were offered in evidence, not only as title, but also in support of the appellant's plea of five years' limitation. The taxes were paid by appellant and those under whom he holds on the Donley county school land for the years 1900, 1901, 1902, 1903, 1904, 1905, 1906, and 1907. In 1902 Lake & Tomb and one Bird Rose, who was either a member of the firm of Lake & Tomb, or the agent and business manager of the ranch known as the "8 league pasture," of which the Donley county school survey No. 10 was a part, by fence inclosed the land in question as a part of the 8 league pasture, which was occupied and used as a cattle ranch, and which was in the actual possession and control of Bird Rose. They remained in possession and use of the same from that time until they sold to the appellant, Ellwood, in 1905, and from that time Ellwood occupied and used the land in question as a part of his pasture. Appellee, Stallcup, by deed of date August 26, 1904, purchased school survey No. 50 from one Hiram Smith, and we conclude from the evidence that Smith holds under the original purchaser from the state, Jesse Dalton, either by conveyance from him or some one to whom he sold. In September, 1903, one B. L. Frost brought a suit in the district court of Lubbock county against Lake & Tomb to recover part of section 74, block 20, which is shown by a map in the record, and which

1904, at the time that Hiram Smith was the owner of school survey No. 50, he entered into an understanding and agreement with Bird Rose in regard to the dividing line between the Donley county school land and survey No. 50, substantially to the effect that they would agree to abide the decision in the suit then pending between Frost and the Lake-Tomb Cattle Company, as above mentioned, and substantially to the effect that, during the pendency and life of that agreement, no limitation would be asserted by Bird Rose or those for whom he was acting. At that time there was a dispute and controversy between Lake, Tomb & Co. and Bird Rose, on the one hand, and Smith, on the other, as to the dividing line between their respective lands. In October, 1906, the Frost suit was compromised. Appellant, Ellwood, was then the owner of the land in question. Frost dismissed the suit, and Ellwood paid him \$5 an acre for that part of section 74 shown to be in conflict with league No. 10 of the Donley county school land, and Frost executed Ellwood a deed, dated the 19th day of October, 1906, and we take it from the evidence upon this subject that that constituted the settlement of the suit of Frost v. Lake, Tomb & Co.

We conclude as a fact that the evidence shows that Bird Rose had the authority to enter into the agreement with Hiram Smith, as above stated, and that that agreement was binding upon Lake, Tomb & Co., of which the evidence shows Bird Rose to be a member.

Appellant's second and fifth assignments of error will be considered together. It is there, in effect, contended that appellant was entitled to recover, because, by virtue of the patent to Donley county, the superior title vested in it, although the land in controversy, a part of school survey No. 50, was previously located by the state as a part of the common school fund. This location, as shown by the facts, was prior to the location for Donley county. The effect of the contention is: That, both surveys being set apart and appropriated for a common purpose—that is, an appropriation to the common school fund—the state by its patent could and did confer upon Donley county the superior right to the land in conflict; that such selection for the use of Donley county was an election upon the part of the state to treat such fund as appropriated to a use common to both the state and the county, and an appropriation by patent to the latter would not be a diversion of the trust fund held by the state for common school purposes generally. We cannot agree with appellant in this contention, nor can we admit that article 4269, Rev. St. 1895, relied upon by appellant, as construed in Steward v. Coleman County, 95 Tex. 445, 67 S. W. 1016, has any application

in the location made in favor of the county. The county in this instance located the land so as to cover the lands previously located by the state for common school purposes; and to permit the location by the county to prevail would disturb a vested right in the State, unless there is some force in the suggestion of appellant, as previously outlined. Section 2, art. 7, of the Constitution, in effect, provides that all alternate sections of land reserved to the state, or that may hereafter be made to railroads, or other corporations, and one-half of the public domain, etc., shall constitute a perpetual public school fund. This provision has been carried into effect by appropriate laws of the several Legislatures. Other provisions of the Constitution protect counties in the grants made by the state for educational purposes. It may be conceded that both reservations were for educational purposes; but their enjoyment was distinct. The reservation in favor of the common school fund was for the benefit of the state at large, in which all of the counties were entitled to participate—that in favor of the county was restricted and limited to its own inhabitants. One was a general trust fund, limited only by the boundaries of the state; the other was circumscribed by the limits of the county. And if it could be conceded that the latter could lay its grant upon the previous location of the state, the effect would be to divert the fund from the general use intended for the benefit of the state at large. Such a concession would be repugnant to all of the laws upon this subject, because the public domain, set aside or located for common school purposes, cannot be diverted, and constitutes a trust fund for educational purposes for the entire state. When the location was made, the right was vested in the state in trust for a definite and defined purpose, and to permit a county to subsequently appropriate the land by patent or otherwise would defeat the trust and affect an interest already vested, which is prohibited by article 4269.

Appellant's third and fourth assignments will be considered together. The third assignment complains of the action of the court in admitting the evidence of Hiram Smith as to the agreement between him and Bird Rose. The objection, in the main, is predicated upon the proposition that Bird Rose, by the agreement in question, could not bind Lake & Tomb. The fourth assignment complains of the admission of the testimony of appellee, Stallcup, tending to show a similar agreement between him and Judge Beatty as existed between Smith and Bird Rose. The objection is that the evidence does not show that Judge Beatty was the agent of the appellant, Ellwood, except by his declarations, and therefore was lacking in authority to bind him by such agreement.

If the testimony objected to was admissible, it was sufficient to justify the trial court in holding that the possession was not adverse. Consequently, limitation did not affect or bar the plaintiff's right to recover. Our findings of fact virtually dispose of the objection urged to the evidence of Hiram Smith showing the agreement with Bird Rose. The court, under the evidence, could have concluded that he was a member of the firm of Lake, Tomb & Co. He was in actual possession and control of the premises, and, if he was not a member of the firm, he had the general control and management of the cattle ranch, of which the land in question was a part. This being true, his agreement to not hold adversely during the pendency of the suit of Frost against Lake, Tomb & Co. would suspend operation of the statute of limitations.

With reference to the objection to the evidence of Stallcup, as to what occurred between him and Judge Beatty, it is contended that the familiar principle that agency cannot be established by the declaration of the agent is applicable to this question. It can be conceded that so much of the evidence of this witness that testified to the declarations of Judge Beatty showing his agency was not admissible; but this would not affect the judgment below or cause its reversal, because the objectionable evidence only relates to the question whether Beatty was agent for appellant, Ellwood, who only acquired his right about two years before suit was filed; and, if we concede that he could not bind Ellwood by conduct or statements showing that the latter was not holding adversely, the advantage gained by appellant would be in eliminating this evidence, which, if done, would have the effect of merely holding that for about two years—that is from September, 1905, when appellant purchased, to the time of filing suit—limitation ran. The appellant, to make out or complete the period of five years' actual possession in order for the statute to operate, must rely upon the possession of his predecessors in title with whom he is connected; and, when we go back to them, we find an agreement between the appellee, or, in other words, those under whom he holds, with the vendors of appellant, substantially to the effect that limitation should not operate during the time of the pendency of the suit of Frost v. Lake-Tomb Cattle Company, which was settled in 1906. If this agreement did not extend to the time this suit was settled, it would certainly be operative to the time the parties who owned title and made the agreement sold to Ellwood, which, as before said, was in September, 1906. This agreement was effective at least during the time the appellant's vendors had possession, which possession, by force of the agreement, would not be adverse to the appellee or his vendors, the parties with whom

the agreement was made. Such being the case, such time must be eliminated, and, when this is done, there is not an adverse possession for a time sufficient to complete a bar under the five years' statute.

We find no error in the record, and the judgment is affirmed.

Affirmed.

PRESSLER v. WARREN.

(Court of Civil Appeals of Texas. Nov. 24, 1909.)

1. LANDLORD AND TENANT (§ 129*)—ACTIONS BY TENANT—DAMAGES.

Where a landlord agrees to rent a certain number of acres and only furnishes one-half of such amount, the tenant may claim as damages the value of his share of the crop which would have been produced on the portion of the land which the landlord failed to furnish him, where the crop would have been raised by the labor of the tenant's family without extra cost and expense to him.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 453; Dec. Dig. § 129.*]

2. LANDLORD AND TENANT (§ 129*)—ACTIONS BY TENANT—ADMISSIBILITY OF EVIDENCE.

In an action for failure of a landlord to give his tenant possession of all the land leased him, evidence is admissible to show the crop which the tenant raised on the land furnished him, and its value, and that the tenant would have cultivated the entire land leased, and that the land which the landlord failed to furnish him was better than the land he actually cultivated.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 129.*]

Appeal from Taylor County Court; T. A. Bledsoe, Judge.

Action by R. L. Warren against G. W. Pressler. Judgment for plaintiff, and defendant appeals. Affirmed.

Wagstaff & Davidson, for appellant.

FISHER, C. J. This is a suit by appellee, Warren, against the appellant, to recover damages on account of the alleged breach of a rent contract. The case was tried before the court without a jury and judgment rendered in appellee's favor against the appellant for \$325, from which judgment he has appealed.

The plaintiff in his petition substantially alleged: That he rented from the appellant, for the year 1907, 100 acres of land, which he agreed to cultivate. The appellant was to receive one-fourth of all the cotton and one-third of the corn and other grain raised on the premises. Plaintiff was to take charge of the 100 acres, and the defendant was to furnish plaintiff two cows for the purpose of furnishing milk and butter to his family during the year. That plaintiff moved upon the premises, started to cultivate, and did cultivate about 50 acres of the land. When the plaintiff demanded of the defendant the other 50 acres, defendant told him

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

too late in the season to plant a crop, defendant refused to furnish the same or any part thereof. That plaintiff, relying upon the rental contract, waited so long that he was unable to get other lands to cultivate, and was prevented from so doing by the act of defendant. That he expected to cultivate all of the land by the labor of his family, and that by virtue of defendant's breach of the rental contract he was unable to procure employment for them. That he would have planted the additional 50 acres which he was to receive in cotton, which would have produced 12 bales, of the reasonable value of \$840, and that his portion would have been \$630. That the defendant refused to furnish plaintiff the two cows to milk, to his damage \$50, and that the plaintiff suffered damage to the extent of \$100 on account of extra team and tools to farm the additional 50 acres of land which were not furnished him by defendant, all of which items of damages he sues for. The defendant filed a general demurrer and special exception to the \$50 item of damage and the \$100 item of damage and to the \$630 item. The objections to the items are that they state no cause of action, and that they are vague, indefinite, uncertain, and speculative. These demurrers were overruled.

Appellant's first assignment of error complains of the action of the trial court in overruling what he terms his "fourth special exception," which is directed against the item of \$630. Really this exception is so general in its terms that it may be classed as a general demurrer; but, however, treating it as a special exception, it is clear that the court properly overruled it. The petition states that the \$630 would have been the value of appellee's share of the crop if he had been permitted to cultivate the extra 50 acres, and it is substantially alleged that this cultivation would have been by his family without extra cost and expense to him. Damages in cases of this character were extensively treated by the Supreme Court, in *Crews v. Cortez*, 113 S. W. 525, in answer to certified questions from this court. Some of the principles there discussed are applicable to the question presented by appellant's demurrer.

Appellant's second assignment of error is to the effect: That the court erred in permitting the plaintiff, over the defendant's objection, to testify that the defendant had rented him 100 acres of land, and would let him have only 50 acres, and that the 50 acres which the defendant refused to let him have, and which was worked by defendant's son, was cultivated to the extent of 35 acres in cotton, and the balance in feed stuff; that the 35 acres made 7 bales of cotton and was

the land was better than the land he actually cultivated. All this evidence was admissible. It was one of the means by which plaintiff undertook to show the damages which resulted to him by reason of the breach of the contract. It was clearly permissible for him to show that he was deprived of the 50 acres, and what it actually produced when cultivated by others, and to what use he would have put it if possession had been delivered. The quality of the land was also properly proven as having some bearing upon the question as to what would have been the probable yield of the cotton crop if plaintiff had been permitted to plant it in cotton.

We find no error in the records, and the judgment is affirmed.

Affirmed.

SIMMERS et ux. v. ANDERSON, Sheriff, et al.

(Court of Civil Appeals of Texas. Nov. 12, 1909. Rehearing Denied Dec. 8, 1909.)

APPEAL AND ERROR (§ 69*)—DECISIONS REVIEWABLE—ORDER DENYING MANDAMUS.

Appellants were sued in trespass to try title, and a writ of sequestration was given to the sheriff, who, at plaintiff's instance, allowed appellants a certain time in which to replevy the premises, they being in possession of a store, and plaintiffs having possession of a saloon thereon, and appellants executed a replevy bond, and, on the sheriff's refusal to place them in possession, moved for a writ of mandamus to compel him to do so. *Held*, that the order refusing mandamus was interlocutory, and hence not appealable, in the absence of statute.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 69.*]

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Trespass to try title by August Frel and wife against N. H. Simmers and wife, aided by a writ of sequestration. From an order refusing a writ of mandamus to compel A. R. Anderson, sheriff, to place defendants in possession of the premises, defendants appeal. Appeal dismissed.

Chas. L. Michael and A. H. Jayne, for appellants. Brockman, Kahn & Williams, for appellees.

NEILL, J. On July 3, 1908, August Frel and his wife sued N. H. Simmers and his wife in trespass to try title to a designated portion of block 632 of the Ranger addition to the city of Houston, at the same time suing out a writ of sequestration. When the suit was brought, there were on the premises a saloon and a store. The plaintiffs were then in actual possession of the former, and the defendants in possession of the latter, and such has been the state of possession

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

ever since. The writ of sequestration was immediately placed in the hands of the sheriff, who, at the instance of plaintiffs, without taking possession of the premises, allowed defendants until the 7th of the month to replevy the same. On that day the defendants executed a replevy bond, conditioned as required by law, for all the land sued for. They then demanded of the sheriff that he place them in possession of all the property, including the saloon room occupied by plaintiffs. This the sheriff refused to do, but allowed the possession of the property to remain as it was before, and at the time the replevy bond was executed. The defendants then moved the court for a mandamus to compel the sheriff to place them in possession of all the property involved in the suit. The court, upon hearing the motion, entered an order refusing the writ, and from such order this appeal is prosecuted.

The order is interlocutory; and, in the absence of any statute authorizing an appeal from it, cannot be appealed from. Wherefore the appeal is dismissed.

STEPHENVILLE OIL MILL et al. v. McNEILL et al.†

(Court of Civil Appeals of Texas. May 29, 1909. On Resubmission, Oct. 23, 1909. Rehearing Denied Nov. 20, 1909.)

1. APPEAL AND ERROR (§ 724*)—ASSIGNMENTS OF ERROR—GENERAL ASSIGNMENTS.

An assignment that the court erred in rendering judgment for appellees against appellants, under which various propositions were submitted complaining of the admission of evidence, etc., is too general.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2997; Dec. Dig. § 724.*]

2. APPEAL AND ERROR (§ 742*)—ASSIGNMENTS OF ERROR—SUFFICIENCY—STATEMENT.

An assignment of error, in overruling appellants' motion on the findings of fact by the jury and court for a judgment pursuant to such findings, cannot be considered, where it was not followed by a statement from the record showing the ruling complained of, or what the findings were on which judgment was asked.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3000; Dec. Dig. § 742.*]

3. APPEAL AND ERROR (§ 547*)—RECORD—PRESENTATION OF GROUNDS OF REVIEW.

An assignment of error in the denial of a motion for judgment on the findings cannot be considered, where the record on appeal contains neither bill of exceptions nor order of court showing that the motion was made and overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2427; Dec. Dig. § 547.*]

4. APPEAL AND ERROR (§ 1053*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where evidence erroneously admitted related to issues which were not submitted to the jury, the error was harmless.

[Ed. note.—For other cases, see Appeal and Error, Cent. Dig. § 4180; Dec. Dig. § 1053.*]

5. TRESPASS TO TRY TITLE (§ 11*)—TITLE TO, SUSTAIN ACTION—COMMON SOURCE—SOVEREIGNTY OF SOIL.

Where plaintiff's ancestor, through whom both parties claimed as a common source in trespass to try title, had prior possession of the land, plaintiffs need not connect themselves with the sovereign of the soil.

[Ed. Note.—For other cases, see Trespass to Try Title, Cent. Dig. § 14; Dec. Dig. § 11.*]

6. APPEAL AND ERROR (§ 755*)—BRIEFS—NECESSITY.

Though justice was not done below, the Court of Civil Appeals cannot review errors not fundamental in character, in absence of a proper brief presenting them.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 755.*]

On Resubmission.

7. APPEAL AND ERROR (§ 759*)—BRIEF—STATING ASSIGNMENTS OF ERROR.

The first assignment of error filed below was for error in rendering judgment against appellants, followed by eight subdivisions stating numerous alleged erroneous rulings, and the brief on appeal submitted the same matter, stating the assignment in eight parts, termed "the first assignment of error, second, third, fourth," etc., subdivisions of the first assignment of error; each subdivision being followed by propositions, statements, and authorities as for separate assignments of error, in effect making eight assignments of error in the one. *Held*, that the assignment in the brief, even if the subdivisions be treated as separate assignments, could not be considered, not being copies of the assignment below, as required by the court rules.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3094; Dec. Dig. § 759.*]

Conner, C. J., dissenting.

Appeal from District Court, Erath County; W. J. Oxford, Judge.

Action by James McNeill and others, against the Stephenville Oil Mill and others. From a judgment for plaintiffs, part of defendants appeal. Affirmed.

Jno. W. Wray, Young & Johnson, and W. W. Moores, for appellants. W. T. Carlton, Eli Oxford, and M. L. Jackson, for appellees.

SPEER, J. Appellees, as the heirs at law of John M. Stephens, deceased, instituted this suit in trespass to try title to recover certain lands in Erath county from the Ft. Worth & Rio Grande Railway Company, Stephenville Oil Mill, J. H. Ott, and G. R. and Mattie Fagan. The cause was submitted to a jury on special issues, and the answers to these issues, supplemented by findings of the court, were made the basis of a judgment for the plaintiffs. The Fagans and the railway company appealed; but the latter has not assigned error, so that, in speaking of appellants, we will be understood as referring only to the Fagans.

Appellants' first assignment of error is: "The court erred in rendering a judgment in favor of appellees and against the Fagans for the land described in their second amend-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes.

† Writ of error pending in Supreme Court.

filed below consists of some 3½ pages of typewritten matter; whereas, the assignment presented in the brief consists only of as many lines. The generality of the assignment is illustrated when it is seen that as many as 21 propositions are submitted under it, complaining of various errors of the court, including numerous rulings on the admission of evidence. In fact, appellants virtually have presented their whole case under this one general assignment, which points out no error at all. To consider such assignment in this case would be, we think, to put a premium on laxness, and needlessly to consume the time of this court in doing the work which the statute and rules contemplate should be done by counsel.

The second assignment is: "Defendants moved the court, on the findings of fact by the jury and the findings of fact by the court, for a judgment in pursuance of such findings. The motion was overruled. In this the court erred." We cannot consider this assignment because it is not followed by a statement from the record showing the ruling complained of, or showing what the findings upon which a judgment was asked were. Furthermore, the assignment cannot be sustained, if considered, because there is neither bill of exception nor order of the court to indicate that such motion for judgment was ever made and overruled. Not only does the brief fail thus to point out error, but the record itself is equally silent.

There are some assignments complaining of the court's ruling in admitting evidence; but a sufficient answer to these is that the issues which the evidence admitted tended to support were not submitted to the jury, and the contention that appellees failed to connect themselves with the sovereign of the soil comes to naught in view of the court's finding of prior possession in appellees' ancestor, both parties claiming, as they do, under him as a common source of title. It may be as insistently urged by appellant that justice has not been done by the judgment of the lower court in this case; but, if so, though we are not intimating such to be the case, we have no power to revise errors, in the absence of a brief properly presenting them, there being no fundamental errors requiring a reversal.

The judgment of the district court is in all things affirmed.

On Resubmission.

The judgment in this case was affirmed at the last term of this court; but the affirmance was afterward set aside, and a resubmission of the case allowed, in order that appellants might be afforded an opportunity to amend their briefs in certain par-

pellants filed their assignments of error, of which the following is a copy of the first:

"(1) The court erred in rendering a judgment in favor of plaintiffs and against these defendants for the land described in their second amended original answer:

"First. Because the plaintiffs failed to connect themselves by regular chain of title with the sovereignty of the soil. (a) The patent shows on its face that it was issued to the heirs of John Blair. (b) Because the alleged power of attorney does not prove heirship, and there was no proof of heirship independent thereof. (c) Because there was no proof of the execution of the alleged power of attorney. (d) Because the alleged attorney was wholly without authority to pass or attempt to pass title of the said land to Stephens, the alleged purchaser. (e) Because the certified copy of the alleged power of attorney was simply a copy of a copy, the original of which had never been filed, as required by law, in the records of deeds for Erath county, or the county to which it was attached originally for judicial and land purposes. (f) Because there is no provision of law authorizing certified copies of either originals or exact copies of instruments from the land office of the character of the one in question to be used in evidence in trespass to try title. (g) Because the alleged copy of the power of attorney was incompetent, inadmissible, and should have been by the court excluded from the consideration of either the jury or himself in the respective findings.

"Second. The application of W. W. McNeill to have the estate partitioned is void on its face. (a) Because it did not recite the names or the residences of the heirs or the distributees, nor that their residences were unknown. (b) Because it is alleged that there were 660 acres of the Blair survey of 17½ labors that belonged to said estate that was ready for partition, without giving any further or better description. (c) Because the petition or application is absolutely void for the want of description of the land and such description as would enable the court to intelligently render a judgment thereof.

"Third. The judgment or order of the court on the application or petition for proceedings is likewise void. (a) Because there is no description in the judgment or order, ordering the partition and appointing partitioners. (b) The partitioners were wholly unable to partition the land from the order of the court, and were necessarily required to make independent investigations as to its locality, and this they were * * * without authority to do.

"Fourth. The order of the court confirming or approving the partition of the com-

missioners is void. (a) Because the map or plat did not become a part of the record of the probate proceedings, and, without that, the whole matter of partition and division of the property is unintelligible. (b) Because the judgment of the court does not undertake to divest the title, and invest it respectively as required by statute. (c) Because there was nothing in the record to put a purchaser or occupant upon notice.

"Fifth. The judgment is void, and the entire partition proceedings are void. (a) Because there does not appear to have been any pending administration. (b) Because, if there was, it does not appear from the judgment or the record or anything offered in evidence that the heirs set out in the petition of the administrator for the partition were ever cited as required by law. (c) Because there does not appear from the records or proceedings or the evidence offered that the court instructed or directed the issuance of the writs of partition to the commissioners.

"Sixth. If it should be held that the partition proceedings were regular and valid, nevertheless the judgment of the court is erroneous, because the commissioners in making the partition set off to W. W. McNeill in fee simple the premises and property involved and claimed by Mrs. Fagan, and it appears that she and those under whom she claims had acquired by mesne conveyance his interest therein, and that the plaintiffs have no right or title thereto.

"Seventh. The jury found, on a proper submission by the court: That Polly Parnell (through whom Mrs. Fagan claims title) built a three-room house on the premises, inclosed it by fence, sunk a storm cellar and well, and went into the possession thereof October 1, 1893; that she remained in the possession from that time to 1901; that Mrs. Fagan purchased the property from Mrs. Parnell (admittedly) July 2, 1901, paid her \$500 in cash therefor, and believed that she was acquiring the title in fee simple to the same, without any notice whatever that plaintiffs were making any adverse claim thereto; that subsequently she made a contract with the ice company, by which she was to convey the lot and adjoining one to the company upon the payment to her of the consideration of \$1,000; that she prepared a deed, was ready to deliver it; that the company failed to pay her, though it had constructed valuable improvements on the property in the meantime, and turned back the improvements and the possession to her, all of which is disclosed in the findings of the jury 9 to 12, inclusive.

"Eighth. The court erred in not rendering a judgment for the defendants on the findings of fact, as found by the jury and by the court."

Appellants' first assignment was disregarded on the first submission for the reasons given in the opinion then filed. By the amended brief the matter constituting the first assignment in the record, as above quoted, is submitted in eight parts, designated, respectively: First assignment of error, second, third, fourth, fifth, sixth, seventh, and eighth subdivisions of the first assignment of error. Each of these is followed by propositions, statements, and authorities, as though they constituted separate assignments of error. In dividing the assignment of error, appellants seem to have made each ground of error therein, as above numbered, the basis for one of their subdivisions, thus presenting eight assignments of error in the one. Most of these subdivisions, it will be seen, are not in the form of an assignment of error, in that they do not complain of any ruling of the court, but rather are in the nature of propositions of law. We have concluded that none of these matters can be considered by us. The difficulty in appellants' way appears to be that the first assignment of error filed below is a comprehensive attack on the judgment because of numerous erroneous rulings made during progress of the trial, rather than an attack upon any particular ruling itself. We know of no authority to subdivide an assignment of error to avoid multiplicity, even if by so doing good assignments were presented in the brief, for obviously the assignments thus presented would not be copies of the assignments filed below, as required by the rules. The primary purpose of an assignment is to point out the particular ruling of the court complained of, and obviously an assignment of error that the court erred in rendering a certain judgment because he had previously erred in a half dozen rulings on evidence and in as many charges given and refused, is not specification of error at all. So that whether we treat appellants' eight subdivisions of assignment No. 1 as constituting a single assignment, as filed below, or whether we treat them as separate assignments, as presented in the brief, we are yet unable to consider them. They are therefore stricken out and disregarded.

The other assignments of error were disposed of in our opinion already referred to, and for the reasons there given are overruled.

CONNER, Chief Justice, inclines to the view that, irrespective of the insufficiency of the assignments of error, and as matter apparent of record, appellant Maggie Fagan was entitled to the value of her improvements in good faith, as shown in the verdict.

The judgment of the district court is affirmed.

1. PLEADING (§ 280*)—ANSWER—"SUPPLEMENTAL ANSWER."

The office of a supplemental answer is, not to supply matter which should have formed a part of the original answer, but is restricted to replies to what may be embraced in the supplemental petition, and it cannot be made to serve the purpose of aiding a defective statement in the original answer, or to add any new matter only available against the cause of action stated in the original petition.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 842-846; Dec. Dig. § 280.*]

For other definitions, see Words and Phrases, vol. 8, p. 6798.]

2. VENDOR AND PURCHASER (§ 308*)—ACTION FOR PURCHASE PRICE—DEFENSES.

A purchaser may defeat the collection of the purchase money by showing the existence of a superior outstanding title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 877-899; Dec. Dig. § 308.*]

3. VENDOR AND PURCHASER (§ 315*)—ACTION FOR PURCHASE PRICE—DEFENSES—BURDEN OF PROOF.

Where a purchaser holds under an executed contract of conveyance, to defeat the collection of the price, he must show with reasonable certainty that there has been a total or partial failure of title, that there is danger of eviction, and such facts as will prima facie repel the presumption that, at the time of the purchase, he knew and intended to assume the risk of the defect.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 928, 928½; Dec. Dig. § 315.*]

4. VENDOR AND PURCHASER (§ 315*)—ACTION FOR PURCHASE PRICE—DEFENSES—BURDEN OF PROOF.

A conveyance of land to the purchaser, who gave a note for the price of the land, title to which was warranted by the vendor, amounts to an executed contract, within the rule that a purchaser holding under an executed contract must show a failure of title and a danger of eviction, and that he did not know and assume the risk of the defect in the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 928, 928½; Dec. Dig. § 315.*]

5. VENDOR AND PURCHASER (§ 314*)—ACTION FOR PURCHASE PRICE—DEFENSES—PLEADING.

A purchaser in an executed contract of conveyance, who merely alleges that the county records do not show title in the vendor, without alleging any outstanding title or denying that the vendor had a good title, and without indicating any danger of eviction, does not allege facts sufficient to defeat the collection of the price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 922; Dec. Dig. § 314.*]

6. PLEADING (§ 228*)—EXCEPTION—EFFECT OF JUDGMENT SUSTAINING EXCEPTION.

A judgment sustaining an exception to a pleading should be construed as going no further than the exception itself.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 590; Dec. Dig. § 228.*]

Appeal from District Court, Cass County; P. A. Turner, Judge.

HODGES, J. On the 9th day of January, 1909, the appellee filed this suit against the appellant to recover the sum of \$1,500 due on a promissory note executed by the appellant as a part of the purchase money of certain described tracts of land theretofore conveyed to him by the appellee. The petition sought a foreclosure of the vendor's lien on the lands conveyed, as well as a personal judgment. The appellant answered by a general demurrer, general denial, and, among other special defenses, the following: "And further specially answering the plaintiff's petition and cause of action, says that the note sued on herein was executed by defendant to plaintiff in part consideration for the purchase money for the lands described in plaintiff's petition, and that plaintiff warranted the title to said lands, and agreed to furnish this defendant with abstracts of title to said lands showing a complete and perfect record title to all of said lands in the plaintiff; but, to the contrary, said abstracts, as well as the records of Cass county, Tex., show that plaintiff did not have or own a complete and perfect title to said lands which he agreed to convey to this defendant, and that the title to said lands has failed, and that therefore the consideration for the execution and delivery of said note herein sued on to the plaintiff by this defendant has wholly failed, and plaintiff is not entitled to recover thereon against this defendant." The appellee filed a supplemental petition in reply to the appellant's answer, in which he "excepts specially to that portion of defendant's answer wherein the defendant avers that the title to said lands has failed. In that defendant fails to aver in what way the title had failed and in whom, if any one, the outstanding title is vested." Other matters of fact were also pleaded, not necessary here to notice. This exception was sustained by the court, and thereafter the appellant filed what is termed his "First Supplemental Answer," which sets up substantially the following defenses:—(1) That the land was originally conveyed to Jane Ritchie in 1842, and there was nothing of record to show that she had conveyed any part of the land to any one, and the record did not show who were her heirs. (2) That the records of Cass county show that William Ritchie and wife conveyed 588 acres of the Jane Ritchie survey, beginning at a designated point; but there was nothing to show that the 95 acres involved in this suit was a part of that land. Also, that the deed from Ritchie and wife was irregular and void because the certificate of the officer

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

failed to show that the parties were known to him, or their identity proved to the officer. (3) Because the abstract of title and the records of Cass county failed to show any conveyance from J. B. McReynolds to A. B. Hinckle and wife, or any other person. (4) Because the abstract of title and the records of Cass county show that Hinckle and wife attempted to authorize one McReynolds by power of attorney to convey the land, and that this is void because a married woman cannot convey land by power of attorney. (5) Because it is shown by the abstract of title and the records of Cass county that, in the conveyance of the land by J. L. White to Lee Smith in 1884, it appears that there were two vendor's lien notes, each for the sum of \$417.75, which do not appear to have been paid. (6) That the records show, in the conveyance from L. C. Smith to J. L. Endsley in 1900, that there is a vendor's lien note for \$800. (7) Because the abstract of title and the records show that in the conveyance from J. L. Endsley and wife to B. J. and M. D. Dodson, December, 1901, the conveyance recites a vendor's lien for two purchase-money notes which do not appear from the records to be paid. (8) That the records do not show that J. M. McReynolds ever conveyed the land to any one. In reply to this, the appellee filed his second supplemental petition, in which he renewed his special exceptions to the amended original answer, and further specially excepted to this additional pleading for the following reasons: (1) Because it was an attempt to plead an outstanding title to the lands in controversy by a supplemental answer, and not as an answer to the original petition; (2) because it attempts to plead that the title to 95 acres of the Jane Ritchie survey is outstanding as set out in the various paragraphs mentioned, but nowhere alleges in whom the title is outstanding, or in what particular the title has failed; (3) because it shows no defense to the cause of action. The court sustained the exceptions. The case was tried upon the remaining pleadings, resulting in a judgment for the appellee.

The complaint is that the court erred in sustaining appellee's special and general demurrers to the appellant's amended and supplemental answers. The first paragraph of the appellant's special answer sets up the fact that at the time he agreed to purchase the land he was ignorant of the appellee's title, but was assured by the latter that he owned a complete and perfect record title and would at once furnish appellant a full and complete abstract showing complete record title, certified to by certain named attorneys. He charges that appellee had failed to do this, but had furnished him an abstract not certified to, and one which showed that he did not have a good title to the lands conveyed. In the second paragraph of the special answer appears the lan-

guage quoted, a portion of which was excepted to. It is evidently the latter part of the second paragraph to which the exception is directed—that portion which avers that the title had failed. It is not clear, from the peculiar construction of the sentence as it appears in the record, whether appellant intended to allege a failure of title, or that the records and abstract show a failure of title. It seems that counsel for appellee, and the court, construed the language used as an averment of the failure of title, and so treated it in their exception and in the judgment entered thereon. In either event, we think the court properly sustained the exception. If we regard the instrument denominated the "First Supplemental Answer" as a supplemental answer, and as containing allegations of new matter not embraced in the original answer, then it was properly stricken out by the court on objection made. The office of a supplemental answer is not to supply matter which should have formed a part of the original answer, but is restricted to replies to what may have been embraced in the supplemental petition of the plaintiff. It cannot be made to serve the purpose of aiding the defective statement of the defenses set up in the original answer, or to add new matter which could only be available against the cause of action as stated in the original petition. Townes on Pleading, 306-309.

This instrument begins as follows: "Now comes the defendant, Tom K. Blewitt, with leave of the court first had and obtained, and files this his first supplemental answer in reply to the plaintiff's special exception to defendant's first amended original answer filed herein on the 3d day of February, 1909, and says," etc. And then proceeds with the specific allegations hereinbefore mentioned. Nowhere else is there any language employed that would convey the impression that this pleading was intended as a reply to the allegations contained in the plaintiff's supplemental petition; nor are the facts stated such as might be construed as having been intended for that purpose. They could in no sense be regarded as replying to the averments of fact set up in the plaintiff's first supplemental pleading. There could be no occasion for the appellant to reply to the legal objections stated in the appellee's exception, and, since this instrument does not purport to do more, we must regard it either as a trial amendment intended to meet the objections urged in the first exception, or as a second amended original answer intended to supersede the first amended original answer. To give it the latter character would place the appellant in the attitude of having abandoned the defenses contained in the preceding answer, including his general denial, and the grounds upon which he sought affirmative relief. If it be treated as a trial amendment, which is the more liberal view, then it must be regarded as intended to meet

the objections urged in the special exception and by the court sustained. It is immaterial whether it be considered an effort to plead a failure of title, or to state that the records show such a failure, as, in either event, it would be stating matter insufficient as a defense in this suit. The right of the vendee, in sales of real estate, to defeat the collection of the purchase money by showing the existence of a superior outstanding title, is sustained upon principles of equity. The courts proceed upon the ground that it would be inequitable to compel the vendee to pay the purchase money for land to which he was obtaining no title. *Land & Live Stock Co. v. North*, 92 Tex. 75, 45 S. W. 995. The rule seems to be that, where the vendee holds under an executed contract of conveyance, he should show with reasonable certainty that there has been a failure of title in whole or in part, that there was danger of eviction, and also such facts as would prima facie repel the presumption that at the time of purchase he knew and intended to assume the risk of the defect. *Cooper v. Singleton*, 19 Tex. 261, 70 Am. Dec. 333; *Luckie v. McGlasson*, 22 Tex. 283; *Tarpley v. Poage*, 2 Tex. 139; *Haralson v. Langford*, 66 Tex. 113, 18 S. W. 339; *Ogburn v. Whitlow*, 80 Tex. 239, 15 S. W. 807; *Groesbeck v. Harris*, 82 Tex. 416, 19 S. W. 850; *Woodward v. Rodgers*, 20 Tex. 176. The conveyance under which the appellant acquired the land in controversy is an "executed contract" within the meaning of this rule, for the purpose of determining what defenses he may set up in an action to recover the purchase money. *Ogburn v. Whitlow*, 80 Tex. 239, 15 S. W. 807; *Carey v. Starr*, 93 Tex. 515, 56 S. W. 325; *Brown v. Montgomery*, 89 Tex. 250, 34 S. W. 443. Nowhere does the appellant allege that there is an outstanding title, nor does he deny that the appellee had a good and perfect title. Neither does he attempt to aver any facts which would indicate that he is in danger of eviction. Stating what the records of Cass county show with reference to the appellee's title is not the legal equivalent of a positive averment that he has no title, or that his title is defective or imperfect. The record may furnish evidence of those facts, from which a jury might conclude that the title had failed, or was bad; but such evidence, when offered, would not be conclusive. The appellee might have a perfect title, and still the records fail to show it. The pleading of what the records show is therefore merely a statement of what might be received as evidence, and not the averment of the essential facts necessary to be proved by evidence.

We do not wish to be understood as holding that, where the vendor contracted, as one of the conditions upon which payment was to be made, that he would furnish to

the vendee a complete and perfect record title to the property, a failure to do so would not be a good defense. That question is not here involved. That part of the appellant's answer which sets up the failure to furnish an abstract showing a good and perfect title was not disturbed by the exceptions sustained. The judgment of the court sustaining the exception should be construed as going no further than the exception itself. If appellant was deprived of the privilege of showing a failure to perform this alleged promise, by the exclusion of germane testimony offered for that purpose, the error, if any, was in the refusal to permit the introduction of the testimony, and not in sustaining the exceptions mentioned. No complaint has been made of any such rulings.

We do not think the court erred in overruling the application for a continuance.

The judgment of the district court is therefore affirmed.

BRAZOS OIL & LIGHT CO. v. CRAWFORD.

(Court of Civil Appeals of Texas. Nov. 6, 1909.)

MASTER AND SERVANT (§ 129*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Plaintiff, a night shoveler in defendant's seedhouse, slipped just after entering and stepped into a conveyor box and was injured. Negligence was alleged, in that the conveyor had been lengthened without notice to him, and that additional lights had not been furnished, as promised. Plaintiff knew, when he entered the building, that the conveyor box extended beyond the point where he stepped, prior to its extension, and the box and conveyor were plainly distinguishable by the available light. *Held*, that defendant's failure to provide the light promised and to warn plaintiff of the extension of the conveyor was not the proximate cause of the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 129.*]

Appeal from District Court, Knox County; Chas. E. Coombes, Judge.

Action by Charles W. Crawford, by his next friend, against the Brazos Oil & Light Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Cunningham & Oliver, for appellant. H. G. McConnell and G. B. McGuire, for appellee.

CONNER, C. J. The following statement by appellant of the nature and result of this suit is sufficiently accurate to an understanding of this opinion, and it is therefore adopted, viz.: "The appellee, Charles W. Crawford, a minor 19 years of age, by his next friend, Archie Crawford, brought this suit in the district court of Knox county against appellant, Brazos Oil & Light Company, for damages for personal injuries sustained by him while working for the appellant in appellant's oil mill operated in Knox county. The

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

house under the supervision and direction of defendant's foreman; that he worked at night and shoveled seed into a conveyor, which was composed of a trough and a spiral screw working in the trough, which conveyed cotton seed from one seedhouse to another. He alleges that he was inexperienced in that kind of work, that there was no light in the seedroom where he was injured, that a short while before the injuries he had complained to the foreman about the insufficiency of light, and that the foreman had agreed to put in good and sufficient lights. He further alleges that when he begun work the spiral screw extended into the seedroom only about 18 inches, and that it entered the room near a hole in the south end of the building which was used for a door. He alleges: That on Saturday the 9th of November, 1907, he did not work during that day or night; that on the 9th of said November, appellant put a door in the building where the hole was before and extended the shaft and metal flanges further into the building, a distance of about 22 feet, without appellee's knowledge; that on the night of the 10th of November, 1907, he was directed to go to work in the seedroom and shovel seed as he had done before; that he took a lantern and went in the room at the door to begin work; that he hung his lantern on a nail which was partly driven in the wall on the inside over the door, and then undertook to close the door which he had entered, which door opened outside of the building, and, in reaching out to pull the door to its place when shut, he stepped with his foot upon some loose cotton seed or other substances on the floor, which caused his foot to slide, and caused said minor to fall back against the wooden trough, located as aforesaid, and, seeing that he was in danger of falling upon said dangerous shaft and flanges, tried to extricate himself therefrom, but, being overbalanced and without sufficient light, was unable to do so, and, in stepping with his right foot to where he thought was a place of safety, came with his foot in contact with said shaft and metal flanges at a point a little more than two feet from the place where said shaft and flanges entered said room at the south end as aforesaid, by reason of which his leg was caught and torn and mangled and afterwards amputated. The negligence alleged was a failure to furnish sufficient light to enable appellee to perform his duties in safety, and a failure of appellant to cause said minor to be notified of the lengthening and extending, of said trough and metal flanges. Appellee sued for \$20,482. The case was tried and resulted in a verdict for appellee for \$4,940. A motion for a new trial was properly made and overruled by the court. Appellant gave no

refusing to give to the jury, as requested, a peremptory instruction to find in appellant's favor. The evidence supports the allegations of appellee's petition as above stated, save that, as we think, it was not shown that appellant's negligence in failing to warn appellee of the extension of the cotton seed conveyor, or in failing to provide sufficient light, as promised, was the proximate cause of the unfortunate result. Appellee alleges that, in the effort to regain his balance, after having slipped on the loose cotton seed, he stepped with his right foot "to where he thought was a place of safety," and thus came in contact with the revolving blades of the conveyor. Had this allegation been supported by the proof, appellant's liability could not be doubted; but appellee, in testifying on this subject, stated on his examination in chief that: "When I first stepped in at the door, I turned around and hung the lantern on a nail over the door, and caught hold of the door, and started to pull it to and the seed rolled under my feet, and I fell backwards and threw my foot back and set it into the conveyor. I struck the conveyor with my foot about a couple of feet from the wall, I suppose. There was a hanger in the conveyor about a foot and a half from the wall, I guess. Prior to that, and on the last time that I was in the seedhouse before that, the conveyor did not extend back to that hanger. The place that my foot got caught in the conveyor was north of that hanger. I would not have got hurt if the new extension had not been put on the conveyor. I said when I got hurt that I hung the lantern up on the nail, and went to pull the door to, and the seed kinder rolled under my feet, and I staggered back, and I went to set my right foot back to catch to keep from falling, and the conveyor caught my heel." On cross-examination he testified that: "My work in the north seedhouse was that of shoveling seed into the conveyor. I had worked at that character of work in the south seedhouse for about two weeks in connection with my stepbrother. I learned that it was dangerous to put my foot into the conveyor, but I never thought much about it. * * * I had given notice, as I said, for additional lights. One of the nights that I made this request was on Friday night before, I believe. I made this request of Mr. Collins. I told him that I wanted them to put some lights in there. I would not have gone in there and worked on that occasion without they had promised me to put in lights. On that night I just worked by lantern on the part of the night that I worked in there. At that time there was just about 18 inches of this iron shaft extending into the building. The box extended on back a good little piece; but there was no auger

in it, at least there was none running. If there was any in there, it was not running. That little seedhouse is a room about 30 by 40 feet. The house was very well filled up with seed, and just left a space at the south end where we stood to throw seed into the conveyor. We had plenty of room in there as far as that was concerned. On the first night that I worked in there, I hung the lantern over the hole. There was not any door in there then. * * * When I hung the lantern up over the door, I suppose I hung it up about 6½ feet high. The way I hung it I could see the conveyor. * * * On the night that I got injured, I went down to the mill and commenced work about 7 o'clock, and the first hour that I worked was in the south seedhouse, and about 10 o'clock at night my stepbrother told me to go and work in the north seedhouse. When I went to the north seedhouse, I don't remember whether the door was open or not. * * * I knew that there were no lights in the house when I went to work in there, and I went and got the lantern and went to work. * * * On the night that I got hurt, I had not worked in the seedhouse any at all. I had just walked in and hung the lantern up over the door. I had not turned to pull the door to. I just reached for the door. I hung the lantern up over the door and turned around facing south. I reached out to get the door, and my feet slipped on the cotton seed. I never fell down at all. When the conveyor caught my foot, I just kinder set down on the box, I did not fall before I put my foot in the conveyor. I staggered backwards and just set my foot back to keep from falling, and when I got my foot caught I just set down. I was trying to catch and keep from falling, and I stepped and put my foot into the conveyor."

H. V. McElwreath, the night foreman, testified: "Just outside of the door, and a little north of it, hangs an electric light near the north wall of the seedhouse and about 20 feet from the south door, where the boy was hurt. If the door to this seedroom was open, the light from this electric light would reflect inside the north seedroom. The electric light was directly in line with the west side of the door. That electric light is either 10 or 15 candle power. The lantern where I saw it sitting there was right close to the door and was also right close to the conveyor. The lantern was hung about 5 feet high. The light from the lantern shone right on the conveyor so it could be seen, and made the conveyor very plain."

There is no other evidence that throws any light on the subject, and that quoted we think merely shows that appellee involuntarily stepped into the conveyor without the thought in mind that in doing so he was stepping into a place of safety. Appellee knew, at the time he entered the building, that the box in which the conveyor operated

extended beyond the point where he stepped, for, in addition to what we have already quoted from the testimony, the brother of appellee, who brought the suit as next friend, testified that: "Prior to the time of the injury, the screw part of the conveyor extended into the north seedroom about 18 inches, and the box part of it extended 6 or 7 feet. I have been in that seedroom a number of times, and have seen these conditions." Appellee, as he testified, had worked in the north seedroom on prior occasions, and therefore must have known, as is plainly indicated by his own testimony, the location of the box in which the conveyor operated. It is not to be presumed therefore that the box, rather than the floor beside it, would have been chosen as a safe place to step had appellee had time to deliberate. In addition to the testimony of the night foreman, which indicates that the box and conveyor were plainly distinguishable by the light of the lantern and of the electric light near the door, which testimony is uncontradicted, appellee himself testified, as we have before quoted, that where he hung the lantern he could see the conveyor. Then, what is there in the evidence that shows that appellee would not have made the instinctive effort he did to retrieve his position, or would have placed his foot otherwise than as he did, had he been warned of the extension of the conveyor, or had the additional lights been furnished as promised? In other words, what causal connection exists between the negligence alleged and the injury?

We have been unable to see any, and to so establish was one of the essential elements of appellee's case. *T. & P. Ry. Co. v. Shoemaker*, 98 Tex. 456, 84 S. W. 1049; *Seale v. G. & S. F. Ry. Co.*, 65 Tex. 274, 57 Am. Rep. 602; *F. W. & R. G. Ry. Co. v. Neely* (Civ. App.) 60 S. W. 282; *Neely v. Ft. Worth & R. G. Ry. Co.*, 96 Tex. 274, 72 S. W. 159; 1 *Thompson on Negligence*, § 43 et seq. No complaint is made because of the presence, character, or situation of the cotton seed over which appellee slipped, or that a want of sufficient light in any degree contributed to the fact that his foot did slip over the rolling seed. The rolling seed and the immediate result were evidently among the risks of appellee's employment, for which appellant is not liable. Nor is it alleged that in extending the conveyor appellant was guilty of negligence. The averment goes no farther than that appellant was negligent in failing to warn appellee of the fact of extension. Therefore it may be true, as he testified, that appellee would not have been injured had the conveyor not been extended; but this is not enough, under appellee's pleading, to fix liability. It should have been made to further appear that the injury would not have happened had light been furnished as promised, or had appellee been warned or notified of the added conveyor. In other

words, as before stated, it must affirmatively appear that the particular negligence alleged caused the injury; whereas, as presented in the record before us, it seems undisputed that the concurring causes—those without which appellee would not have been injured—were happenings not made grounds of recovery.

It follows that appellee has failed to show a right of recovery herein, and, inasmuch as appellee was afforded full opportunity to testify and fully develop his case, we conclude that the judgment should be reversed, and here rendered for appellant, and it will be so ordered; other assignments being disregarded as immaterial, in view of our conclusion.

SMITH v. GUNN.

(Court of Civil Appeals of Texas. Nov. 3, 1909.
Rehearing Denied Dec. 1, 1909.)

1. CONTRACTS (§ 300*)—BUILDING CONTRACTS—BREACH BY CONTRACTOR—LIABILITY.

A contractor failing to complete a building within the agreed time cannot escape liability therefor by showing that he notified the owner that he would finish the building within a short time, on receiving notice that the owner desired to use or rent the building, and that the owner negligently failed to give any notice.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1372-1381; Dec. Dig. § 300.*]

2. DAMAGES (§ 9*)—NOMINAL DAMAGES—BREACH OF CONTRACT.

A contractor, sued for failing to complete a building within the agreed time, is liable for nominal damages and costs, though he shows that during the inexcusable delay the building would not have had a use or rental value to the owner.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 7-15; Dec. Dig. § 9.*]

3. CONTRACTS (§ 349*)—BREACH OF CONTRACT—EVIDENCE.

Where an owner sued the contractor for the rental value of a building while the contractor delayed its completion, in violation of the contract fixing the time for the completion of the work, it was error to require the owner to testify that he went out of business, and that, after he did so, he made no effort to rent another building to continue such business.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 349.*]

4. CONTRACTS (§ 349*)—BREACH OF CONTRACT—EVIDENCE.

In an action for the rental value of a building during the time the contractor delayed its construction beyond the time fixed, any testimony bearing on the question of rental value is admissible.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 349.*]

Appeal from Williamson County Court; T. J. Lawhon, Judge.

Action by W. G. Smith against A. A. Gunn. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

W. A. Barlow, for appellant. Stanton Allen and Wilcox & Graves, for appellee.

KEY, J. W. G. Smith brought this suit against A. A. Gunn seeking to recover damages for alleged delay in completing a certain building, which it was alleged Gunn had contracted and agreed to complete and deliver within 90 days from the date of the contract. The plaintiff alleged that the building was not completed until 9½ months after the time agreed upon for its completion. The defendant's answer included a general demurrer, several special exceptions, a general denial, and a special plea setting up certain matters, which we deem it unnecessary to set out in detail. The plaintiff filed a first supplemental petition, and the defendant filed a first supplemental answer, the particulars of which need not be here stated. There was a jury trial, which resulted in a verdict and judgment for the defendant, and the plaintiff has appealed. After the plaintiff filed his motion for a new trial, and before it was overruled, the defendant filed what was termed a "remitter" of so much of the judgment as taxed the costs against the plaintiff, and asked that the costs be taxed against the defendant. The court granted that motion, and then overruled the plaintiff's motion for a new trial.

We have neither the time nor disposition to discuss in detail the numerous assignments of error presented in appellant's brief, and shall confine the discussion, in the main, to the errors which require a reversal of the judgment. The defendant urged, and the trial court approved, a ground of defense which has no support in law and no place in the case. The defense referred to is indicated by the following paragraph of the court's charge, which is assigned as error: "If you find from the evidence that the defendant delayed the construction and delivery of said building, and you find that such delay, if any, is not excused by your findings under instructions above given you, and you further find that the defendant informed plaintiff at the beginning or during such delay, if any, that he (defendant) would deliver to plaintiff said building within a short period of time upon notice by plaintiff to defendant that plaintiff desired to use or rent said building, and you further find that defendant could and would have delivered said building within such a period of time upon such notice, and you further find that plaintiff, in the exercise of ordinary care, to prevent the accrual of damage to him—that is, such care as an ordinarily careful and prudent person would exercise under the same or similar circumstances—should have given such notice to defendant, if he desired and could use or rent same, and you further find that plaintiff did not give such notice, then you are instructed that you will not find for plaintiff any damages, which you may find that plaintiff could have prevented,

if you find he could have and should have prevented same, by giving such notice to defendant." When analyzed, it will be seen that this charge embraces the proposition that, although the defendant may have breached his contract, nevertheless the plaintiff could not recover damages on account of such breach if the defendant notified the plaintiff that he would finish and deliver the building within a short period of time, upon notice that the plaintiff desired to use or rent the building, and that the plaintiff was guilty of negligence in not giving such notice. If the defendant breached the contract by failure to complete the building within the time agreed upon, he could not lay any duty upon the plaintiff, the nonperformance of which would constitute negligence, by notifying the plaintiff that he would complete and deliver the building thereafter, upon condition that plaintiff would do something dictated by the defendant. Under the circumstances referred to, if they existed, no duty rested upon the plaintiff to give the defendant the notice specified, and therefore the plaintiff could not be charged with negligence upon failing to give such notice. There is no rule of law or equity that will permit a wrongdoer to dictate the terms upon which he will repair the wrong or diminish its injurious effect, and then assert as a defense the failure of the injured party to comply with the terms dictated by such wrongdoer. The doctrine of contributory negligence has no application to this case, nor does this belong to the class of cases where a plaintiff is required to exercise care to prevent or diminish injury. Hence we hold that the trial court committed error in giving countenance to the defense referred to, in admitting testimony in support of that defense, and in giving the charge above set out.

There was also error committed in that portion of the court's charge which instructed the jury that if there was inexcusable delay in the construction and delivery of the building, but that during the time of such delay the building would not have had a use or rental value to the plaintiff, then to return a verdict for the defendant. Under the circumstances referred to, the plaintiff would have been entitled to a verdict and judgment for nominal damages and costs, and for that reason it was error to give such instruction. Whether or not that error was cured by the alleged remittitur, and the decision of the court in adjudging the costs against the defendant, it is not necessary to decide, as that question is not likely to arise upon another trial. However, it would seem that when, upon a given state of facts a litigant is entitled to a judgment in his favor on the merits of the case, the error in rendering judgment on the merits for his adversary is not entirely cured by taxing the costs against such adversary, even though the complain-

ing litigant was only entitled to recover a nominal sum.

We also hold that error was committed in requiring the plaintiff, over his objection, to state to the jury when he went out of the grocery business, and that after he went out of that business he made no effort to rent another building to continue such business in. The plaintiff sued for what would have been the rental value of the building during the time of the delay in its construction, and not for what it would have been worth to him for use in his business, and therefore the testimony referred to was immaterial.

We overrule the various assignments which complain of the action of the court in admitting certain testimony bearing upon the question of rental value of the building. Some of it consisted of circumstances only, which, considered separately, may have been of but little probative force; but all of the testimony referred to had a material bearing on the question of rental value, and therefore was admissible. 6 Cyc. 114, and cases there cited; 13 Cyc. 158, and cases there cited.

All the assignments of error presenting other questions have been considered and are overruled.

For the errors pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

MYERS v. MOODY.

(Court of Civil Appeals of Texas. Nov. 17, 1909. Rehearing Denied Dec. 8, 1909.)

1. EVIDENCE (§ 342*) — PLATS — 'OFFICIAL PLATS—ADMISSIBILITY.

Rev. St. 1895, art. 62, provides that all records, surveys, maps, papers, and documents pertaining to lands of the late republic shall constitute a part of the archives of the General Land Office. Article 2306 provides for the admission of copies of records of all public officers, certified, etc., together with copies of all records in the land office, and article 2308 requires a record of all surveys by the county surveyor with plats thereof, certified copies of which may be used as evidence. *Held*, that sketches and plats made in the General Land Office from maps of H. county were admissible in a boundary line dispute concerning land located therein, though the maps were not made contemporaneously with the date of location of the different surveys.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1304; Dec. Dig. § 342.*]

2. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where there was no dispute as to the location of the south boundary of a survey when pointed out to a surveyor, the admission of the surveyor's evidence that the line was pointed out to him by two persons designated, without evidence that either of such persons knew where the line was on the ground, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4163; Dec. Dig. § 1051.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

An objection to the admission of evidence is unavailing, where another witness is permitted to give the same testimony without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4171; Dec. Dig. § 1052.*]

4. BOUNDARIES (§ 35*)—EVIDENCE—LOCATION AND LINE.

In a boundary line dispute, a witness was properly allowed to state the fact of having run the line at a certain place and time, whether he knew where the original line was run or not.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 158; Dec. Dig. § 35.*]

5. BOUNDARIES (§ 35*)—ASCERTAINMENT OF LINES—EVIDENCE.

In a boundary line dispute, a witness was properly permitted to testify that G., a surveyor, was with him on an occasion when witness found a marked boundary line concerning which he testified.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 157, 158; Dec. Dig. § 35.*]

6. BOUNDARIES (§ 37*) — ESTABLISHMENT — EVIDENCE.

Evidence held to sustain a judgment establishing a boundary line between certain surveys.

Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 184-194; Dec. Dig. § 37.*]

Appeal from District Court, Harris County, Norman G. Kittrell, Judge.

Action by L. B. Moody against W. D. Myers. Judgment for plaintiff, and defendant appeals. Affirmed.

E. P. & Otis K. Hamblen, for appellant. L. B. Moody, for appellee.

FLY, J. This is a suit instituted by appellee, and involves the boundary between his land on the south and appellant's land on the north. A large number of parties were brought into the suit; but a severance was granted, and the case was tried as one entirely separate and distinct from the others, and judgment was rendered fixing the boundary as desired by appellee. The contention of appellee, which was sustained by the court and supported by the evidence, was that the south line of his land, known as the "Culp tract," is situated 883 varas south of where appellant claims that it is situated. The beginning point of the Reeves survey, of which appellant claims the west half, called for the northeast corner of the Wilson survey, and there was a call for the southwest corner of the Reeves survey as being on the north line of the Wilson league. The contest was therefore to show the position of the north line of the Wilson league, to which the Reeves was tied by its field notes. The evidence satisfactorily showed that line to be where it was claimed to be by appellee.

The first assignment of error assails the action of the court in admitting in evidence certain sketches and plats made in the General Land Office from maps of Harris coun-

ty; the objection urged being that the maps were not made contemporaneously with the date of locations of the different surveys. We are not aware of any law requiring maps of counties to be made contemporaneously with the making of surveys therein in order to be authentic archives of the General Land Office. To sustain such a proposition would involve the construction and manufacture of a multiplicity of maps. The plats were admissible in evidence. Rev. St. 1895, arts. 62, 2306, 2308.

The second assignment of error complains of the admission in evidence of statements of Stimson, a surveyor, that the south line of the Rankin survey had been pointed out to him by Dunks and Singleton; the grounds of objection being that there was no evidence that either knew where the south line of the Rankin survey was on the ground, and that any statement they made would be self-serving, as they owned the north half, and there was a dispute as to the north and south halves of the Rankin survey between Judge Tod and parties living about him. The bill of exception shows that there was no dispute between Tod and others at the time the south line of the Rankin survey was pointed out to the surveyor by Dunks and Singleton. The objections seem to attack the weight of the evidence, rather than its admissibility. Another surveyor was permitted, without objection on the part of appellant, to state that Singleton and another man, thought to be Dunks, pointed out the south line of the Rankin survey to him, and therefore appellant lost any right he may have had to complain of the admission of the testimony of Stimson.

The third assignment of error objects to testimony of the witness Lynch that he and Jim Minter, the county surveyor of Liberty county, had, in 1873 or 1874, run the north and south lines of the Whitlock survey, which lies west of the Reeves and north of the Wilson survey, and south of the Rankin survey, and that the line now established as the south line of the Rankin survey was the north line of the Whitlock survey. The grounds of objection to the evidence were that it was not shown that either Lynch or Minter knew where those lines were originally located, and the evidence was immaterial and hearsay. It was permissible for the witness to state the fact of having run the line at a certain place, at a certain time, whether he knew where the original line was run or not, and the statement of that fact could not be hearsay. It was material because some of the owners of the Rankin survey had pointed out the line as being the original south line of the Rankin.

In the same assignment of error, there is an objection to the testimony of Lynch that, some time between 1866 and 1870, he, in company with J. J. Gillespie, John M. Sims, and

others, surveyed the Reeves tract, that they began at the southwest corner of the Whitlock, and ran out a continuation of the south line of the Whitlock with the Reeves south line, and that it came out about one-half a mile south of the north line established by Polk for the Wilson survey, or, in other words, where appellee now claims that the Wilson north line and the Reeves south line are situated. The ground of objection was that it was not shown that Lynch or his companions knew where the lines of the Wilson survey were located. In the only proposition under the assignment, it is stated "such declarations are never admissible in evidence, unless it is shown that the persons making them were the original surveyors who located the land, or it is otherwise shown that they knew where the lines were originally located." The declarations of no one were sworn to by Lynch, and we are unable to see the applicability or pertinence of the proposition. The Court of Civil Appeals of the First district passed upon the same testimony of the same witness under a like objection, and said: "As to the testimony of Lynch, to which objection was made, it was admissible, since he testified to no more than that the surveyor, Gillespie, was with him when he found the marked line about which he testifies. He relates no declaration of Gillespie, but merely shows how, when, and under what circumstances the witness gained his knowledge." *Hornberger v. Giddings*, 31 Tex. Civ. App. 283, 71 S. W. 989.

The evidence fully supports the judgment of the court. The Rankin survey, which lies north of the Whitlock and part of the Culp surveys, is an older survey than the Whitlock, and the latter is older than the Wilson, which lies south of the Whitlock and the Reeves, of which appellant owns the west half. The Wilson survey was made in 1833 on vacant land lying south of the Whitlock, and the land where the Reeves is now, and north of the Jackson survey. The Wilson survey calls for the northwest corner of the Jackson survey on the San Jacinto river and runs east from that point on the north line of the Jackson, 5,742 varas, for its southeast corner; thence north, 3,496 varas, for corner; thence east to the river, 8,205 varas, to the southwest corner of the Whitlock survey; thence with the meanderings of the river to the place of the beginning. The south line of the Whitlock being the north line of the Wilson it became necessary to establish that line, which was dependent upon the location of the south line of the Rankin, which was an older survey than the Whitlock. Stimson, a surveyor, placed the south line of the Rankin where it was placed in the case of *Hornberger v. Giddings*, hereinbefore referred to. He stated that the line was recognized in the community as the south line of the Rankin, and that up to 1894 it was the only line run there, but that two other lines have been run since then. Several witnesses corroborated

that witness as to the location of the south line of the Rankin survey. The witness Lynch stated that there were ancient marks on that line showing its location in 1874. He had lived near the Rankin and Whitlock surveys since 1860. The field notes of the Whitlock call for a distance of 5,000 varas south from the Rankin south line. When the Whitlock was surveyed, the land south of the Rankin was vacant and unappropriated. Measuring from the southeast corner of the Whitlock, 5,000 varas from the south line of the Rankin as established in this case and in *Hornberger v. Giddings*, a line, upon which ancient landmarks were found in 1874, was run west to the river. That this was the south line of the Whitlock, and necessarily the north line of the Wilson, was shown not only by the marks on the trees in 1874, but by the general reputation in the community. The line as located gives a little less amount of land than the Whitlock was entitled to. To establish it as desired by appellant would reduce its size about 1,000 acres. Stimson testified that the north line of the Wilson as called for in the field notes is 8,205 varas long, and that the line located by him was the same length; but, if the contention of appellant prevailed, it would be 9,300 varas more than it should be. This would result from the bend in the river preventing the line from reaching the river under that distance. Under the claim of appellant, the Wilson tract would have over 300 varas more from north to south than it is entitled to, making an excess of 500 or 600 acres. Following the meanderings of the river, the lines as found by the lower court would more nearly conform to the field notes than they would at any other points. The south line of the Whitlock as claimed by appellee and found by the court was shown to be exactly where it was located in *Hornberger v. Giddings*. Lynch testified: That he and his companions, at some time between 1867 and 1870, started at the southwest corner of the Whitlock, which is on the San Jacinto river, and ran the north line of the Wilson to its full distance south of the Whitlock and the Reeves to the southeast corner of the latter; that they passed through Gum Gully, south of the Reeves, and found a hacked line at that time, and the hacks were old then; that the line so established was about a half a mile south of what is known as the "Polk line," and which is claimed by appellant to be the true boundary between the Reeves and Wilson.

The field notes of appellee call for the north line of the Reeves, and, if it is placed where appellee claims that it should be placed, he will have his full quota of land, and appellant will have his full quantity; but, if placed where appellant claims that it should be located, appellee would have less than his quantity, and the Wilson survey would have more.

The judgment is affirmed.

1. MASTER AND SERVANT (§ 70*)—COMPENSATION—WAGES—CONTRACT—TERMINATION.

Only actual notice of the reduction of an employe's wages by a general reduction of employe's wages, given directly by the employer or indirectly through other employes, would terminate the contract of employment, and there could be no constructive notice of the reduction to the employe, nor was he bound to exercise diligence to learn of a reduction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 86; Dec. Dig. § 70.*]

2. TRIAL (§ 193*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

An instruction which indicated to the jury the court's opinion as to the effect of certain evidence on plaintiff's case was improper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 436-438; Dec. Dig. § 193.*]

3. MASTER AND SERVANT (§ 80*)—COMPENSATION—ACTIONS—INSTRUCTIONS—MISLEADING INSTRUCTIONS.

In an employe's action for the difference between his original salary and the amount which the employer claimed was his salary after it had been reduced by giving notice to all employes of a general reduction in wages, plaintiff claiming that he received no such notice, a requested charge that the old contract of employment controlled until a new one was made, while technically correct, was calculated to mislead on the facts as requiring the formal termination of the old contract and a formal execution of a new contract, when any new contract might have arisen from plaintiff's continuing to work after actual notice of the reduction.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 123; Dec. Dig. § 80.*]

4. MASTER AND SERVANT (§ 70*)—COMPENSATION—WAGES—CONTRACT—MODIFICATION—NOTICE.

While an employe's continuance in the employer's service with notice of a general reduction of wages would show an acceptance thereof, the notice must have informed the employe that his wages had been reduced, and knowledge that the wages of other employes had been reduced would not be sufficient, unless his were included therein.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 86; Dec. Dig. § 70.*]

5. APPEAL AND ERROR (§ 1050*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—PREJUDICIAL EFFECT.

In an employe's action for the difference between his original salary and the amount which the employer claimed was his salary after it had been reduced by a general reduction of employe's wages, where plaintiff claimed that he received no notice of such reduction, error in admitting testimony that defendant would have lost money if wages had not been reduced, because not within the issues which were the fact of a reduction and plaintiff's acceptance thereof, was harmful to plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4154; Dec. Dig. § 1050.*]

6. MASTER AND SERVANT (§ 80*)—COMPENSATION—ACTION—ADMISSION OF EVIDENCE—CONFORMITY TO ISSUES.

In an employe's action for the difference between his original salary and the amount which the employer claimed was his salary after it had been reduced by a general reduction of

whether other mills had reduced the wages of their employes, and as to why employes accepted a reduction in wages, and defendant's purpose in cutting wages—was inadmissible under the issues which were the fact of a reduction in wages and plaintiff's acceptance thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 114; Dec. Dig. § 80.*]

7. MASTER AND SERVANT (§ 80*)—ACTIONS FOR COMPENSATION—ADMISSION OF EVIDENCE.

In an employe's action for the difference between his original salary and the amount which the employer claimed was his salary after it had been reduced by giving notice to employes of a general reduction in wages, of which plaintiff claimed to have received no notice, testimony by defendant's manager of a notice of reduction of wages given at a meeting of employes was admissible as a basis for showing that plaintiff received notice thereof, though not at the meeting.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 116; Dec. Dig. § 80.*]

Appeal from Tyler County Court; A. G. Reid, Judge.

Action by W. G. Pennington against the Thompson Bros. Lumber Company. From a judgment for plaintiff for a less amount than claimed, he appeals. Reversed and remanded.

W. A. Johnson and Joe. W. Thomas, for appellant. Mooney & Mann, for appellee.

FLY, J. Appellant sued appellee in the justice's court for \$195 alleged to be due for labor performed for the company, at the rate of \$65 a month, in running a pump and hauling wood and other fuel. The petition declared on both express and implied contracts. Appellee admitted owing appellant the sum of \$6.10, and tendered that amount into court. The justice of the peace rendered judgment for appellant for that sum, and, on appeal to the county court, the cause was tried by jury, and resulted in a verdict and judgment in favor of appellant for the same sum recovered in the justice's court.

Appellant testified that he had been receiving \$65 a month, and had no notice that there had been a lowering of his wages until May 1, 1908, at which time he was informed that there had been a cut in his wages. He sought to recover the difference between \$65 and \$46.80 for six months. He swore that, had he known that his wages had been lowered, he would not have worked for appellee. The vice president of appellee swore that appellant was working for appellee for the sum of \$65 a month for quite a while; that in October he adopted a new scale of wages, first, a reduction of 20 per cent., and, second, of 10 per cent. One reduction was to take place on November 1, 1907, and the other on December 1, 1907. He did not notify appellant in person of the reduction, but sent out notices to all the men he could requesting

them to meet him and have a talk. About 75 out of 200 of the men met him, and he told them of the reduction in wages intended by him. The point as to notice was a sharply contested one, and yet, in a special charge requested by the appellee and given by the court, the issue was taken from the jury, and they were informed that the contract between appellant and appellee for \$65 was terminated on November 1, 1907. In the absence of notice direct or indirect to appellant of the change made in his wages, there was no termination of the contract between appellant and appellee. The charge was accompanied by an instruction that notice of the declaration of the manager should have been given to appellant, and that, if the jury found that appellant had actual or constructual notice of the declaration of termination of the contract, they should find for appellee. There could be no constructive notice of the change in the wages of the employees under the facts of this case. Notice may have been direct or indirect; that is, given by the appellee itself, or by others to whom the notice was given, but constructive notice could have no place in this case. The court not only bound appellant by constructive notice, which must have been confusing to any jury, but also made it incumbent on appellant to exercise diligence to ascertain that a change in the contract had been made. No such duty rested on him. The old contract of \$65 a month prevailed until it was terminated by both parties, and, in order to create an implied contract that less wages would be given and accepted, it became necessary to show that notice was given by appellee to appellant, directly or indirectly, that his wages had been lowered, and, after receiving such notice, that he had remained in the service of appellee. Only actual notice would meet the demands of the case whether it reached appellant directly or indirectly. If he was told by appellee's manager or any one else conversant with the facts that his wages, together with those of all employees, had been lowered, and after such notice he remained in the service of appellee, the implication would arise that he had accepted the reduction of his wages.

The language of the court, complained of in the second assignment of error, was improper as indicating to the jury the opinion of the court as to the effect of certain evidence on the case of appellant.

The fourth assignment of error complains of the refusal of the court to give a special charge in which it was stated substantially that the old contract would prevail until a new one was made. The charge, while technically correct, was calculated to mislead the jury, because it would seem to require the formal abrogation of the old contract and the formal making of a new one, while, if there was a setting aside of the old contract, it arose from notice to appellant that it had

been abrogated, and, if there was a new contract, it arose from a continuance by appellant in the service of appellee after actual notice of the reduction of his wages proposed by appellee. A charge should have been framed which conformed to the facts of the case.

The charge whose rejection is complained of in the fifth assignment was, so far as it went, a correct proposition of law, and should have been given by the court. In order to bind appellant by the reduction of his wages, he must have had actual notice of the reduction of his wages, and must have accepted the reduction. Of course, acceptance of the reduction would be indicated by his remaining in the service of appellee after full knowledge of the reduction. The notice must have been such as to inform appellant that his wages had been reduced, and notice that the wages of others had been reduced, unless his were also included therein, would not be sufficient notice.

It was not proper to ask witnesses whether every one but appellant had accepted the cut in wages, or if there was any reason why appellant should have been excepted from the reduction. These matters were not issues in the case. The only issue was as to whether there was a general reduction of wages and as to whether appellant accepted the reduction. The fact that all others had accepted the cut, and that there was no reason for excepting appellant from the general reduction, could not affect the question of his knowledge of the reduction of his wages and his acceptance of the same. The court erred in permitting the introduction of such testimony as that complained of in the sixth assignment of error.

Appellee's manager should not have been permitted to testify that his company would have lost money if the wages had not been reduced. The propriety of the reduction of the wages was not an issue in the case, and speculations as to what might have happened to appellee if the reduction had not been made were not made to assist the jury in arriving at a decision as to whether the reduction had been made and appellant had accepted it after notice of the same. The evidence must have been harmful to appellant if it was considered at all.

Testimony as to other mills having reduced the wages of their employees was totally foreign to the issues in this case, and should have been excluded. The same may be said as to the opinions of witnesses as to why employees accepted a reduction in wages, and the statement of appellee's manager as to what purpose he had in view in cutting down wages. These matters were totally foreign to the issues in the case.

It was proper to allow testimony of the notice of the reduction of wages given by the manager at the meeting of the employees called by him, as a basis for showing that

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. KING.

(Court of Civil Appeals of Texas. Nov. 18, 1909. Rehearing Denied Dec. 9, 1909.)

APPEAL AND ERROR (§ 936*)—PRESUMPTIONS—AWARD OF COSTS.

Rev. St. 1895, art. 1436, provides that on appeal or certiorari taken by the party against whom judgment was rendered in the lower court, if the judgment of the upper court be against him, but for a less amount, he shall recover the costs of the upper court, but shall be adjudged to pay the costs of the lower court, and, if the judgment be against him for the same or greater amount than in the lower court, the adverse party shall recover the costs of both courts. Article 1438 provides that the court may, for good cause, be stated on the record, adjudge the costs otherwise than as provided in article 1436. Held that, where no reasons are stated on the record for adjudging costs other than as provided by article 1436, it will be presumed on appeal that good cause did not exist.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3782, 3787; Dec. Dig. § 936.*]

Appeal from District Court, Morris County: P. A. Turner, Judge.

Action by Henry King against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reformed and affirmed.

J. M. Burford, Glass, Estes, King & Burford, and E. B. Perkins, for appellant. W. E. Moore, for appellee.

WILLSON, C. J. In a justice court of Morris county appellee recovered a judgment against appellant for \$150 and costs. The county court of the county being without jurisdiction in such cases, appellant appealed to the district court, where a judgment against it in appellee's favor for \$115 and costs was rendered. From the latter judgment this appeal is prosecuted.

The contention is that the judgment is erroneous, in that it adjudges the costs of both the justice and the district court against appellant, notwithstanding the judgment of the latter court was for a less amount than the amount of the judgment rendered in the justice court. The statute declares that "in cases of appeal or certiorari taken by the party against whom the judgment was rendered in the court below, if the judgment of the court above be against him, but for a less amount, such party shall recover the costs of the court above, but shall be adjudged to pay the costs of the court below; if the judgment be against him for the same or a greater amount than in the court below, the adverse party shall recover the costs of both courts."

Id. article 1438. Why the court refused to adjudge the costs as directed by the statute does not appear from anything in the record. He may have had "good cause" for so refusing and for adjudging them as he did. But should it be presumed in support of the judgment that "good cause" for his action existed? We think not. Lumpkin v. Williams, 119 S. W. 917. The right conferred by the statute to have the costs adjudged as it directs is a substantial and frequently an important one. It could not have been the purpose of the Legislature to leave its enforcement to an unchallengeable discretion on the part of the trial judge, else it would not have required that his reason for otherwise adjudging them should be "stated on the record." On the contrary, we think the purpose in requiring the reasons of the court to be so stated was to guard against the exercise by him of an arbitrary discretion by making it possible for a litigant affected by the ruling always to know why the direction of the statute was ignored in his case, and, if he sees proper to do so, to present for review in an appellate court a question as to the sufficiency of the reasons influencing the court to so ignore the direction of the statute. We are inclined to believe that the purpose of the statute can be more effectually accomplished by indulging a presumption that "good cause" did not exist, when none is "stated on the record," than by indulging a presumption in such a case that "good cause" did exist. In no other way now occurring to us can the right of a party who may be aggrieved by the action of the court in adjudging costs otherwise than as directed by the statute to relief be better protected and enforced.

The judgment of the lower court will be so reformed as to adjudge the costs accruing in the district court in favor of appellant against appellee, instead of in favor of the latter against the former, and as so reformed it will be affirmed. The costs of this appeal will be adjudged against the appellee.

WISEGARVER v. YINGER et al.

(Court of Civil Appeals of Texas. Oct. 27, 1909. Rehearing Denied Dec. 1, 1909.)

1. PRINCIPAL AND SURETY (§ 142*)—LIABILITY OF SURETY—DEFENSE.

Where a surety on a note given for the price of corporate stock, bought by the maker under inducement of fraudulent representations as to the character and value of the stock, sought to escape liability on the ground of the extension of the note under an agreement with the maker for a valuable consideration and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

without the surety's consent, he need not tender back the corporate stock.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. § 390; Dec. Dig. § 142.*]

2. PARTNERSHIP (§ 8*)—EXISTENCE OF RELATION.

That a surety on a note given for the price of corporate stock bought by the maker was to receive, as compensation for the use of his name, an interest in the proceeds of the stock did not show that he was a partner of the maker in the transaction.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. §§ 13, 14; Dec. Dig. § 3.*]

3. TRIAL (§ 60*)—ORDER OF PROOF.

In an action on a note given for the price of corporate stock, defended on the ground of false representations as to the value of the stock, it is proper for the court to admit in the first instance evidence that third persons made false representations, and then admit evidence connecting plaintiff therewith.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 141, 142; Dec. Dig. § 60.*]

4. DEPOSITIONS (§ 77*)—CERTIFICATE—REQUISITES.

Under Rev. St. 1895, art. 2284, requiring the officer before whom depositions are taken to certify on the envelope inclosing the depositions that he in person deposited the same in the mail for transmission, etc., and article 3507, providing that every notary public shall authenticate his official acts with his seal of office, the certificate of a notary on the envelope inclosing depositions must be authenticated by his official seal.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. § 199; Dec. Dig. § 77.*]

5. DEPOSITIONS (§ 2*)—STATUTES—REPEAL—CERTIFICATE—REQUISITES.

Rev. St. 1895, art. 2286, requiring the postmaster mailing a deposition to indorse thereon that he received it from the officer before whom the same was taken, is not repealed by article 2284, requiring the officer to certify on the envelope containing the deposition that he in person deposited the same in the mail, but the two sections are in force, and must be complied with.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. § 2; Dec. Dig. § 2.*]

6. DEPOSITIONS (§ 75*)—CERTIFICATE—REQUISITES.

The certificate of the officer taking depositions on written interrogatories propounded under the general statute need not show that the witnesses were first cautioned and sworn to testify to the truth; the statute relating thereto applying only to depositions taken under oral examination.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 184-189; Dec. Dig. § 75.*]

Appeal from District Court, McLennan County; M. Surratt, Judge.

Action by Mrs. E. L. Wisegarver against Frank T. West, M. E. Yinger, and others. From a judgment for insufficient relief, plaintiff appeals. Affirmed in part and reversed in part.

Fisher & Sears, Eugene Williams, and W. B. Carrington, for appellant. Sleeper, Boynton & Kendall and Sanford & Ross, for appellee.

FISHER, C. J. This suit was brought by plaintiff, Mrs. E. L. Wisegarver, originally

against defendants Frank T. West and M. E. Yinger, and also against one S. T. Cochran, who was thereafter dismissed from the case. Plaintiff's suit, as shown in her second amended petition upon which she went to trial, is against defendants West and Yinger upon a note for \$5,000 dated January 29, 1906, due on or before six months after date, providing for interest and attorney's fees, and secured by deed of trust on certain lands of defendant West in Coryell and Hamilton counties, Tex., said note being payable to order of S. T. Cochran, and executed by defendants West and Yinger, and containing this further provision: "This note may be renewed in whole or in part for another six months on the same terms by the makers hereof at their option"—plaintiff alleging that said Cochran, for valuable consideration, assigned said note and lien before maturity of the note to plaintiff, who then became the legal owner and holder thereof, and that said defendants renewed said note for another six months, in accordance with said provision in said note, and that said note had never been paid in whole or in part, wherefore plaintiff prayed for judgment against West and Yinger for principal, interest, and attorney's fees due on said note and for foreclosure of her deed of trust lien, and costs, general and special relief. Defendant West answered, as shown in his first-amended answer, upon which he went to trial, setting up fraud on the part of plaintiff in securing said note, and fraudulent conspiracy between plaintiff and the stockholders and directors of a certain corporation known as the Rock Island Construction Company for stock, in which he alleged said note was given, and further that said note was extended without his consent, he being a surety thereon, and prayed that said note and lien be canceled. Defendant Yinger answered in his second amended answer, upon which he went to trial, wherein he adopted the allegations of defendant West, contained in his amended answer above referred to, on the issue of fraud and fraudulent conspiracy, so far as applicable, and further set up that plaintiff had agreed to make a credit on said note of \$1,500, which she had not done, and prayed that in no event she should have judgment for more than \$3,877 with 6 per cent. interest from June 23, 1906. Plaintiff answered the pleadings of West and Yinger by her second supplemental petition, wherein, after specially excepting, she set up good faith on her part; that, if there was a binding agreement to extend, West had constructive notice of such agreement to extend; ratification by him of Yinger's acts; estoppel; that West was a joint maker with Yinger of the note sued on, and not an accommodation maker; that West and Yinger were partners; that defendants were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

estopped to deny the binding effect of the note; and that defendants had constructive knowledge of all the facts set up by them. Upon a trial before a jury a judgment was rendered, September 19, 1908, that plaintiff recover of defendant Yinger \$6,370.87, with 6 per cent. interest thereon from date of judgment, and costs, and in favor of defendant West, and decreeing that, as to the note and lien and all other causes of action set up by plaintiff against West, he go hence without day, and recover of plaintiff and the sureties on her cost bond his costs, and that said note and lien be canceled, and that the cloud created by said deed of trust be removed.

Appellant's first assignment of error complains of the refusal of the court to give a peremptory instruction for a verdict in favor of the plaintiff against both Yinger and West for the full sum sued for, and for a foreclosure of the deed of trust executed by West to secure the notes sued upon. There are a number of assignments of error, practically to the same effect, in which it is stated that the court erred in overruling the appellant's motion for a new trial on account of the insufficiency of the evidence upon which the verdict and judgment in appellee West's favor are based. All of these assignments have been considered and are overruled; and as the case will be reversed, we think it proper to decline to further express our views upon the evidence.

There are a number of assignments of error complaining of the action of the court in refusing special instructions requested by appellant, and there are some assignments which complain of the charge of the court and of special instructions given at the request of appellee West. We think the charge, when considered in connection with the special charges given at the request of the appellant and the appellee, is sufficient to cover all of the issues presented by the record, with the exception of appellant's special instruction No. 10, which is set out on page 79 of appellant's brief. The charge of the court did, in a negative way, present this question; but, in view of the special request, we think this charge should be submitted upon another trial. Of course, if appellee West knew of the alleged fraud that had been perpetrated upon him when he bought the stock from the promoters of the Construction Company, he is in no condition to complain. Charge No. 10 pointedly calls the jury's attention to this question.

One of the special charges which was properly refused is to the effect that, before West could recover, he should have tendered back the stock for which the note was given. Certain facts appear from the record to show that this was not required to be done. West claimed that he was surety for Yinger, and that the extension of the note under an agreement between appellant and Yinger, for a valuable consideration, re-

leased him. Of course to assert this defense it was not necessary that the stock should be tendered. Further, there is some evidence tending to show that the stock in question was worthless.

One of the requested charges, and which was correctly refused, is to the effect that as it appears that West and Yinger were to share in the profits of the sale of the stock, they would be held as partners, and that a renewal of the note or extension of time by agreement between Yinger and appellant would not release West. The charge as framed loses sight of the fact that it was shown by West that he and Yinger were not partners, and that he was to receive an interest in the proceeds of the stock merely as compensation for the use of his name in securing Yinger's note.

Appellant's thirtieth, thirty-first, and thirty-second assignments complain of the action of the trial court in admitting testimony to the effect that Cochran, Davis, and others made certain false representations to West as to the character and value of the stock which was consideration of the notes sued upon. One of the propositions presented under these assignments is to the effect that such evidence should not have been heard until proof had been offered showing that the appellant participated in the fraud, or had notice of it. The objection goes merely to a question of practice, which involves the order in which the evidence is offered, and we do not think that any error was committed by the trial court. There could not well have been evidence of plaintiff's knowledge or participancy in the fraud alleged by West until there had been some evidence of fraud presented. We think that the court logically pursued the correct course; that the evidence of fraud should properly be first introduced, then followed by evidence showing the plaintiff's connection with or knowledge of it.

The thirty-fifth assignment of error complains of the charge because it does not set out, or attempt to set out, the issues raised by the appellant's petition. In view of another trial we suggest that the court more fully state the plaintiff's case, either in its general charge, or in a charge requested by appellant to that effect.

There is reversible error shown by the thirty-ninth, fortieth, forty-first, and forty-second assignments of error. The first two assignments named complain of the action of the trial court in failing to sustain plaintiff's motion to quash the depositions of Mrs. McAuley and Mrs. Walton and M. E. Yinger, on the ground that the certificate of the notary indorsed on the envelopes, inclosing the depositions is not accompanied with an impression of his seal of office. Article 2284 of the statutes as amended (Laws 1907, p. 186, c. 91) states that the officer shall certify on the envelope inclosing depositions that he in person deposited

Revised Statutes of 1895 that every notary public shall provide a seal of office, and he shall authenticate all his official acts therewith. This last statute should be read in connection with the first. It is true that the first says that the officer shall certify but it does not state that that shall be done under his signature and seal of office; it is clear from article 3507 that all of official acts shall be authenticated by seal of office. Indorsing the certificate on the envelope is certainly an official act; it is one required and demanded by law, and we know of no reason that is given why the act of making the certificate in a case of this character would not be official. He does not do it as an individual, but it is solely as an official that he performs this service.

The second two assignments complain of the action of the trial court in overruling appellant's motion to set aside the depositions of these witnesses on the ground of the fact that the postmaster had indorsed on the envelope that the deposition was taken from the hands of the officer before whom they were taken. We think this objection well taken and that the article of the constitution so referred to, making it the duty of the officer before whom the deposition is taken to certify that he has taken the same in the mail for transmission, if not directly, requires the postmaster to do so. We do not see how it can be the case. It is merely a double duty, looking to the Legislature may be satisfied with it, and a double check was an advantage. We see no reason why it should not be consistently performed by different officers.

We overrule the assignment of error, which also assigns error to the action of the court in setting aside the depositions of these witnesses on the ground that the certificates of the witnesses were false. We affirm the action of the court in setting aside the depositions of these witnesses when taken under the circumstances. The assignment was not intended to be sustained. The answers are taken and the depositions are propounded under the circumstances.

The certificate of the witnesses is substantially correct.

For the error assigned between the parties is reversed, and the case is remanded for a new trial.

*For other cases see

tained by the court; and, upon plaintiff's declining further to amend, a final decree was entered dismissing his suit. Plaintiff has appealed from the decree, and has assigned as error the ruling of the court sustaining the demurrer to his petition.

The allegations in the petition are substantially: That on the day his suit was filed he was in actual possession of certain real estate therein described, holding the same as the tenant of W. F. Miller, and had been in quiet, lawful, and peaceable possession thereof, using, enjoying, and cultivating the same for about six years prior to March 14, 1908; that on or about the last-named date plaintiff began to plow the land, seed it with corn and vegetables, when defendants threatened him with violence, threw stones at him, commanded him not to plant or seed the land, and threatened to pour hot water on him if he did not desist from working on said premises; that plaintiff verily believes that defendants will carry out their said threats and assault him if he should prosecute his said lawful work; that if the land is not planted with seed and properly cultivated at this time of the year (the time the suit was brought), it will be impossible for plaintiff to raise any crop upon it, because too late in the season; and that defendants are insolvent and unable to respond in damages. Then follows the prayer for the injunction. We are of the opinion that the assignment of error is well taken. The rule is well settled that where the conduct complained of will cause irreparable injury to property rights, for which there is no adequate redress in a court of law, equity may properly interfere by injunction, and the fact that the same acts are declared to be crimes by the law of the state, and are punishable as such, constitute no defense to issuing the writ of injunction. Under such circumstances the court may properly grant the relief; but in so doing it acts solely for the purpose of protecting property rights from irreparable damage, and in no way interferes with the enforcement of the criminal laws of the state. *High on Injunctions* (4th Ed.) § 1415h. In such cases actual violence is not necessary to justify such relief, but it is regarded as sufficient if there is such a suggestion or display of force as to result in moral intimidation and coercion and in forcing a person of reasonable and ordinary courage to a course which he would otherwise not pursue. *O'Neil v. Behanna*, 182 Pa. 236, 37 Atl. 843, 38 L. R. A. 382, 61 Am. St. Rep. 702; *Jersey City Printing Co. v. Cassidy*, 63 N. J. Eq. 759, 53 Atl. 230; *Vegeahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443.

It is said in *High on Inj.* (4th Ed.) § 772b, that: "An examination of the later authorities upon the subject of injunctions against

trespass discloses a decided tendency to adopt the adequacy or inadequacy of the legal remedy as the sole and ultimate test to the right of equitable relief in such cases, and it would seem that the question of irreparable injury is of importance only in so far as it bears upon this fundamental question of legal remedy." The cases of *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994, *Lone Star Salt Co. v. Texas Short Line Ry. Co.*, 86 S. W. 355, *City of Galveston v. Mistrot*, 104 S. W. 417, and *Chancey v. Allison*, 107 S. W. 605, are in line with and illustrate the tendency of the modern authorities. Assuming the allegations in plaintiff's petition as true, and indulging every reasonable intendment in its favor, which must be done in testing its sufficiency as against a general demurrer, it appears that plaintiff was treated with such acts as would cause him irreparable injury to his property rights. For certainly his right to plant and cultivate his land and enjoy the products thereof, were property rights which he was entitled to exercise and enjoy without let or hindrance from the wrongful acts done and threatened by the defendants. It cannot be said as a matter of law that such acts done and threatened by them were not such as might force a person of reasonable and ordinary courage to a course which he would not otherwise pursue. The plaintiff, though he might have legally resorted to force and violence to protect his property rights from the trespasses of defendants, was not compelled to do so, but had the right to resort to the strong restraining hand of equity to protect such rights from the aggressions of defendants, who were insolvent, and could not respond in damages for their trespasses upon such rights of plaintiff.

The judgment is reversed, and the cause remanded.

WHELESS v. W. Y. DAVIS & SON.

(Court of Civil Appeals of Texas. Nov. 18, 1909. Rehearing Denied Dec. 9, 1909.)

1. APPEAL AND ERROR (§ 1027*)—HARMLESS ERROR—ERRORS NOT AFFECTING RESULT.

Where, in libel, the truth of the statements complained of was established without dispute as a defense, as authorized by Gen. Laws 1901, p. 30, c. 26, so that the only proper judgment that could be rendered was the one rendered for defendant, errors committed by the trial court were not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4033; Dec. Dig. § 1027.*]

2. LIBEL AND SLANDER (§ 54*)—ACTION FOR LIBEL—DEFENSES—TRUTH.

Under Gen. Laws 1901, p. 30, c. 26, providing that in libel the truth of the statements complained of shall be a defense, the defenses of truth pleaded and proved is a complete one, though the statements were libelous per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 152; Dec. Dig. § 54.*]

dict under peremptory instructions; it not being error to peremptorily instruct when there is no issue of fact.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. § 123.*]

4. LIBEL AND SLANDER (§ 54*)—DEFENSE—TRUTH.

Where, in libel, based on a statement that plaintiff was indebted to a hotel for entertainment, and that while so owing it, he, without notice to the hotel management, and in violation of the rules, removed his trunk from the hotel, leaving the bill unpaid, the evidence conclusively showed that plaintiff left the hotel while indebted for entertainment there; that he procured his trunk without saying anything to the hotel management, and the hotel management did not know that the trunk was moved out until plaintiff had left town—the truth of the libelous statement was shown, though plaintiff had claimed an offset to his bill which had been contested, and showed that he did not usually obey the rules of hotels as to the removal of baggage, without showing that the hotel management knew that fact.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. § 152; Dec. Dig. § 54.*]

5. PARTNERSHIP (§ 153*)—SLANDER BY PARTNER—LIABILITY OF FIRM.

A partner is not liable for slanderous words uttered by his copartner, where it does not appear that the words were made in furtherance of the firm business, or specially authorized by the firm, or subsequently ratified by it.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 274; Dec. Dig. § 153.*]

6. PARTNERSHIP (§ 153*)—SLANDER BY PARTNER—CONSPIRACY—LIABILITY OF FIRM.

A conspiracy between a partner and an employé of the firm to slander one, with which conspiracy the copartner is not connected, does not render the firm liable for the slander.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 274; Dec. Dig. § 153.*]

Appeal from District Court, Lamar County; T. D. Montrose, Judge.

Action by L. L. Wheless against W. Y. Davis & Son. From a judgment for defendants, plaintiff appeals. Affirmed.

This action was brought by appellant against the appellees, W. Y. and Merrick Davis, as a copartnership owning and operating, under the management of Mrs. W. Y. Davis, the wife of W. Y. Davis and mother of Merrick Davis, the Merrick Hotel in Paris, Tex., at which hotel appellant had been stopping prior to the happening of the matters he complains of. The action grew out of an indebtedness of \$10, admittedly due by appellant to the hotel as a balance on his board bill, against which he claimed an offset by reason of failure by the hotel management to produce and return to him a picture, "The Smokers," which he had left hanging in the hotel office, and in charge of the hotel while a guest there. By the petition the cause of action is twofold, and based upon alleged

changing of his territory, as the sales representative of the Continental Tobacco Company, under the supervision of H. A. Benton, from Paris to Dallas. The slander was charged in the alleged malicious statements of Mrs. Davis and Merrick Davis acting together, in substance, that appellant had slipped his trunk out of the hotel, and had run away, leaving his board bill unpaid, made in the presence and hearing of the guests of the hotel and certain friends and acquaintances of his named. The court in the trial did not submit the allegation of slander to the jury, for reasons given in the ruling, which is complained of.

The libel was charged in the alleged false and malicious statements contained in a letter written by Merrick Davis to H. A. Benton, manager of the Continental Tobacco Company and immediate employer of appellant, and by the hotel management to the Continental Tobacco Company, and to the secretary of the Hotel Keepers' Association, of which this hotel was a member, and in the official bulletin No. 9, based on this letter issued and sent by the association to its members. The alleged defamatory matter in the letter to Benton is declared as: "He told our clerk he guessed he would pay the amount if held down to a pinch and not before. The pinch didn't come owing to his getting out of the house in the manner in which he did, and that is why the matters stand as they now are, the bill unpaid. In leaving the hotel he went to our porter, who makes the trains, and gave him the order about getting out his personal trunk and didn't say a word to the office about it, where of course all orders for baggage should be given; nor was it known to the office until after the train had left, and Lon, trunk and all were out of reach. The amount \$10 is the correct amount due us by Mr. Wheless when he left last, that is just as our Mr. Edwards makes it up. My mother says that at no time did Lon ever offer to pay the difference to her if the picture was produced. She tried repeatedly, and one time particularly, to find out the reason why he would not settle up in full and failed to get any more satisfaction than that he would settle it all up at some future time. Seems that he wanted to keep putting it off as much as possible. He was a pretty hard subject to get any kind of money out of and it was all we could do to get him to make settlement at all." By an innuendo it was averred that "Lon" meant appellant, and that in writing "The pinch didn't come owing to his getting out of the house in the manner in which he did" it was intended and

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

meant to convey to appellant's employer the defamatory charge against appellant that he had slipped his trunk out of the Merrick Hotel, leaving a part of his board bill unpaid. This letter was offered in evidence, and is quite lengthy, and purports in terms, when read connectedly and in its entirety, to make a statement, with full particulars, of the indebtedness of appellant to the hotel, and the claim of appellant in regard thereto, and his claim of the reasons for not paying the same, and the manner in which he left the hotel. The letter purports to have been written at the request of Benton, and commences with the words: "When you were here last week you remember I had quite a lengthy conversation with you in regard to a \$10 balance that we had against Mr. L. L. Wheless. You told me to just get the particulars together and write them to you and that you would see that the amount was paid. I would have written you sooner but was waiting for a reply to a letter that Mr. Edwards our clerk wrote to Mr. Wheless a day or two after he left Dallas telling him that if the difference was not settled at an early date what modes we were going to use to get same." The balance of the letter continues, with statements and particulars mentioned.

The statements in the letter to the Continental Tobacco Company were alleged to be false, and written with malicious intent to injure appellant with his employer and in his business, and were defamatory as impeaching his honesty, and exposing him to contempt and hatred and ridicule and financial injury. The letter, which was in evidence, properly addressed to such company, reads: "Some time ago you had one Mr. L. L. Wheless representing your company in Paris and immediate territory who made this place (The Merrick Hotel) his headquarters during the entire time that he had this territory. When Mr. Wheless was transferred to another territory he left Paris indebted to us in the amount of \$10 balance on his hotel bill which he now positively refuses to pay, and we have put forth every available effort to collect this balance from him, but it seems to no avail. We write now to know whether or not you feel disposed to lend us any aid in collecting this balance on Mr. Wheless' hotel bill. At any rate we shall greatly appreciate a reply to this letter and any other assistance you may feel disposed to give will be greatly appreciated and considered a great favor to us."

The libel in the letter written to the secretary of the Hotel Keepers' Association, and the official bulletin based on this letter, issued and sent by the association to its members, was on the alleged false and malicious statements of appellees, as follows: "Dear Sir: Below you will find the names of two delinquents, one of whom at least you may know quite well; L. L. Wheless \$10, Continental Tob. Co., reg. out of Dallas." The

other name this court does not regard as material to mention. The bulletin mentioned and which was by the association published to its members reads, as material to this case: "Official Delinquent Bulletin No. 9, Texas Hotel Keepers' Association. Cleburne, Texas, 4, 14, 1904. Dear Sir: The following people have been reported delinquent since last report: Name, L. L. Wheless—City, Paris—Hotel ——— Amount, \$10."

It was alleged that the association existed and had for its object to notify the different hotels who are members of said association of any person who fails to pay his hotel bill where such person has been a guest, and such person is thereafter blacklisted by said association, and no hotel will receive such person as a guest until he pays in advance or gives a satisfactory reference or explanation. The evidence shows, admittedly by appellant, that he was due and owing appellees the sum of \$10, as the balance due on a board bill, when he finally left the hotel. The evidence further shows that appellant, while he was a guest of the hotel, placed on the office wall a picture in the care and charge of the hotel, and that the hotel management lost or mislaid same and failed to return to him; that appellant claimed an offset or counterclaim against the debt for board claimed to be due by him to appellees. The evidence is sufficient, we think, to warrant the finding by us that appellant had offered to pay the debt claimed if appellees would return, or account for, the picture, and that appellees so knew at the time of the written communications complained of. It was indisputably shown by the evidence that appellant, at the time he finally left the hotel for Dallas, had the porter of the hotel take his trunk from his room for transfer to the depot, and that he did not make request of the hotel clerk to have his trunk so taken, and did not make known to the clerk or management, as was required by the hotel, the fact that he had the trunk so taken out. In fact appellant testified: "I did not leave any word at the office to have my trunk carried from my room; never do; never did." We make the finding that the statements complained of in the letters were indisputably proved to be true in fact. The trial was before a jury, and in accordance with their verdict a judgment was rendered.

Dudley & Dudley, Burdett & Connor, and B. Sturgeon, for appellant. Moore, Park & Birmingham and Lightfoot, Long & Wortham, for appellees.

LEVY, J. (after stating the facts as above). If in an action for libel the truth of the statements in such publication is a defense to such action, and we think it should be so ruled, then in this case, the truth of the published statements complained of appearing in the evidence, as it does, indisputably true in fact, it must be held, we think, that

court (Pearson v. Burditt, 28 Tex. 172, 80 Am. Dec. 649) would not be ground for reversal (Gen. Laws 1901, p. 30, c. 26; Cranfill v. Hayden, 97 Tex. 544, 80 S. W. 609; Mitchell v. Spradley, 23 Tex. Civ. App. 43, 56 S. W. 134; Dem. Pub. Co. v. Jones, 83 Tex. 302, 18 S. W. 852; Newell on L. and S. 651, par. 68; 18 A. & E. Ency. Law, 1067). The statements published being proved true, the imputation or inference naturally arising from statements is justified by the truth of the statements. And the defense of truth under the statute and authorities cited would be complete if pleaded and proved, as in this case, even if the published statements were libelous per se, as contended for by appellant, and which we are inclined to so hold in this case. If the statements were true, and conclusively shown, even admitted, there was no issue for the jury to determine in the case, and appellees would have been entitled to a verdict under peremptory instruction from the court. It is not error to peremptorily instruct the jury when there is no issue of fact to determine. Joske v. Irvine, 91 Tex. 574, 44 S. W. 1059. That the truth of the published statements, allowable under the terms of the statute as a defense, was conclusively shown in gist and substance is evident from the record. The substance of the libel is founded in the fact that appellant is charged by the publication with owing a hotel bill, and, while so owing same and refusing to pay it, having without notice to the hotel management or authority, removed his trunk out of the hotel, leaving the bill unpaid. It was admitted by appellant that he owed the sum of \$10 as a balance unpaid on a board bill when he finally left the hotel and changed his headquarters from Paris to Dallas, and that he positively refused to pay the amount. It was further admitted that in leaving the hotel he went to the porter of the hotel, who makes the trains, and had him get his trunk out of his room for transportation on the train, and did not say a word to the hotel office or management about what he had done in reference to the trunk, and did not make known to the hotel office, or any one in authority there, that he had moved out his trunk. It was conclusively shown that the hotel management did not know that the trunk was moved out until appellant and the train had left town. If these are the precise statements as published and appearing in the letters written and complained of, as they are, the sting or presence of the libel charged is justified by the truth of the statements published. The facts are true taken alone or together. It may be true that appellant positively refused to pay the board bill only until his picture was returned or its value paid him. This difference is not

convert the fact, which was true, of there being an indebtedness to the hotel, into a false and defamatory statement. A debtor may claim an offset to his bill, and may be legally entitled to the offset, but until settled, by agreement of the parties or process of law, the fact remains as true that he is indebted. It does not appear from the record that appellees had agreed to credit the board bill to the value of the picture, or had adjusted the claim of appellant in any way so as to make the statement as to indebtedness by appellant false and untrue, but it does affirmatively appear that appellees were denying liability for the picture and appellant's claim to its value. The value of the picture is not conclusively shown. According to the testimony of appellees, the picture was an advertisement and reasonably worth \$1. According to appellant, the picture was of extrinsic value to him, but he does not place any money value on it. But the exact amount of indebtedness is a non-essential to the plea in defense; the fact of an indebtedness is the essential, and it affirmatively appears true. It may be true that appellant in leaving the hotel did not, as he claims, usually give orders to the hotel office to have his trunk brought from his room. He does not deny that it was a rule of the hotel that guests desiring to get baggage out of their rooms, and on leaving the hotel, should give an order for removal to the hotel office with the clerk or management; nor does he prove that the hotel office knew that it was his custom to violate the rules, or that the porter had authority to execute such orders, in violation of the rules, direct from the guests. Hence the mere fact, we think, that appellant did not usually obey the rules of the hotel as to removal of baggage, in the absence of such knowledge to the hotel authority, would not warrant and be sufficient to support the holding that the substance of the charge as published is not established by the evidence. This mere fact, in the circumstances, would not make the statement as to the manner, at the particular time in question, of his leaving the hotel as published false and untrue either in substance or fact. If the gist of the charge is established by the evidence, the defendant has made his case. Hearne v. De Young, 119 Cal. 670, 52 Pac. 150, 499; Finley v. Widner, 112 Mich. 230, 70 N. W. 433. In this ruling, we think, assignments of error from 1 to 10, inclusive, are satisfactorily and properly disposed of.

By the twelfth and thirteenth assignments there is presented the question as to the admissibility of certain evidence, not allowed by the court, as bearing upon the alleged slanderous statements charged to have been spoken by Mrs. Davis and Merrick Davis

acting together. We have carefully considered the contention, and think the same should be overruled. Under the pleadings of appellant, as we interpret it, a recovery would not be warranted for the alleged slander against either the copartnership, as being a tort for which the copartnership as such is not in this case liable, or W. Y. Davis individually, as no recovery is sought against him in an individual capacity for a distinct tort of himself or his wife. To construe the pleading as seeking a recovery against Merrick Davis individually for the slander would be, we think, to subject it to an objection of misjoinder of causes of action in this case, and be contrary to the construction appellant gives it as gathered from the brief. In a case for slander there is no such community of interest as would make one partner responsible in damages for the slanderous words of his copartner, or an agent of the copartnership, where it does not appear, as we construe the pleadings in the case, that the statements as spoken and claimed to be slanderous were made in furtherance of the business, or specially authorized and empowered by the partnership to be made, or subsequently ratified and adopted by the partnership. *Newell on L. and S.* 373; 1 *Clark & Skyles on Agency*, 1098; 25 *Cyc.* 434. It could not properly be held, we think, that the words alleged to have been spoken by Mrs. Davis appear in the allegations to have been in or during the performance or furtherance of the firm business. The allegation charging a conspiracy between Merrick Davis, one of the partners, and Mrs. Davis, an employé of the partnership, to slander the appellant, the other partner not by allegation being connected with the design and purpose of the conspirators, would not, we think, state an actionable liability for the alleged slander against the copartnership. We do not think it could be held that such conspiracy to slander is within the scope and authority of a partnership so as to make the conspiracy the subject of an action against the partnership; though it is well settled that the person wronged by the conspiracy may have his remedy against the individuals acting in or concurring in the conspiracy, in a proper suit for such injury. 1 *Cooley on Torts*, 209. It may be conceded, on the other contention, that the husband is liable for slanderous words spoken by his wife, in a proper suit against them. *Zeliff v. Jennings*, 61 *Tex.* 470; *Taylor v. Pullen*, 152 *Mo.* 434, 53 *S. W.* 1086. But the answer to this contention is that in this case the pleading, we think, could not be construed as seeking a personal judgment against them as such. The other contention in this respect as to the evidence being admissible to show malice is, we think, disposed of in the previous ruling on the action herein for libel.

In view of our conclusion disposing of this case, we do not think there could be predicated reversible error on the remaining assignments, and they are overruled.

The judgment was ordered affirmed.

CROW et al. v. FAILS et al.

(Court of Civil Appeals of Texas. Nov. 2, 1909. Rehearing Denied Dec. 2, 1909.)

1. MANDAMUS (§ 167*)—PROCEEDINGS—PLEADING—ALLEGATION—PROOF.

In mandamus to compel a county commissioners' court to recognize a school district, under allegations of the petition that a certain district was legally formed, and that a proposed second district changed the first without authority of law and was void, which were not excepted to, petitioners could show any fact which made void the act of the commissioners in changing the first district, including the fact that the change was without the consent of the majority of the legal voters of the first district.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 369, 370; Dec. Dig. § 167.*]

2. PLEADING (§ 228*)—EXCEPTIONS—ADMISSIONS.

Allegations of a petition must be taken as true for the purpose of exceptions thereto.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 590; Dec. Dig. § 228.*]

3. SCHOOLS AND SCHOOL DISTRICTS (§ 38*)—CHANGE OF DISTRICT—VALIDITY OF PROCEEDINGS—CONSENT OF VOTERS—NECESSITY.

Under Rev. St. 1895, art. 3938, providing that, when school districts in district counties are once established, they shall not be changed without the consent of the majority of the voters of the district, the change of a legally established district by the county commissioners' court without the consent of such voters, was void.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 66; Dec. Dig. § 38.*]

4. MANDAMUS (§ 79*)—PURPOSE OF WRIT—ENFORCEMENT OF MINISTERIAL DUTIES.

Under Rev. St. 1895, art. 3995c, added by Laws 1897, p. 211, c. 146, § 1, requiring the county commissioners' court to adopt and enter on its record an order organizing a school district upon presentation of a proper petition by the citizens of a community, which district shall become entitled to all the privileges of districts in district counties, the commissioners' court was bound to recognize a district duly organized, and accord it all the rights and privileges of a district in district counties, and such duty was ministerial and could be enforced by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 170-176; Dec. Dig. § 79.*]

5. MANDAMUS (§ 76*)—PURPOSE OF WRIT—ENFORCEMENT OF MINISTERIAL DUTIES.

Under Acts 29th Leg. 1905, p. 283, c. 124, § 89, requiring the county superintendent of public instruction to appoint one of the trustees of each school district or other qualified person to take a school census, the appointment of a census trustee by the superintendent is a ministerial duty, and may be enforced by mandamus.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 158; Dec. Dig. § 76.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

require to canvass the returns and declare the result of an election for school trustees, the judgment, upon decreeing that the district was legally formed, need not further direct the commissioners to perform ministerial duties imposed upon them by statute as to legal school districts, as they were bound to do so by law.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 392-394; Dec. Dig. § 176.*]

7. MANDAMUS (§ 187*)—HARMLESS ERROR—DECREE.

In mandamus to compel a county commissioners' court to recognize a school district and require it to canvass the returns and declare the result of an election for school trustee held therein, any error in the decree in not directing the commissioners' court to perform any ministerial duty, upon decreeing that the district was legally formed, was not prejudicial to defendant.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 436; Dec. Dig. § 187.*]

8. MANDAMUS (§ 178*) — JUDGMENT — CONSTRUCTION.

In mandamus to compel the county commissioners' court to canvass the returns of an election held for school trustees, and declare the result, and, upon a finding that no election was legally held, to declare a vacancy in the board of trustees and require the county superintendent to fill it, the decree, by declaring vacancies to exist, and directing that they be filled, in effect decreed that the election was not legally held.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 400; Dec. Dig. § 178.*]

9. MANDAMUS (§ 187*)—REVIEW—RIGHT TO ALLEGE ERROR.

In such case, the commissioners' court or the county superintendent could not complain that the judgment did not expressly declare that the election was not legally held upon decreeing that a vacancy existed and directing that it be filled.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 436; Dec. Dig. § 187.*]

Appeal from District Court, Trinity County; S. W. Dean, Judge.

Mandamus by Ben Falls and others against C. H. Crow and others. From a decree for relators, defendants appeal. Affirmed.

O. H. Crow and J. P. Stevenson, for appellants. Kenley & Minton, for appellees.

MCMEANS, J. Suit by Ben Falls and others for mandamus against C. H. Crow, county judge of Trinity county, W. L. Avery, J. L. Manry, A. F. Reese, and B. F. Richardson, county commissioners composing the commissioners' court of Trinity county, and J. W. Bright, county superintendent of public instruction of said county, to compel the said judge and commissioners and said commissioners' court to recognize the school district created by order passed by said court on February 15, 1907, and to require said court to canvass the returns and declare the result of an election for school trustees held in said district on the first Saturday in April, 1908, and to require the said Bright, as such

had been legally held, to declare a vacancy in the board of trustees and require said superintendent to fill such vacancy.

Appellees alleged in their petition: That the community school system has been in continuous operation in Trinity county. That on February 15, 1907, at a regular term of the commissioners' court of Trinity county, the said court, on the petition of Ben Falls and 16 other qualified voters, created by its order No. 40 a common school district; the said petitioners constituting a majority of the qualified voters of said district. That thereafter, on the 13th day of May, 1907, the said commissioners' court, upon petition, attempted to create, by its order No. 8, a district a large portion of which is included within the bounds of the one previously created by its order No. 40. That the first district created by order No. 40 is a valid district, and the attempt to create another district, including a large part of the territory of the district first created, is without authority of law and void; that the district first created is entitled to all the rights and privileges of a legally created district. That there is only one trustee of the district first created, and said district is entitled to two other trustees. That on April 4, 1908, a valid election was held in the district first created, for the election of two trustees, and two trustees were elected at said election, and the election returns were made to C. H. Crow, county judge, as required by law, and said commissioners' court refused to canvass said returns; that it is the duty of J. W. Bright, superintendent of public instruction for Trinity county, to appoint one of the trustees of said district, or some other suitable person, to take the census of persons within the scholastic age in said district. That no such appointment had been made, and the census had not been taken. They prayed for judgment requiring said commissioners' court to recognize the district created by order No. 40 as a valid and subsisting district, to canvass the returns of the election held therein for school trustees and to declare the result, and requiring the county superintendent to recognize said district as one legally created and subsisting, and to appoint a census trustee therefor, and that, in the event the court should find that the election for school trustees was not legally held, that it declare a vacancy in the board of trustees, and to require the county superintendent to fill such vacancy.

The respondents, in their answer and amended answer, presented general and special exceptions to the relators' petition, all of which were overruled, and pleaded a general denial; and in their trial amendment alleged the names of school patrons living in

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the district created by order No. 40, and also of the patrons living in the territory sought to be created by order No. 8; admitted that a portion of the district created by order No. 40, $1\frac{1}{2}$ by 4 miles in extent, was omitted from the district attempted to be created by order No. 8; but alleged that in the portion so omitted there were but two school patrons, and that they desired to be attached to another school district; and further pleaded that the district formed by order No. 8 would be more convenient for all school patrons of that neighborhood, and that a large majority living within the district created by order No. 8 are anxious to have said district remain as it is.

The case was tried by the court without a jury, and judgment was rendered in favor of the relators, adjudging that the district created by order No. 40 is a legal, valid and subsisting common school district, and has been since its creation, and requiring the county judge and the several county commissioners, composing the commissioners' court of Trinity county, and the said Bright as county superintendent of public instruction, to recognize the said district as valid and subsisting, and further requiring the said Bright as such superintendent to appoint two school trustees for said district to fill the existing vacancies. The trial court filed his findings of fact and conclusion of law, which are as follows:

"Findings of Fact.

"(1) During all of the A. D. 1907, and up to the time of the trial, C. H. Crow was county judge of Trinity county, Tex.; W. L. Avery, Com. Prec. No. 1; J. L. Manry, Com. Prec. No. 2; A. F. Reese, Com. Prec. No. 3; B. F. Richardson, Com. Prec. No. 4; and J. W. Bright, County Superintendent.

"(2) The community system of schools was in effect in Trinity county during 1907 and at the time of the trial.

"(3) On February 13, 1907, Ben Falls and 16 others, all qualified voters, residents therein, filed their petition asking for a common school district to be established by the commissioners' court with the metes and bounds as set out therein and constituting the district as claimed by relators to be the true district. The signers to said petition constituted a majority of the legal voters in said district or territory proposed to be made a district.

"(4) At the February term, 1907, of the commissioners' court of said county, the court, after examining said petition and the evidence in support of same, established the district as prayed for.

"(5) After the establishment of the district, the court were informed that there would be a dissatisfaction with the district as formed, and at the May term accepted a petition and established a district with a part of the territory formerly included and a

large scope of territory not formerly included in the district.

"(6) Before making the change as made at the May term of the court, there were no efforts made to determine whether a majority or any part of the legal voters in the district as formerly established would consent to the change; but the court was informed and believed that they were not willing to have the change made and would not consent to such change.

"(7) A majority of the legal voters in the district formed at the May term of the court signed the petition for such district and consented thereto; but those in the district as formerly constituted did not sign, and were not asked to sign, the same.

"(8) The district as formed at the May term of the court embraced a larger number of children within the scholastic age, and the school as located accommodates a larger number of children than as located in the former order it could have accommodated; but there are a number of the children in the old district who cannot attend the new on account of the distance and inconvenience.

"(9) No school has ever been taught in the district as first established; but school was taught in the new district during the past school year.

"(10) The commissioners' court, the county judge, and the county superintendent recognized the new district and refuse to recognize the old, and no election was ordered for trustees therein, and no election of trustees canvassed nor recognized. The county superintendent refuses to appoint trustees for the old district.

"Conclusion of Law.

"A majority of the legal voters in the district as established at the February term, A. D. 1907, did not consent to the change in the district, and the change is therefore void."

It does not appear that the court's findings of fact were excepted to, and there is no assignment of error attacking any finding of such fact. By their first assignment of error, appellants complain of the refusal of the court to sustain their exceptions to the appellees' petition; the complaint being that the petition shows on its face that appellees were attempting to use the powers of the court to force appellants to perform acts that involved the exercise of judicial and official discretion, and did not ask for an order requiring them to perform any ministerial act. We are of the opinion that the assignment is without merit. It was charged in the petition: That the community school system prevailed in Trinity county during the year 1907, and at the time of the trial; that appellee Falls and 16 others, constituting a majority of the qualified voters of a certain district, not less than 16 square miles in extent, petitioned the commissioners' court

creating it valid; that subsequently said court attempted to create another district, embracing a large part of the territory of the district first created; and that this action of the court was without warrant of law and void. It was further alleged that an election for school trustees had been held in the district first created, and that returns thereof had been made to the county judge, but that the commissioners' court refused to canvass the returns or to declare the result. Under these allegations, the relators prayed that the commissioners' court be compelled to recognize as valid the district first created and to canvass the returns and declare the result of the election therein held for school trustees, and that the county superintendent be required to recognize said district as legally created and subsisting, and to appoint a census trustee, etc. Article 3908c, Rev. St. 1895, added thereto by Laws 1897, p. 211, c. 146, § 1, provides: "The citizens of any community or territory embraced in any community county may organize a school district in said community or section of territory, in the following manner: A petition asking for the organization of said district and giving the metes and bounds of the proposed district, shall be presented to the commissioners' court and signed by a majority of the qualified voters of the proposed district, it shall adopt and enter on its record an order organizing said district, upon which said district shall acquire and become entitled to all the privileges of districts in district counties, and the schools shall be conducted in the same manner; the intention of this article being to permit subdivisions of community counties to adopt the district system when the whole county does not wish to adopt it," etc. Now it is clear from the petition that a majority of the citizens residing in a certain territory of Trinity county, the metes and bounds of which were given in their application, and which application was attached to the relators' petition and made a part thereof, petitioned the commissioners' court to organize said territory into a school district, having all the rights and privileges of school districts in district counties, and that the said court, as it appears from a certified copy of its order, which is also attached to relators' petition and made a part thereof, after hearing evidence in support of the application, granted the same and ordered that the territory described in the application be created into a common school district, "with the name, metes, and bounds as prayed for in said petition." Upon this action of the commissioners' court, the district became a common

also: "Provided that when districts are once established they shall not be changed without the consent of a majority of the legal voters in all districts affected by such change."

Now while it is true that relators did not charge in their petition in terms that the change attempted to be made by order No. 8 was not with the consent of a majority of the legal voters of the district created by order No. 40, it is alleged that the first district was legally formed, and that the proposed second district changed the first, and that such change was without authority of law and void. This allegation was not excepted to, and under it appellees were entitled to show any fact or facts that rendered void the act of the commissioners' court in changing the district first formed. The first district then, according to the allegations of the petition, which for the purpose of the exception must be taken as true, having been legally established, and the act of said court in changing it being void, the plain duty rested upon the commissioners' court to recognize the district as a common school district and to accord to it all the rights and privileges of a district in district counties, and such recognition and the according of such rights and privileges involved no judicial discretion, but were plainly ministerial. *Sansom v. Mercer*, 68 Tex. 488, 5 S. W. 62, 2 Am. St. Rep. 505; *Barrett v. Coleman*, 12 Tex. Civ. App. 663, 35 S. W. 418; *Whitmire v. State*, 47 S. W. 293. What we have said applies also to the county superintendent of public instruction in regard to the duties which it was sought in the petition to have him perform. Section 80, Acts 29th Leg. 1905, p. 285, c. 124. It follows therefore that the assignment is not well taken, and is, with the several propositions thereunder, overruled.

What we have said in disposing of the first assignment of error disposes also of the second.

The matters which appellants sought to prove by the testimony of the witnesses Watson, White, Lee, Crow, and Bright were not admissible over the objection offered, and the court did not err in excluding their testimony. The assignments raising the points are overruled.

Appellants complain that the court, in its judgment, failed to direct the appellants to perform any act or duty ministerial in its nature, but merely orders the commissioners' court to recognize the district created by order No. 40 as a legal and subsisting district. The duties of the commissioners' court and county superintendent in relation to legally constituted school districts are

fixed by law. Hence, when the court decreed that the district has been legally formed, the law stepped in and directed these officers what they should do in the discharge of their duties, and, as such duties are ministerial, it was not necessary for the court to direct them in its decree to perform the duties the law imposed upon them. If there was error in the matter complained of, it certainly was not one of which the appellants are entitled to complain. The assignment raising the point is overruled.

Nor is there any error pointed out, in the eighteenth assignment, which complains that the judgment fails to respond to the pleadings of the relators, in that they prayed the commissioners' court be required to canvass the returns of election held for school trustees in district No. 40 and declare the result, and, in the event that the court should find that no election for trustees was legally held, to declare a vacancy in said board of trustees and require the county superintendent to fill said vacancy, and that the judgment is entirely silent on this question and makes no mention of the fact whether or not an election was held for the election of school trustees in district No. 40.

While the judgment did not in terms declare that the election for trustees was not legally held, it did this in effect by declaring vacancies to exist and directing the county superintendent to fill such vacancies. The assignment points out no error, or at least not one that is prejudicial to appellants, and is overruled.

The judgment was rendered against Crow, Avery, Manry, Reese, and Richardson, not as individuals, as complained in appellants' first supplemental assignment of error, but as county judge and county commissioners "composing the commissioners' court of Trinity county, Tex." This was proper.

To treat of all the assignments presented by appellants for a reversal of the judgment of the court below would extend this opinion to an unreasonable length. We have, however, examined all the assignments and conclude that no reversible error is shown in any of them.

We are of the opinion that the judgment of the court below should be affirmed, and it is so ordered.

Affirmed.

MITCHELL v. BURNETT.

(Court of Civil Appeals of Texas. Oct. 16, 1909. Rehearing Denied Nov. 20, 1909.)

1. INJUNCTION (§ 7*)—EXISTENCE OF OTHER REMEDY—SEQUESTRATION.

An injunction may be issued under Rev. St. 1895, art. 2989, to prevent defendant in trespass to try title from inclosing the land and

removing timber, though sequestration under article 4864 is an adequate legal remedy.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 6; Dec. Dig. § 7.*]

2. PLEADING (§ 406*)—DEFECTS IN PETITION—WAIVER.

A petition for an injunction against trespass on land, described as 300 acres off the eastern portion of certain surveys definitely described, is sufficient to authorize the issuance of the writ, in the absence of special exception that the description is vague.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1363; Dec. Dig. § 406.*]

3. PLEADING (§ 406*)—DEFECTS IN PETITION—WAIVER.

A petition for an injunction, though containing no allegation that the threatened wrong will result in irreparable injury, and that petitioner has no legal remedy, is sufficient in the absence of special exception.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1363; Dec. Dig. § 406.*]

Appeal from District Court, King County; Jo. A. P. Dickson, Judge.

Action by S. B. Burnett against J. J. Mitchell. From an order granting a temporary injunction, defendant appeals. Affirmed.

Coombes, Millwee & Coombes, for appellant. Smith, Turner, Bradley & Powell and Moore & Kendall, for appellee.

DUNKLIN, J. This is an appeal by J. J. Mitchell from an order of the judge of the district court of King county granting a temporary writ of injunction in favor of S. B. Burnett, plaintiff in the suit, restraining J. J. Mitchell, the defendant, from inclosing certain lands which plaintiff alleged he owned in fee simple, and also from removing timber therefrom. The suit was for trespass to try title in the usual form for five sections of land, and plaintiff further alleged in his petition that defendant was removing timber from about 300 acres off the eastern portion of those sections, and would continue to do so if not restrained from so doing.

By his first assignment appellant insists that plaintiff had an adequate remedy at law in the provisions of article 4864, Rev. St. 1895, for the issuance of writs of sequestration, and for that reason he contends that the writ of injunction was improperly issued. In support of this contention the case of *Frazier v. Coleman*, 111 S. W. 663, is cited; but the assignment must be overruled upon the following authorities: *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994; *Green v. Gresham*, 21 Tex. Civ. App. 601, 53 S. W. 382; *Sullivan v. Dooley*, 21 Tex. Civ. App. 580, 73 S. W. 82; *Chancey v. Allison*, 107 S. W. 605; *Buchanan v. Wilburn*, 105 S. W. 841. In the case of *Sumner v. Crawford*, above cited, our Supreme Court sustained an injunction upon the ground that the applicant had no other adequate remedy, but quoted subdivision 1, art. 2989, authorizing the issuance of writs of injunction "where

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

quires the restraint of some act prejudicial to the applicant," and expressed a strong inclination to hold that the right to an injunction given by that subdivision of the article was a legal right, although there might be some other adequate legal remedy for the wrong complained of. In the case of *Green v. Gresham*, 21 Tex. Civ. App. 601, 53 S. W. 382, an injunction of the same character as the one now under discussion, issued upon similar grounds, was sustained, and Justice Stephens, in discussing the question, used the following language: "Besides, to prevent threatened waste, injunction has long been a familiar remedy. See *Hammond v. Martin*, 15 Tex. Civ. App. 570, 40 S. W. 347."

Appellant further complains that the petition for injunction was too vague and indefinite to authorize the issuance of the writ, in that the 300 acres of land which it was alleged defendant was about to invade was not definitely described. As above noted, the 300 acres was described as being off the eastern portion of the five surveys which were definitely described. In the absence of a special exception to the petition raising this objection, we think the description was sufficient, and the assignment is overruled.

Appellant further insists that plaintiff's petition for injunction was insufficient in that it contained no allegation that the threatened wrongs of defendant would result in an irreparable injury to the petitioner, and that he had no legal remedy therefor. It would be a sufficient answer to this assignment to say, as of the last preceding one, that no special exception was urged to the petition, in the absence of which the allegation was sufficient. Furthermore, facts were alleged which warranted the conclusion by the judge ordering the writ that plaintiff was entitled to the relief prayed for, and we do not think an allegation by the pleader of that conclusion would in any manner have strengthened the petition.

What we have already said is sufficient to dispose of all other assignments adversely to appellant. The order directing the issuance of the writ of injunction is therefore affirmed.

* THACKER v. WILSON et al.

(Court of Civil Appeals of Texas. Nov. 3, 1909.
Rehearing Denied Nov. 24, 1909.)

1. TRESPASS TO TRY TITLE (§ 44*)—TRIAL—QUESTION FOR JURY.

Where there is any evidence in trespass to try title to support the defense that the land in dispute is a part of a larger tract owned by defendant and no part of the tract owned by plain-

2. BOUNDARIES (§ 40*) — ESTABLISHMENT—QUESTION FOR JURY.

Evidence as to the boundary between tracts held to raise a question for the jury.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 196-204; Dec. Dig. § 40.*]

3. ADVERSE POSSESSION (§ 115*)—TRIAL—QUESTION FOR JURY.

Whether title to land by adverse possession is established is a question for the jury, where the evidence is conflicting as to the length and continuity of occupation, and the use and cultivation of the land.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 691-701; Dec. Dig. § 115.*]

4. ADVERSE POSSESSION (§ 100*)—EXTENT OF POSSESSION.

Adverse possession of land extends to the entire tract claimed, unless a part thereof is in the actual possession of another during some of the period of limitation.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. §§ 547-574; Dec. Dig. § 100.*]

5. EVIDENCE (§ 274*)—HEARSAY.

Evidence of declarations of a surveyor since deceased, made when he was attempting to survey a tract of land not originally surveyed by him, and of which he had no previous knowledge, as to his opinion of the identification of corners and lines of the survey, are inadmissible.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 1131; Dec. Dig. § 274.* *Boundaries*, Cent. Dig. § 156.]

6. BOUNDARIES (§ 35*)—EVIDENCE—REPUTATION.

Evidence of reputation, so far as it definitely exists, is admissible to prove the location of private boundaries.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 155; Dec. Dig. § 35.*]

7. BOUNDARIES (§ 33*)—BURDEN OF PROOF.

The burden is on plaintiff of showing the land in dispute to be a part of the tract owned by him as alleged, rather than a part of the tract owned by defendant.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 149-152; Dec. Dig. § 33.*]

Error from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Hunter L. Wilson and others against R. J. Thacker and others. Plaintiffs had judgment, and defendant Thacker brings error. Reversed.

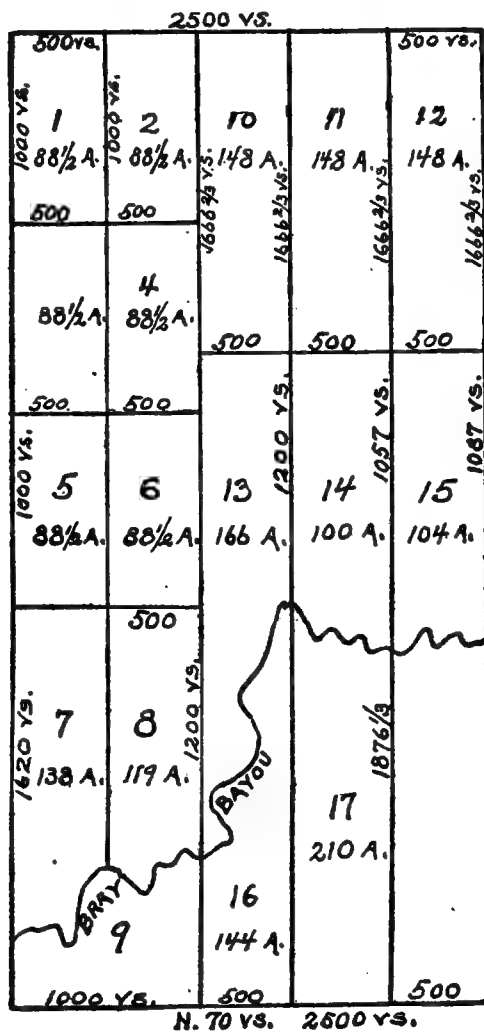
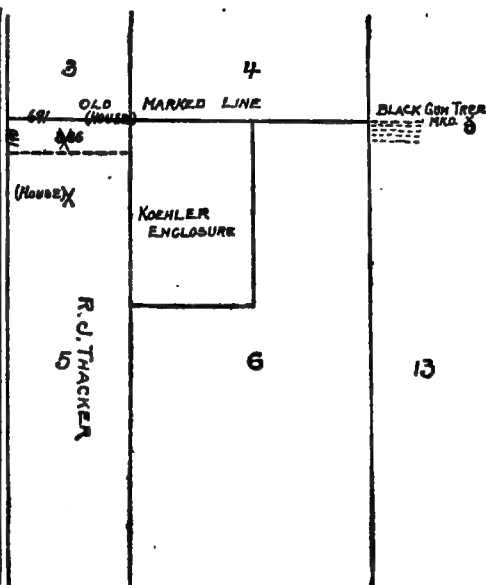
Tharp & Whitehead, for plaintiff in error.
Hutcheson, Campbell & Hutcheson, for defendants in error.

NEILL, J. Hunter L. Wilson and others sued the Houston Electric Company and a number of persons, including R. J. Thacker, in trespass to try title to recover lot 3 of the west half of the Luke Moore league. Upon the application of Thacker, a severance was granted him. He disclaimed as to all the land except a tract of 3.86 acres, which he claims to be a part of lot 5, and as to it pleaded not guilty, and the statutes of limita-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion of three, five, and ten years. The case as to him was tried before a jury, who, in obedience to a peremptory instruction of the court, returned a verdict in plaintiffs' favor, upon which the judgment from which this writ is prosecuted was entered.

It is not disputed that plaintiffs showed a chain of title to lot 3 from the sovereignty of the soil down to themselves. The contention of Thacker is that the tract in controversy is no part of lot 3, but is a part of lot 5, owned by him. If there was any evidence reasonably tending to support this theory, the court should have submitted as an issue to be determined by the jury the question as to which of the two lots the land in controversy is a part; it evidently being a part of one or the other. The evidence shows that the west half of the league was subdivided by Henry Trott, a surveyor, under the direction of James F. Perry, the executor of Stephen F. Austin, in 1838. Here is a copy of the plat:



shown by whom these lines were made, but we think the circumstances sufficiently tend to show that they were made by Trott as to require the issue as to whether they were made by him when he subdivided the land to be submitted to the jury. Among these old lines there is evidence of one extending from the southeast corner of lot 4, which is the northeast corner of lot 6, at which stands a black gum tree marked "XO," to the east line of the west half of the Luke Moore league. If this line was run by Trott when he subdivided the land, and is the one shown by his plat of the subdivision, then it would seem that it is the south boundary line of lot 3 and the north boundary line of lot 5. The evidence tends to show that this line is taken by surveyors, and regarded by persons living in the vicinity as the Trott line. If it is, in fact, such line, then, as shown by the plat attached, the 3.86 acres in controversy lies in lot 5, as is claimed by Thacker, and not in lot 3, which is sued for. So it is seen that an issue of fact was raised by the evidence, which should have been submitted to the jury.

Another assignment of error complains of the court's refusal to submit the case to the jury upon the issue of limitation. Under it is asserted the proposition that "the evidence was so conflicting that fair-minded men would reasonably differ as to whether or not R. J. Thacker acquired the 3.86 acres in controversy by the 10-year statute of limitation." If there were such conflict in the evidence, the case, of course, should have been submitted on that issue. Upon full examination and consideration of the testimony upon this question, we have reached the conclusion that it is insufficient as to length and continuity of occupancy of the land in controversy, as well as to cultivation, use, or enjoyment, to carry the case to the jury. In this connection we will say, in view of another trial, it is not essential to Thacker's recovery of the 3.86 acres that he should have been in actual or pedal possession of that very part of the land, cultivating, using, and enjoying the same; for, if he was in exclusive, actual, adverse possession of any part of lot 5 claimed by him, using, cultivating, or enjoying the same, such adverse possession would extend to the 3.86 acres in controversy, if a part of the land purchased, claimed, and occupied by him, unless the part in controversy was in possession of another holding adversely to him during some of the time necessary to complete the statutory period required to give him title by limitation.

A. E. Stimson, a witness for plaintiffs, having testified that J. J. Gillespie had been a surveyor in Harris county since 1850, that he had been dead for four years, and when

tree marked "XO," seen by them at the northeast corner of lot 6 and the southeast corner of lot 4, was shown him by Gillespie. Upon objection being made that the question called for hearsay testimony, the witness was not permitted to answer it. He would, had he been permitted to do so, have answered that J. J. Gillespie pointed out the tree marked "XO" as a Trott corner between 4 and 6 and on the west line of 13. The action of the court in sustaining plaintiffs' objection to the question, and in not allowing the witness to answer it, is assigned as error. The assignment is not well taken. The declarations of a surveyor who is dead, made at a time when he was attempting to survey a tract of land not originally surveyed by him, of which he had no previous knowledge, which relate to his opinion regarding the identification of corners and lines of a survey, are inadmissible as evidence. *Russell v. Hunnicutt*, 70 Tex. 657, 8 S. W. 500; *Titterington v. Trees*, 78 Tex. 570, 14 S. W. 692; *Goodson v. Fitzgerald*, 115 S. W. 50; *Cable v. Jackson*, 16 Tex. Civ. App. 579, 42 S. W. 137; *Hurt v. Evans*, 49 Tex. 311.

The defendant Thacker, having testified that he purchased the land in controversy in 1879 or 1880 and had it surveyed by Alstaten, and Gillespie, since deceased, who started from the gum tree marked "XO" and run from there to the Tierwester line to the west line of the Luke Moore league, and that their survey placed the land in controversy in lot 5, and that in 1880 he fenced the land according to the survey, was then asked if he knew the general reputation of the line between lots 3 and 5. The plaintiffs objected to the question upon the grounds that it was inadmissible to prove the location of the line by reputation, unless it was shown that the owners of 3 and 5 recognized the line, and that the reputation was based upon some ancient mark or line shown to have been put there by the party who originally ran the line. The objection was sustained, and the witness was not permitted to answer the question. He would have testified that the line run by Gillespie and Alstaten between lots 3 and 5 is reputed as being the Trott line upon the ground. The exclusion of the testimony is assigned as error. Prof. Wigmore in volume 2, § 1587, in his work on Evidence, in considering the question as to the admissibility of reputation to prove private boundaries, reaches the conclusion that, except in Maine and Massachusetts, it is now everywhere accepted in the United States as a legitimate application of the general principle that reputation, so far as it definitely exists, is admissible to prove the location of private boundaries. Among the cases cited to sustain this conclusion are *Stroud v. Spring-*

field, 28 Tex. 649; Clark v. Hills, 67 Tex. 141, 2 S. W. 856. See, also, Camp v. League, 92 S. W. 1062; Greenl. Ev. (15th Ed.) notes under section 145; Elliott Ev. §§ 398, 401. It may be that a sufficient predicate was not laid for the introduction of such evidence; it not being shown when such reputation began, whether before or after the origin of the dispute as to such boundary line, but such objection was not urged against the testimony offered. Under the authorities cited we believe such testimony was admissible as against the objections made.

We have not considered or discussed the plaintiffs' evidence on the question as to the location of the boundary line between lots 3 and 5, but have only considered so much of the testimony in the case as was necessary to show that the case should have been submitted to the jury upon that issue. In this connection we will observe that the burden of showing that the strip of land in controversy was a part of lot 3 was upon the plaintiffs; and if, as the evidence indicates, the line was actually run on the ground, it was incumbent upon them to show the line actually run, and that, according to it, the land in controversy was on their lot.

For reason of the errors indicated, the judgment is reversed, and the cause remanded.

LATHAM CO., BANKERS, et al. v. SHELTON.

(Court of Civil Appeals of Texas. Oct. 16, 1909.)

1. EXECUTION (§ 171*)—LEVY ON REAL ESTATE—INJUNCTION.

The legal and equitable owner of real estate, holding the same under a deed duly recorded prior to the levy on the property to satisfy a judgment against another, has an adequate remedy at law in trespass to try title, and injunction to restrain a sale of the property under the levy does not lie.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 498, 499; Dec. Dig. § 171.*]

2. APPEAL AND ERROR (§ 1201*)—REMAND—AMENDMENT.

Where the court on appeal vacated an injunction restraining a judgment creditor of plaintiffs grantor from selling under execution realty held by plaintiff under a conveyance duly recorded before the levy, it will permit plaintiff on remand to amend the petition so as to bring a case within Rev. St. 1896, art. 2989, amended by Gen. Laws 1909, p. 354, c. 34, § 1, providing that an injunction may be granted where a cloud will be put on the title to real estate sold under execution, etc., adopted after the granting of the injunction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4673-4683; Dec. Dig. § 1201.*]

Appeal from District Court, Nolan County; Jas. L. Shepherd, Judge.

Action by Mrs. M. A. Shelton against Latham Company, Bankers, and another. From

a judgment for plaintiff, defendants appeal. Reversed and remanded.

Earl Conner, for appellants. H. M. Lightfoot, for appellee.

CONNER, C. J. This is an appeal from an ex parte order of the judge of the Thirty-Second judicial district granting an injunction to restrain the sale of lot 4, block 110, in the town of Sweetwater, Nolan county, upon which the sheriff of said county had levied certain executions in favor of appellants and against H. M. Lightfoot and M. L. Lightfoot. It is alleged in the petition upon which the injunction rests that appellee, Mrs. M. A. Shelton, at the date of the executions, which were issued on the same day, and at the date of the levy of the same was "the legal and equitable owner" of said lot 4, and "that her title is duly recorded in deed records of Nolan county, Tex., and was so recorded" at the time said executions were levied. The petition further describes the executions and the several judgments by virtue of which they were issued, from which it appears that the judgments were by the justice court of Eastland county in favor of appellants and against said H. M. and M. L. Lightfoot only. Appellee, therefore, was not a party to the proceedings, and, her title being of record, the levy upon and the threatened sale of lot 4 as the property of the Lightfoots, strangers to the title, did not authorize the grant of an injunction.

The early case of Carlin v. Hudson, reported in 12 Tex. 202, 62 Am. Dec. 521, is closely in point. In that case Carlin sought and was awarded an injunction by the district court restraining the sale of certain lands which had been levied upon as the property of one Ford. Carlin alleged in his petition for the injunction that by a bona fide purchase from Ford he was the owner of the lands levied upon, and that on the 12th day of March, 1852, some three days before the levy of the execution, he "had his title deeds duly recorded." In disposing of the case on appeal our Supreme Court said: "The cases in which injunctions are granted to restrain the alienation of property are those where it is indispensable to secure the enjoyment of specific property; or to preserve the title to such property; or to prevent frauds, or gross and irremediable injustice in respect to such property. 2 Story, Eq. c. 23. The present manifestly does not come within that description of cases. The proposed sale of the land as the property of Ford could not operate to dispossess the plaintiff, or deprive him of its enjoyment, or to defeat his title, or embarrass him in the prosecution of his legal remedies for any injury to his title or possession, if, indeed, the property was his by a fair and bona fide purchase, made before any lien had attached or any right had ac-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

might be. If he had none, the sale could not work any irreparable injury to the real owner. And to permit the execution of judgments to be enjoined for such causes would be to enable judgment debtors, by fraudulent transfers of property, to embarrass the collection of debts by imposing upon their creditors the necessity of almost interminable litigation and delay. The present was not a proper occasion for the court to interpose its preventive and protective authority by injunction. *Henderson v. Morrill*, 12 Tex. 1; *Cameron v. White*, 3 Tex. 152. The injunction was improvidently awarded. And as the threatened sale was the only injury complained of, and the obtaining of an injunction the sole purpose of the suit, the petition was rightly dismissed for the want of equity."

The case of *Carlin v. Hudson* has been followed and approved by numerous subsequent decisions. In some of the cases injunctions have been upheld where the title or right of the petitioner rested in part in parol or was not of record at the time of the levy of the execution against a third party. But we know of no case in which an order for an injunction has been sustained where, as here, the petitioner shows that she was not a party to the judgment or execution sought to be enforced, and where she is the legal and equitable owner by virtue of due conveyance of which the plaintiff in execution has full notice by record or otherwise. In such cases the owner has full and adequate legal remedy in the action of trespass to try title, and a resort to the equitable remedy of injunction is unnecessary and unauthorized. *Walker v. Herron*, 22 Tex. 58; *Purinton v. Davis*, 66 Tex. 456, 1 S. W. 343; *Mann v. Wallis, Landes & Co.*, 75 Tex. 611, 12 S. W. 1123; *Cook v. T. & P. Ry. Co.*, 3 Tex. Civ. App. 145, 22 S. W. 58; *Chamberlain v. Baker*, 28 Tex. Civ. App. 499, 67 S. W. 532; *Brown v. Ikard*, 33 Tex. Civ. App. 661, 77 S. W. 967.

We conclude that appellee's petition exhibits no equity, and that the court erred, as assigned, in granting the injunction prayed for. It follows that the order appealed from should be set aside and the writ of injunction issued by virtue thereof vacated, and it is so ordered. The suit, however, will not be dismissed, as usual in cases where no relief other than for an injunction is sought, for the reason that some of the members of the court are inclined to think that the statutory right to an injunction has been enlarged by the amendment of Rev. St. 1895, art. 2689, passed since the date of the order herein appealed from, to the effect that, in addition to cases heretofore prescribed, injunction may now be granted " * * * where a cloud would be put on the title of

irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law." See chapter 34, p. 354, Gen. Laws 1909.

The suit, therefore, will be remanded to the end that appellee may, if she can and so desires, amend her petition so as to bring her case within the new statute.

TEXAS & N. O. R. CO. v. PLUMMER.

(Court of Civil Appeals of Texas. Nov. 17, 1909. Rehearing Denied Dec. 8, 1909.)

1. MASTER AND SERVANT (§ 153*)—INJURIES TO SERVANT—DANGEROUS MACHINERY—INSTRUCTIONS—FAILURE TO WARN—NEGLIGENCE.

Where plaintiff, a minor of 17, was employed in defendant's machine shop to clean the revolving cylinders of a "nut tapper," and was injured in so doing, defendant was negligent in not instructing him as to the proper way to clean the machine, and in failing to warn him of the danger of doing the work when the machine was in motion.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 314-317; Dec. Dig. § 153.*]

2. MASTER AND SERVANT (§ 153*)—INJURIES TO SERVANT—NEGLIGENCE—PROXIMATE CAUSE.

Such negligence was a proximate cause of plaintiff's injury to his hand, which was drawn into the machine by the catching of waste in a cogwheel as he was cleaning a revolving cylinder by application of the waste.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 304; Dec. Dig. § 153.*]

3. EVIDENCE (§ 151*)—TESTIMONY AS TO STATE OF MIND—KNOWLEDGE.

In an action for injuries to a servant, plaintiff was properly permitted to testify that he did not know of the danger of doing the work in which he was injured in the way he did.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 440; Dec. Dig. § 151.*]

4. MASTER AND SERVANT (§ 218*)—INJURIES TO SERVANT—ASSUMED RISK—KNOWLEDGE OF DANGER.

To charge a minor with the assumption of a risk incident to a dangerous employment, he must not only know the danger, but must be aware of its extent, and have sufficient discretion to comprehend the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 603; Dec. Dig. § 218.*]

5. MASTER AND SERVANT (§ 218*)—INJURIES TO SERVANT—MINORS—ASSUMED RISK—CONTRACT OF EMPLOYMENT.

The rule that a minor servant does not assume the risk unless he is aware of the danger and its extent, and has sufficient discretion to comprehend the risk, was not affected by the fact that his contract of employment was made with his parents; they having no authority to contract away his rights, and relieve the master from duties imposed by law for his protection.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 601; Dec. Dig. § 218.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

6. TRIAL (§ 296*)—INSTRUCTIONS—OMISSIONS.

The omission of an element essential to the cause of action or defense from one paragraph of the charge is not material, where it is included in another.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 706; Dec. Dig. § 296.*]

7. MASTER AND SERVANT (§§ 295, 296*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMED RISK—INSTRUCTIONS.

An instruction charged that if plaintiff knew, or had the same means of knowing as his employer, of the danger to which he would be exposed when cleaning the machine in question, and failed to exercise that degree of care that a man of ordinary prudence would have used under the circumstances to avoid injury, and by reason of such omission, he was injured, he could not recover; that if he was a youth of immature judgment and inexperience, and the perils of the undertaking were not communicated or known to him, and by reason of his immaturity he was incapable of understanding the nature of the hazards he had undertaken, the jury, to prevent recovery by him, must believe that he failed to exercise that degree of care that persons of his age, undeveloped judgment, and want of information would have used under the circumstances. The court also charged that if the jury believed that there was danger of the waste being caught in the cogs, and his hand drawn therein, while he was cleaning the machine in motion, and if plaintiff had discretion to understand such danger, then he assumed the risk and could not recover. *Held*, that such instruction prevented a recovery in case plaintiff either assumed the risk, or was guilty of contributory negligence, and was not objectionable as requiring a finding of both to prevent a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1163, 1180; Dec. Dig. §§ 295, 296.*]

8. MASTER AND SERVANT (§ 296*)—INJURIES TO SERVANT—MINORS—DEGREE OF CARE REQUIRED—INSTRUCTIONS.

Such instruction was not erroneous in so far as it charged that plaintiff was required to exercise that degree of care that a person of his age, undeveloped judgment, and want of information would have used under the same circumstances, on the theory that the correct test was the exercise of that degree of care that a person of ordinary prudence of his age, undeveloped judgment, and want of information would have used under the same circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1184; Dec. Dig. § 296.*]

9. TRIAL (§ 260*)—INSTRUCTIONS—REQUESTED CHARGE—REFUSAL.

It is not error to refuse a requested charge, the subject of which has been correctly stated in the court's main charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.*]

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by W. C. Plummer against the Texas & New Orleans Railroad Company. Judgment for plaintiff, and defendant appeals. *Affirmed*.

Baker, Botts, Parker & Garwood and Lane, Jackson, Kelley & Wolters, for appellant. Lovejoy & Parker, for appellee.

NEILL, J. This is a suit by W. C. Plummer, a minor, brought by Cordella Plummer, as his next friend, against the railroad com-

pany to recover damages for personal injuries alleged to have been inflicted upon him by the latter's negligence. The trial resulted in a verdict and judgment in favor of the plaintiff for \$5,000.

Conclusions of Fact.

The evidence shows that on November 3, 1906, plaintiff, then a minor 17 years old, while in the employ of defendant and working in its machine shops at Houston in the duty of his employment, got his right hand caught in the cogwheels of a machine called a "nut tapper," which he was cleaning, and three of his fingers were mashed off, leaving only his thumb and index finger, of which the latter was seriously injured, and its use permanently impaired. The plaintiff had only been engaged in working about the machine three days prior to the accident, and had never cleaned it before, and had never been instructed by defendant or any of its servants as to how such work should be done, or informed of the danger in cleaning the machine when it was in motion. When he commenced to clean the machine, it was not in motion, but when he had cleaned the part exposed, he put it in motion so as to expose parts which could not be reached unless moved by operating the machine. And while it was in motion, and he was cleaning the revolving cylinders by the application of "waste" thereto, the shreds of the waste caught in a cogwheel and drew his hand between the cogs, whereby it was injured as before stated. On account of plaintiff's youth and inexperience he did not know of the danger of being injured as he was in cleaning the machine, nor was such danger obvious or apparent to one of his age and inexperience, who had never been instructed how to clean the machine, nor warned of the danger of cleaning the same while in motion. Hence we conclude that the defendant was negligent in not instructing the plaintiff as to the proper method of cleaning the machine, and in not warning him of the danger in doing such work when the machine was in motion, that such negligence was the proximate cause of plaintiff's injuries, and that by reason of such negligence he was damaged in the amount found by the jury.

Conclusions of Law.

1. It was not error to allow plaintiff to testify that he did not know of the danger in performing the work in which he was injured in the way he did. As to whether he was aware of the danger or not was a matter about which he knew more than any one else. This was the principal issue in the case. If he knew of the danger, whether it was obvious to one of his age and experience or not, his doing such work in the manner he did with knowledge of such danger might have defeated his action. Therefore it was per-

2. The paragraph of the charge assailed by the second assignment is not obnoxious to the first proposition advanced. It is certainly the law in this state that, to charge a minor with the assumption of a risk incident to a dangerous employment, he must not only know the danger, but be aware of its extent and have sufficient discretion to comprehend and understand the risk. *T. & N. O. Ry. Co. v. McCoy*, 117 S. W. 446; *Wood v. Texas Cotton Product Co.*, 88 S. W. 496. Nor can an implication contrary to this principle arise from the fact that the contract of employment was made with the minor's parents. A child has no voice in such a contract; his duty in the matter is simply obedience to the will of his parents, and they cannot impliedly or expressly contract away his rights or relieve the master from a duty the law imposes on him for the protection of the minor. Nor, when the entire charge is read and construed in connection with it, is the fifth paragraph obnoxious to the second proposition advanced under this assignment.

3. The sixth paragraph of the charge, attacked by the third assignment, is a correct application of the law to plaintiff's theory of the case made by his pleadings and evidence, leaving it to the jury to find whether the essential facts pleaded were proved, and, if proved, whether they constituted negligence, and, if so, whether such negligence was the proximate cause of plaintiff's injuries. It does not eliminate the defense of contributory negligence, but requires that the jury should believe from the evidence that plaintiff was not guilty of contributory negligence before they could return a verdict for him.

4. The seventh paragraph of the charge, which is the subject of the fourth assignment, explicitly presents the issuable facts necessary for plaintiff to prove to entitle him to a verdict, and, in effect, plainly tells the jury that if he has failed to establish any of them by a preponderance of the evidence, they must return a verdict for the defendant. The objection urged by defendant is that it does not present the proposition that, if plaintiff failed to exercise ordinary care in cleaning the machine, such as a person of his age and discretion would exercise under similar circumstances, he would not be entitled to recover. This is merely an omission which, if appearing in the charge taken as a whole, would not, in the absence of a requested charge supplying it, authorize a reversal of the judgment on account of it. But in the fifth paragraph the substance of the proposition, claimed to be omitted, occurs. A charge must be taken as a whole, and not in fragments, in order to determine whether it is erroneous.

knowing as his employer, of the danger to which he would be exposed in cleaning the said machine, and further believe from the evidence that the plaintiff failed to exercise that degree of care that a man of ordinary prudence would have used under the circumstances to avoid injury from such danger, and that by reason of his omission to observe that measure of caution he was injured, he cannot recover, unless, however, you believe from the evidence that, at the time plaintiff was hurt, he was a youth of immature judgment and inexperienced in the business in which he was employed, and that the perils of his undertaking were not communicated or known to him, and that by reason of such immaturity of judgment and inexperience, and want of information as to the perils of the employment, he was incapable of understanding the nature and extent of the hazards to which he was subjected, in which event, in order to prevent recovery by him, you must believe that he failed to exercise that degree of care that persons of his age, undeveloped judgment, and want of information would ordinarily use under the circumstances. From what has been stated, you will perceive that it is not the mere fact of plaintiff's minority at the time he was hurt that would relieve from the care demanded of an adult, but such immaturity of judgment, inexperience, and lack of information as has been defined to you would be necessary to relieve him from that degree of care. And in this connection you are also instructed that if you believe from the evidence that there was danger of the waste being caught in the cogs, and plaintiff's hand drawn therein, while he was cleaning the machine in motion, and believe that plaintiff had the discretion to understand such danger, then he assumed the same, and cannot recover."

It is contended under the fifth assignment of error that this part of the charge in effect tells the jury that they must believe both that the plaintiff assumed the risk of the danger, and that he was guilty of contributory negligence, before they could find for the defendant. Clearly this is not the effect of the charge. On the contrary, it is obvious from it that he could not recover if he either assumed the risk of his injuries, or was guilty of negligence contributory to them. See *T. & P. Ry. Co. v. Brick*, 83 Tex. 600, 20 S. W. 511. Again it is urged that this part of the charge gives an incorrect statement of the degree of care required of a minor, in that it tells the jury that plaintiff was required to exercise that degree of care that a person of his age, undeveloped judgment, and want of information would use under the same circumstances; the correct test being the exercise of that degree of care that a person of ordinary prudence of his age, un-

developed judgment, and want of information would use under the same circumstances. It will be observed that the charge is almost in the exact language of the Supreme Court in *T. & P. Ry. Co. v. Brick*, *supra*. Besides, we are not prepared to say that the test as to negligence of a minor is as contended for by the defendant, for it is difficult to determine who is a person of "ordinary prudence" in the application of the term to minors. Unless such a standard of conduct can be reasonably established, it would seem that the test given by the court in its charge is preferable to the one contended for by the defendant.

6. The defendant evidently misconstrues the charge in asserting in its sixth assignment that it fails to present the issue of assumed risk, for it prominently presents the question in accordance with the law governing cases of this character. Nor does the charge, as is asserted by the seventh assignment, fail to present the issue of contributory negligence.

7. There was no error in the court's refusing to instruct the jury, at appellant's request, that plaintiff had failed to make out a case, and for that reason to return a verdict in defendant's favor. The evidence emphatically disclosed such facts and circumstances as required the submission of the question of defendant's negligence to the jury; it not appearing as a matter of law that plaintiff's injuries resulted from a risk assumed by him as incident to his employment, or that he was guilty of negligence contributing to them.

8. So much of the special charges, the refusal of which is the subject of the ninth, tenth, and eleventh assignments, as is the law applicable to the case is embraced in the main charge. Therefore it was not error to refuse each and all of them.

9. The conclusions of fact dispose of the twelfth assignment, which complains that the verdict is contrary to the law and evidence.

There is no error in the judgment, and it is affirmed.

WESTERN UNION TELEGRAPH CO. v. SHOCKLEY.

(Court of Civil Appeals of Texas. July 3, 1909.
Rehearing Denied Nov. 27, 1909.)

TELEGRAPHS AND TELEPHONES (§ 37*)—DELAY IN DELIVERY OF MESSAGE—LIABILITY.

Where a contract for transmission of a telegram, evidenced by the message, was to promptly deliver it to the sendee at the point to which it had been directed, the original message containing the clause that messages would be delivered free within established free delivery limits of the terminal office, but that for delivery at a greater distance a special charge would be made, and only the charge for transmission to the place where directed was paid, the company was not liable for failure to de-

liver the message to the sendee at his residence, seven miles in the country.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. §§ 29, 32; Dec. Dig. § 37.*]

Appeal from District Court, Young County; A. H. Carrigan, Judge.

Action by N. C. Shockley against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Spoons, Thompson & Barwise and Geo. H. Fearons, for appellant. Kay & Akin and Theodore Mack, for appellee.

CONNER, C. J. Appellee sued in the district court to recover damages in the sum of \$1,995.60 for the failure to seasonably deliver to him the following message: "To Newt Shockley, Graham, Texas. Your mother is dead. W. B. Shockley." From a judgment in his favor in the sum of \$500 this appeal has been prosecuted.

The principal complaint is that the court erred in refusing to give to the jury a requested peremptory instruction to find in appellant's favor. The following facts seem undisputed: Appellee, who is the Newt Shockley referred to in the telegram, lived in the country about seven miles from Graham, Tex. His post office and trading point, however, was Graham. Appellee's mother lived several miles in the country from Heflin, Ala., and died at her home on January 1, 1908. Some time previously, appellee had visited his mother in Alabama, and had arranged with W. B. Shockley, a kinsman, to send a telegram in event of the serious sickness or death of his mother, and on January 1st W. B. Shockley over the phone directed one of his friends living at Heflin (a Mr. Glasgow) to send a message to Newt Shockley at Graham, Tex., informing the latter of the death of his mother. Glasgow delivered the message we have quoted to the agent at Heflin, and it was received at Graham, Tex., about 11 a. m. on January 2d. W. B. Shockley knew the place of appellee's residence in the country, but it appears that Glasgow for him paid only the charge of transmission from Heflin to Graham, the record being silent as to what, if anything, was said about appellee's residence, or whether an additional charge would be required. The evidence is conflicting as to whether appellant's agent at Graham ascertained appellee's place of residence, but, in deference to the verdict of the jury, we find that appellee's Graham agent was informed of it on the day of the receipt of the telegram at the Graham office. The telegram, however, was not in fact delivered until the 9th day of January, when appellee called for it at appellant's office in Graham; appellee having learned of the death of his mother by letter. The burial of appellee's mother was

delayed five days awaiting his arrival, and appellee could and would have attended the burial had the telegram been promptly delivered. It should be further stated that on January 3d the Graham office sent a service message to its agent at Heflin inquiring for a better address, but it does not appear that any other or further inquiry or demand was made. After the dispatch of the service message, appellant's Graham agent also mailed in the post office at Graham a notice of the receipt of the telegram.

We are of opinion that appellee failed to show a right of recovery, and that the special instruction should have been given. The basis of appellee's right, if any, is the contract evidenced by the message, and not the nonperformance of a duty prescribed by any general law. That contract was for the prompt transmission and delivery of the telegram to appellee at Graham, Tex., and not at his residence, seven miles in the country. See *W. U. Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310, 22 S. W. 532; *W. U. Tel. Co. v. Swearingen*, 95 Tex. 423, 67 S. W. 767; s. c., 97 Tex. 293, 78 S. W. 491, 104 Am. St. Rep. 876. The original message contained the clause that "messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery"; and appellee insists upon the authority of *W. U. Tel. Co. v. Ayres*, 105 S. W. 1165, that appellant is liable on the ground that it failed to inquire of W. B. Shockley, the sender of the telegram, and afford him an opportunity of guaranteeing the special charge of \$3 which the evidence shows under appellant's regulations would have been necessary in order to transmit the telegram from Graham to appellee's residence in the country. The case cited is quite distinguishable from the one before us. Among other things in that case there was a failure to deliver for some 15 hours after the sender of the telegram had paid additional charges when informed that the party lived outside of the company's free delivery limits. Again, the facts in the Ayres Case show that the addressee, in fact, lived within the town or city to which it had been addressed. In such a case there is support for the holding of the court to the effect that it is the duty of the company, in view of a provision like that we have quoted, to deliver the telegram or to at least afford the addressee an opportunity to pay the additional charges, and certainly, after the additional charges had been paid, it could be said that a new contract was entered into requiring the telegraph company to deliver to the addressee, notwithstanding her residence beyond the free delivery limit. But in this case appellee did not live in any part of the town of Graham, to which the telegram had been directed by

the sender. We cannot assume that it was intended by the sender to pay an extra charge for a delivery to appellee seven miles in the country. He had the right, if he desired to do so, to avoid the payment of extra costs by taking the risk of appellee's being found in the town of Graham at the time of or soon after the receipt of the telegram at that place. At all events, it cannot be said that appellant contracted to deliver the telegram at appellee's residence, and, in the absence of such a contract, we know of no duty on appellant's part, for the violation of which a pecuniary liability arises, which required its agent or employé at Graham, in violation of appellant's regulation to the contrary, to take or send the telegram to appellee seven miles in the country.

The foregoing conclusion renders the disposition of other assignments unnecessary; and it is ordered that the judgment be reversed and here rendered for appellant.

TEXAS & N. O. R. CO. v. MARSHALL.

(Court of Civil Appeals of Texas. Nov. 15, 1909.
Rehearing Denied Dec. 9, 1909.)

1. EVIDENCE (§ 123*)—DECLARATIONS—RES GESTÆ.

In an action by a passenger for the misconduct of the conductor, consisting of insulting language, the statement of a fellow passenger, who had heard the conductor's language, made to the passenger after the termination of the dispute, that it was a shame for a man to have to take anything like that, and that the passenger ought to have slapped the conductor, was inadmissible as the opinion of a stranger to the occurrence, and not a part of the res gestæ.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 351-368; Dec. Dig. § 123.*]

2. WITNESSES (§ 319*)—IMPEACHMENT.

A witness making a statement about an immaterial matter cannot be impeached by showing that his testimony is false.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1068; Dec. Dig. § 319.*]

3. APPEAL AND ERROR (§ 1140*)—EXCESSIVE VERDICT—REMISSION ON APPEAL.

An excessive verdict in an action by a passenger for the misconduct of the conductor, rendered after trial without error, will be corrected on appeal by the court ordering a proper remittitur.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.*]

4. CARRIERS (§ 321*)—CARRIAGE OF PASSENGERS—MISCONDUCT OF CONDUCTOR.

In an action by a passenger for misconduct of the conductor, consisting of insulting language used in taking up the passenger's ticket, which by the mistake of the agent selling it was not the kind the passenger should have had, an instruction that the carrier must furnish courteous employes was erroneous.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 321.*]

Appeal from Liberty County Court; I. B. Simmons, Judge.

Action by A. W. Marshall against the Texas & New Orleans Railroad Company. From

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

a judgment for plaintiff, defendant appeals. Reversed and remanded.

Baker, Botts, Parker & Garwood, Parker, Hefner & Orgain, and Stevens & Pickett, for appellant. H. E. Marshall, F. M. Stevens, and J. F. Dabney, for appellee.

REESSE, J. This is a suit by A. W. Marshall against the Texas & New Orleans Railroad Company to recover damages in the sum of \$995 for alleged mistreatment of plaintiff while as a passenger on one of defendant's passenger trains by the conductor in charge of the train. The mistreatment consisted in rough and insulting language alleged to have been used by the conductor to plaintiff in taking up his ticket, which by mistake of the agent who sold the ticket was not the kind of a ticket plaintiff should have had to entitle him to a passage. The conductor accepted the ticket, but it is alleged that he used towards plaintiff discourteous, rough, and insulting language in doing so. A trial with the assistance of a jury resulted in a verdict and judgment for plaintiff for \$995, the full amount claimed, from which defendant appeals.

Over seasonable and proper objections by appellant, the court allowed appellee to testify that after the dispute between himself and the conductor was ended, and about the time the conductor stepped away, a fellow passenger, who had heard the language used by the conductor, said to witness: "It is a shame for a man to have to take anything like that. You ought to have gotten up and slapped him." To the admission of this evidence appellant took a bill of exceptions, and the question of the admissibility of the evidence is presented by the first assignment of error. The evidence was clearly inadmissible. It was nothing more nor less than the opinion of a passenger, a stranger to the occurrence, as to the conduct of the conductor. The testimony does not come within the exception with regard to admission of testimony of acts done or words spoken as part of the *res gestæ*. *Railway v. Ivy*, 71 Tex. 417, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758; *Duyer v. Continental Ins. Co.*, 63 Tex. 356; *T. & M. O. R. R. Co. v. Beller*, 112 S. W. 323. This testimony must have had great influence with the jury, and is probably the cause, in part, of the extraordinary size of the verdict.

The testimony of the witness Smith, referred to in the second assignment of error, was inadmissible. If a witness under examination makes a statement about an entirely immaterial matter, it is not admissible, for the purpose of impeaching him to show that such testimony is not true. The testimony did not tend to show that the conductor was drunk at the time of the occurrence in question. The second assignment of error pre-

senting the point must be sustained. *T. & P. Ry. Co. v. Phillips*, 91 Tex. 278, 42 S. W. 852.

There was no error in the charge complained of in the third assignment of error. The assignment is overruled.

The court did not err in refusing to give the charge referred to in the fourth assignment of error. No question is made of the right of the conductor to question the ticket produced by appellee, but complaint is made of the rude and insulting way in which he is alleged to have acted.

The fifth and sixth assignments of error are overruled without discussion.

The seventh assignment of error complains of the verdict as excessive, and must be sustained. If there were no other errors requiring a reversal, this could be cured by proper remittitur, and would not require a remand of the cause.

We are not prepared to say that as a matter of law the evidence for plaintiff does not authorize a recovery of any amount as damages, as contended by appellant in the eighth assignment.

It was error to instruct the jury that it was "the duty of the defendant company to furnish courteous employes." No case is presented by the pleadings or evidence against appellant in this regard.

For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

J. T. STARK GRAIN CO. et al. v. HARRY BROS. CO.†

(Court of Civil Appeals of Texas. Nov. 13, 1909. Rehearing Denied Dec. 4, 1909.)

1. CORPORATIONS (§ 499*)—RIGHT TO DEFEND ACTION—PAYMENT OF FRANCHISE TAX.

Where, at the time a corporation was sued, it had not failed to pay its franchise tax, a condition precedent to its right to do business in the state, it would not be deprived of the right to defend the action by afterwards failing to pay such tax.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 1918; Dec. Dig. § 499.*]

2. EVIDENCE (§ 513*)—OPINION EVIDENCE—SUBJECT OF EXPERT TESTIMONY.

In an action for breach of contracts to pay for an elevator building, tanks, etc., a qualified expert could express an opinion that the building, etc., were constructed in accordance with the contracts.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2317; Dec. Dig. § 513.*]

3. EVIDENCE (§ 471*)—OPINIONS—CONCLUSIONS OF WITNESS.

A witness having testified that the construction of an elevator and tanks was under his supervision; that he was fully acquainted with the contract and specifications, and stated that the building, tanks, etc., were in accordance with the contract and specifications, and stated in many respects the size of the building and tanks, character of material used, and the manner in which the work was done, which

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

Cent. Dig. §§ 2149-2151; Dec. Dig. § 471; Witnesses, Cent. Dig. §§ 833-836.]

4. APPEAL AND ERROR (§ 1052*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in admitting testimony is harmless where the witness is allowed to make substantially the same statement without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.*]

5. EVIDENCE (§ 258*)—ADMISSIONS—LETTERS—AUTHORITY OF AGENT.

In an action for breach of a contract to pay for an elevator building, tanks, etc., where a defense was that certain of the tanks did not hold 1,000 bushels of wheat, as contracted for, a letter entirely in typewriting, containing the initials of defendant's assistant bookkeeper, written on defendant's letterhead, received by plaintiff in due course of mail, which letter stated that defendant had put 1,000 bushels of wheat into one of the tanks, and that it had twisted out of shape, was admissible as an admission of defendant that the tanks held 1,000 bushels, as against an objection that authority to write the letter was not shown.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1006, 1007; Dec. Dig. § 258.*]

6. APPEAL AND ERROR (§ 1051*)—HARMLESS ERROR—ADMISSION OF TESTIMONY.

If the evidence was insufficient to show the execution of the letter by defendant, its admission was harmless where the undisputed evidence showed that the tanks did not hold 1,000 bushels, which was admitted by plaintiff's counsel in open court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4163; Dec. Dig. § 1051.*]

7. PARTIES (§ 40*) — PARTIES PLAINTIFF — TRANSFER OF CLAIM PENDING SUIT.

Where a claim is transferred pending suit thereon, the transferee may come in and make himself a party, but it is not necessary as he takes the transfer subject to the result of the litigation.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 60-67; Dec. Dig. § 40.*]

8. APPEAL AND ERROR (§ 739*)—ASSIGNMENT OF ERROR EMBRACING TWO PROPOSITIONS OF LAW.

In an action for breach of contract to pay for an elevator building, tanks, etc., an assignment of error in refusing to instruct that defendants were entitled to recover the reasonable value thereof from the time they should have been completed under the contract and the time that they were actually completed, and that the jury, in determining the value of such use, might consider the purpose for which the building and tanks were intended to be used, and that defendants were entitled to the reasonable value of the use of the structures for such time as they lost by reason of their not being completed within a reasonable time, and that if, by reasonable expenditure, the property could and would have been used as an elevator, that its value as an elevator would be the measure of defendants' damages, embraces two or more distinct and inconsistent propositions of law, and as such is not entitled to consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3084; Dec. Dig. § 739.*]

9. DAMAGES (§ 218*)—INSTRUCTIONS—BREACH OF CONTRACT.

A contract for building storage tanks was made March 25, 1905, and one for the erection of an elevator April 10, 1905. The latter con-

tract was the date of the contract, nor that, by reasonable expenditure of money, defendants could and would have used the property as an elevator. Held, that charges that, if plaintiff failed to erect the elevator building and tanks within the time specified in the contracts, defendants could recover the reasonable value of the use of such property from the time plaintiff was bound to erect it until it was constructed, and that, in determining the reasonable value of such use, if the jury believed that with a reasonable expenditure of money defendants could and would have used the property as an elevator, its value as an elevator would be the measure of defendants' damages, were inapplicable, and properly refused.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 560-562; Dec. Dig. § 218.*]

10. DAMAGES (§ 122*)—DELAY IN PERFORMING CONTRACT—MEASURE OF DAMAGES.

The proper measure of damages of defendants would be the rental value of the building for such time as they were deprived of the use thereof after the contract date for completion thereof, and not the profits that would have been made during the time they were deprived of its use by failure of plaintiff to complete it within the time agreed upon, since, to determine such profits, it would be necessary to take into consideration the operation of the entire elevator plant; whereas plaintiff undertook to erect only portions of the plant, especially in the absence of evidence that defendants, at the time of plaintiff's contracts, had any contracts for the storing or handling of grain in the elevator when it should be completed, and that plaintiff contracted with knowledge or with reference thereto.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 310-315; Dec. Dig. § 122.*]

11. DAMAGES (§ 218*)—DELAY IN PERFORMING CONTRACT—INSTRUCTIONS.

A charge not to consider profits that defendant could or would have made if the elevator had been completed within the contract time, in computing defendants' damages, did not mislead the jury or withdraw from their consideration evidence proper to be considered in determining the rental value of the elevator building, there being direct evidence as to such value which manifestly was considered by the jury, with perhaps other evidence, in view of the verdict, which would or should have been for a larger amount for plaintiff, if damages for the rental value of the building had not been allowed.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 560-562; Dec. Dig. § 218.*]

12. TRIAL (§ 256*)—INSTRUCTIONS—DUTY TO ASK.

Where a charge given is correct so far as it goes, if a party desires fuller instructions upon the subject, they must be asked for.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 628; Dec. Dig. § 256.*]

Appeal from District Court, Collin County; J. M. Pearson, Judge.

Action by the Harry Bros. Company against the J. T. Stark Grain Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Abernathy & Abernathy and Garnett & Hughston, for appellants. Smith & Wilcox, for appellee.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

TALBOT, J. Appellee, Harry Bros. Company, a corporation, sued appellants, J. T. Stark Grain Company, J. T. Stark, J. H. Bowman, G. W. Bowman, T. C. Jasper, W. A. Vines, H. W. Colt, John J. Russell, and W. R. Norton, in the district court of Collin county, Tex., and alleged, in substance, as follows: That on March 25, 1905, plaintiff and defendant J. T. Stark Grain Company entered into a written contract, whereby the plaintiff agreed to erect for said defendant six grain storage tanks of the capacity of 15,000 bushels each, near the railroad at Plano, Tex., for the sum of \$6,000, and six black steel grain storage tanks of the capacity of 1,000 bushels each in the mill of defendant for the sum of \$150 each, all of said tanks to be erected according to certain plans and specifications made a part of said contract; that defendant Stark Grain Company was to build foundation for said tanks, and plaintiff was to have 60 days after the completion of said foundation and notice thereof to complete its part of the contract, and, if said tanks should buckle or leak within the first 12 months used, plaintiff was to fix the same free of charge; that on the 19th day of May, 1905, plaintiff and defendant grain company entered into another and additional contract, by the terms of which plaintiff agreed to build a certain line of eight-inch piping and six-inch piping to connect the head of said defendant's elevator with the outside tanks, for which said defendant agreed to pay plaintiff 68 cents per foot for the eight-inch pipe and 55 cents per foot for the six-inch pipe, and, in addition thereto, the sum of \$45 for erecting and installing the same. It was further alleged that on April 10, 1905, plaintiff contracted in writing to erect for the defendant Stark Grain Company a certain steel elevator building according to the plans and specifications made a part of the contract, and to have the same completed and ready for occupancy by June 1, 1905; that said defendant agreed to pay for said building \$2,600 on the 1st day of June, 1905, provided the same was completed, and, if not completed at that time, then as soon as the same was completed and accepted; that said defendant Stark Grain Company reserved the right to have a competent architect to examine the building while it was being erected, and after same had been completed, and that the judgment of said architect should be final as to whether or not the building was being constructed or had been constructed in a workmanlike manner and of sufficient strength to carry the load that it was supposed to carry, etc.; that plaintiff complied with its contract with reference to said building, and that said defendant had said building inspected and examined by a competent architect, who decided that said building had been constructed according to the contract, and that the judgment of the architect was final; that said de-

fendant Stark Grain Company had accepted said building as having been completed according to said contract, and had been using and enjoying the benefits thereof; that Stark Grain Company sold all of its assets to J. T. Stark to defraud its creditors; that J. T. Stark assumed the payment of the debt sued for, and mortgaged all the property to W. R. Norton, trustee for J. H. Bowman, G. W. Bowman, W. A. Vines, John J. Russell, H. W. Colt, and T. C. Jasper. Plaintiff prayed for judgment against Stark Grain Company and J. T. Stark for the amount of its debt and interest and the foreclosure of lien on the property sold by Stark Grain Company to J. T. Stark as against all the defendants. Defendants J. T. Stark Grain Company and J. T. Stark each pleaded a general denial, and, in addition to the general denial, said defendants pleaded, among other things, that the building was not constructed absolutely waterproof; that plaintiff did not use the material contracted for as set out in plaintiff's petition, and used an inferior grade of material, and failed to have the workmanship done in a neat and substantial manner and workmanlike manner and in accordance with the best practice for such work; also, that the plaintiff failed to comply with its contract as to painting; that the "I" beams and bracings were not strong enough to stand the load they were designed to carry; that the six black steel storage tanks did not hold 1,000 bushels each, but only 900 bushels each; that the top and bottom of the large tanks were not watertight, but leaked, etc. J. T. Stark adopted all the allegations of the Stark Grain Company not inconsistent with his pleas. Defendant J. T. Stark further answered that he had bought the property involved in this suit, and all claims for damages in favor of Stark Grain Company against plaintiff; that he assumed the payment of any debt due plaintiff by Stark Grain Company, and asked judgment against plaintiff for the amount of his damages. Defendants Bowman, Norton, Russell, Vines, Colt, and Bowman answered by general demurrers and general denial, and that they, except W. R. Norton, held a superior lien to plaintiff. Plaintiff replied by special exceptions, estoppel, and general denial. The case was tried before the court and a jury on September 30, 1908, resulting in a verdict in plaintiff's favor for \$4,461.25 against Stark Grain Company and J. T. Stark, and for a foreclosure of lien on the property in question against all defendants, and a judgment was duly entered thereon. From this judgment all the defendants appealed.

The contract for the erection of the elevator building, among other things, provided that plaintiff should "furnish and erect in place 6-in.x12¼-in. I-beams. The beams to be covered on the lower flange with curved corrugated galvanized steel of sufficient strength to carry a safe load of 150 pounds

per square foot; that all workmanship should be done in a neat, substantial and workmanlike manner and in accordance with best practice for such work; that the entire framework should be painted with two coats of good metallic paint, one coat to be applied before the material left the shop and one after the building was erected; that both the roof and sides of said building should be absolutely waterproof." Appellee has filed a motion in this court to dismiss the appeal of the J. T. Stark Grain Company on the ground that it had forfeited its right to do business in this state by failing to pay its franchise tax. If such matter could be presented and urged by an original motion filed in this court, the motion in this case is, we think, without merit. At the time this suit was filed, the appellant had not failed to pay its franchise tax, and, if it afterwards forfeited its right to do business in this state by failing to pay such tax, it would not thereby be deprived of defending this suit. Besides, the undisputed evidence in the record shows that prior to the date of the forfeiture alleged the appellant grain company had disposed of all of its property in Texas to J. T. Stark, one of its codefendants; that said defendant has assumed the payment of the obligation sued on, and that its entire property out of the state had been sold to certain of its stockholders; that all of its business, with the exception of the matters involved in this suit, had been wound up, and that it had ceased to do the business for which it was incorporated. The motion is therefore overruled.

The first, second, and third assignments of error, as numbered in the brief, raise the same question of law, and will be considered together. It is complained in these assignments that the trial court erred in permitting the plaintiff's witness, Oury, to testify that the elevator building, the line of piping, and the six storage tanks of the capacity of 1,000 bushels each were constructed and erected in accordance with the terms of the respective contracts entered into between the parties. It is objected that the testimony was the opinion and conclusion of the witness, involved a mixed question of law and fact about a matter not the subject of expert testimony, and permitted the witness to invade the province of the court and jury. We think there was no material error in the admission of the testimony. The witness qualified as an expert of large experience in the construction of steel buildings, tanks, etc., and was therefore competent to express an opinion in regard to the matter to which his testimony related. But, if mistaken in this, then the record shows that the witness testified that the work of erecting the building, tanks, and pipe line in question was under his supervision from the time it was begun until it was completed; that while said work was being done he had

possession of and was fully acquainted with the contract, agreement, and specifications with reference to said improvements. Furthermore, in connection with his testimony that the building, tanks, and pipe line were erected in accordance with the contracts and specifications, the witness stated, if not fully, in many respects the size of the elevator building and tanks, etc., the character of the material used and manner in which the work was done, which was substantially as called for in the contract. We therefore regard the testimony complained of as the statement of a fact within the knowledge of the witness, and not merely the statement of an opinion or conclusion. This case is distinguishable in the facts from the case of *Anderson Electric Light Company v. Cleburne Water, Ice & Light Co.*, 23 Tex. Civ. App. 328, 57 S. W. 575, cited by appellants. In that case it does not appear that the witness had qualified and was testifying as an expert, or that the evidence showed, as it does in this case, that he was testifying to facts within his own knowledge. But, aside from the foregoing view of the matter, it appears, we think, that, if the court erred in admitting the testimony, the error was harmless, for the reason that the witness was allowed to make substantially the same statement without objection. He said: "I have been through said elevator building and machinery since the same has been installed and put in operation, and, so far as I could see from my knowledge in that line of business, everything was working as smoothly and as nicely as could be expected for a new plant. In other words, everything was working perfectly as far as I could see. I will state that in my judgment there is nothing lacking as far as I could see to make the building perfect in every respect for the purpose it was intended for. And, as to its efficiency, I am sure that it would come up to the contract and specifications in every respect. I talked with Mr. Stark several times after the elevator was completed. * * * I heard Mr. Stark make the remark 'that he had the best elevator in the state of Texas.'"

The fifth assignment is as follows: "The court erred in permitting plaintiff to introduce in evidence over the objections of the defendants made thereto at the time the following written instrument: 'Plano, Texas, 10-17-05. Harry Bros., Dallas, Tex. Gentlemen: We beg to inform you that on yesterday we loaded into one of the inside tanks, constructed for us, one thousand bushels of wheat. The tank buckled at the hugs and twisted out of shape. We consider it dangerous and would be glad to have your Mr. Oury come and look at the tank, and take steps to put it into serviceable condition. We were obliged to empty the tank and throw the load into the big outside tank for fear it would collapse. Please give this your prompt attention. Yours truly, J. T. Stark Grain Company, W. F. M. L.' Ap-

pellant objected to the introduction in evidence of this letter on the ground that "it was not proven that the letter had been executed by any one having authority to make declarations binding upon defendant, and that it was not shown to have been executed by any one. Just simply a letter written with typewriting on it, signed with a typewriter, and there is no handwriting on it whatever, and its execution is not proven, and there is nothing to show who wrote it, and it is hearsay and prejudicial." The language, "We beg to inform you that on yesterday we loaded into one of the inside tanks, constructed for us, one thousand bushels of wheat," is the objectionable part of the letter; appellants claiming that the tanks therein referred to were not in accordance with the terms of the contract, in that said tanks did not hold 1,000 bushels each, and the portion of the letter quoted tended to show an admission on their part that they did. We are of the opinion that the trial judge's explanation of his ruling in admitting in evidence this letter, as contained in the bill of exception reserved thereto, shows the execution of the letter by the defendant Stark Grain Company. He certifies that the proof shows that the letter was on the stationery and letter head of the defendant J. T. Stark Grain Company, and that it was entirely in typewriting, and that W. F. M. L. were the initial letters of the name of the assistant bookkeeper of the defendant J. T. Stark Grain Company. It was also shown that the plaintiff received the letter in due course of the United States mail, and that the letter was acted upon by plaintiffs, in that they sent men to Plano to work on the tanks in question. If, however, it can be said the evidence was insufficient to show the execution of the letter by said defendant, its admission was harmless because the presiding judge in further explanation of his ruling in admitting the letter in evidence certifies that the undisputed evidence in the case showed that the tanks did not hold 1,000 bushels and the size of the hopper had been changed by agreement, and it was admitted in open court by plaintiffs' attorneys that said tank as constructed would not hold one thousand bushels.

We are also of the opinion that the court did not err in refusing to give appellant's special charge, to the effect that inasmuch as the plaintiff had averred in its supplemental petition that the claim sued on had been transferred to Harry Bros. Manufacturing Company, and that fact was established by the undisputed evidence, to find that said plaintiff take nothing by its suit, and proceed to determine whether said defendants are entitled to recover on their crossbill. The claim sued on was transferred to the Harry Bros. Manufacturing Company after the institution of this suit. The original petition was filed by Harry Bros. Company December 21, 1906, and they filed an

amended second supplemental petition September 23, 1908, in which it was alleged that after the institution of the suit, and on, to wit, June 29, 1907, Harry Bros. Manufacturing Company became the owner of the claim and cause of action sued on. This supplemental petition was in reply to the answer of the defendants charging that the plaintiff Harry Bros. Company was not the owner of said claim, and it was alleged in said petition that Harry Bros. Company was prosecuting the suit in its name for the use and benefit of Harry Bros. Manufacturing Company. The supplemental petition in the respects mentioned was doubtless unnecessary, and it did not authorize a judgment in favor of the defendants as to the claim sued on. The transfer of the claim having been made during the pendency of the suit, Harry Bros. Company could legally prosecute the suit to final judgment. In such case it is not necessary to make new parties. In *Matthews v. Boydston*, 31 S. W. 814, this court said: "The transferee may come in and make himself a party by appropriate pleading, but it is not necessary that he should do so. He takes the transfer subject to the result of the litigation, and the defendant is fully protected by the judgment rendered."

The seventh and eighth assignments of error are grouped by the appellants, and presented as one assignment in the brief. The seventh complains that the court erred in refusing to give requested special charge No. 2, to the effect that, if the plaintiff Harry Bros. Company did not complete the elevator building and tanks within the time specified in the contract or contracts, then the defendant J. T. Stark Grain Company would be entitled to recover from the plaintiff the reasonable value of the use of said elevator and said tanks from the time the same should have been completed under said contract and the time the same were actually completed and delivered to defendants, and that they might consider in determining the value of such use the purpose for which the parties intended the elevator building and tanks to be used. The eighth complains that the court erred in not giving special charge No. 12, to the effect that, if plaintiff Harry Bros. Company failed to erect the elevator building and tanks (in question) within the time stipulated in the contracts, defendant would be entitled to recover the reasonable value of the use of such property as it contracted to erect from the time it was bound to erect the same until the same was constructed, and that, in determining the reasonable value of such use of said property, to look to all the circumstances of the case, and that, if they believed from the evidence that by reasonable expenditure of money (defendants) could and would have used the same as an elevator, then its value as an elevator would be the measure of defendant's damages. As presented, we think the assignment embraces two or more distinct and inconsistent propositions of law,

pellant was entitled to recover the reasonable value of the elevator building and tanks from the time they should have been completed under the written contracts and the time that they were actually completed, and that the jury, in determining the value of such use, might consider the purpose for which said building and tanks were intended to be used, is materially different from the proposition involved in special charge No. 12, to the effect that appellants were entitled to the reasonable value of the use of said property for such time as they lost by reason of the same not being completed within a reasonable time, and that, if by reasonable expenditure of money the property could and would have been used as an elevator, then its value as an elevator would be the measure of appellants' damages. But, if we are mistaken in this, then the answer to the assignment is that whatever may be the pleadings the concluding part of special charge No. 12 is not a correct statement of the law, and both of the special charges in question are inapplicable to the facts and misleading. The contract for the building of the tanks referred to in the charges was entered into March 25, 1905, and that for the erection of the steel elevator April 10, 1905. The latter contract provided that the elevator shall be completed by the 1st day of June, 1905, but no time was specified in the contract entered into for the erection of the tanks within which said tanks should be completed. Appellant does not point out any evidence, and we have discovered none, showing that these tanks were not finished and ready for use within a reasonable time from the date of the contract; nor do we find any evidence that, by "a reasonable expenditure of money," appellants could and would have used the property as an elevator, and that issue, and the issue as to whether the tanks were completed within a reasonable time as sought to be submitted by the special charge No. 12, was not raised by the evidence. Therefore charge No. 12 was properly refused; and, as the contract for the erection of the tanks did not stipulate when the tanks should be completed, and there was no evidence that they were not completed within a reasonable time, special charge No. 2 should not have been given. The charge of the court upon this phase of the case, limiting appellant's right to recover damages for such time as appellant was deprived of the use of the elevator building after June 1, 1905, and in instructing them that the measure of such damages was the rental value of said building for such time, was, we think, a correct application of the law to the facts, and full enough, at least, in the absence of a correct special charge upon the subject.

Appellants' ninth assignment asserts that the court erred in charging the jury at ap-

to show the profit that defendant J. T. Stark Grain Company could or would have made, if said elevator building had been completed within the time required by the contract, in considering the damage which said defendant J. T. Stark, by reason of such delay, if any, is entitled to receive." The objections to this charge are, in substance, that it is erroneous, misleading, and upon the weight of the evidence, in that appellants were entitled to the value of the use of the building for the purpose for which it was intended to be used and that the jury should have permitted, in estimating their damages, "to consider the profits that could have been made out of the building"; that, in withdrawing from the consideration of the jury all evidence tending to show the profits that could have been made, the court withdrew from their consideration evidence which tended to establish its rental value. We are of the opinion that the rental value of the elevator building, as charged by the court, was the measure of appellants' damages in this case, and not the profits that could have been made during the time they were deprived of its use by the failure of appellee to complete said building within the time agreed upon. To determine the amount of profits which could have been made during such time, it would be necessary to take into consideration the operation of the entire elevator plant, including the outside storage tanks and all inside machinery. The appellee did not undertake to erect for the appellants an elevator plant complete, but only portions of such a plant under contracts executed at different times and for different, separate, and distinct portions thereof. The defendant Stark Grain Company constructed the foundation for the outside storage tanks, the concrete foundation for the elevator building, and installed in said building a large amount of machinery necessary for its operation with which appellee had nothing whatever to do. Besides, there is no evidence to show that the appellant Stark Grain Company at the time of the execution of either of the contracts entered into by appellee had any contracts for the storing or handling of grain in the elevator plant when the same should be completed and that appellee contracted with a knowledge of or reference thereto. It seems clear that the profits were not in the contemplation of the parties when the contracts referred to were entered into.

We are further of the opinion that the charge did not have the effect to mislead the jury or to withdraw from their consideration evidence which was legitimate and proper to be considered by them in arriving at the rental value of the elevator building. There was direct evidence as to such value, and that such and perhaps other evidence upon the question was considered by the jury, and

the appellants allowed some damages for the breach of the contract as alleged, is manifest from the amount of the verdict rendered in favor of appellee; for it is evident from the record and a simple calculation of the interest on the amount shown to have been unpaid on the contracts declared on that, had not such damages been allowed, the verdict in appellee's favor would or should have been for a larger amount.

The clause of the court's charge complained of in the tenth and eleventh assignments was correct as far as it went, and, if appellants desired further and fuller instructions upon the subject to which it relates, such charge should have been asked. If there was error in the charge, it was not an affirmative error, but one of omission.

The fifteenth assignment is, in effect, that the verdict of the jury is contrary to, and not supported by, the evidence. In this contention we do not concur. We have carefully considered the evidence, and conclude that it is amply sufficient to authorize and sustain the verdict, and this assignment is overruled.

Some of the assignments not discussed have been disposed of by what we have said in discussing others; and those not so disposed of present, in our judgment, no reversible error.

The judgment is affirmed.

CATOR v. HAYS et al.

(Court of Civil Appeals of Texas, Nov. 24, 1909.)

1. APPEAL AND ERROR (§ 907*)—REVIEW—PRESUMPTIONS.

In the absence of a statement of facts, a finding of the trial court that the report of a jury of view appointed to lay out a road was accepted will be presumed to be correct, though the fact is not shown by the record of the commissioners' court; evidence aliunde being admissible to establish the fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3673; Dec. Dig. § 907.*]

2. EVIDENCE (§ 10*)—JUDICIAL NOTICE—GEOGRAPHICAL FACTS.

The court takes judicial notice of geographical subdivisions of the state, and of state and federal boundaries.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 9-14; Dec. Dig. § 10.*]

3. HIGHWAYS (§ 53*)—ESTABLISHMENT—ORDER—DESCRIPTION OF ROAD.

A road is not illegal because the intermediate calls of the order directing it to be laid out do not coincide with those of the report of the jury of view which was adopted.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 159, 160; Dec. Dig. § 53.*]

Appeal from District Court, Hansford County; H. G. Hendricks, Judge.

Action by Bert O. Cator, administrator, against E. C. Hays and others. From a

judgment for defendants, plaintiff appeals. Affirmed.

Hoover & Taylor, for appellant.

RICE, J. This suit was originally brought May 27, 1907, by George Aitken in the district court of said county against E. C. Hays, as county judge, and against B. V. Andrews, W. O. Douglas, J. C. Sangster, and J. A. Deal, county commissioners, constituting the commissioners' court of said county, and against Joe Stafford, an overseer, to enjoin the opening by said county of a road known as the "Guymon and Ochiltree road," which is alleged to have been formerly established by said court, and for the recovery of \$250 damages incident thereto. During the progress of the suit said Aitken died, and appellant was duly appointed his administrator, and continued said litigation as such, and in such capacity prosecutes this appeal.

A temporary writ of injunction was granted as prayed for, and at the October term, 1907, of said court, appellees answered by general demurrer, special exceptions, special answer, and a general denial. A trial was had before the court without a jury at the April term, 1908, resulting in a judgment in favor of appellees dissolving the injunction, and in favor of appellant against said appellees for the sum of \$10, awarding costs against him, from which judgment this appeal is prosecuted.

There is no statement of facts in the record, but the trial judge filed his conclusions of fact and law. Among other things, he found that the county commissioners' court of Hansford county upon June 13, 1904, same being a called session, made the following order: "It is ordered by the court that a third-class road be established as follows: From the east line of the county to the north line, and described as follows: Commencing at the east line of section 12 block 2 W. C. Ry. Co.; thence N. W. to the S. E. corner of section 69 block 45 H. & T. C. Ry.; thence N. W. to a gate on the old three-seven trail; thence through road now traveled on section 58 and 57, block 45 H. & T. C. Ry. Co., crossing Palo Duro Creek at the N. E. corner of section 56 block 45 H. & T. C. R. R. Co., following the road traveled near the line of said section 56 and in an N. W. direction by C. A. Hitch's windmill on Hackberry Creek, along the road now traveled the N. line of the county near what is known as Texas Lake." Several other orders of the court were set out in the findings, but all were made subsequent to the above order, and it is questionable whether they should be regarded as pertinent to the inquiry before us. The fifth finding of the court was as follows: "I find from the testimony of N. B. Crosby, then county judge of Hansford county, Tex., that the deceased, Aitken, the original plaintiff, presented his claim for \$1,000

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

at the same session of said commissioners' court the said Aitken, after understanding that it was a third-class road, and that he could fence across it at any place just so he left a gate on the road, withdrew his claim for damages, and said that the commissioners' court might proceed and open up the road as laid out by the jury of view, and I further find that the report of the jury of view was accepted, the road declared open, and an overseer appointed. Seventh. I find that the road in question was marked by plowing furrows by the jury of view, and thereafter was traveled by the general public until the temporary writ of injunction was issued in this cause."

By his first assignment appellant questions the correctness of that part of the court's fifth finding of fact as above set out, wherein it is recited that the report of the jury of views was accepted (meaning by the commissioners' court) since the order itself merely recited that said report be received, but did not declare the road open as found by the court, nor show that the overseer was appointed, nor that the report of the jury of view was accepted, insisting by his proposition thereunder that it was error for the court to find a fact that was not supported by the evidence. While it is true that the order referred to only recited that the report was received, still, in the absence of a statement of facts, we believe we are authorized to presume, in aid of judgment of the court, that there was other evidence before the court which would sustain his findings in this respect, and the findings of the court do show that there was evidence aliunde the order upon which the court based its findings in this regard. There was no objection, so far as the record discloses, to the introduction of this evidence, and, even if there had been, we are inclined to believe that there is authority to the effect that such evidence would be admissible to establish the existence of such order. The county could not be prejudiced by reason of the fact that the same had not been entered in the minutes of the court. The chief question was whether such order had, in fact, been made, since its entry could have been made nunc pro tunc at any time thereafter.

By his second assignment appellant assails the court's conclusion of law wherein it is found that as matter of law the plaintiff has wholly failed to show that the road in question was an illegal one, for the reason, as claimed by him, that there was a variance between the order directing the laying out of the road and the report of the jury of view made thereunder, insisting by his proposition that the statute with reference to laying out a public road must be strictly complied with, and, in effect, that the report of jury of view must conform to the order

indicate that the law in this respect was substantially complied with. While it is by no means clear that the order of June 13, 1904, heretofore set out, was the only order made upon this subject, especially so, since the court has found that the road was established, ordered opened, and an overseer appointed, as above shown, still, if this were the only order directing the laying out of this road, there is no substantial variance between it and the report of the jury of view. In the order of June 13th it is directed that the road be laid out from the east line of the county to the north line thereof, describing by intermediate calls its direction between said two points. The report of the jury of view recites that they were appointed by the commissioners' court to view a third-class road from the east line of Hansford county, Tex., to the south line of Beaver county, Tex., in the direction of Guymon, Okl., and the body of the report shows that they commenced at the same point as directed in the order and terminated at the Beaver county line. Notwithstanding the fact that the report of the jury of view recited that they were appointed to review a road from the east line of Hansford county, Tex., to the south line of Beaver county, Tex., still the court judicially knows that there is no such county in Texas as Beaver county; and the report, together with the order, clearly indicates that it was the intention and object of the court to direct the road to be laid out from the east line of Hansford county to the north line thereof. The court can take judicial cognizance of geographical subdivisions of the state. Elliott on Evid. § 66. Courts will likewise take judicial cognizance of state and federal boundaries. Ogden v. Lund, 11 Tex. 688. So that we therefore understand by this report that the jury of view knew that they were to locate a road running from the east line of Hansford county, Tex., to the north line thereof, which point was also the south line of Beaver county, Okl.; thus giving the same terminal as indicated in the order, and this was in fact done, as shown by the report of said jury of view. And, while it is true that the intermediate calls of the order do not coincide with those of the report, still it has been held in Kelley v. Honea, 32 Tex. Civ. App. 220, 73 S. W. 846, that, as the statute does not require the application for the road to more than specify its beginning and termination, the fact that the application specified section lines along which the road is to run did not deprive the commissioners' court of the power to open it, on the recommendation of the jury of view, along a different route. So in this case we are inclined to believe that, since the jury of view commenced at the point directed in the order of

the commissioners' court, and ran to the north line of the county, as directed therein, that it was immaterial whether they in their report, in fact, followed the intermediate calls named in the order, because we believe the commissioners' court, under the authority of the case just cited, would have had the power to adopt said report and order the road opened in accordance therewith, which it seems from the evidence as found by the court was done.

In *Sneed v. Falls County et al.*, 42 S. W. 121, it is held by this court, as shown by the syllabus, that it is not essential to the validity of the laying out of a highway that the face of the record of the commissioners' court should affirmatively show a compliance with all the requirements preliminary to the establishment of such road; clearly indicating that, if the proper steps which were necessary to the laying out and establishment of the highways had in fact been taken, in that event, the same could not be regarded as improperly laid out, simply because of the failure on the part of the court to place of record all of such requirements. We therefore hold that there was no such variance in this case as would defeat the action of the commissioners' court in establishing and laying out the road. See, also, *Sneed v. Falls County*, 91 Tex. 168, 41 S. W. 481.

We do not think there is any merits in the contention urged in appellant's third assignment of error, and therefore overrule same.

Finding no error in the judgment of the court below, the same is in all respects affirmed.

Affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS et al. v. VANDIVER.

(Court of Civil Appeals of Texas. Nov. 10, 1909.)

1. APPEAL AND ERROR (§ 931*) — PRESUMPTIONS — EVIDENCE CONSIDERED BY LOWER COURT.

Where the lower court in a nonjury trial makes its written conclusions of fact, in accordance with certain testimony, in the absence of a showing that such facts were not considered by it in the final determination of the case, an appeal must be disposed of upon the theory that they were so considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3765; Dec. Dig. § 931.*]

2. CARRIERS (§ 104*)—DELAY IN TRANSPORTING CORPSE.

In an action against a carrier for mental anguish caused by delay in not carrying plaintiff's wife's body on the same train that he was carried on, and in not delivering it at his destination by the time that he arrived there, testimony that while in transit the conductor told him that the body of his wife was on the same train was inadmissible; as plaintiff could not have suffered mental anguish until he ascertained that the body was not being carried on the train; and the conductor's statement to the con-

trary, if untrue, could have caused no distress of mind.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 104.*]

3. CARRIERS (§ 105*)—DELAY IN TRANSPORTING CORPSE—MENTAL SUFFERING.

In an action against a carrier for mental anguish by delay in not carrying plaintiff's wife's body on the train upon which plaintiff was carried, recovery could not be had for mental anguish sustained by plaintiff's daughter and sister-in-law as a result of the delay.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 105.*]

Appeal from the Tarrant County Court; John L. Terrell, Judge.

Action by J. S. Vandiver against the Missouri, Kansas & Texas Railway Company of Texas and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Spoons, Thompson & Barwise, for appellants. James C. Scott, for appellee.

KEY, J. Appellee instituted this suit for the recovery of damages caused by alleged delay in the transportation of the body of his deceased wife between Ft. Worth, Tex., and St. Louis, Mo. The principal item of damage was mental suffering alleged to have been sustained by the plaintiff and his daughter and his wife's sister. There was a nonjury trial, which resulted in a judgment for the plaintiff for \$260, and the defendants have appealed.

The assignments of error are addressed to the action of the court in permitting the plaintiff to testify that, after he left Ft. Worth and while in transit, the conductor on the train told him that the body of his wife was on the same train, and in allowing proof that his daughter and sister-in-law were greatly distressed and grieved when they ascertained that the body was not on the train, and did not reach St. Louis until several hours after they and the plaintiff reached there, and in considering the facts referred to in deciding the case. In his written conclusions of fact, the judge found in accordance with the testimony referred to, and, therefore, in the absence of a showing that such facts were not considered by him in the final determination of the case, the appeal must be disposed of upon the theory that they were so considered. The plaintiff's suit was based upon mental anguish caused by the carrier's delay in not carrying the body of his wife on the same train that he was carried on, and in not delivering it in St. Louis by the time he reached there. This being the nature of his case, it necessarily follows that the plaintiff could not have suffered mental anguish until he ascertained that the body was not being carried on the train upon which he was traveling. Therefore the statement of the conductor that the body was on the train, though

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

distress.

The plaintiff was not entitled to recover any damages on account of mental anguish sustained by his daughter and sister-in-law as a result of the delay in transporting the corpse, and the trial court erred in admitting and considering the testimony referred to upon that subject. *Railway Co. v. Overton* (Sup.) 110 S. W. 736, 19 L. R. A. (N. S.) 500.

For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

SCHWARTZ v. JONES et al.

(Court of Civil Appeals of Texas. Nov. 20, 1909.)

1. APPEAL AND ERROR (§ 878*)—PARTIES ENTITLED TO RAISE QUESTIONS.

Where, in trespass to try title, defendant brought in his vendor as a party, and sought to recover on his warranty of title, and the court gave judgment for plaintiff for the land, and for defendant against his vendor on the warranty, and the vendor alone perfected his appeal, defendant could not on appeal question the correctness of the judgment for plaintiff, but he could, by cross-assignments of error, combat the vendor's appeal against him.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2573, 2574; Dec. Dig. § 878.*]

2. COVENANTS (§ 100*)—TITLE—BREACH.

A covenant of title of a grantor, conveying land owned in part by another, and while the latter's title to the other part was maturing by adverse possession, was only breached as to the extent the latter owned the land, and not to the extent of title acquired by adverse possession after the conveyance.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 139; Dec. Dig. § 100.*]

3. COSTS (§ 241*)—PARTIES LIABLE.

Where, in trespass to try title, defendant brought in his vendor, and sought recovery on his warranty of title, and the court gave judgment for plaintiff for the land, and for defendant against his vendor on the warranty, and the vendor appealed and obtained a modification of the judgment against him to the extent of one-half, one-half of the costs of the trial court should be taxed against defendant, and one-half against the vendor.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 927; Dec. Dig. § 241.*]

Appeal from District Court, Harris County; W. P. Hamblen, Judge.

Action by Lucinda Jones against E. A. Witt, who brought in C. Schwartz as a defendant, and asked for judgment against him. From a judgment for plaintiff, and for defendant Witt against defendant Schwartz, the latter appeals. Affirmed in part; reformed and affirmed in part.

Love & Channell, for appellant. Fisher, Sears & Campbell, for appellee Witt.

stated to contain half an acre. Witt brought in his vendor, C. Schwartz, as defendant, and under appropriate allegations sought to recover on his warranty of title from his vendor. The case was tried with the assistance of a jury, resulting in a verdict and judgment for plaintiff for all the land sued for, and for defendant Witt against Schwartz on his warranty for \$125. Both Witt and Schwartz made motions for new trial, which were overruled, from which both parties gave notice of appeal. Each of them filed in the trial court assignment of errors, but Schwartz alone perfected his appeal by giving bond. In this court Schwartz has filed briefs presenting one assignment of error attacking the judgment in favor of the plaintiff in favor of the land, and several assignments assailing the judgment against him in favor of Witt on the warranty. He has expressly waived the assignment attacking the judgment in favor of plaintiff for the land, and presents only those questioning the judgment against him on the warranty. Defendant Witt has filed a brief seeking to present the assignment of error filed by him, questioning the judgment for plaintiff for the land. In this state of the record defendant Witt, not having perfected his appeal, is in no position here to question the judgment, in favor of plaintiff against him, and his brief, which is limited to the single assignment, abandoned defendant Schwartz, questioning judgment for the land, must be disregarded. The appeal of Schwartz authorized Witt, without filing appeal bond himself, by cross-assignments of error to combat Schwartz's appeal against him, but not the plaintiff's judgment. *Carroll v. Carroll*, 20 Tex. 740; *Caperon v. Wanslow*, 18 Tex. 125; *Halsell v. Neal*, 23 Tex. Civ. App. 26, 56 S. W. 137. The judgment, therefore, in so far as it is in favor of plaintiff for the recovery of the land, must be affirmed, and it remains only to consider the objections to the judgment in favor of Witt against Schwartz on the warranty.

The court gave the jury the following charge: "You are charged, if you find for plaintiff for the land sued, then you will find for the defendant Witt, against the defendant Schwartz, for the sum of \$125. If you find for plaintiff for one-half of the land under this charge, then you will find for the defendant Witt against said Schwartz for the sum of \$62.50." This charge is assailed by the second assignment of error. The court charged the jury, in substance, that the plaintiff, Mrs. Jones, could not recover more than one-half of the land in controversy, unless she had acquired title under the statute of limitation of 10 years, that is, that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

under her plea of 10 years' adverse possession. As no objection is presented by any assignment of error to this charge, it must be assumed to be correct. The jury found for her the entire tract.

Schwartz had conveyed to Witt, by deed dated August 30, 1899, two acres of land, of which the half acre sued for forms a part. The court also instructed the jury that Mrs. Jones' adverse possession did not begin, in any event, earlier than August 19, 1892. So on August 30, 1899, her adverse possession had not ripened into a title under the 10-year statute of limitation, which could only be when the 10 years' adverse occupancy was fully completed. As the case thus stands at the date of Schwartz's deed to Witt, Mrs. Jones had title to one-half of the land in suit, and her claim, by virtue of her adverse occupancy, was in course of maturing into a title under the 10-year statute, but not yet matured, lacking 3 years. As to one half of the land, then, there was breach of Schwartz's warranty to Witt, but not as to the other half. The covenant of title was not broken by adverse title acquired by limitation after the conveyance by Schwartz to Witt. *Harn v. Smith*, 79 Tex. 310, 15 S. W. 240, 23 Am. St. Rep. 340; *Thompson v. Weisman*, 98 Tex. 175, 82 S. W. 508.

Schwartz's warranty to title to the two acres was limited to \$500 for the whole. It does not appear that the half acre here involved had a greater value than its proper proportion of the whole. From this it would result that Witt was entitled to judgment only for the proportion of the \$500 which the part of the land for which the warranty was breached bore to the entire two acres. The adverse title acquired by limitation after the date of Schwartz's conveyance being no breach, Witt was entitled to recover only for the breach by reason of Mrs. Jones' superior title at date of the conveyance to Witt, which only extended to one-half of the half acre sued for—that is, one-eighth of the two acres—and Witt was only entitled to recover a corresponding proportion of the \$500; that is, \$62.50. The jury by its verdict gave him \$125, for which the court rendered judgment. Appellant Schwartz sought to have presented to the jury, by requested charges which were refused, the law as here stated with regard to the effect of the title, acquired by limitation upon the warranty, as a breach thereof. The refusal of the charges, and also the objections to the judgment for \$125, are presented by proper assignments of error, which must be sustained. As we have said, no reply is attempted to be made to these assignments by appellee Witt. It is entirely clear that upon no theory of the evidence was Witt

that amount. It necessarily follows that the judgment against Schwartz for all of the costs of the trial court is erroneous. One-half of such costs should have been taxed against Witt, as he lost one-half of the land for which Schwartz was not responsible. The judgment will also be reformed in this particular, adjudging one-half of the costs of the trial court against Witt, and one-half against Schwartz, as between them. Mrs. Jones, however, is entitled to have her judgment affirmed as it was rendered.

The judgment in favor of Mrs. Jones for the land is affirmed, and the judgment in favor of Witt against Schwartz is reformed as herein indicated, and, as so reformed, is affirmed. One-half of the costs of the appeal will be adjudged against appellant Schwartz, and one-half against Witt.

Affirmed in part; reformed and affirmed in part.

MAYHEW & CO. v. HARRELL et al.

(Court of Civil Appeals of Texas. Nov. 13, 1909.)

1. PROCESS (§ 4*)—ON CROSS-PLEA.

Where defendants filed a cross-plea against codefendants for affirmative relief, and codefendants never appeared nor filed answers, in the absence of service of citation on the cross-plea, the court was without jurisdiction to award the relief prayed for.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 4.*]

2. APPEAL AND ERROR (§ 635*) — DEFAULT JUDGMENT—PLEADINGS OR PROCESS TO SUSTAIN—FAILURE OF APPEARANCE—SERVICE.

A default judgment entered on a cross-plea against codefendants cannot be sustained on writ of error, in the absence of a showing in the record of an appearance of the codefendants or of service on them aside from recitals in the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2776-2782; Dec. Dig. § 635.*]

3. PROCESS (§ 4*)—CITATION ON CROSS-PLEA.

In an action by an indorsee against the makers and the indorsers of a note, to secure which fire policies had been pledged, where plaintiff did not allege the existence of the policies nor ask any foreclosure of his lien thereon, and the indorsers, in a cross-plea against the makers, the policies being in the name of one of them, prayed that, in case of recovery by plaintiff, execution should first issue against the makers, and that plaintiff should be required to exhaust the security of the policies which were in litigation, the insured property having been destroyed, before recovering judgment, but no legal service of citation on the policy holder upon the cross-plea was shown, the court had no jurisdiction to foreclose the lien on the policies.

[Ed. Note.—For other cases, see Process, Dec. Dig. § 4.*]

Error from District Court, Eastland County; J. H. Calhoun, Judge.

Action by Mrs. J. C. Harrell and others

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

J. R. Stubblefield and B. W. Patterson, for plaintiff in error. Scott & Brelsford, for defendant in error.

DUNKLIN, J. J. J. Wright and Mattie M. Wright executed their promissory note in favor of Mayhew & Co., a corporation, for \$1,000. The payee indorsed and delivered the note to Mrs. J. C. Harrell, who sued the makers and indorsers. Judgment was rendered in favor of the plaintiff against J. J. Wright as principal and Mayhew & Co. as indorser for the amount due on the note; but the court found that Mattie M. Wright was a married woman at the time she executed the note, that no facts existed to render her personally liable thereon, or which would subject her separate property to the payment of the same, and upon such findings judgment was rendered in her favor. By plea over against J. J. Wright and Mattie M. Wright, Mayhew & Co. alleged that it was liable on the note as an indorser only, and prayed that in case of recovery by plaintiff, execution should first issue against the makers of the note, as provided by the statutes, and that Mayhew & Co. should have judgment over against the two makers for any sum it might pay on said judgment. In its answer Mayhew & Co. further alleged that two fire insurance policies on property, since destroyed by fire, had been hypothecated to secure payment of the note sued on, that suits had been instituted by J. J. Wright to collect the policies against the companies issuing them, and upon those allegations Mayhew & Co. prayed that this suit be abated, and that plaintiff Mrs. J. C. Harrell be required to exhaust such security before recovering judgment in this suit. The trial court found that the suits to collect the policies were pending, and adjudged that Mayhew & Co. was subrogated to all the rights of J. J. Wright and Mattie M. Wright in and to those policies and the proceeds thereof. After reciting appearance of plaintiff and defendant Mayhew & Co., the judgment contained the following further recital: "The defendants J. J. Wright and Mattie M. Wright, although duly cited to appear and answer herein, came not, but wholly made default."

None of the pleadings of plaintiff or defendant Mayhew & Co. contained any allegation that Mattie M. Wright was a married woman. Mayhew & Co. has prosecuted this writ of error, and by various assignments insists that the trial court erred in failing to render judgment in favor of plaintiff and Mayhew & Co. against Mattie M. Wright, as well as against J. J. Wright. Plaintiff in the suit has not complained of a failure to enter such judgment in her favor. The record falls to show any service of citation upon J. J. Wright or Mattie M. Wright to answer the cross-

or any character, and, in the absence of service of citation on the cross-plea, the court was without jurisdiction to render judgment awarding any affirmative relief prayed for therein as against those defendants. *Harris v. Schlinke*, 95 Tex. 91, 65 S. W. 172; *Kruegel v. Bolanz*, 100 Tex. 572, 102 S. W. 110; *Johnston v. Fraser*, 92 S. W. 49; *Field v. O'Connor*, 80 S. W. 872. And this is true, even though it should be held that the recital in the judgment of due service upon J. J. Wright and Mattie M. Wright should be construed as meaning due service upon the cross-plea, as well as upon plaintiff's petition. If judgment had been entered upon the cross-plea, it would have been by default, and to sustain such a judgment upon appeal the record must show an appearance by defendants, or else service aside from recitals in the judgment. *Burditt v. Howth*, 45 Tex. 466; *Carlton v. Miller*, 2 Tex. Civ. App. 619, 21 S. W. 697, and authorities there cited; *Shook v. Laufer*, 84 S. W. 277; *Smithers v. Smith*, 35 Tex. Civ. App. 508, 80 S. W. 646.

The foregoing disposes of all assignments of error except the sixth, which reads as follows: "The court erred in not adjudging that plaintiff should exhaust her security against the mortgaged property, or fire policies covering same, given to secure the note sued on, before execution be issued against Mayhew & Co." Plaintiff did not allege the existence of the insurance policies, nor ask any foreclosure lien thereon, neither in her original petition nor after they had been pleaded by defendant. Consequently, plaintiff's pleadings did not warrant a foreclosure of lien on the policies. The policies were in favor of J. J. Wright, and, as the record fails to show legal service of any citation on him upon the cross-plea of Mayhew & Co., the court was also without authority to decree a foreclosure of the lien with the cross-plea as a basis for the foreclosure. However, the court did decree that Mayhew & Co. was subrogated to all the rights of J. J. Wright in the policies and their proceeds, and J. J. Wright makes no complaint of this decree.

Mayhew & Co. in their answer pleaded that the plaintiff's suit should be abated until suits upon the policies should be disposed of, to the end that any proceeds therefrom should be first applied to the note sued on before trial of this suit; but no assignment of error has been prosecuted complaining of the action of the court in failing to abate the suit. Furthermore, the record contains no statement of facts, and there is not even a recital in the judgment to show that the policies of insurance were of any value.

The sixth assignment of error is, accordingly, overruled, and the judgment of the trial court is affirmed.

SIMPSON et al. v. BAKER et al.

(Court of Civil Appeals of Texas. Nov. 11, 1900. Rehearing Denied Dec. 9, 1900.)

1. APPEAL AND ERROR (§ 387*)—APPEAL BOND—TIME TO FILE.

Under Sayles' Ann. Civ. St. 1897, art. 1387, providing that an appeal may be taken during the term by filing a bond within 20 days after the term, the appellate court acquires no jurisdiction where the appeal bond was not filed within 20 days after the adjournment of the term.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2065, 2066; Dec. Dig. § 387.*]

2. APPEAL AND ERROR (§ 387*)—APPEAL BOND—TIME TO FILE.

Under Rev. St. 1895, art. 1387, providing that an appeal may be taken during the term by filing a bond within 20 days after the term, and that, if the term may legally continue more than 8 weeks, the bond may be filed within 30 days after notice of the appeal, if appellant is a nonresident, a nonresident appellant does not have 30 days after notice of appeal within which to file his bond where the term could not continue longer than 8 weeks.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 387.*]

Appeal from District Court, Hardin County; L. B. Hightower, Judge.

Action between George T. Simpson and another, and H. V. Baker and another. From a judgment for the latter, the former appeal. Dismissed.

Jno. L. Little and W. W. Dies, for appellants. Oliver J. Todd, for appellees.

PLEASANTS, C. J. The term of the court at which the judgment was rendered from which this appeal is prosecuted adjourned on October 29, 1908. The appeal bond was filed on the 28th day of November, 1908. The bond not having been filed within 20 days after the adjournment of the trial court, as required by the statute, this court has no jurisdiction to hear and determine the case, and the appeal must be dismissed. Sayles' Ann. Civ. St. 1897, art. 1387; Converse v. Trapp, 29 S. W. 415.

One of the appellants is a nonresident of the county in which the judgment appealed from was rendered; but, under the statute above referred to, such nonresident did not have 30 days after the notice of appeal within which to file his appeal bond, because the term of the court at which the judgment was rendered could not have continued by law longer than 8 weeks. If the court could have continued in session for more than 8 weeks, the bond should have been filed within 30 days after notice of appeal, and this bond was not filed within that time; such notice having been given on October 9, 1908. Nash v. Noble, 114 S. W. 848.

For the reason stated, the appeal is dismissed.

Dismissed.

GAINESVILLE WATER CO. v. CITY OF GAINESVILLE.

(Court of Civil Appeals of Texas. Oct. 23, 1909. Rehearing Denied Nov. 20, 1909.)

1. APPEAL AND ERROR (§ 1054*)—HARMLESS ERROR—RULINGS ON EVIDENCE.

Where a trial is before the court, and there is sufficient legal evidence to support the judgment, the erroneous admission of evidence is not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.*]

2. APPEAL AND ERROR (§ 219*)—FINDINGS—NECESSITY OF REQUEST.

The court's failure to find specified facts and propositions of law cannot be reviewed, where no request for such findings was made at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315-1324; Dec. Dig. § 219.*]

3. APPEAL AND ERROR (§ 265*)—REVIEW—NECESSITY OF EXCEPTION.

Court's failure to find specified facts and propositions of law cannot be reviewed, where no exception was taken at the trial to the court's failure to make such findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1536-1551; Dec. Dig. § 265.*]

4. WATERS AND WATER COURSES (§ 183*)—PUBLIC WATER SUPPLY—FRANCHISES—FUTURE.

Where a waterworks company holding a municipal franchise had become insolvent, and had failed to provide wholesome water or sufficient pressure required by the franchise ordinance, and its waterworks system had been permitted to decay, the court was authorized, at the suit of the city, to forfeit the franchise and appoint a receiver.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 287; Dec. Dig. § 183.*]

Appeal from District Court, Cooke County; R. E. Carswell, Special Judge.

Suit by the City of Gainesville against the Gainesville Water Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Gregory, Batts & Brooks and Potter & Culp, for appellant. J. T. Adams, Davis & Thomason, and Garnett & Eldridge, for appellee.

CONNER, C. J. This suit was instituted by the city of Gainesville on June 25, 1907, against the appellant company, a private corporation, alleging that Gainesville was incorporated under the General Laws of Texas, with a population of more than 200, and less than 10,000, inhabitants; that in 1883 the city council by ordinance granted the defendant the right to construct and operate a system of waterworks within its corporate limits for 25 years, and that this ordinance, with a few changes, was re-enacted in 1889, and again slightly changed in 1897, so as to require, among other things, that the water furnished plaintiff and its inhabitants by the company should be suitable for domestic con-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

failed to comply with the terms of its contract in the following respects: First, that the pumping engine used by it was not of the character contracted for; second, that the water mains were not of the material and strength contracted for, and were not laid at the depth required by the ordinances; third, that the building in which the machinery of defendant was installed was insecure, and not of the material provided for by the ordinances; fourth, that the system operated by defendant had not for many years been capable of discharging water through the fire hose to the height provided for by the contract for fire protection; fifth, that defendant had for several years persistently and continuously failed to furnish the inhabitants of the city with water suitable for domestic purposes, and that the water furnished was polluted, unwholesome, and contaminated by disease-breeding germs. It was further alleged that under the terms of the ordinances referred to there was an attempt to rent from defendant during the life of the franchise a number of fire hydrants at a fixed price per annum per hydrant, and that this portion of the ordinance contract was illegal and void, because it attempted to create a debt without a provision, by tax levy or otherwise, for its payment, and because it was contrary to public policy for the city council to attempt to bind its successors for this period of time and prevent them from exercising their discretion and judgment in reference to the payment of hydrant rentals, which became a charge against the general revenues of the city, and which had been and was more than sufficient to exhaust the general revenues of the city, leaving it nothing with which to conduct the city government. It was further charged that appellant was insolvent, and without credit to improve the plant and put it in better condition, and it was charged that it had no intention of doing so. Other allegations were made, not necessary to refer to, and the petition, among other things prayed that the hydrant rental contract be declared void; that the franchise of the water company be forfeited; that a receiver be appointed, etc. The company answered by general and special demurrers, a general denial, and pleaded specially, among other things: First, that the city was estopped from setting up a noncompliance with the terms of the ordinance contract with reference to the character of water furnished, pipes laid, etc., and was also estopped from denying the legality of the contract providing for hydrant rentals, because of an alleged compromise judgment of the United States Court, and new agreement entered into in 1897. The trial was before the court without a jury, resulting in a judgment declaring the hydrant

a review of the proceedings.

Appellant has presented, in a brief of 207 pages, 127 assignments of error. It seems manifest that we will be unable to dispose of each assignment separately. We think, however, they may be classified and disposed of in groups. Quite a number of assignments complain of the introduction of specified testimony over appellant's objection, but these, we think, should be overruled, inasmuch as the trial was before the court without a jury, and inasmuch, as will hereinafter appear, we think there is other legal evidence supporting the judgment. In such cases we understand the rule to be that a judgment will not be reversed on the ground of the admission of testimony, whatever may be the objection thereto. See 1 Greenleaf on Evidence, § 49, *Melton v. Cobb*, 21 Tex. 539, *Beaty v. Whitaker*, 23 Tex. 528, *Lindsay v. Jaffray*, 55 Tex. 626, *St. Louis, A. & T. Ry. Co. v. Ticer*, 3 Willson, Civ. Cas. Ct. App. § 403, and other authorities that might be cited.

Another group consisting of numerous assignments complain of failures on the part of the court to find specified facts and specified propositions of law. In no instance, however, in the statements under such assignments, do we find that appellant requested findings, as insisted upon, or any exception, because of the court's failure, and we, therefore, think all such assignments should be overruled.

Yet another group of assignments complaining of findings of the court may be disregarded, on the ground that they become immaterial in view of the conclusions hereinafter announced. We, therefore, now address ourselves to a determination of that class of assignments presenting what we deem to be the vital questions involved in this appeal.

In 1883, and again by an amended ordinance in 1897, appellant was granted for a term of 25 years the right of installing, operating, and maintaining a water system in the city of Gainesville, in consideration of which, among other things, appellant agreed to supply the inhabitants of such city with water "suitable for domestic purposes," and that its system, when completed, should be capable of "discharging simultaneously five one-inch streams through fifty feet of two and one-half inch hose to a height of one hundred feet," and that the company or its successors and assigns should "operate and keep the said works and every part in constant repair and working order, and upon alarm of fire being given to the person in charge of the engines of said works, either by day or night, to immediately cause sufficient pressure to throw the five streams specified in this ordinance for any length of time needed for the extinguishment of any fire." The court in a

for some 5 or 6 years preceding the trial appellant had extensively used water contaminated with sewage and impregnated with col- on bacilli and other disease-breeding germs, which was commingled with artesian water furnished to the inhabitants of Gainesville, and that the water so furnished was wholly unfit for domestic use; that "since the 2d day of February, 1897, the defendant has failed to maintain its system of waterworks in such state of repair and efficiency as to be able to throw five streams of water, mentioned in the fourth section of said ordinance, to the height of 100 feet as therein required, but has not been able to give more than sufficient pressure to throw said streams at a greater height than from 50 to 65 feet."

Both ordinance requirements above specified were certainly material inducements to the grant of the franchise to appellant, and it would be lamentable indeed if the inhabitants of the city of Gainesville were without remedy if the findings of the court above specified are supported by the evidence. This, however, appellant vigorously denies. But, after as careful a consideration of the evidence as we have been able to give it, we feel constrained to overrule appellant's contention. The statement of facts consists of some 415 pages, and we can only summarize. Upon the Saturday preceding the trial a test of the capacity of the waterworks was made upon the square. J. H. Adams testified to the effect that they succeeded in getting the water some 45 or 50 feet high, and that that was about like the pressure they had been getting at fires for the last 3 or 4 years. He says: "With such a pressure as we have been getting for the last 5 or 6 years we could not put out a fire in the roof of the courthouse, and we could not have put out a fire in the third story of the Lindsay House, not without a ladder to carry the water up there. I don't believe we could get water on the high school building. If we had a stream we could throw 100 feet high, we could put water up there. We could put fires out in the buildings mentioned if we could throw a stream of water 100 feet high." J. W. Puckett testified that he had been a member of the Gainesville Fire Department, with the exception of 2 years, since 1883 or 1884; that when the water- works were built he thought they could throw five streams of water at the same time over the cupola of the courthouse (shown by other testimony to be something less than 100 feet high), but that, again quoting: "They can't do that now; they haven't done it lately. I would judge they can throw five streams to a height of 50 to 65 feet now. The firemen did break through windows of houses when the waterworks were first built, and they also knocked shingles off of houses. They could do that with the pressure they

burned. * * * I think the stronger the pressure the quicker you can get a fire under control. You can do more effective work with a strong stream; if you have a good pressure you can reach the fire a good deal better. With the present pressure I don't think you could reach a fire in the court- house steeple. We couldn't put out a fire on the roof of the high school building with the pressure we have had for the last few years. I don't think they could reach a fire in the roof of the Lindsay House. I was here on the square last Saturday at the time they made that test. I don't think they got the water higher than 60 feet then. I think that was as good pressure as they have been hav- ing, if anything a little over an average." Mart Gwynn testified that he was and had been a member of the Gainesville Fire De- partment, and attended fires, and that in his judgment, when there was no wind, they could get the water "50 or 60 feet high straight up. I would think that was as high, in my judgment, as we have ever been able to get it. Ordinarily I would think we could get it about 50 feet high." An operator of the telephone company in Gainesville testi- fied that the telephone company had never failed to notify the water company when an alarm of fire was turned in; that she re- membered of no instance in which there was such failure.

There was a great deal of testimony on the issue of the character of water furnish- ed the citizens. We will not undertake to quote it, but deem it only necessary to say that it tended to show that the sewage from "negro town" and other parts of the city drained in the direction of, and to a greater or less extent percolated through the soil into waters gathered in appellant's recep- tacles for water, from whence it was com- mingled with artesian water, and furnished through hydrants to the citizens; that the water furnished the citizens at times had disagreeable odor and taste, and that many of the citizens declined to use it save for sprinkling yards and like purposes; that on one occasion water had been taken from one of appellant's receptacles for water, desig- nated "Specimen No. 1," and also from pools on the surface near thereto, designated as "Specimen No. 2," and sent to Dr. Robert Zeit, professor and head of the department of pathology and bacteriology, Northwestern University Medical School, Chicago, Ill., who stated that his experience in the bacterio- logic examination of water extended over a period of 11 years, and included many thousand specimens of water. Dr. Zeit reported that the purest specimen sent (out of appellant's well) could not be safely used as a drinking water; that it would produce principally intestinal diseases—diarrhea, dys- entery, typhoid fever—that it might also

tirely unfit and dangerous to use as drinking water, because it contains 21,500,000 bacteria per liter (about a quart), and is badly polluted with sewage bacteria, colon bacilli, types in large numbers; and some streptococci."

It is true that upon both issues above discussed appellant offered evidence of a contrary tendency. It offered tests of other physicians, who had made a chemical analysis of the water and found it sanitary, and that the test of Dr. Zeit was unfair, in that the water had been taken from a supply well and from the surface soon after an overflow, which had impregnated their water receptacles. It also offered evidence tending to show that at the tests made of the system they had not been given time to get up the proper pressure in order to comply with the ordinance requirements. But we think all of this constituted mere conflicts of testimony which was for the determination of the trial court, and that the evidence as a whole cannot be said to be insufficient to support his findings. The court found, and there was evidence tending to support the finding, that appellant was insolvent, and unable to carry out the purposes for which its franchise had been extended; so that, on the whole, we think the court's material findings of fact must be adopted, and the judgment affirmed. *Palestine Water Co. v. City of Palestine*, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203; *Farmers' Loan & Trust Co. v. Galesburg*, 133 U. S. 156, 10 Sup. Ct. 316, 33 L. Ed. 573.

BUCHANAN et al. v. ROLLINGS et al.

(Court of Civil Appeals of Texas. Nov. 18, 1909. Rehearing Denied Dec. 9, 1909.)

1. WILLS (§ 297*)—PROBATE—ADMISSIBILITY OF EVIDENCE—DECLARATIONS OF TESTATRIX.

In proceedings to probate a will not produced in court, testatrix's declarations, tending to show the execution of the will, its contents, and that it was in existence until about 10 days before her death, were admissible to prove the execution.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 692, 695; Dec. Dig. § 297.*]

2. WILLS (§ 293*)—PROBATE OF LOST WILL—PROCEEDINGS—ADMISSIBILITY OF EVIDENCE.

In proceedings to probate a holographic will not produced in court, and which the proof showed gave most of testatrix's property to an adopted child of her deceased sister, a mutilated draft of a purported will by testatrix, prepared some time before her death, while she was married to another than her surviving husband, the untorn part of which recited the gift of her sister's child to testatrix, and contained a blank appointment of a guardian for such child, and instruc-

3. WILLS (§ 302*)—PROBATE OF LOST WILL—SUFFICIENCY OF EVIDENCE—EXECUTION.

In proceedings to probate an alleged holographic will which was not produced in court, evidence held to sustain a finding that testatrix executed the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 706, 709; Dec. Dig. § 302.*]

4. APPEAL AND ERROR (§ 1002*)—VERDICT—CONCLUSIVENESS—CONFLICTING EVIDENCE.

If there is any evidence in the record on appeal which, fairly construed, would support the verdict, it will not be set aside because it contained other testimony tending to support a contrary conclusion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.*]

5. WILLS (§ 306*)—PROBATE OF LOST WILL—SUFFICIENCY OF EVIDENCE—REVOCATION.

In proceedings to probate an alleged holographic will which was not produced in court, evidence held to sustain a finding that the will, as probated, was not destroyed by testatrix during her lifetime for the purpose of revoking it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 732; Dec. Dig. § 306.*]

6. TRIAL (§§ 139, 140*)—JURY QUESTION—WEIGHT OF EVIDENCE.

The weight of the testimony and the credibility of witnesses is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 334; Dec. Dig. §§ 139, 140.*]

Appeal from District Court, Lamar County; T. D. Montrose, Judge.

Proceedings by J. I. Rollings and others against E. H. Buchanan and another to probate a will. From a judgment admitting the will to probate, contestants appeal. Affirmed.

Moore, Park & Birmingham, for appellants. B. B. Sturgeon, W. F. Moore, and Burdett & Connor, for appellees.

WILLSON, C. J. The case was before us at a former term on an appeal, as this one is, from a judgment of the district court of Lamar county, admitting to probate, as the last will of Hettie C. Buchanan, deceased, the contents, as testified to by witnesses, of a writing alleged to have been the will, wholly written by herself, of said Hettie C. Buchanan, and to have been lost or secreted, suppressed or destroyed, by appellants Buchanan and Mary Higdon. The statement made in the opinion disposing of that appeal is referred to as accurately stating the case as it appears from the record on this appeal, except that it did not appear from the record on the first appeal whether the decedent, Hettie C. Buchanan, at the time of her death was 45 or 60 years of age, while it appears from the record now before us that she was then 40 or 45 years of age. See 112 S. W. 785.

On the former appeal it was urged that the trial court erred in permitting witnesses,

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

its existence, until about 10 days before her death. This court overruled the contention then made, holding such declarations to be admissible. On the trial resulting in the judgment from which this appeal is prosecuted, over appellants' objection thereto on the ground that they were hearsay, such declarations were again admitted, and the contention urged on the former appeal has been renewed and vigorously pressed on this one. The question made has long been a controverted one. The view taken of it by appellants is, we think, amply supported by the authorities they cite; among them being *Throckmorton v. Holt*, decided by the Supreme Court of the United States in 1901 (180 U. S. 562, 21 Sup. Ct. 482, 45 L. Ed. 672), where it was held that declarations of a decedent, not a part of the *res gestæ*, were not admissible, whether made before or after the date of a will alleged to have been made by him and attacked as a forgery, to show the improbability of his having made such a disposition of his property as was claimed to have been made by him, or to show the state of his mind in order to raise an inference that acts of mutilation shown by the will were his acts, performed with the purpose of revoking such mutilated will. On the former appeal we were of the opinion that a view of the question contrary to that entertained by the Supreme Court of the United States and other courts had been taken by the Supreme Court of our own state (*Tynan v. Paschal*, 27 Tex. 300, 84 Am. Dec. 619; *McElroy v. Phink*, 97 Tex. 147, 76 S. W. 753, 77 S. W. 1025), and that, in disposing of the contention, we should follow the rule as we understood it to be established in this state. We are still of the same opinion, and therefore overrule the assignments presenting the question.

On the trial appellee Rollings testified that, on the day after the burial of Mrs. Buchanan's remains, he and appellant Buchanan, Mrs. Buchanan's surviving husband, renewed a search for a will begun by them on the day she was buried, and found "laying on the desk a red black paper," denominated by him as "an adoption paper"; that the paper so found was handed to him by Buchanan, who remarked, "Here is something, but it is torn up and is no account"; that he (Rollings) remarked, "I'll take that"; that said paper was not on the desk when the search was made on the evening before it was found, as stated; and that he had never before seen it. Buchanan testified, with reference to said paper, that the search was renewed as stated at Rollings' instance; that Rollings "came to his house the next morning after the burial of his wife, and wanted to look through her desk again"; that they looked through it, but did not find a will; that Rollings then drew some-

tion paper." After having the witness to identify a paper as the one he referred to as having been drawn by Rollings from his pocket, appellants offered it as evidence. Appellee objected to the admission of the contents of the paper as evidence, on the ground that same were immaterial and irrelevant, and because appellants had not offered to prove the contents of the portions thereof torn off. The objections were sustained by the court "to the extent," it is recited in the bill of exceptions, "of excluding the contents of the remaining and undestroyed portions of said instrument, but permitted defendants to offer its physical condition and appearance only, and to show simply that it was a mutilated instrument." The action of the court as indicated is assigned as error. The original of the instrument in question is with the record on this appeal. It appears to have been a typewritten draft of a will to be executed by Mrs. Buchanan, prepared at a time not shown, but when she was the wife of M. J. Webb, who is mentioned in it as sole executor thereof. The greater portion of the first page of the document, and the concluding part thereof on the fourth page, are absent, having, apparently, been torn from the portions of the pages left, and presumably destroyed. In portions thereof remaining is a recital of the gift to her by her deceased sister, Sallie C. Rollings, and her surviving husband, J. I. Rollings, of their child, John Mitch Rollings, "to be raised and educated as her own child," followed by an appointment in blank of a guardian of the person and estate of said John Mitch Rollings, instructions to such guardian in regard to the management, etc., of property then owned by said Johnny Mitch, and as to his burial, etc., in the event he should die during his minority. Other portions of the document provide for compensation to be paid the guardian for his services, name her husband, M. J. Webb, as the sole executor of the will, exonerate him from giving bond as such, and direct that her estate be administered independently of the courts. We do not think the court erred in excluding the contents of the document as evidence in the case. So far as we see to the contrary, they were immaterial and irrelevant to any issue presented for determination.

It is insisted that the evidence was insufficient to support the finding of the jury (1) that Mrs. Buchanan executed the alleged will sought to be probated; (2) as to its contents; and (3) if executed, that it was not revoked by her.

The statute provides that a will wholly written by the testator "may be probated on proof by two witnesses of his handwriting." 1 Sayles' Ann. Civ. St. 1897, art. 1900. It further provides that "a written will which

testimony shall be required to prove such will as is required to prove a written will produced in court." Id. art. 1901. The testimony indicated that Mrs. Buchanan was a self-reliant, intelligent woman, who, during her lifetime, had assisted her first husband in the management and conduct of a grocery business carried on by him, and who after his death continued the business, and alone managed and conducted it. The witness Hill testified that, acting for other parties, she had written two wills, and that one of them had been admitted to probate. The testimony referred to suggested as entirely probable that, if she desired to make a will, Mrs. Buchanan would draft it herself, and that it would be wholly in her own handwriting.

Mrs. Allen testified that she was acquainted with Mrs. Buchanan's handwriting, that in the fall of 1902 Mrs. Buchanan showed her a written instrument, which she at the time declared to be her will, and that the instrument was wholly in Mrs. Buchanan's handwriting, and had been duly signed by her. Mrs. Swalm testified that she also was acquainted with Mrs. Buchanan's handwriting; that on two different occasions—the last in December before her marriage to appellant Buchanan—Mrs. Buchanan exhibited to her a written instrument purporting to be her will, and that the instrument so exhibited was in Mrs. Buchanan's handwriting, and had been duly signed by her. Each of the witnesses named described the writing as being with black ink on white legal cap paper. A portion of the instrument exhibited to Mrs. Allen was read to her by Mrs. Buchanan, and as read it bequeathed her home place to Johnny Mitch Rollings, her personal property to appellee J. I. Rollings, a house and lot to Wooten Saufley, and a house and lot to Milt Saufley. A portion of the instrument exhibited to Mrs. Swalm also was read to her by Mrs. Buchanan, and as read it bequeathed to said Johnny Mitch her homestead and a farm, to said J. I. Rollings "her money and personal notes to keep for said Johnny Mitch in case he outlived her," to Milt Saufley a house on Jefferson street, and to Wooten Saufley a house and lot on Webb street. It will be observed that, while Mrs. Allen testified that by the terms of the will exhibited to her appellee Rollings was to take Mrs. Buchanan's personal property and hold it as his own, Mrs. Swalm testified that, by the terms of the will exhibited to her, said appellee Rollings was to take said personal property and hold same in trust for the use and benefit of said Johnny Mitch. And also it will be observed that, according to the terms of the will exhibited to Mrs. Swalm, said Johnny Mitch was to take a farm as well as the home place, while, according to the terms of the will read to Mrs. Allen, he

ited to Mrs. Swalm was the one exhibited to Mrs. Allen could it be contended that the execution of the will as probated was not established as it was required to be by the statute. But such discrepancies in the testimony of the witnesses as to the contents we think would furnish no reason for saying that the finding of the jury that the instrument shown to Mrs. Allen was one and the same as the instrument shown to Mrs. Swalm was not supported by the testimony. With better reason, it seems to us, the discrepancies referred to might be urged in support of the contention that the contents of the will as probated had not been sufficiently shown by the evidence.

But on the issue as to the contents of the will as probated there was other evidence. Mrs. J. I. Rollings testified that about two weeks before Mrs. Buchanan married Buchanan she exhibited to her (the witness) an instrument she declared to be her will, and read to her a portion of it, when some one came in and interrupted her. By the terms of the will so far as read to her, Mrs. Rollings testified Mrs. Buchanan's home place and the farm were bequeathed to said Johnny Mitch, and her money and notes to J. I. Rollings in trust for said Johnny Mitch. Mrs. Vowell testified that Mrs. Buchanan read to her an instrument which she declared to be her will, and that by its terms as so read to her it gave the homestead and the farm to said Johnny Mitch, to Wooten Saufley and Milt Saufley a house and lot, and to appellee Rollings her money. And the testimony we have referred to as to the contents of the will as probated was corroborated by other testimony in the record. For instance, Mrs. Moss testified to hearing appellant Buchanan, about three weeks before the date of Mrs. Buchanan's death, complaining to her that she had given everything she had to "that boy"—meaning said Johnny Mitch. Reed heard her declare a short time before her death that she "wished Johnny Mitch to have everything." And other declarations made by Mrs. Buchanan to the same general effect were testified to by the witnesses McHam, Eubanks, Shanklin, Wynne, and Mrs. Rutherford. We clearly are of the opinion that the finding of the jury that Mrs. Buchanan executed the will with contents as probated was not without evidence to support it.

Of the questions made on this appeal the one about which we have been doubtful is as to the sufficiency of the evidence to support the finding of the jury that the will as probated had not been destroyed by Mrs. Buchanan during her lifetime for the purpose of revoking it. There was no direct evidence that she had, or that she had not, destroyed the will. Circumstances were relied upon

circumstances were relied upon by appellants to establish the contrary of appellees' contentions. In discussing the testimony on this issue we shall confine ourselves to such of it as in our judgment tends to support the finding of the jury; for if there is evidence in the record which, fairly construed, can be said to support the conclusion reached by them, their verdict, and the judgment based upon it, should not be set aside merely because other testimony in the record might be referred to as tending to support a contrary conclusion.

It appears from the testimony that Mrs. Buchanan was first married to M. J. Webb, and that there was no child of this marriage. Ten or more years before the date of Mrs. Buchanan's death her sister, the wife of appellee J. I. Rollings, died, leaving surviving her her son, said Johnny Mitch Rollings, then 3 or 4 years of age. At the time of her sister's death Mrs. Buchanan, then Mrs. Webb, took charge of, and during the remainder of her life cared for, her sister's child as she would have cared for him had he been her own child. The evidence indicates that the child was not strong mentally, and that Mrs. Buchanan was very solicitous about him while she lived, and equally anxious to provide for his welfare after her death. She declared to the witness Robinius, after her marriage to Buchanan, referring to Johnny Mitch: "I am going to take care of him as long as I live, and not only that, I have done provided for him." She declared to Eubanks, about three weeks before she died: "I have got a will made to give that boy, and I am going to give him enough to keep him the balance of his days." Shanklin heard her say more than once that she "had made provision for Johnny Mitch; * * * that he was not able to take care of himself, and she was going to take care of him." At various times before and after her marriage to Buchanan, she made similar declarations to Mrs. Rutherford, Mrs. J. I. Rollings, and others. Such being the state of her feelings towards Johnny Mitch, unless she had another or other relatives as near and as dear to her, and as dependent as Johnny Mitch, it reasonably was to be expected that, if she made a will, he would be its chief beneficiary. So far as the record shows to the contrary, the only other blood relative she had was her sister Mrs. Higdon, for whom it appears she entertained the kindest regard. But it also appears that she did not look upon her as a proper object of her bounty, for she declared to Mrs. J. I. Rollings that she (Mrs. Higdon) "did not need any of her property." As meeting an inference that she had revoked the will, which might be deduced from the fact that she had married again, it may be stated that

determination to bequeath her property to her nephew, Johnny Mitch.

On the former appeal most, if not all, the testimony we have referred to was in the record, and it impressed us then, as it does now, as strongly tending to show a fixed determination on the part of Mrs. Buchanan to make provision for the boy after her death, and as sufficiently accounting for the fact that she made him the chief beneficiary in her will as probated. We nevertheless felt ourselves constrained to hold that the evidence, as it appeared in the record on that appeal, was not sufficient to support the finding of the jury that the will had not been revoked. Mrs. Buchanan was taken sick on Sunday, August 7, and died on Tuesday, August 18, 1904. On the former appeal the testimony tended to show that the will was in existence and in her possession on the Thursday immediately preceding the Sunday on which she became ill, but, as we construed it, did not tend to show that it was in existence at any time thereafter, and did not tend to show that, during the period intervening between the Thursday referred to and the date of her death, Mrs. Buchanan had destroyed it with the intention of thereby revoking it. Such being the state of the case as shown by the testimony in the record on that appeal, we were of the opinion that the proponents had not discharged the burden resting upon them to overcome, by evidence to the contrary, the presumption to be indulged where a will when last seen was in possession of a testator, and cannot be found after his death, to wit, that he destroyed it with the intention of revoking it. *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 618; *Graham v. Burch*, 28 Am. St. Rep. note on p. 347. For that reason alone we reversed the judgment complained of on that appeal.

In the record on this appeal we find evidence tending to show that the will was in existence on the Sunday morning preceding Mrs. Buchanan's death on Tuesday, and also testimony tending to show that she may not, on said Sunday morning and to the time of her death, have been in a condition to destroy the will for the purpose of revoking it. There was evidence tending to show that the will in question was kept by Mrs. Buchanan in a cloth shot sack. Mrs. John W. Webb testified that Mrs. McDade and Mrs. Cann were with and ministered to Mrs. Buchanan during the earlier part of the Saturday night before she died, that she and Mrs. Moss attended her during the latter part of that night, and that while she was with her, Mrs. Buchanan "put her hand under the pillow, and said: 'Dearie, my will, my papers.'" The witness further testified that at that time the shot sack in which Mrs. Buchanan kept her will was under her pillow.

"kept feeling under her pillow for something—feeling like she was trying to find something." Mrs. Webb further testified that Mrs. Buchanan was never out of her bed, after she spoke as recited above about her will and papers, and, the witness added, "mortification had set in then." Mrs. McDade did not testify, but Mrs. Cann, as a witness on behalf of appellants, testified that she and Mrs. McDade sat up with Mrs. Buchanan during the greater part of Saturday or Sunday night before she died, and until about 2 o'clock in the morning, and that Mrs. John Webb and some one else sat up the remainder of the night. It is fair, therefore, to infer that it was the earlier part of said Saturday night, and not of said Sunday night, that Mrs. Cann referred to. She testified that Mrs. Buchanan was then unconscious. If the jury, as they had a right to do, believed the testimony we have just referred to, it was sufficient to justify them in finding that the will existed on the Sunday morning before Mrs. Buchanan died, and that she was then, and until she died continued to be, so incapacitated as to be unable to revoke it.

In this state of the evidence, we would not be prepared to say that the finding of the jury in the particular in question was without support, if there was an utter absence in the record of evidence to which they might refer as furnishing a basis for an inference that the will had been destroyed or suppressed by Buchanan or by Mrs. Higdon, or by both of them acting together. But it cannot be said that there is not such evidence in the record. During the period intervening between the Sunday morning, when, according to the testimony of Mrs. John W. Webb, Mrs. Buchanan was feeling under her pillow and calling for her will, and the date of her death Mrs. Higdon and Buchanan were both in the house where Mrs. Buchanan lay sick, and presumably had an opportunity to get possession of the will. Mrs. Rollings testified, and her testimony was corroborated by that of her husband, appellee J. I. Rollings, that she and her said husband and Mrs. Higdon and Buchanan attended Mrs. Buchanan's funeral, and in going to the cemetery rode together in the same carriage; that while they were on the way to the cemetery Buchanan, addressing Rollings, asked him "if he reckoned the Webbs [brothers and sisters of Mrs. Buchanan's deceased husband] would sue for any of the estate," that Rollings made no reply, but that Mrs. Higdon did, remarking: "Let them sue. We have got everything our way, and will keep it our way." While Buchanan positively denied that any such conversation occurred, in her testimony Mrs. Higdon did not

destroyed or secreted it, and believed her act would render futile an effort on the part of the Webbs, if they made one, to obtain any of the property belonging to Mrs. Buchanan at the date of her death. Wooten and Milt Saufley were "Webbs," in that they were the children of a sister of Mich Webb, Mrs. Buchanan's deceased husband. It will be remembered that the will as probated by its terms bequeathed to each of the Saufeys named a house and lot.

As further bearing on this feature of the case, it may be stated that, while practically every issue made on the trial, and every phase of it, was sharply controverted, it fairly can be said that the evidence satisfactorily established that if Mrs. Buchanan had a will, she habitually kept it in a cloth shot sack. It appears from the record that the shot sack was never seen by any one after Mrs. Buchanan's death, nor during her lifetime after the Sunday morning it was seen by Mrs. John W. Webb, when Mrs. Buchanan was feeling under her pillow and calling for her will. Appellee Rollings testified that he and his wife, and Buchanan and Mrs. Higdon, returned to Mrs. Buchanan's former home, where she had died, after her funeral, and that when they got back there Buchanan suggested that they "look for a will"; that he (Rollings) then stated that, "The will is in the shot sack," when Buchanan replied that, "the shot sack was on the river," referring to the place where, it seems, before his marriage to Mrs. Buchanan, and occasionally afterwards, he resided. Rollings' testimony in the particulars stated was corroborated by the testimony of his wife. Rollings further testified that, on the day following the day the conversation just recited occurred, he heard Buchanan declare to Judge Moore that "there was no will," when he (Rollings) remarked to Buchanan, "That will is in the shot sack." The reply made by Buchanan to Rollings' assertion that the will was in the shot sack was: "Let's go to the bank and look for a will." Buchanan testified that he had never seen the shot sack, nor heard of it until he went to the county court, presumably after proceedings to probate the will had been commenced. The jury had a right to believe the testimony of Rollings and disbelieve that of Buchanan. If they believed that Buchanan declared the shot sack to be on the river, they might have made inferences from his subsequent denial of any knowledge of it tending to support appellees' contention that he had destroyed or secreted it.

We are of the opinion that the findings of the jury necessary to support their verdict were not without evidence to sustain them. The weight to be given the testimony tending

STURGEON v. CITY OF PARIS.†

(Court of Civil Appeals of Texas. Oct. 28, 1909.
On Rehearing, Dec. 2, 1909.)

**1. WATERS AND WATER COURSES (§ 201*)—
SUPPLYING WATER—PERSONS LIVING OUT-
SIDE CITY.**

Under a city's charter (Sp. Laws 1905, p. 87, c. 6) § 252, denying the council power to grant the use of any public utilities operated by the city to any one living beyond the limits of the city, one owning a tract of land, a narrow strip of which is within the city, but whose house in which he lives is on the part outside the city, cannot predicate his right to be furnished water for the residence on his ownership of the strip within the city.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 201.*]

**2. MUNICIPAL CORPORATIONS (§ 871*)—GRANT
OF THING OF VALUE TO INDIVIDUAL.**

Conferring the power on a city to sell water service to a manufacturing plant located beyond its boundaries, by Sp. Laws 1905, p. 87, c. 6, § 252, denying the city power to grant the use of any public utilities operated by it to any one living beyond its limits, with an exception in favor of manufacturing plants, is not a grant of a thing of value to such a plant, which Const. art. 3, § 52, inhibits the Legislature from authorizing a city to make.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1817; Dec. Dig. § 871.*]

**3. STATUTES (§ 64*)—EFFECT OF INVALIDITY
IN PART.**

Even if the exception to Sp. Laws 1905, p. 87, c. 6, § 252, denying power to a city to grant the use of any public utilities operated by it to any one living beyond the limits of the city, except to manufacturing plants, be unconstitutional, the portion remaining being complete in itself, and capable of execution in accordance with the legislative intent, must be sustained.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 58-66; Dec. Dig. § 64.*]

**4. MUNICIPAL CORPORATIONS (§ 252*)—SUP-
PLYING WATER—CONTRACTS TERMINABLE AT
WILL.**

A contract of a city to furnish a person water as its other customers, not being for a definite time, but based merely on his application to introduce water into his premises for certain purposes, he agreeing to be governed by all rules and regulations existing, or that may be established from time to time, is one at will, which therefore can be ended by either party at any time, and without cause.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 692-694; Dec. Dig. § 252.*]

**5. WATERS AND WATER COURSES (§ 201*)—
SUPPLYING WATER—RIGHTS OF INDIVIDUAL
—PLEADING AND PROOF.**

A city having the right, in the exercise of its general power to control and conserve its water supply, for the common benefit of its inhabitants, to dictate as to the purposes for which water shall be supplied to consumers, one seeking to compel the city to furnish him water for his land, on which are only flowers, shrubs, and trees, must plead and prove that

Appeal from District Court, Lamar County; Ben H. Denton, Judge.

Action by B. B. Sturgeon against the City of Paris. Judgment for defendant. Plaintiff appeals. Affirmed.

See, also, 110 S. W. 459.

Appellant sought to compel appellee, by mandatory injunction, to restore the pipes and the connection with its water main, and to furnish him water therefrom for use on his premises within the corporate limits of the city. The trial was to the court without a jury, and a judgment was entered against appellant denying the injunction. By his petition the appellant claims that in September, 1908, the city of Paris, a municipal corporation duly incorporated and acting as such by authority of special acts of the Legislature of 1905 (Sp. Laws 1905, p. 31, c. 6), and incorporated and acting as such prior thereto by authority of the special act of the Legislature of 1889 (Sp. Laws 1889, p. 112, c. 14), and specially authorized by each of the special acts to provide, own, and maintain a system of public waterworks, which it did, illegally and wrongfully disconnected and discontinued its water with his premises, situated in the city limits, which was previously connected by appellee to appellant's premises, and which was used by appellant on his premises and for use of himself and family, and refused to let him have any water at all from its main. By proper allegations appellant claims the right, and was entitled, to the use of the city water, and to compel the city to grant the use of the water to him, upon (1) a legal and binding contract with the city to sell and furnish him water on his premises so long as he desired to use the water and paid for the same, made on October 12, 1904, he having at all times fully complied with the contract, the city having power to make the contract under its charter of 1889 then in force; (2) independent of contract, as a citizen and resident of the city owning premises within the corporate limits and residing thereupon with his family; (3) as an owner of property within the corporate limits to the extent of the property within the corporate limits, whether he was an inhabitant of the city or not. Appellee in answer at length denied any contract with appellant to furnish him water so long as he desired and paid for same, but claimed that if the agreement it made with appellant, which was set out and relied on by him, was a contract, it was only a contract at will, and could be rescinded by either party at any time, and that it was rescinded by appellee after due notice to appellant prior to the time the premises

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

† Writ of error denied by Supreme Court.

of the city, and that his premises and his residence thereon were adjoining and outside the corporate limits of the city, except 5 feet east of his west boundary line, which was within the corporate limits, and that section 252 of the charter of 1905, set out, specially denied the city the right or power to sell the use of the water to any person living beyond the limits of the corporation.

The findings of fact by the court appear in the record, and the same are supported by the testimony, and we here adopt the same. The findings substantially show that appellant is not, and never has been, a citizen, resident, or inhabitant of the city of Paris, but lives beyond its limits, and owns, and has continuously before and since October 12, 1904, resided with his family upon, and occupied as a homestead, a tract of land of about three acres in the G. W. Cox head-right in Lamar county, which tract lies east of and adjoins the city of Paris. The tract fronts south on Lamar and west on Pacific avenues, and has improvements on it consisting of a dwelling, barn, horse lot, chicken lot, flowers, trees, and shrubbery. That a strip of the premises 5 feet in width, fronting south on Lamar, and extending north 500 feet with the east boundary line of Pacific avenue, is within the corporate limits of the city of Paris, and that the east boundary line of the corporate limits is 5 feet east of the west boundary line of appellant's premises. That this strip includes a portion of appellant's yard and chicken lot, and has on it a few shrubs and trees, but there is no house, dwelling, or other structure on it, and this strip is the only portion of his premises within the corporate limits, and that the extreme west edge of his house is 27 feet east of the east boundary line of the corporate limits of the city, and that no part of the house is within the corporate limits. The city of Paris is a municipal corporation situated in Lamar county, Tex., and incorporated by special act of the Twenty-Ninth Legislature which contains, among other things, section 252, which provides: "The city council shall not have the right or power to grant, extend or sell the use, enjoyment or benefit of any public utilities established, owned or operated by the city of Paris to any person living beyond the limits of the corporation of the city of Paris, provided that manufacturing plants are not included in the provision of this section." That on the 12th of October, 1904, the city of Paris was a municipal corporation duly incorporated by virtue of special act of the Legislature of 1889, and that, among other things, section 24 of said act provides: "Also the city council may provide, own and maintain waterworks for the use of the city and inhabitants." That on the 12th of Octo-

1904, appellant made in writing an application to the city of Paris, upon its regular blank form for such purposes, for the introduction of water into his premises, agreeing in the application to be governed by all existing rules and regulations, or any that may be established from time to time for the management of the same. This application was approved by the superintendent of appellee, who had full power to make and annul contracts for the supply of water, on October 21, 1904, and service connection made by appellee on the portion of appellant's premises within the corporate limits; and this was the only agreement appellee had with appellant. Appellant, at his own cost, caused pipes to be laid on his premises, and connected his house, yard, and lot with service, and placed fixtures in his house, bathroom, and kitchen, and has been using city water, and paying therefor the usual rental, continuously since the connection was made until September 20, 1908, when appellee, after notice to appellant, disconnected same.

J. G. Dudley, for appellant. Edgar Wright, for appellee.

LEVY, J. (after stating the facts as above). It is the contention of appellant by his first assignment of error that, to the extent of the premises owned by him as situated within the corporate limits of the city of Paris, he is entitled, as a matter of right, to the use of the city water upon paying for it, as he did, and upon complying with all reasonable regulations, which he did, whether he be an inhabitant of the city of Paris or not. In view of the finding of fact by the trial court, and which is not complained of, and which finding we think fully supported by the evidence, that appellant is not, and has never been, a citizen, resident, or inhabitant of the city of Paris, but now lives beyond and outside of its corporate limits with his family, and has continuously lived and resided outside of the corporate limits of the city since October 12, 1904, we are of the opinion that the assignment should be overruled. Appellant concedes the established rule of law to be that a municipal corporation is restricted and limited to the power and authority capable of being legally exercised under its charter, and cannot legally exercise power which is expressly denied. It is expressly provided, by section 252 of the city charter of 1905, that: "The city council shall not have the right or power to grant, extend or sell the use, enjoyment and benefit of any public utilities established, owned or operated by the city of Paris to any person living beyond the limits of the corporation of the city of Par-

is." It is evident from this provision of the charter that the proper exercise of the power of the city to extend and grant the benefit and use of its water service to an individual is not dependent upon the proof of the fact that the individual owns property situated within the corporate limits of the city, but upon the proof of the fact that the individual seeking the water service is himself an inhabitant of, or lives within, the city limits. Hence by the terms of the charter the individual seeking water service, in order to establish a legal right to compel the city to furnish and sell, for his use, water on premises within the corporate limits, must prove that he is an inhabitant of, or lives within, the corporate limits. The ownership of land within the city limits, where the owner at the time is a noninhabitant, and does not live within the city limits, does not establish the right of privilege of the individual to, nor the power of the city to grant the use of, water and water service. Indeed the provision of the charter expressly denies any power or authority to the city or its authorities to grant or extend the use of its water and water service for any purpose to a person living beyond the city limits, and in legal consequence has the force and effect to deny any right to the individual living beyond the corporate limits. The right of the water service to the individual is thus by the charter a privilege of special citizenship, or inhabitancy, or living within the city limits. It clearly follows in this case, we think, that appellant could not predicate any legal right to compel the city, by mandatory injunction, to furnish and sell the use to him of water from its waterworks upon the ground alone of being the owner of the specific property within the corporate limits; he at the time not living within the corporate limits of the city. *Sturgeon v. City of Paris* (on former appeal) 110 S. W. 459.

But appellant contends in the second assignment of error that section 252 of the charter of 1905 is contrary to section 52, art. 3, of the Constitution of Texas, because it discriminates in aid of manufacturing corporations. The section of the charter has the following proviso: "Provided that manufacturing plants are not included in the provisions of this section." We are of the opinion that conferring the right and authority to the city to sell its water and water service to a manufacturing plant located beyond its boundaries is not a grant of a thing of value to such corporation as inhibited by the Constitution. Even if it should be held, which we do not so think, that the portion of the section excepting manufacturing plants is prohibited by the Constitution, the portion of the section which remains, and which is applicable to appellant, is complete in itself, and capable of being executed in accordance with the Legislature's intent, and must be sustained. *Cooley on Const. Lim.* (3d Ed.)

§§ 177, 178; *Queen Ins. Co. v. State*, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483.

The appellant by his third assignment contends that the court erred in the following conclusion of law: "That on the 20th day of October, and September, 1908, and since March 5, 1905, the city of Paris was being operated under a special act of the Twenty-Ninth Legislature, and that said charter expressly prohibited the city of Paris from selling the use or enjoyment of any public utility established, owned, or operated by the city to any persons living beyond the limits of the corporation, and that, even if on the 12th of October, 1904, the charter of the city of Paris had authorized the city of Paris to sell water to plaintiff, and a valid contract had been entered into between plaintiff and defendant, by reason of section 1, art. 17, of the Constitution there could be no vested right of such contract to plaintiff, and the subsequent passage of the act of Twenty-Ninth Legislature granting the city of Paris a new charter, and expressly prohibiting the city from selling the use and enjoyment of its public utilities to persons not living within its limits, would authorize the city of Paris to rescind same." Assuming that the city or its representatives had the power to make the agreement or contract, as pleaded and shown by appellant, to furnish him water, yet it must be held in this case, we think, that it conclusively appears from the pleading and findings of fact by the court that the agreement or contract, under the most favorable construction to appellant, was a contract at will, and determinable by either party at any time. The petition does not aver that the city ever contracted to furnish appellant water and water service for any definite period of time, but affirmatively alleges "that under and by the said contract, permit, and agreement, as herein set out, this defendant agreed to furnish this plaintiff water, so long as he paid for same, as its other customers." The evidence as to a contract is found in the findings of the trial court, and rests upon the following application to the city for water signed by the appellant, and which the court finds "constitutes the only agreement plaintiff had with the defendant." The application reads: "Paris Waterworks. Application for Water Connection. Paris, Texas, October 12, 1904. I hereby make application for the introduction of water into the premises of B. B. Sturgeon, No. —, Pacific avenue, for the following purposes, and agree to be governed by all existing rules and regulations or any that may be established from time to time for the management of same." This finding is supported by the evidence, because appellant in his evidence states the agreement and circumstances under which he connected his premises with the city water as: "Well, I applied, as my recollection serves me, and I think I am almost positive of it, to Mr. Hill, the mayor

in October, 1904. That I wanted to do that which was necessary to get water connections. I don't remember all that was said, except Mr. Hill said he would have the connections made, and I was granted water connections by the city superintendent." On cross-examination he said, "I signed the application," meaning the application above set out. We must take the contract as alleged in the petition to be the contract on which appellant must predicate his rights, if any at all; and, looking to that, in connection with the testimony, there can be no doubt that the term of water service was indefinite and depended upon appellant's own will. The evidence does not bear out the stipulation "so long as he paid for same." By the contract appellant was not bound to take, nor the city to furnish, the water for any length of time, and appellant could have stopped taking the water the next day or the next week, if he had chosen to do so, without causing a breach of the agreement. It is laid down as a rule of contract that when the time or period of the performance is left to the discretion of either party, or is indefinite or determinable by either party, either may put an end to it at will, and do so without cause. *Bradshaw v. Terrell Foundry Co.*, 104 S. W. 509; *Railway v. Scott*, 72 Tex. 70, 10 S. W. 99, 13 Am. St. Rep. 758; *Coffee Co. v. Guenther (Ky.)* 80 S. W. 1170; *Echols v. N. O., etc., R. R. Co.*, 52 Miss. 610. Appellant, being a noninhabitant of the city, could not properly rest any legal contention that, by reason of the agreement to furnish him water service, there was a continuing legal duty on the part of the city to furnish him the water as long as he paid for the same. It was conclusively shown in the case that appellee rescinded the agreement, as it has the legal right to do, and upon due notice to appellant before disconnecting the water connection. It, therefore, follows that appellant could not predicate any legal right upon the contract, as pleaded and proved, to compel the city by injunction to continue to furnish him water, and that this ruling is decisive of any contention of contractual right to appellant arising in the case. This ruling further renders it unnecessary to pass upon the several propositions under the assignment.

The judgment was ordered affirmed.

On Rehearing.

That portion of the original opinion reading, "The ownership of land within the city limits, where the owner at the time is a non-inhabitant, and does not live within the city limits, does not establish the right or privilege of the individual to, nor the power of the city to grant the use of, water and water service," appears to the writer as calculated

red to the particular facts and pleading of the case. It was meant to rule, and we adhere to the ruling, that the appellant has not shown himself entitled to the relief sought, because it appeared in the case that he resided, and his resident property was located, outside of the city limits, and that the use of the water would have been outside of the city limits, and that as to the strip of land owned by him within the city limits, he had not shown such occupancy or use of or about the same, or contractual right to, or legal duty owing thereto by the city for the particular kind of water service, to predicate mandatory injunction to compel the water service sought.

Appellant insists in his motion that he has shown such a case as would entitle him to the injunction against the city, upon showing that he used the city water for the purpose of watering his flowers, shrubs, and trees situated on that part of his premises within the city limits. The findings of the court were that appellant resided outside, and all his premises were outside of, the city limits, and that he used the water outside of the city limits, except that a strip of the land 5 feet in width by its length was inside the city limits, and on this strip there were a few flowers, shrubs, and trees that were watered by him out of the city's water. It could not from the petition and proof be reasonably said, we think, that appellant was seeking to enforce this particular kind of water service, but was seeking to compel a general water service to him on all his premises described in the petition. The burden was upon appellant to clearly and affirmatively show a legal right to him in the relief sought; and, under the pleading and proof, it must be held, we think, that he has not so done. That he could predicate no right to the water service upon contract with the city is determined and adhered to in the main opinion. The mere proof that he was using water in watering flowers, etc., in the city limits, and that the city had abundance of water, would not of itself be sufficient, we think, to give the right to the relief sought in this case. In the absence of allegation and proof, as in this case, that the city was under obligation, or owed some legal duty to appellant, to furnish him water to water his flowers, shrubs, and trees within the city limits, and that the regulations by the city of its water service and supply to the individual permitted and authorized the use of city water for such particular purposes named, the court would not be authorized, we think, to compel the city to furnish appellant water for the particular purposes named. Cities, in their general power to control and conserve the water supply for the common benefit of their inhabitants, have the right to dictate as to the

amount of water to be supplied to the given consumer, for what purposes and the manner in which it is to be used. If it should be held that appellant has alleged an obligation to furnish the water, it is plain that he has neither alleged nor proved, in order to further predicate any right to compel the city to furnish him water, that the watering of flowers, shrubs, and trees was such use of the water as was authorized and permitted by the water regulations of the city; and the court would not be authorized to assume, we think, that the particular use of the water in watering flowers, shrubs, and trees is a proper use of the city water and authorized by the city.

The motion in all things was ordered overruled.

PALO DURO CLUB v. McALISTER.

(Court of Civil Appeals of Texas. Nov. 6, 1909.)

1. CONTRACTS (§ 247*)—MODIFICATION—EVIDENCE.

Where a contract for the construction of a road contained no provision that a member of defendant's committee having the matter in charge should set grade stakes for plaintiff, the contractor, and there was also no evidence that any member of such committee was authorized to change the contract or make such agreement, evidence that one of the members had so agreed, but had failed to set the stakes, and that the contractor had performed the work as well as he could without stakes, was inadmissible.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 247.*]

2. WORK AND LABOR (§ 30*)—PERFORMANCE NOT ACCORDING TO CONTRACT—ACTION FOR PRICE—QUANTUM MERUIT—INSTRUCTIONS.

Where, in an action for the balance due on a contract for road construction, plaintiff's right to recover on a quantum meruit was in issue, an instruction that plaintiff could not recover if he did not show that a majority of defendant's committee had accepted the work, unless the jury further found that plaintiff had completed the road in accordance with the contract, was properly refused.

[Ed. Note.—For other cases, see Work and Labor, Dec. Dig. § 30.*]

3. TRIAL (§ 260*)—INSTRUCTIONS ALREADY GIVEN.

A requested charge, substantially covered by instructions given, may be properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.*]

Appeal from Potter County Court; W. E. Gee, Special Judge.

Action by J. R. McAlister against the Palo Duro Club. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Reeder, Graham & Williams and Turner & Boyce, for appellant. J. Marvin Jones, L. C. Barrett, and J. A. Templeton, for appellee.

DUNKLIN, J. J. R. McAlister recovered a judgment for \$151.25 against the Palo Duro Club in the county court of Potter county

for work done on a road leading from Amarillo to defendant's property some 18 miles distant, and from this judgment the defendant has appealed.

The club appointed a committee consisting of C. O. Wolfelin, H. B. Jones, and W. Boyce to secure bids to do the work. J. R. McAlister submitted a bid which, being reported to the club, was by the club accepted, and the committee were empowered to notify McAlister of the acceptance of the bid and to supervise the work. The bid was in parol, and upon the trial there was a sharp conflict in the testimony as to the terms of the contract; the defendant contending that the road was to be of uniform grade, while the plaintiff contended that his contract was merely to build a straight road. Prior to the suit the defendant had paid McAlister \$198.75. It seems to have been shown, by undisputed testimony, that the contract price for the work to be done by McAlister was \$350. Over appellant's objection plaintiff was permitted to testify that Banks Jones, one of the committee, agreed with him to set the stakes on the road for the plaintiff, to guide the plaintiff in grading the same. The evidence shows beyond controversy that Jones was directed by the other members of the committee to notify McAlister that the club had accepted his bid, and that this agreement by Jones to set the stakes for the grade was made by Jones at the time he notified McAlister of the acceptance of his bid, and that the stakes were never set. In connection with the testimony admitted over defendant's objection, plaintiff and other witnesses testified that McAlister had performed the work as well as he could do so without stakes. There was no evidence in the record tending to show that McAlister's bid for the work contemplated that Jones, or any one else acting for the club, should set the stakes for the grade. The acceptance of McAlister's bid and notice to him of such acceptance closed the contract between him and the club, and there was no evidence in the record to prove that even the committee as a whole had authority from the club to change the contract by any subsequent agreement tending to excuse McAlister from a compliance with the terms of his contract, and we think the court erred in admitting the testimony complained of in the assignment above referred to, and that for such error the judgment should be reversed.

In the third subdivision of the court's charge the jury were instructed in effect that plaintiff would be entitled to recover on a quantum meruit the value of the work done by him less the amount already paid, if the minds of the parties never met as to the character of work to be done by the plaintiff. In other words, if there was a failure to make a legal contract by reason of an absence of a meeting of the minds of the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 324, 325; Dec. Dig. § 92.*]

4. JUSTICES OF THE PEACE (§ 124*)—PLEADINGS—SUFFICIENCY TO SUPPORT JUDGMENT.

A pleading in a justice's court, which asks a specific and definite relief without any prayer for general relief, does not support a judgment granting different relief from that asked, though a pleading in justice's court need not be as definite and specific as in courts in which written pleadings are required.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 389; Dec. Dig. § 124.*]

The answer of a carrier sued in justice's court for injury to a shipment of stock, which prays that no judgment be rendered against it, but that judgment for the damages be rendered against another carrier cited to appear and answer the action of the shipper, does not authorize a judgment against the latter carrier for the amount of the judgment rendered against the answering carrier, and such a judgment is void.

Appeal from District Court, Houston County; B. H. Gardner, Judge.

Jno. T. Garrison, for appellant. Mantooth
& Collins, for appellee.

The facts shown by the record are as follows: On the 29th of April, 1908, H. F. Barclay brought suit, in the justice court for precinct No. 3 of Houston county, against appellee for the sum of \$60. The claim filed with the justice is itemized as follows:

To 2 milk cows killed, valued.....	\$35 00
" 1 calf " "	5 00
" 8 milk cows damaged.....	20 00
	<hr/>
	\$60 00

This claim was filed and docketed as cause No. 176 on the docket of the justice court, and citation thereon was duly issued and served upon appellee on April 29, 1908. Thereafter, on May 20, 1908, appellee filed the following pleading in said suit:

"H. F. Barclay v. Eastern Texas Railroad Co. Suit in Justice Court of Precinct No. —, Houston County, Tex. To the Hon. A. J. McLemore, Judge of Said Court: Now

(Court of Civil Appeals of Texas. Nov. 13, 1909. Rehearing Denied Dec. 9, 1909.)

Where the initial carrier only undertook to transport freight to the end of its line, and the connecting carrier did not receive the same under a through bill of lading, Rev. St. 1895, art. 331a, defining lines of common carriers, did not apply, and the connecting carrier was not liable for damages occurring on the line of the initial carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 791-803; Dec. Dig. § 177.*]

A connecting carrier, which is not liable to the shipper for injury to freight, may not recover over against the initial carrier the sum wrongfully recovered against it by the shipper, though the initial carrier is liable to the shipper.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 29, 30; Dec. Dig. § 13.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

comes the Eastern Texas Railroad Company, and for answer to the plaintiff's cause of action denies all and singular the charges, statements, and averments contained in plaintiff's petition or cause of action as filed against this defendant, and requires strict proof thereof. Defendant, Eastern Texas Railroad Company, further answering, comes and shows to the court that the defendant is sued for damages to a shipment of certain cattle claimed to have been caused by the Eastern Texas Railroad Company. That said cattle were shipped from Chester, Tyler county, Tex., via Corrigan, Polk county, Tex., at which point the shipment was received by the Houston, East & West Texas Railroad Company, and was then and there shipped from Corrigan to the town of Lufkin in Angelina county, and there delivered to the defendant, Eastern Texas Railroad Company, at Lufkin, from the Houston, East & West Texas Railroad Company. The damages to the cattle, as claimed by the plaintiff herein, had already accrued to said cattle, and that two head of said cattle were dead in the cars of the Houston, East & West Texas Railroad Company, and three head of the cattle were down in the cars of the Houston, East & West Texas Railroad Company at the time they were delivered to the Eastern Texas Railroad Company, and that at the time of this delivery the Eastern Texas Railroad Company's agent at Lufkin notified the Houston, East & West Texas Railroad Company that said cattle were in a damaged condition, in that two head of said cattle were then dead, and three head of them were down and being trampled upon by the other cattle, while they were in the cars of the Houston, East & West Texas Railroad Company, and before the said cattle were delivered from the Houston, East & West Texas Railroad Company to the Eastern Texas Railroad Company. That whatever damages or liability there is existing to said cattle at any time from the time they were received at Corrigan by the Houston, East & West Texas Railroad Company to the time they were delivered to the defendant in this case to be transported to Kennard was caused by the Houston, East & West Texas Railroad Company and not by the Eastern Texas Railroad Company. Defendant, further answering, says that if the plaintiff in this should recover against the Eastern Texas Railroad Company for the damages charged against it in this cause, the said Eastern Texas Railroad Company would have no recourse over against the Houston, East & West Texas Railroad Company for the damages to said cattle caused by the Houston, East & West Texas Railroad Company, unless such last-named company was made a party in this cause. Wherefore your defendant filed this answer, and shows to the court wherein the damages accrued to the cattle as claimed by the plaintiff herein, and prays that citation be issued to the Houston, East & West Texas Railroad Company, re-

quiring them to appear and answer plaintiff's cause of action, and that upon a final hearing hereof your said defendant, Eastern Texas Railroad Company, be permitted to defend this suit against the plaintiff, and to prosecute the same against the Houston, East & West Texas Railroad Company, which company is alone responsible for the damages herein, and that judgment final shall be entered against the Houston, East & West Texas Railroad Company for such damages as plaintiff sustained to his cattle by reason of said shipment, and that the defendant go hence without day and recover its cost."

Upon the filing of this plea the cause was redocketed and numbered 177, and the following citation was issued and served upon appellant: "The State of Texas. To the Sheriff or any Constable of Houston County, Greeting: You are hereby commanded that you summon the Houston, East & West Texas Railroad Company to be and appear before me, at a regular term of the justice's court for precinct No. 8 in said county of Houston, to be held at my office in the town of Ratcliff in the county of Houston, on the 16th day of June, A. D. 1908, to answer the suit of H. F. Barclay, plaintiff, against the Houston, East & West Texas Railroad Company, defendant, being numbered No. 177 on the docket of said court, the plaintiff's demand being for the sum of \$60, due upon an account duly sworn to and filed in justice court precinct No. 8, Houston county, Tex., on the 20th day of May, 1908. The plaintiff's demands being for the sum of \$60 and interest at 8 per cent. from January 10, 1908, and being for the killing of three head of cattle valued at \$40, and damages to three head of cattle, \$20, a total of \$60 and interest at 8 per cent., as above stated. Wherefore plaintiff prays for judgment for the above sum of \$60, with interest at 8 per cent. from January 10, 1908, together with all costs of this suit, and for such other sums of said H. F. Barclay may be entitled to either in law or equity. Herein fail not, and of this writ make due return to the next regular term of the justice's court for precinct No. 8, in said county of Houston, to be held on the 16th day of June, A. D. 1908, next. Given under my hand this 21st day of May, A. D. 1908. A. J. McLemore, Justice of the Peace, Precinct No. 8, Houston County, Tex."

In answer to this citation the appellant appeared in the justice court, and entered a general denial to plaintiff's suit. There was a trial in the justice court of the original cause No. 176, and judgment was therein rendered in favor of the plaintiff against the appellee herein for the sum of \$45, and in favor of appellant that plaintiff take nothing against it by said suit. The appellee appealed from this judgment to the county court, and upon the trial de novo in said court judgment was rendered in favor of the plaintiff against the appellee herein for the

execution against the appellant upon said judgment, appellant applied to the district judge before named to restrain the execution of said judgment, on the ground that it was rendered without any pleading to support it, and therefore void. In refusing the application the district judge made the following indorsement thereon, showing his reasons for such refusal: "Injunction refused because it does not appear that the judgment of the county court is void. The answer of the Eastern Texas Railroad Company is sufficient to authorize the judgment over against the Houston, East & West Texas Railroad Company, though it must be admitted that said answer is inartistically drawn. The prayer for judgment against the Houston, East & West Texas Railroad Company is not alone in favor of plaintiff, but, in the light of the facts pleaded, and other parts of said answer, should be construed as asking for such judgment as the facts pleaded and proven will warrant."

We do not think the pleading before set out can be given the construction placed upon it by the trial judge. It does not appear from this pleading, nor otherwise from the record, that the stock killed and those injured were shipped under a through bill of lading, and the allegation of the pleading that appellee was not liable for the injury to said shipment negatives the idea that the shipment was upon a through bill. If the connecting carrier only undertook to transport the stock to the end of its line, and appellee did not receive them under a through bill of lading, article 331a of the 1895 Statute does not apply, and appellee would not be liable for damages which occurred while the stock was in possession of its connecting carrier. *Ry. Co. v. Arnett*, 41 Tex. Civ. App. 403, 92 S. W. 57.

It goes without saying that if appellee was not liable to the plaintiff, it would not be entitled to recover over against the appellant the sum wrongfully recovered against it by the plaintiff, notwithstanding the fact that appellant was liable to the plaintiff. If it be conceded, however, that the facts stated in the pleading would warrant a recovery by appellee against appellant of the damages recovered by plaintiff against it, the fact remains that no such recovery was asked. Appellee was not required to file a written pleading, but, having done so, it is bound by the allegations of the plea just as it would be if the case had not originated in the justice's court. There was no additional pleading, oral or written, on the part of appellee, and the judgment can only be sustained, if at all, upon the pleadings before set out. While it is true that pleading in the

definite relief, without any prayer for general relief, will support a judgment granting entirely different relief from that asked. In this pleading the prayer is that no judgment be rendered against the appellee, and that judgment for the amount of the damages sustained by plaintiff be rendered against the appellant. This is, in effect, a prayer for judgment in favor of plaintiff against the appellant, and cannot be otherwise construed. That this was the intention of the pleader is shown by the citation which was issued upon said plea, and which only cites the appellant to appear and answer the suit of the plaintiff. There being no pleading to support the judgment against appellant, such judgment is void, and the trial judge erred in refusing to grant the injunction. *Ry. Co. v. Skeeters*, 44 Tex. Civ. App. 105, 98 S. W. 1064.

It follows that the order refusing the injunction should be reversed, and the cause remanded, with instructions to the trial judge to grant the injunction upon the filing of a proper bond by appellant, and it has been so ordered.

J. I. CASE THRESHING MACH. CO. v. WATSON et al.

(Supreme Court of Tennessee. Dec. 4, 1909.)

1. STATUTES (§ 206*)—CONSTRUCTION—LEGISLATIVE INTENT.

A statute should be construed so as to give effect to every part of it, and at the same time avoid absurd conditions.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 283; Dec. Dig. § 203.*]

2. STATUTES (§§ 197, 200*)—PUNCTUATION—"Or."

The word "or," in Acts 1889, p. 117, c. 81, providing that a conditional seller, on regaining possession on the buyer's default, shall advertise the property for sale "by printed hand bills or written or printed notices," etc., is used in its ordinary meaning to indicate an alternative; and the court, in interpreting the statute, may properly insert a comma after the quoted words "printed hand bills."

[Ed. Note.—For other cases, see *Statutes*, Dec. Dig. §§ 197, 200.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5002-5015; vol. 8, p. 7739.]

3. SALES (§ 479*)—CONDITIONAL SALES—REMEDY OF SELLER—SALE OF PROPERTY.

Acts 1889, p. 117, c. 81, providing that a conditional seller, on regaining possession on the buyer's default, shall advertise the property for sale by printed hand bills or written or printed notices posted at least 10 days before the day of sale, etc., though permitting a sale on notice by printed hand bills or notices posted, without fixing the time for the distribution of printed hand bills before the sale, requires the seller advertising by printed hand bills to distribute the same a reasonable time before the sale.

[Ed. Note.—For other cases, see *Sales*, Dec. Dig. § 479.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

On petition for rehearing. Dismissed.
For former opinion, see 122 S. W. 86.

BEARD, G. J. A petition for rehearing in this case has been presented, in which it is insisted the court, in the opinion handed down, has changed the meaning of section 1, c. 81, p. 117, Acts 1889, invoked in the cause, by placing, as is done, in the excerpt from the act, a comma after the words "printed hand bills," when in the original there is no such mark of punctuation. It is conceded by counsel of the petitioner that, thus punctuated, the section "is subject to the interpretation that the advertisement may be made in either one of the two manners [modes?]; that is to say, by printed hand bills, or written or printed notices, posted on the door of the courthouse."

That it should be construed so as to give effect to every part of the section, and at the same time avoid absurd conditions, is certainly true. In the effort to do this, the question raised in the petition for rehearing is: Has the court kept itself within sound canons of interpretation? While the disjunctive conjunction "or" is sometimes used in a sentence to connect synonyms, yet it is ordinarily employed in stating alternative subjects and ideas. Illustrations of these several uses are to be found in the standard works of grammarians and lexicographers. For instance, in the phrase, "The Prime Minister, or head of the British Cabinet," it evidently introduces a synonym, while in the sentence, "He may study law, or medicine or divinity, or may go into trade," it as clearly marks alternative conditions; and the section of the act under consideration equally illustrates the two distinct uses to which the particle may be applied. But, whether used in one form or the other, the best authorities recognize the comma preceding the particle as proper, if not essential, to bring out the true meaning of the sentence.

Not only have grammarians and lexicographers defined the word "or" as ordinarily indicating an alternative, but the courts in many cases have adopted and applied this definition. *Kuehner v. Freeport*, 143 Ill. 92, 32 N. E. 372, 17 L. R. A. 774; *Caster v. McClellan*, 132 Iowa, 502, 109 N. W. 1020; *Whiteside v. State*, 4 Cold. 175; *McBride v. McBride*, 111 Tenn. 616, 69 S. W. 781.

It was by giving the particle "or" its ordinary, and, as we think, its obvious, meaning, and then punctuating the clause, as approved by the best authorities, that the interpretation was reached, the soundness of which is complained of in this petition. It was assumed that, in the preparation of the act, by inadvertence or clerical omission the section was left by the draftsman to read as it is found published.

It is insisted, however, reading the section thus construed, no provision is made for the

length of time before the sale that printed hand bills announcing the same should be distributed. This is true; but, when the reclaiming seller is permitted to give notice in this form, the statute implies reasonable notice, and if he should undertake to make a mockery of this provision, by resorting to a trick or device which would be the equivalent of no notice, the courts, when applied to, would see that he, rather than the unfortunate purchaser, was the victim of the wrongdoing.

As is said in the opinion, in such case reasonable notice would be essential, and, while no fixed limitations can be given for this notice, it may, possibly, be properly inferable that the notice implied in the distribution of hand bills would be the same as where notice is given in the other mode provided in the section.

Upon re-examination of the question, we are satisfied with the conclusion heretofore announced, and it is therefore adhered to.

The petition for rehearing is dismissed.

DEADERICK v. STATE.

(Supreme Court of Tennessee. Nov. 6, 1900.)

1. TRESPASS (§ 84*)—CUTTING TIMBER—DEFENSES—TITLE.

Shannon's Code, § 6496, declares a trespass on the lands of another by cutting down or in any manner destroying valuable timber thereon exceeding 50 cents in value, with a view to convert the same to the use of the taker, is a misdemeanor. *Held*, that such section was intended to protect actual possession of the land held under color of title from forcible invasion; and hence it was no defense that those who authorized defendant to cut the timber had the superior title to the land.

[Ed. Note.—For other cases, see *Trespass*, Dec. Dig. § 84.*]

2. MALICIOUS MISCHIEF (§ 1*)—OFFENSES—DEFACING BUILDING.

In a prosecution for injury to the property of another, under Shannon's Code, § 6496, subd. 1, making it a misdemeanor to wantonly injure or deface any building, or fixture attached thereto, etc., belonging to another person, possession only need be proved.

[Ed. Note.—For other cases, see *Malicious Mischief*, Dec. Dig. § 1.*]

3. TRESPASS (§ 20*)—RIGHT OF ACTION—POSSESSION.

A party in possession of land may recover in an action for trespass thereto.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 32-47; Dec. Dig. § 20.*]

4. TRESPASS (§ 78*)—CUTTING TIMBER—POSSESSION.

Possession, by occupation or inclosure, of part of land covered by a corporation's title papers, constituted actual possession by construction of the entire premises within the boundaries described in the papers, within Shannon's Code, § 6496, subd. 7, making it a misdemeanor to trespass on the lands of another by cutting or destroying valuable timber.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 168; Dec. Dig. § 78.*]

Error to Circuit Court, Cocke County; G. McHenderson, Judge.

SHIELDS, J. The plaintiff in error was convicted of the offense of malicious mischief, committed in cutting and removing timber from the lands of the Stony Mountain Land Company, in Cocke county, Tenn., under section 4652, subsec. 7, of the Code (Shannon's Code, § 6496), declaring it to be a misdemeanor "to trespass upon the lands of another by cutting down or in any other manner destroying valuable timber thereon exceeding fifty cents in value with a view to convert the same to his own use, unless the offender be traveling or moving along any road and by accident or otherwise require the same for his own immediate use."

The defenses made in the trial court, and here relied upon, are that Brown and others had the superior title to the lands upon which the timber was cut, and that plaintiff in error was employed and authorized by them to cut and remove it, or, if plaintiff in error's employers did not have the superior title, the trespass was committed under color of title and a claim of right, and in the bona fide belief that they did have such title, and the right of possession.

The case was tried much like an action of ejectment. The state introduced the title papers of the Stony Mountain Land Company, deraigning title from the state of Tennessee. The defendant introduced the title papers of Brown and others, showing title from the state of North Carolina. The state also offered evidence of possession by the Stony Mountain Land Company, and its predecessors in title, for the purpose of perfecting its title under the statutes of limitations and raising presumption of a grant; while the defendant offered proof of the coverture of his employers during that period.

The lands claimed by the parties, the Stony Mountain Land Company and Brown and others, consist of a tract of 5,000 acres, uninclosed and in timber, with the exception of two or more inclosures containing 12 or more acres, of which the Stony Mountain Land Company and those under whom it holds have had the actual possession, claiming to the extent of the boundaries defined in its title papers, for some 15 or 20 years, and perhaps longer. Brown and others, the employers of the plaintiff in error, had never had any actual possession. They were advised, and believed, they had the superior title, and employed the plaintiff in error to cut timber upon the uninclosed land, which he did in good faith, believing that his employers had the right to authorize him to do so. He and his employers knew of the adverse possession, and the timber was cut, evidently, for the purpose of compelling action on

to the charge of which he was convicted. Validity of title and good faith of the trespasser are not material inquiries in cases of this character.

The object of the statute, upon which plaintiff in error was convicted, is to protect actual possession of land held under color of title from forcible invasion, and to prevent breaches of peace, violence, and bloodshed, resulting from rival claimants of lands, attempting to take forcible possession, and to compel resort to the courts for determination of the validity of titles.

In *Dotson v. State*, 6 Cold. 545, it is said:

"This statute is not intended to constitute our criminal courts tribunals for the trial of ejectment suits at the expense of the state. It is not intended to settle the title to real estate, but is enacted in pursuance of the policy, apparent in our statutes of forcible entry and detainer and other statutes, to protect the actual possession of real estate against unlawful and forcible invasion, and to remove occasion for acts of violence and breach of peace.

"To support an indictment under the statute above recited, there must have been, by the express term of the statute, a trespass—such wrongful invasion of the possession of another as would enable the party in possession to maintain the action of trespass for the injury. The possession invaded must be the possession of some other person than the defendant."

In a prosecution for injury to the property of another, under subsection 1 of this statute, possession only need be proved. *State v. Mathes*, 3 Lea, 37; *Malone v. State*, 11 Lea, 703.

The party in actual possession can recover in an action for trespass to land. *Large v. Dennis*, 5 Sneed, 597; *Allen v. McCorkle*, 3 Head, 182; *Bailey v. Massey*, 2 Swan, 169.

The Stony Mountain Land Company was in actual possession of the land from which the timber was cut. Possession, by occupation or inclosure, of part of the land covered by its title papers, was actual possession, by construction, of the entire premises within the boundaries defined in those papers. *Pickens v. Delozier*, 2 Humph. 400; *Mansfield v. Northcut*, 112 Tenn. 536, 80 S. W. 437; *Lieberman v. Clarke*, 114 Tenn. 117, 85 S. W. 258, 69 L. R. A. 732.

This is the way, as a rule, actual possession is held of all timber lands in this state. It is virtual possession, and effective to give notice to all persons of the occupation and adverse claim of the party so holding. It is sufficient to put in operation the statutes of limitations, make a sale champertous, sustain an action of forcible entry and detainer against a trespasser, and replevin for timber

cut and removed. *Lieberman v. Clarke*, supra; *Mansfield v. Northcut*, supra; *Hebard v. Scott*, 95 Tenn. 467, 32 S. W. 390; *Green v. Cumberland Coal & Coke Co.*, 110 Tenn. 33, 72 S. W. 459.

Were the law as contended for plaintiff in error, all persons, in possession of lands under valid titles, could be compelled to resort to expensive litigation to establish their title at the instance of any trespasser, who could connect himself with one of the many duplicate grants which have unfortunately been issued, covering large bodies of land in all parts of the state held under older and superior titles. The statute justly protects them from burdens of this nature.

The plaintiff in error committed the trespass alleged against him with full knowledge of the actual adverse possession of the land. The case is clearly made out, and he was properly convicted.

The case of *Dotson v. State*, supra, is relied upon to support the contentions of the plaintiff in error. It is there said that title in the defendant, or color of title with the bona fide belief that it is his property, is a good defense in a prosecution under this statute. This, however, is in conflict with the construction given the statute in the previous part of the opinion, which we have quoted, and was only intended for the facts of that case. There it appears the prosecutor resided upon the land, having a part of it inclosed; but it does not appear that he had a paper title covering the uninclosed part upon which the timber was cut. The defendant also resided upon the land, having an inclosure, and claimed under a grant covering the place where he cut the timber. The parties were both in possession, provided the prosecutor had color of title extending his boundaries to the portion in dispute. Upon these facts, the defendant did not invade the possession of the prosecutor, and was not guilty.

This case, *Dotson v. State*, so far as it may be in conflict with the construction of the statute herein declared, is erroneous, and is overruled.

The judgment of the circuit court is affirmed.

STATE ex rel. WEBB v. PARKS.

(Supreme Court of Tennessee. Dec. 4, 1909.)

1. PARDON (§ 9*)—EFFECT—IMPEACHMENT—RESTORATION TO OFFICE.

Under Const. art. 3, § 6, providing that the Governor shall have power to grant pardons after conviction, except in cases of impeachment, a Governor's pardon of a justice of the peace, convicted of oppression in office, carrying with it removal from office, was ineffective to restore the office.

[Ed. Note.—For other cases, see Pardon, Cent. Dig. § 17; Dec. Dig. § 9.*]

2. JUSTICES OF THE PEACE (§ 10*)—IMPEACHMENT—REMOVAL FROM OFFICE.

Const. art. 5, § 4, provides for the impeachment of certain state officers by the House of Representatives in a specified manner; and section 5 declares that justices of the peace and other inferior officers, not previously mentioned, for crime or misdemeanor in office, shall be liable to indictment in such court as the Legislature may direct, and on conviction shall be removed from office by the court as if impeached, and shall be subject to such other punishment as may be prescribed by law. Shannon's Code, § 6717, provides a punishment by fine or imprisonment for official oppression; and section 6721 declares that an officer convicted shall, in addition, be removed from his office, and will be forever disqualified to hold office. Held that, where a justice of the peace was indicted and convicted of oppression in office, the judgment, in so far as it deprived him of the office, was an impeachment, and was properly rendered as part of the same proceeding; it being unnecessary, to obtain the justice's removal, that the state, after his conviction, proceed against him by quo warranto, as authorized by sections 5165-5187.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 10.*]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Bill by the State, on the relation of J. P. Webb, against W. M. Parks. From an order sustaining a demurrer to the bill, relator appeals. Affirmed.

Vance & Carden, for appellant. Shepherd, Fleming & Shepherd, for appellee.

NEIL, J. The present bill was filed to remove the defendant from the office of justice of the peace, claimed by him, on the ground that he was an intruder without authority of law, and that the complainant was the real incumbent of the office. The bill was met by a demurrer, which was sustained by the chancellor. Thereupon an appeal was prayed and prosecuted to this court.

The facts stated in the bill are these:

That on the 2d day of August, 1908, the relator was elected a justice of the peace for the Sixth civil district of Hamilton county for the full term of six years, and was duly commissioned by the Governor, and entered upon the discharge of his duties; that at the January term, 1909, of the criminal court of Hamilton county he was indicted, jointly with Thomas Light, a deputy sheriff, and W. G. Sears, constable for the Sixth district, on the charge of official oppression, in four cases—each indictment containing the same statement of facts—under section 6717 of Shannon's Code, and that he was convicted in all four of the cases, and in each of them was entered a judgment as follows, viz.:

"Again came the Attorney General, and defendants in person, and the same sworn jury, to wit: * * * And they, having heard all the proof, arguments of counsel, and charge of the court, do upon their oaths say the defendants are guilty of oppression, as charged in the indictment, and fix their

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and, in default thereof, be confined in the workhouse of Hamilton county until same is worked out, as prescribed by law. Execution shall issue against defendants for costs. It is the further order, judgment, and decree of this court that the defendant J. P. Webb be removed from his office, to wit, justice of the peace for this county, and that defendant W. G. Sears be removed from his office, to wit, constable of Hamilton county, and that defendant Thomas Light be removed from the office of deputy sheriff of Hamilton county, and all of said named defendants are forever hereafter disqualified from holding office, under the laws and Constitution of the state of Tennessee."

It is further alleged in the bill that the election commissioners of Hamilton county, on the — day of May, 1909, called an election to choose relator's successor; that on the 5th day of May, 1909, after the election commissioners had called the election as aforesaid, but before it had been held, the Governor of the state pardoned the relator, and the said Light and Sears, of said offense of official oppression; that said pardon, after fully stating the Governor's reasons for granting it, contained the following language: "Therefore I, Malcolm R. Patterson, Governor as aforesaid, by virtue of the power and authority in me vested, do hereby relieve of the fines and pardon the said J. P. Webb, Thomas Light, and W. G. Sears of the said offense; and I do further authorize and direct that said judgment be rendered null and void and of no effect, except as to costs." It is further alleged that, immediately upon receipt of this pardon, relator served written notice upon the election commissioners that the pardon had been received, and that his office had not been legally vacated, and therefore no election for said office could be legally held; that this notice, however, was disregarded by the commissioners, and they proceeded to hold an election as called on the 8th day of May, 1909, which resulted in the election of W. M. Parks, who received a commission from the Governor, and at the date of the filing of the bill was, without authority of law, undertaking to perform the duties of the office.

The demurrer which was interposed by the defendant, Parks, raised the point that, under the facts stated, there was a vacancy in the office of justice of the peace for the Sixth district of Hamilton county, created by the judgment, and that the pardon of the Governor did not restore relator to his office, and that the pardon could not render "null and void and of no effect" the whole judgment.

We think the decree of the chancellor was correct.

The pardoning power in this state does not extend to the relief of defendants from judg-

ment contained in article 3, § 6, of the Constitution. That section reads that the Governor "shall have power to grant reprieves and pardons, after conviction, except in cases of impeachment." That the judgment which deprived relator of his office was an impeachment proceeding, in so far as it referred to that subject, is apparent from article 5, § 5, of the Constitution. In order to properly understand this latter section, it should be construed in connection with sections 1, 2, 3, and 4. Section 1 lodges the power of impeachment in the House of Representatives. Sections 2 and 3 provide the method of trial. Section 4 mentions the officers who may be impeached. That section reads as follows:

"Sec. 4. The Governor, judges of the Supreme Court, judges of the inferior courts, chancellors, attorneys for the state, Treasurer, Comptroller, and Secretary of State, shall be liable to impeachment, whenever they may, in the opinion of the House of Representatives, commit any crime in their official capacity, which may require disqualification; but judgment shall only extend to removal from office, and disqualification to fill any office thereafter. The party shall, nevertheless, be liable to indictment, trial, judgment, and punishment according to law. The Legislature now has, and shall continue to have, power to relieve from the penalties imposed upon any persons disqualified from holding office by the judgment of the court of impeachment.

Section 5 reads:

"Sec. 5. Justices of the peace, and other inferior officers, not hereinbefore mentioned, for crime or misdemeanor in office, shall be liable to indictment in such court as the Legislature may direct; and upon conviction shall be removed from office by said court, as if found guilty on impeachment; and shall be subject to such other punishment as may be prescribed by law."

The latter section prescribes the mode of impeachment applicable to justices of the peace and to other officers therein named. Pursuant to this section the Legislature passed sections 6717 and 6721 of the Code, under which the judgment complained of was rendered against the relator. These sections read:

"Sec. 6717. If any person by color of his office, willfully and corruptly oppress any person under pretense of acting in his official capacity, he shall be punished by fine not exceeding \$1,000.00, or imprisonment in the county jail not exceeding one year."

"Sec. 6721. If any judicial, ministerial, or executive officer in this state is prosecuted for misdemeanor in office under the provisions of this Code, and duly convicted, he shall, in addition to the punishment prescribed for such offense, be removed from his

office, and shall forever thereafter be disqualified from holding office, under the laws and Constitution of the state."

It was proper, therefore, that the judgment should be framed in the manner set out in the bill. It was clearly contemplated in section 5, art. 5, of the Constitution, that in the same proceeding in which the guilt of the accused should be ascertained he should be removed from office and disqualified from ever thereafter holding office. While it was contemplated that the officers mentioned in section 4, art. 5, should be impeached when necessary before the Legislature, and also indicted and punished in the criminal court, as to justices of the peace and other inferior officers, the two proceedings were united into one by section 5. This is the clear meaning of the provisions of the Constitution. The question has not previously been adjudicated in this state, but this construction is clearly implied in *Carpenter v. State*, 6 Baxt. 535, and *State v. Casetty*, 3 Tenn. Cas. 120. We are referred to *Moore v. State*, 9 Yerg. 353, as an adverse authority; but upon a careful examination of that case we do not see that it has any bearing upon the question before us.

It is insisted by relator's counsel that after the conviction of the relator, under section 6717, it was necessary, in order to remove him from office, that he should be proceeded against by a bill in the nature of a quo warranto under sections 5165 to 5187 of Shannon's Code. From what has been said, it is apparent that this is a mistaken view. Certainly there could be no need of any additional proceedings after the very ground of removal had been ascertained by proceedings under an indictment. Costs and time were avoided by a judgment in that case removing the officers. No good reason can be conceived for an additional proceeding. This was evidently the view of the framers of the Constitution, when section 5 of article 5 was drawn.

We have had submitted to us, by counsel for relator, a very learned and interesting argument upon the effect of pardons in general under the common law of England and of this country. We have examined this argument with care, but do not find it necessary to write at length upon the phase of the case covered by it, because, as already stated, the pardoning power in this state does not apply to impeachment proceedings at all. The disabilities so imposed can be relieved only by the Legislature, as shown by section 4, art. 5, which is construed with section 5. It is proper to remark, also, that in our opinion section 3655 and section 6066 do not apply to such proceedings.

And, even aside from the provisions of our Constitution, it appears from the weight of authority that a pardon cannot restore to a former incumbent an office which he has for-

feited. *Ex parte Garland*, 4 Wall. 380, 18 L. Ed. 366; *In re Spenser*, 5 Sawy. 195, Fed. Cas. No. 13,234; *Cook v. Chosen Freeholders*, 26 N. J. Law, 326; same controversy, 27 N. J. Law, 637; *Baum v. Clause*, 5 Hill (N. Y.) 199; *Roberts v. State*, 30 App. Div. 106, 51 N. Y. Supp. 691; same case, 160 N. Y. 217, 54 N. E. 678; *In re Attorney*, 86 N. Y. 563; *Com. v. Fugate*, 2 Leigh (Va.) 724; *Edwards v. Com.*, 78 Va. 39, 49 Am. Rep. 377; *State v. Carson*, 27 Ark. 469; *Nelson v. Com.*, 128 Ky. 779, 109 S. W. 337, 16 L. R. A. (N. S.) 272. *Jones v. Board of Registrars*, 56 Miss. 766, 31 Am. Rep. 385, is cited as an authority to the contrary; but the opinion in that case, while stating very broadly the effect of a pardon, still recognizes the distinction above mentioned, to the effect that a pardon will not restore one to an office which he has forfeited. The proposition is fully supported in the common-law authorities referred to in *Ex parte Garland*, viz.: 4 Blackstone, Com. 402; 6 Bacon's Abr. tit. "Pardon"; Hawk. book 2, c. 37, §§ 34, 54. And see these authorities discussed in *Re Spenser*, supra.

It results that there is no error in the decree of the chancellor; and it must be affirmed, with costs.

ADCOCK et al. v. HOUK et al.

(Supreme Court of Tennessee. Dec. 4, 1909.)

1. INJUNCTION (§ 80*)—OFFICERS (§ 82*)—JURISDICTION—RESTRAINING PUBLIC OFFICERS.

The chancery court has no power to enjoin election officers from issuing a certificate of election, or to restrain public officers from assuming their functions, even though it be alleged that there was fraud in the election sufficient to vitiate it.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 151; Dec. Dig. § 80;* *Officers*, Cent. Dig. § 114; Dec. Dig. § 82.*]

2. COURTS (§ 154*)—CIRCUIT COURT—JURISDICTION—CONTESTED ELECTIONS.

Under the Code provision that the circuit court has jurisdiction in any case left unprovided for, that court has jurisdiction of the trial of a contest over the offices of mayor and alderman; no tribunal being provided for the induction of these officers.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 154.*]

3. ELECTIONS (§ 273*)—CONTEST—PARTIES.

The incumbent of an office, though not a candidate, may contest on the ground that the election was void, or a contest may be raised by the court itself, upon which is devolved the duty of inducing the officer; and, where the questions raised by the litigation necessitate going behind the returns, the case is an election contest, whether the judgment to be rendered under the pleadings be that one or the other of two contesting parties has been elected, or that there has been no legal election at all.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 249; Dec. Dig. § 273.*]

Appeal from Chancery Court, Knox County; Hu. L. McClung, Chancellor.

Bill by T. J. Adcock and others against

castle, Luckey, Fowler & Andrews, and John W. Green, for appellants. Thomas L. Carty, for appellees.

NEIL, J. The bill in the present case was filed on June 7, 1909, in the chancery court of Knox county, by the board of mayor and aldermen of the city of Lonsdale, made such by the election held the first Thursday in June, 1907, for a term of two years, against the new board elected on the first Thursday in June, 1909. The old board was composed of T. J. Adcock, mayor, J. M. Wood, recorder, and Robert Snow, Sam Mllwee, Joe Ford, Sam De Armond, Sam Johnson, and F. E. Stanford, aldermen. The new board is composed of M. M. Copenhaver, mayor, W. B. Ailor, recorder, H. E. Chrlsenberry, W. H. Davis, C. L. Householder, J. A. Bean, S. G. Sentell, and C. O. Gentry, aldermen. It is alleged in the bill that various acts of intimidation were used against nonresident property holders, who had a right to vote under the charter of the city, whereby a sufficient number of them were restrained from voting to change the result of the election, and to render the election incurably uncertain, and hence that there was no free election, such as the law contemplates and provides. It is therefore further alleged that the election was void. It was alleged that on the face of the returns the defendants were elected, and that unless restrained the election commissioners would meet at the courthouse in Knoxville, on Monday, June 7, 1909, and canvass the returns and issue certificates of election to the defendants. An injunction was prayed and granted, restraining the election commissioners from canvassing the votes and from issuing certificates to the defendants, and also restraining the defendants from entering upon the discharge of their duties as mayor and aldermen. Stated briefly, this is a bill filed by the old board of mayor and aldermen, seeking to hold over and prevent the new board from assuming office and discharging the duties thereof, on the ground that the election was void by reason of frauds committed in the progress thereof, which made the result incurably uncertain.

Several grounds of demurrer were filed, but we need only state the first, which is that the chancery court has no jurisdiction of the controversy. The chancellor sustained this ground of demurrer, and dismissed the bill. Thereupon the complainants prosecuted an appeal to this court, and have here assigned errors.

The decree of the chancellor was correct, and must be affirmed. The chancery court has no power to enjoin election officers from issuing a certificate of election, or restraining public officers from assuming their func-

1312, 1316.

It is insisted in the brief of complainants' counsel that a distinction must be taken between the jurisdiction of the court and the propriety of applying a particular remedy. This is true; but the suggestion is not apt in the present case, because the very life of the bill before us is the injunction sought, by means of which the complainants seek to retain possession of the offices, after their time has expired, and prevent the defendants, who have a prima facie title, from assuming the duties of the office.

Aside, however, from the question of the remedy, we are of the opinion that the chancery court has no jurisdiction of the controversy. The facts stated make the case one of contested election pure and simple. No tribunal being in terms designated by statute for the trial of such cases as a contest over the offices of mayor and aldermen, and no tribunal being provided for the induction of these officers, it follows that the jurisdiction devolves upon the circuit court, under the section of the Code which provides, in substance, that the court has jurisdiction in any case left unprovided for. It was so held in *Baker v. Mitchell*, 105 Tenn. 610, 59 S. W. 137. See, also, *Conner v. Conner*, 8 Baxt. 11.

It is insisted in behalf of complainants that there can be no contest, except between persons who are candidates for the office. This is a mistaken view. It was held in *Marshall v. Kerns*, 2 Swan, 68, that the incumbent might object to the induction of the person holding the certificate of election, and contest the matter with him on the ground that the election was void, although such incumbent had not been a candidate for election. It was held in *McCraw v. Haralson*, 4 Cold. 34, that such a contest might be raised, indeed, by the court itself, upon which was devolved the duty of inducing the officer; in *Lewis v. Watkins*, 3 Lea, 174, 181, 182, that one who had been an opposing candidate, although he received less votes than his opponent, might maintain a contest with him, on the ground that the latter was disqualified to hold office, and hence insist that the election was void. It was held, in *Maloney v. Collier*, 112 Tenn. 78, 91-94, 83 S. W. 667, that it is settled law in this state that the validity of an election may be determined in a contested election case. The authorities above referred to, and others, are cited and discussed in that case. Our authorities do not warrant any such distinction as is attempted in the brief of complainants' counsel, to the effect that there must be opposing candidates involved in the litigation before there can be a contest, and that where there are not such opposing candidates the jurisdic-

tion exists in the chancery court to declare the election void on the ground of fraud. Our authorities distinctly hold that, where the questions raised by the litigation necessitate going behind the returns, the case presented is an election contest, whether the judgment to be rendered under the pleadings be that one or the other of two contesting parties has been elected, or that there has been no legal election at all. Authorities *supra*, and *State ex rel. v. Gossett*, 9 Lea, 644.

We are referred by counsel to certain cases as justifying the bill, viz.: *Pucket v. Bean*, 11 Heisk. 600, and *Lawrence v. Ingersoll*, 88 Tenn. 52, 12 S. W. 422, 6 L. R. A. 308, 17 Am. St. Rep. 870 (mandamus cases); *Morris v. City of Nashville*, 6 Lea, 337 (a case involving the annexation of a new territory to a city); *Winston v. Railroad Co.*, 1 Baxt. 69, and *Catlett v. Railroad*, 120 Tenn. 702, 112 S. W. 559 (cases involving county subscriptions to railroads); and *Lindsay v. Allen*, 112 Tenn. 659, 82 S. W. 171 (involving the removal of a county seat). In *Lindsay v. Allen* the jurisdiction of the chancery court was objected to on the ground that it was a matter involving a contested election. The court said, upon that subject, that the case fell within the principle of *Winston v. Tennessee & Pacific R. Co.*, *supra*; that the occasion of the interference of the court in that case was to declare void the subscription of a county to a railroad enterprise, because a constitutional prerequisite, the consent of the people by the required majority, had not been obtained, while in the case then before the court the jurisdiction was invoked on the same ground to prevent the removal of a county seat; that the underlying principle was the same in such case, although the special occasion that called it into being was different; that such controversies do not fall under the classification of contested election cases, but, on the contrary, under the class of cases wherein the court restrains public officers from the exercise of unconstitutional powers. 112 Tenn. 659, 660, 661, 82 S. W. 171.

It is also said in *Winston v. Railroad Co.* that the means by which the will of the people is ascertained and their consent obtained to the making of a contract is merely by accommodation called an "election." This is also true as to cases in which it is sought to ascertain the same thing in respect of a proposition to remove a county seat. When a question is subsequently raised as to whether the people really consented to the proposed action, it is necessary that the court having jurisdiction of the matter should investigate the operation of the means adopted in order to learn whether the consent was truly obtained. The court of chancery is, of course, the proper tribu-

al to enjoin the acts of officers purporting to obey an alleged direction of the people, when it is charged that there was, in fact, no such direction, because of fraud practiced upon the people or the violation of some constitutional inhibition. The same is true when the question arises as to whether the people have truly directed the removal of a county seat from one part of a county to another. As to mandamus cases, when it is sought to compel an officer to do some particular thing—that is, to recognize some other person as an officer, or to obey some mandate supposed to be the mandate of the people rendered in the form of an election—it necessarily results that the officer or person so sought to be coerced must have the right to question whether the person put forward as an officer to be received is in fact an officer, or whether the assumed direction is a real direction of the people.

Affirm the decree, with costs.

SNYDER v. SUPREME RULER OF FRATERNAL MYSTIC CIRCLE.

(Supreme Court of Tennessee. Dec. 4, 1909.)

1. INSURANCE (§ 771*)—FRATERNAL BENEFIT INSURANCE — BENEFICIARIES — DIVORCE — WAIVER.

The charter of a fraternal order declared that its object was to unite fraternally persons of proper age for beneficial purposes, to provide for the payment to its members, or their families, widows, or other dependents, benefits in case of death, but did not affirmatively provide that the benefit fund should be appropriated to none others than those enumerated, and made no provision for the forfeiture of a certificate payable to the wife of a member on the wife obtaining a divorce. The order issued a certificate to a member for the benefit of his wife, who subsequently obtained a divorce, and who was thereafter induced by the highest officer of the order to continue the payment of dues with knowledge of the facts. *Held*, that the wife was entitled to recover on the certificate on the death of the member.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1935; Dec. Dig. § 771.*]

2. INSURANCE (§ 771*)—FRATERNAL BENEFIT INSURANCE — BENEFICIARIES — BY-LAWS — WAIVER.

A fraternal order issued a certificate to a member for the benefit of his wife, who obtained a divorce, and who thereafter informed the highest officer of the order of the fact, and he induced her to continue to pay dues, which she did. *Held*, that receipt of dues thereafter amounted to a waiver of a by-law providing that where the designated beneficiary is a wife, and she obtains a divorce, the benefit shall be payable to others.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1935; Dec. Dig. § 771.*]

3. INSURANCE (§ 755*)—FRATERNAL BENEFIT INSURANCE—FORFEITURE—WAIVER.

Where a fraternal order declined to pay a benefit certificate on the sole ground that the member died because of the excessive use of narcotics, in violation of a rule of the order, it is estopped in a suit thereon to assert a forfeiture of the certificate because the wife of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

4. ESTOPPEL (§ 63*)—ACTS CONSTITUTING ESTOPPEL.

Where a party gives a reason for his conduct touching anything involving any controversy, he is estopped, after litigation is begun, from changing his ground, and putting his conduct on another and different ground.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 63.*]

5. INSURANCE (§ 819*)—FRATERNAL INSURANCE—ACTION ON CERTIFICATE—EVIDENCE—SUFFICIENCY.

In an action on a benefit certificate, void on the death of the member caused by the use of drugs, evidence held to show that the death of the member was not caused by the use of drugs.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 2006, 2007; Dec. Dig. § 819.*]

6. CONSTITUTIONAL LAW (§ 165*)—IMPAIRING OBLIGATION OF CONTRACTS—IMPOSING PENALTY.

Acts 1901, p. 248, c. 141, imposing a penalty of 25 per cent. for the failure to pay insurance losses, is not void as impairing the obligation of the contract of insurance.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 460; Dec. Dig. § 165.*]

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Suit by Mrs. Annie Snyder against the Supreme Ruler of the Fraternal Mystic Circle. From a decree for plaintiff, defendant appeals. Affirmed.

D. L. Snodgrass and T. C. Latimore, for appellant. Pritchard & Sizer, for appellee.

BEARD, C. J. The defendant is a corporation duly organized under the laws of the state of Pennsylvania, with its principal office in the city of Philadelphia, in that state, and with subordinate lodges, or agencies, located in different states of the Union. The corporation is social and benevolent in character; its object, as indicated in its charter, being "to unite fraternally white persons of proper age and good social and moral character * * * for beneficial and protective purposes, collecting dues and assessments from its members, to provide for the payment to its members, or their families, widows, heirs, blood relatives, or other dependents, benefits in case of sickness, disability, or death of its members, in compliance with its constitution, laws, and regulations."

On the 23d of November, 1887, the corporation issued to Charles C. Snyder, a resident of Chattanooga, and a member of one of its lodges, a benefit fund certificate, or policy, by which it bound itself, on certain conditions therein set forth, at the death of the assured, upon the proof thereof, to pay to the present complainant, at that time and for many years thereafter his wife, or, in case of her death prior thereto, to his children, a sum not exceeding \$3,000.

ant to the defendant, and payment of the certificate was demanded by her. This demand being refused, the present bill was filed.

The defenses to this claim, set up in the answer, are:

First. That it had been determined by the Supreme Medical Examiner of the defendant corporation, whose determination of the question, under the laws of the association, was final, that "the health of the assured had become impaired and his death was caused directly or indirectly by the use of narcotics," and the assured had stipulated in the application, on the faith of which the certificate was issued, that in such case the defendant should "not be responsible under the contract."

Second. That the complainant had been divorced from the assured prior to his death, and by the express terms "of the constitution and laws of the order" was ipso facto excluded from all further interest in this certificate.

The record shows that, many years after the issuance of the certificate in question, the complainant obtained a divorce from the assured, and was given the custody and control of the children born of their marriage, and afterwards, to wit, on the 25th of June, 1904, that she wrote defendant a letter, in which she advised defendant of this divorce, and that for 10 years prior thereto she had paid the assessments on this certificate, and making inquiry as to whom the money provided for therein, in the event the assessments were kept up, would be paid on the death of the assured. To this letter, under date of June 28, 1904, F. H. Duckwitt, the Supreme Mystic Ruler—the highest officer of the association, and in charge of its affairs as such—made a reply to the complainant, in which he said, in substance, that under the laws of the order Charles C. Snyder, being a member, had "the absolute right" to change the beneficiary, within certain limitations; that "as the certificate now stands" it would be payable, on his death, to the complainant, "provided, of course, that the assessments were paid up," and in case of complainant's death "to his children." This letter concludes with the following paragraph: "I assume, from what you write, that you are in possession of this certificate. If so, it might be difficult for him to secure a new certificate, unless he should take the position that the old certificate was lost, and he would make affidavit to that effect, which, under our law, would entitle him to a new certificate."

To this letter the complainant replied, under date of August 18, 1904. In this reply

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

fore you take any action in the matter. * * *

In response to this letter the Supreme Mystic Ruler wrote complainant that he would file her letter with the petition for membership, in order that the clerks of the association might be advised of her request "to be notified of any application for change of beneficiary."

Following this correspondence, and relying on the statements of the chief officer of the corporation as to her rights in the premises, complainant, as shown by her, with much sacrifice, continued to pay all assessments, or dues, on this certificate up to the death of her former husband, on the 1st of May, 1908.

As has been stated, proofs of loss were promptly submitted by the complainant soon thereafter. In these, in answer to the question as to the cause and manner of his death, she stated it was due to suicide by "inhalation of illuminating gas." In response to a request to state the habits of the deceased "with reference to the use of spirituous or fermented liquors," she replied, "He did drink prior to leaving Chattanooga," and in answer to the question, "Did the deceased use morphine, opium, chloral, or other drugs or narcotics?" she said, "I think he used morphine."

On receipt of these proofs the Supreme Recorder of the defendant corporation wrote complainant, informing her that her claim was "not on its face a valid one," and that in accordance with the constitution and laws of the order an opportunity was given her to appear before the Supreme Executive Committee and present such evidence as she might have to establish its validity. In this letter there was set out a copy of resolutions passed by that committee, in which were recited provisions of the laws of the order to the effect that no benefit should be paid on account of the death of any member when his health had become impaired, or death had resulted, directly or indirectly, from the use of opiates, or alcoholic, vinous, or malt liquors, or when, at the time of his death, the member shall be addicted to the excessive use of alcoholic, vinous, or malt liquor. It was then stated in one of the resolutions that "from the proofs of death presented it appears that Charles C. Snyder was at the time of his death addicted to the excessive use of narcotics, or alcoholic, vinous, or malt liquors, on which account the claim presented by his beneficiary should not be approved." The resolutions then provided that the complainant "shall appear in person, or by attorney, or both, before the Supreme Executive Committee at the office of the defendant in Philadelphia, Pa., on Friday, July 17, 1908, * * * and offer

liquor, or if he was accustomed to use of narcotics, she did not know it, and did not intend so to state in the proofs of death; that Snyder had been away from Chattanooga for a number of years, and she had no personal knowledge of his personal habits, but when she saw him last he showed no evidence that he used narcotics, or that his health had become impaired by the use of intoxicating liquors. She stated, further, that it was impossible for her to appear in Philadelphia, either in person or by attorney, on July 17th, but that she would send such statements as she could before that date, and requested that a copy of the proofs she had furnished be sent her.

In answer to this letter the Supreme Mystic Ruler wrote complainant: "We are unable to furnish you a copy of the proofs of death, as they are on file with the Supreme Medical Director, at Columbus." He stated that: "Upon investigation we found that Mr. Snyder was a morphine and cocaine fiend, and that after his death many vials, labeled 'Cocaine,' 'Morphine,' and 'Chloroform,' were found in his rooms. We also ascertain that he used alcoholic liquors to excess, and that he had been a heavy drinker for more than 15 years before he went to Brooklyn, N. Y. Further, that he was again married in Brooklyn, in July, 1904, and that the widow, his last wife, is living." He then calls complainant's attention to the agreements in the "Application for Beneficial Membership" made by Snyder, to the effect that "if his health should become impaired, or if he should die from the excessive use of" liquors, narcotics, etc., the defendant would not be liable on the certificate, and stated that complainant might submit such proofs as she was able to secure tending to establish the justness of her claim, by affidavits or other documentary evidence, and suggested that she also furnish a certified copy of her decree of divorce from Charles C. Snyder. In conclusion, the letter states that "any proof that you may submit will receive careful consideration by the Supreme Executive Committee."

Soon after this, and in obedience to the suggestion made, the complainant secured and sent to the defendant, at its office in Philadelphia, the affidavits of 21 different persons, who claimed to have known the deceased intimately during a portion of, or all, the years that he lived in Brooklyn, and who stated that during their acquaintance with him his habits were temperate in the use of intoxicating liquors, and that from their associations with him and to the best of their knowledge he did not use narcotics. In addition, she submitted her own affidavit,

in which, among other things, she states that she had not seen or talked with Snyder, or had any correspondence with him, from the time she obtained her divorce, in June, 1901, up to the date of his death, in May, 1908, and that she knew nothing about his habits during that period; that he never drank nor used narcotics to such an extent as to impair his health during the time she knew him, and if he used either after the separation she did not know it; and that she did not intend, by anything she said in the proofs of loss, to indicate that she knew what his habits were. She also set out in detail the information that she had as to the circumstances attending his death, from which she drew the conclusion, as she says, that the assured committed suicide because of his financial troubles and disappointments over the failure of his eldest son to go to New York and live with him.

On August 10, 1908, the Supreme Recorder wrote complainant that her claim "as the alleged beneficiary" under the certificate in question had been rejected by the Supreme Executive Committee "as not being a valid one under the constitution and laws of the order and contract of membership"; and on the day following the general counsel wrote complainant at length, explaining the action which had been taken. He stated that the Supreme Executive Committee, "after careful consideration of all the proofs presented, decided that the defendant was not liable on the certificate," for the reason "that said member's [Charles C. Snyder's] death was due solely and wholly to the excessive use of morphine and other opiates." He then referred to the correspondence which had taken place between himself as Supreme Mystic Ruler and complainant, in June, 1904, already referred to, and stated, in substance, that under the laws of the order no divorced wife could be a beneficiary, and that, therefore, she could not be a beneficiary under the certificate in question, even if the claim had been a valid one.

Leaving out of view, for the time being, other matters for consideration, the first question presented is: Is the complainant, as the divorced wife of Charles C. Snyder, entitled to recover on this certificate? It is insisted by the defendant that she is not; and to sustain this insistence the charter, the constitution, and by-laws of the order, and certain authorities, are invoked.

That the complainant was rightfully a beneficiary at the time of the issuance of this certificate, and continued to be such at the date of her divorce, is beyond question. After the divorce was obtained, the beneficiary was not changed by the assured, as he had the right to do under the laws of the order, and the defendant corporation continued the certificate in her name, and with the full knowledge of the divorce she was encouraged by its chief executive officer to believe that, in the event of the death of

the assured without change, if dues and assessments were paid by her, she would be entitled to receive the money provided for in the certificate upon proper proofs of loss. Accepting the assurance of the supreme officer of the corporation to be made in good faith, she continued to pay these dues and assessments up to the death of Charles C. Snyder. Certainly, on these facts, there is a strong equity in her favor, which the defendant should not be permitted to repel, unless it can interpose some legal objection which a court is without power to disregard.

It will be observed, in reading that portion of the charter which affects this question, hereinbefore set out, that only in general terms is the "object" of the corporation set out; that is, the collection of dues and assessments "from its members to provide for the payment due its members, or their families, widows, heirs, or other dependents, benefits," in case of "sickness, disability, or death."

It may be conceded that, if the charter had in express terms restricted the application of the benefit fund to the class named, or, in other words, had affirmatively provided that it should be appropriated to none others, then it might be argued that payment to complainant upon her personal claim as the divorced wife of the assured could not be enforced. In such a case we can well understand that a recognition of the claim of the divorced wife by the superior officer of the order, followed by the receipt of assessments by it, would not avail to repel the defense of ultra vires. The authorities largely relied upon by the defendant corporation announce and enforce this principle.

But there are no restrictive words in this charter. At the time of the issuance of the certificate to Charles C. Snyder the complainant was his wife, and as such had an insurable interest in his life. The defendant issued the certificate, payable to her as such wife, as unquestionably it had the power to do. Its charter made no provision for a forfeiture of her right as beneficiary in the event of her divorce from the assured. No demand was made by the defendant for a surrender of this certificate on account of the changed relations of the beneficiary to the assured, and no alteration was made in it, and no intimation ever given to her that she had, after her divorce, no claim on the order. To the contrary, in recognition of an existing interest, with full knowledge that she no longer sustained the relation of wife, its Supreme Mystic Ruler induced her to continue the payment of dues and assessments on this certificate, at the expense of much personal sacrifice, and the defendant received and appropriated the sums so paid for a term of years, and until the death of the assured. Certainly, we repeat, if there is any sound ground for an equitable estoppel upon which this claim can be rested,

defendant, that in the face of even such general terms, lacking words of limitation or description, as are to be found in this charter, it would be an unauthorized diversion of a trust fund to award the money, represented by this certificate, to the complainant. The courts in which this class of cases are found have adopted a rigid rule of construction. 1 Bacon on Benefit Societies, §§ 243-245. On the other hand, other courts have adopted a "more liberal view," and, as we think, altogether a more reasonable one, and with these this court, as is said in Manley v. Manley, 107 Tenn. 191, 64 S. W. 8, has ranged itself.

That case involved a controversy between the surviving mother of a deceased member of an order, known as the "Brotherhood of Locomotive Firemen," and his widow and children, as to a fund represented by a certificate issued to the member and payable to his mother. It was there insisted by the widow, for herself and children, that the fund from which the claim in question was paid was "established to provide substantial relief to members and their families, in the event of death or total disability," and that the mother of the deceased was not within the classes provided for. The provision just quoted constitutes a part of section 47 of the constitution of that order.

In reply to this insistence it was said by the court: "It will be observed that there are no restrictive words in section 47. The terms used are general, and declare the purpose for which this beneficiary department is established, without fixing or undertaking to fix beyond recall a class to which, in case of death of a member, the money provided for must of necessity go. While the clear implication is that the fund raised is for the "substantial relief of members and their families, in the event of death or total disability," yet there are no words depriving the member of the right to designate any member of his family he may see proper as a beneficiary, or which gives one member of his family a fixed right superior to that of another." It was held that the mother was entitled to the benefit of that fund.

Among the cases referred to as supporting the conclusion of the court is that of Maneely v. Knights of Birmingham, 115 Pa. 306, 9 Atl. 41, in which the same liberal construction was given to a charter clause of one of these beneficial associations, which stated that the purpose of the corporation was the maintenance of a society to benefit "the widows and orphans of deceased members." A person other than a widow or orphan of a deceased member, to whom a certificate has been issued, when demanding payment, was met by a defense that the contract was ultra vires, and it was so held

the general purpose of the corporation is there stated, * * * It must be observed that this is only the statement of a general purpose. * * * There is no prohibitory or restrictive language excluding from the powers of the corporation the right to contract specially with the member for the payment of benefits to other persons than his widow or orphans." Supporting this view are to be found many cases. Among these may be cited Lane v. Lane, 99 Tenn. 639, 42 S. W. 1058; Alfson v. Crouch, 115 Tenn. 352, 89 S. W. 329; White v. Brotherhood of American Yeomen (1904) 124 Iowa, 293, 99 N. W. 1071, 66 L. R. A. 164, 104 Am. St. Rep. 323; Sheehan v. Journeymen, 142 Cal. 489, 76 Pac. 238; Benefit Society v. Blue, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; Linssey v. Western Mutual Aid Society, 84 Iowa, 734, 50 N. W. 29; Story v. Williamsburg, etc., Mutual Benefit Assn., 95 N. Y. 474.

It is urged, however, that one of the laws adopted by the defendant, and in existence at the time of the issuance of the certificate to C. S. Snyder, provided that "if at the time of the death of a member, who has designated as his beneficiary a person of class second [in the present case the wife], the dependency required by the laws of the order shall have ceased, * * * or if the designated beneficiary is a husband or wife, and they should be divorced upon the application of either party, * * * then the benefits shall be payable to person, or persons, mentioned in class first (section 11, law 1), if living, * * *" and that this provision necessarily defeats the claim of complainant. We think the answer to this contention is that the order which made this law could waive it, and that by the receipt of assessments and dues by the defendant after the divorce, and with full knowledge of that fact, it was waived. It is true that Mr. Duckwitch, the Supreme Mystic Ruler, states that in a moment of forgetfulness as to this provision he wrote the letter to the complainant of date June, 1904, hereinbefore referred to. We grant that he was not able, by virtue of his position as chief executive of this order, either by direction or indirection, to set aside or suspend the operation of one of its laws. But this is not the point. His knowledge of the divorce secured by the complainant was that of the association, and its receipt of assessments and dues thereafter constituted the waiver in law insisted upon.

There is another ground, however, which we regard as conclusive on this point as against the defendant. It will be seen, from the statement hereinbefore made, that the representatives of the order did not decline to pay this claim because of the divorce of the complainant from Chas. C. Snyder, the

assured, but on the other and distinct ground that his "death was due solely and wholly to the excessive use of narcotics, alcoholic, vinous, and malt liquors, and the excessive use of morphine and other opiates." Having taken this ground with knowledge of this provision in its laws, and of the fact of the divorce, it is now estopped to assert this latter fact as being a forfeiture of complainant's interest in this certificate. 3 Cooley's Insurance Briefs, p. 2680; Insurance Company v. Thornton, 97 Tenn. 1, 40 S. W. 136; Insurance Co. v. Hancock, 106 Tenn. 513, 62 S. W. 145, 52 L. R. A. 665; Smith v. German Insurance Company, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368; McCormick v. Insurance Co. 163 Pa. 184, 29 Atl. 747.

This is but the application to insurance cases of the well-established rule "that, when a party gives a reason for his conduct and decision touching anything involved in the controversy, he is estopped, after litigation is begun, from changing his ground, and putting his conduct on another and different consideration." Ault v. Dustin, 100 Tenn. 366, 45 S. W. 981; Railway Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693.

This rule equally disposes of the contention that the determination of the medical director of the defendant against this claim was conclusive on the complainant, and also as to the effect under the by-laws of the failure of the complainant to appeal from the decision of the Executive Committee to the General Counsel.

Independent, however, of the views above expressed, we think that the present suit could be maintained by the complainant in her own name, having the legal title by virtue of this certificate in question to the fund provided for in it, and that, under section 14, her recovery would inure to the benefit of her children. It is not necessary, however, in order to save this claim in favor of complainant, that this ground should be taken, as we are satisfied that the views already presented are sound, and that she is entitled in her own right to this recovery.

This leaves open only the question as to whether the death of the assured was due to the excessive use of narcotics, and of vinous and malt liquors. That his death was the result of suicide, produced by the inhalation of illuminating gas, is beyond controversy. It is not insisted, however, that the death thus caused was within the inhibition of the policy. The laws of the order prevented the interposition of the defense of suicide, where a member had continued in good standing for a period of ten years or more, as was the case of the deceased.

An examination of the record shows that the overwhelming weight of the testimony,

coming from witnesses who knew the deceased intimately for 15 or 20 years, and some of them up to the time of his death, is that he was a moderate drinker, and was not addicted to the use of narcotics in any form. His death, on this record, can be attributed to the fact that the deceased had become desperate from financial straits, and on account of his conduct, whatever it may have been, which had separated from him the present complainant and their four children, and the consciousness of the utter waste of what might otherwise have been, possibly, a brilliant life. The statement of the complainant, in the proofs of loss, with regard to his drinking and to the use of morphine, were honestly made by her. She had not seen him for about 14 years before the making of these proofs. While they lived together as man and wife, as is shown, he did drink moderately, and, knowing this, she answered, as to the habits of the deceased as to the use of spirituous or fermented liquors, that "he did drink prior to leaving Chattanooga." In response to the question as to whether he used morphine, etc., she made reply, as has been seen, "I think he used morphine." This last answer is explained by her in an affidavit submitted to the defendant, when seeking a settlement of her claim, and before the institution of the present suit, as well as in her deposition, by the statement that prior to their separation, while in the city of Chicago, upon one occasion she found a white substance in the room occupied by herself and her then husband, and, apprehensive that it might be a narcotic, she sent it by one of their children to a druggist for his opinion, and the child came back and reported that it was morphine, and that this was the incident that she had in her mind at the time she made this particular answer. She stated, further, that she knew nothing since their separation of the habits of the deceased.

We regard this explanation as entirely satisfactory, and consistent with good faith in pressing the present claim.

The chancellor not only gave the complainant a decree for the amount of the certificate and interest, but allowed her, in addition thereto, 25 per cent. thereon, under chapter 141, p. 248, Acts of 1901. It is insisted that this act, in imposing this additional liability on the defendant, is void, in that it impaired the obligation of the contract in question. This question has been presented and determined against this insistence in both published and unpublished opinions. We are entirely satisfied with the holding heretofore made. In all respects the decree of the chancellor is affirmed.

No particular acts are necessary in order that adverse possession may be actual; any visible or notorious acts clearly showing an intention to claim by adverse possession being sufficient.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. § 16.*]

For other definitions, see Words and Phrases, vol. 1, pp. 227-236; vol. 8, p. 7568.]

2. ADVERSE POSSESSION (§ 30*)—NOTORIETY—SUFFICIENCY.

Defendant, a nonresident, agreed to allow certain persons to fence the land in controversy, and graze their cattle thereon, they to look after the land for him. They inclosed it with a wire fence, and maintained it for the statutory period, except when it was occasionally broken by high water. No part of the land was cleared, and no buildings were erected thereon. *Held*, that defendant's possession was sufficiently notorious to be adverse.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 126, 127; Dec. Dig. § 30.*]

3. ADVERSE POSSESSION (§ 44*)—CONTINUITY—INTERRUPTION.

That the wire fence by which an adverse claimant inclosed the land was occasionally broken by spring floods, after which it would be repaired to hold cattle, did not break the continuity of his possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 226-231; Dec. Dig. 44.*]

Appeal from White Chancery Court; John E. Martineau, Chancellor.

Action by A. C. McComb against G. R. Saxe. From a decree for defendant, plaintiff appeals. Affirmed.

S. Brundidge, Jr., and Harry Weelly, for appellant. J. H. Harrod, for appellee.

MCCULLOCH, C. J. Appellant, A. C. McComb, instituted this action in the chancery court of White county against appellee, G. R. Saxe, to quiet his title to a tract of land containing 320 acres. He deraigned title from the government, and alleged that appellee was claiming title under a purchase from the administrator of the estate of one Pickett, who was one of the owners of the land in appellant's chain of title, and who conveyed the same during his lifetime to appellant's grantor. Appellee answered, claiming title to the land by adverse possession under color of title for more than seven years prior to the commencement of the action. The chancellor found from the testimony that appellee had held actual, open, and notorious possession of the land for more than seven years under color of title, and sustained his plea of the statute of limitations. Decree was rendered accordingly against appellant, and he appealed to this court.

There is practically no conflict in the testimony. The lands are wild and unculti-

agreed with certain persons in White county engaged in the stock business, whereby he agreed to allow said parties to inclose the lands in controversy with a fence so that it could be used for grazing stock, and on condition that they would look after the lands for appellee and preserve the timber. They were to build the fence at their own expense. These parties inclosed the land with a wire fence stretched partly on trees and partly on posts set in the ground. It was constructed of from one to three strands of wire. The lands were used as pasture lands, and the fence has thus been maintained continuously from that time to the present, except that occasionally the fence would be broken in the spring of the year in times of high water, but would be immediately repaired as soon as the water went off, in order to hold the live stock. No part of the land was ever cleared, and no building of any kind was ever placed thereon. It is insisted that these acts were not of sufficient notoriety to give title by limitation. But we do not agree with this contention. The correct rule on this subject is stated as follows: "No particular act or series of acts are necessary to be done on the land in order that the possession may be actual. Any visible or notorious acts which clearly evidence an intention to claim ownership and possession will be sufficient to establish a claim of adverse possession." Tiedeman on Real Property (3d Ed.) § 495. It is not essential that there shall be buildings on the lands in order to claim actual adverse possession, nor that any part thereof shall be in cultivation. It is sufficient if the claimant notoriously occupies a visible relation to the land which is sufficient to put the true owner on notice that his rights are invaded. In other words, the claimant must exercise such acts of ownership and occupancy as are sufficient to "hoist his flag" over the lands, so that all may observe it. And he must continue those acts without a break, so as to keep the flag flying. In *Carpenter v. Smith*, 76 Ark. 447, 88 S. W. 976, we held that where a party fenced a portion of a tract of land with a three-wire fence for the purpose of penning cattle thereon at certain seasons of the year, and also for the purpose of preserving it for hay cutting, these were sufficient acts of adverse possession, which, continued during the statutory period, gave title by limitation. The occasional damage done to the fence in times of high water, where the same was repaired, was not sufficient to break the continuity of possession. *Robinson v. Nordman*, 75 Ark. 593, 88 S. W. 592. There is no evidence that

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the actual possession acquired in the manner indicated above was ever abandoned.

The decree of the chancellor is fully sustained by the evidence, and the same is therefore affirmed.

FIRST NAT. BANK OF BATESVILLE v. BOARD OF EQUALIZATION OF INDEPENDENCE COUNTY.

(Supreme Court of Arkansas. Nov. 15, 1909.)

1. TAXATION (§ 7*) — PROPERTY SUBJECT TO TAXATION—UNITED STATES BONDS.

United States bonds are not subject to state taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 19, 20; Dec. Dig. § 7.*]

2. TAXATION (§ 10*) — NATIONAL BANKS — STATE TAXATION.

Rev. St. U. S. §§ 5214, 5219 (U. S. Comp. St. 1901, pp. 3500, 3502), imposing a federal tax on national banks, and authorizing any state to tax the shares in national banks, subject to the restriction that such tax shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the state and authorizing the state to tax the real property of national banks to the same extent as other real property is taxed, limit the state power to tax national banks, and confine taxation to the shares of stock and to an assessment of real estate of the bank.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 23-26; Dec. Dig. § 10.*]

3. TAXATION (§ 11*) — NATIONAL BANKS — STATE TAXATION.

A state may tax shares of stock in a national bank at their actual value, without regard to the fact that a part or the whole of the capital stock of the bank is invested in nontaxable bonds, as taxation of the shares is not taxation either of the capital stock or of the nontaxable bonds.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 27-29; Dec. Dig. § 11.*]

4. TAXATION (§ 12*) — NATIONAL BANKS — STATE TAXATION.

Kirby's Dig. §§ 6902, 6919-6924, requiring every bank to annually deliver to the assessor a statement of the amount of capital, undivided profits, value of moneys, credits, etc., the amount loaned to or deposited with the bank, and providing that the shares in banks taxable by law shall be listed by the officers thereof showing the names of the persons owning the same, and that the taxes assessed on the shares of stock thus listed shall be paid by the bank, etc., provide for the taxation of the shares of national bank stock, and not the capital stock of the bank itself, and the requirement of a schedule setting forth the enumerated things is merely intended as a method of arriving at the valuation of the shares, so that the statute meets the requirement of Rev. St. U. S. § 5219 (U. S. Comp. St. 1901, p. 3502), authorizing the taxation of the shares in national banks, subject to the restriction that the tax shall not be at a greater rate than is assessed on other moneyed capital, etc.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 12.*]

5. TAXATION (§ 12*) — NATIONAL BANKS — STATE TAXATION.

Assessing officers who levied an assessment in solidio against a national bank as agent of its stockholders did not thereby discriminate against the bank merely because they failed to

assess the shares of stock in the same manner in which shares of stock in other like institutions were assessed.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 12.*]

Appeal from Circuit Court, Independence County; Frederick D. Fulkerson, Judge.

Proceedings by the First National Bank of Batesville against the Board of Equalization of Independence County, to obtain a reduction of an assessment for taxation. From a judgment of the circuit court sustaining the action of the Board of Equalization rendered on appeal from a judgment of the county court sustaining such action, the bank appeals. Affirmed.

Ernest Neill and McCaleb & Reeder, for appellant. Hal L. Norwood, Atty. Gen., C. A. Cunningham, Asst. Atty. Gen., Sam M. Casey, and Morris Cohn, for appellee.

MCCULLOCH, C. J. Appellant, a national banking corporation domiciled and doing business at Batesville, Ark., listed with the tax assessor the amount of its capital stock and undivided profits, deducting therefrom the amount of capital stock invested in real estate and in bonds of the United States. The county board of equalization struck out the deduction for said investment in bonds, and on successive appeals to the county and circuit courts the action of the board was sustained. The bank appealed to this court.

The question at issue on this appeal is whether, under the statutes of this state and the federal statutes, the capital stock of a national bank, invested in bonds of the United States, can be included in assessments for taxation. This question involves primarily a construction of our own statutes—whether they authorize an assessment against shares of stock in banks or against the capital stock of the bank itself, or against both. Let it be understood in the beginning that a state cannot levy a tax upon bonds of the United States, for such property is not subject to taxation. Neither can the state levy a tax upon the capital and assets of a national bank. This, too, is exempt from state taxation. The limit of the taxing power of a state with respect to a national bank is as to the real estate owned by the institution and the shares of stock therein. Rev. St. U. S. §§ 5214, 5219 (U. S. Comp. St. 1901, pp. 3500, 3502).

Section 5214 declares that, in lieu of all existing taxation, a national bank shall semi-annually pay to the Treasurer of the United States one-half of 1 per centum upon the average amount of its notes in circulation, one-fourth of 1 per centum upon the average amount of deposits, and one-fourth of 1 per centum upon the average amount of its capital stock not invested in United States bonds. Section 5219 reads as follows: "Nothing herein shall prevent all the shares

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

state within which the association is located; but the Legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." The latter section is declared to be the limit of the state's power to tax national banks. "This section, then, of the Revised Statutes is the measure of the power of a state to tax national banks, their property, or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank. Any tax, therefore, which is in excess of, and not in conformity to, these requirements is void." *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850; *Louisville Third Nat. Bank v. Stone*, 174 U. S. 432, 19 Sup. Ct. 759, 43 L. Ed. 1035; *Rosenblatt v. Johnston*, 104 U. S. 462, 26 L. Ed. 832.

The capital stock of a national bank is exempt from state taxation. So are United States bonds exempt from state taxation. But a state may tax shares of stock in a national bank at their actual value, without regard to the fact that a part or the whole of the capital stock of the bank may be invested in nontaxable bonds and securities; for taxation of the shares of stock is not taxation either of the capital stock of the bank nor of the nontaxable bonds in which the same may be invested. *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229; *People v. Tax Commissioners*, 4 Wall. 244, 18 L. Ed. 344; *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701; *Hepburn v. School Directors*, 23 Wall. 480, 23 L. Ed. 112; *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. Ed. 645; *First Nat. Bank v. Chehalls County*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829, 42 L. Ed. 236.

The question which arises, then, is whether the assessment in this state is for the purpose of taxing the capital stock of the bank, or for the purpose of taxing the shares

stock. A section of the revenue act provides that "no person shall be required to include in his statement, as a part of the personal property, moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise which he is required to list, any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation in this state." Section 6902, *Kirby's Dig.*; *Dallas County v. Banks*, 87 Ark. 484, 113 S. W. 37.

The other provisions of our revenue laws relating especially to banking concerns form a part of the general revenue act of 1883 (*Acts 1883*, p. 199), and, as amended by subsequent acts, read as follows:

"Sec. 29. Every corporation, company, individual person or association of persons, whether authorized by law to issue notes for circulation or not, that shall keep an office, counting house, or other place for the transaction of business in this state, and shall discount, buy or sell exchange notes, bonds, stocks, certificates of public debt, or other evidences of debt, claims or demands with a view to profit, shall be deemed a bank within the meaning of this act.

"Sec. 30. Every bank shall annually on the first Monday in July in each year make out and deliver to the assessor a correct statement attested by the oath of the president and cashier of such bank, or if there be no president or cashier then by the oath of the principal manager and principal accountant of such bank, setting forth: First. The amount of capital, whether divided into shares or not, actually paid in or secured to be paid by note or otherwise, or in any manner procured or furnished, to be employed in its banking business. Second. The amount of undivided profits arising from such business belonging to the bank, whether in its possession or subject to its control, or loaned or otherwise invested for its benefit. Third. The value of moneys, credits or other personal property converted into bonds or other securities of the United States, or of this state, not taxed in the year immediately preceding the first Monday in June of the year in which the assessment is made, and which said bonds or securities on said first Monday in June were in the possession or control of such bank. Fourth. The amount loaned to or deposited with such bank for a term certain, or which by agreement or understanding between the parties is not to be withdrawn on demand, excepting the amount which may have been deposited with any bank established as a clearing house, for the redemption of the notes of banks making such deposits, and on which no interest is charged or received by the bank making such deposit. Which several amounts shall truly

day in June, and shall be added together, and the gross sum so produced shall be deemed the amount of property employed in banking, for the then current year, by such bank. The shares of persons in banks taxable by law, that the holders or owners thereof are not required to list in person by the provisions of this act, shall be listed by the president or principal accounting officer or agent thereof, showing the name or names of the person owning or holding the same. The taxes assessed upon the shares of stock thus listed shall be paid by the corporation, or company respectively, and they may recover from the owner or owners of such shares the amount of taxes to be paid by them, or deduct the same from the dividend accruing on such shares, and the amount paid shall be a lien on such shares respectively, and shall be paid before a transfer of such stock or shares can be made.

"Sec. 31. The assessor shall return to the clerk of the county court the statement described in section thirty made by any bank in his county, and the amount so returned shall be placed upon the tax books of the county and taxed as other personal property in such city, town, ward or school districts as the same may be situated." Sections 6919-6924, Kirby's Digest.

It is seen that these sections apply to all banks, and of course include national banks. If the statute be held to provide for the taxation of the property of national banks, it is to that extent void, for this is beyond the taxing power of the state; and, unless the statute be held to tax the shares of stock, instead of the property of the bank itself, then the shares of stock in a national bank escape state taxation altogether. Did the Legislature intend any such result? This court has never construed the statute in a way that could have any bearing on the present question. In *Hempstead County v. Hempstead County Bank*, 73 Ark. 515, 84 S. W. 715, we merely held that, in summing up the valuation of the property of a bank for taxation purposes, the amount of capital stock invested in real estate should be deducted. But this is not inconsistent with the conclusion, either one way or the other, on the proposition whether the shares of stock are to be taxed.

In the state of Washington a statute (Laws 1891, p. 280, c. 140) is in force which, we think, is, so far as the present question is concerned, substantially like our statute. It reads as follows:

"Sec. 21. Every individual, firm, corporation or association of persons carrying on a general banking business in this state, whether the same has been organized under the banking laws of this state or of the United States, or conducted under the style of private bankers, shall be assessed and taxed

Annually, at such times as provided for listing property for taxation, every such bank or banking association as contemplated in this section shall, by its accounting officer, furnish the county or city assessor a statement, verified by oath, giving the amount of paid-up capital stock, the amount of surplus or reserve fund and the amount of undivided profits of such bank or banking association. The aggregate amount of capital, surplus and undivided profits shall be assessed and taxed as other like property in this state is assessed and taxed: Provided, at the time of listing the capital stock, the amount and description of its legally authorized investments in real estate shall be assessed and taxed as other real estate is assessed and taxed under this act, and the assessor shall deduct the amount of such investments in real estate from the aggregate amount of such capital, surplus and undivided profits, and the remainder then taxed as above provided."

"Sec. 23. Each bank and banking association shall be liable to pay any taxes assessed against them as the agent of each of its shareholders, owners or owner, under the provisions of this act, and may pay the same out of their undivided profit account, or charge the same to their expense account, or to the accounts of such shareholders, owners or owner, in proportion to their ownership."

The Supreme Court of that state, in the case of *Paul v. McGraw*, 3 Wash. St. 296, 28 Pac. 532, construed the statute to authorize the taxation of shares of stock of all banks, including national banks, the same to be assessed in the name of the bank and charged against shareholders. The court in its opinion summed up the reasons for that conclusion as follows: "We know that the Legislature must have had in mind: (1) That the capital of national banks could not be taxed at all; (2) that the shares of such banks could be taxed, provided that the shares of state banks were taxed, and at the same rates as state bank shares and other moneyed capital; (3) that the shares of nonresidents of the state could only be taxed at the place where the bank is located; (4) that while all the property in the state is required to be taxed, it can only be taxed once; (5) that the very easiest and simplest way to collect the tax on property of this kind is by the garnishment method, approved in *National Bank v. Commonwealth*, supra, and actually in operation in the state and territory for many years."

In the later case of *First National Bank v. Chehalis County*, 6 Wash. 64, 32 Pac. 1051, the court held that (quoting from the syllabus): "The assessment of the capital stock of a national bank, made to the bank in solido, is valid." The latter case went to the

court was sustained. Mr. Justice Shiras, in delivering the opinion of the court in that case, said: "If this section [referring to section 21 above quoted] stood alone, there might be ground for the contention that it contemplates taxation of the capital of the bank. But section 23 of the statute provides that 'each bank and banking association shall be liable to pay any taxes assessed against them as the agent of each of its shareholders, owners or owner under the provisions of this act, and may pay the same out of their individual profit account or charge the same to their expense account, or to the accounts of such shareholders, owners or owner in proportion to their ownership.' The Supreme Court of Washington held in this case that these two sections are to be read together, and that, so read, their provisions are not inconsistent with those of the federal statute. That the two sections of the state law should be read together is obviously proper; and, at any rate, we are bound by the judgment of the Supreme Court of the state in the mere matter of the construction of that law."

These decisions are precisely in point, for they construe statutes which are substantially like our own, and their persuasive force cannot be escaped. The reasoning upon which they are based goes to sustain the contention that our statutes are intended to tax the shares of stock in banks, and not to tax the capital of the bank itself, and that this taxation and the method in which it is enforced neither offend against the federal statutes, nor transcend the taxing powers of the state. The federal statutes do not restrict the state's form or method of levying and collecting the tax. If the tax is levied on the shares of stock, the cases already cited establish the principle that the tax may be collected by assessment in *solido* against the bank as the agent of its shareholders.

Mr. Justice Miller, in delivering the opinion of the Supreme Court of the United States in *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701, said: "It is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the state has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is anything else than a tax on these shares." It is true the Supreme Court of the United States, in *Owensboro National Bank v. Owensboro*, *supra*, said that a tax on a franchise and property of a national bank was not equivalent to a tax on the shares of stock therein, or vice versa; for it said that that rule would render illegal a state tax on shares of stock. But that was said in a case which involved the va-

an intention to overrule former opinions in which it was held that an assessment in *solido* against the bank, paid by the bank and collected from its shareholders, is valid. We are therefore of the opinion that the revenue statutes of this state now under consideration provide for the taxation of shares of stock, and not the capital stock of the bank itself, and that the method of assessment prescribed by this statute, in requiring the bank to file a schedule setting forth the things enumerated, is merely intended as a method of arriving at the valuation of the shares of stock. The statute contemplates the assessment of the tax in *solido* against the bank, as trustee for, or agent of, its stockholders, the same to be paid by the bank and collected from its stockholders. The statute meets every requirement of the federal statute. It applies to all banking concerns alike, either state or national, without discrimination, and provides that the shares of stock "be taxed in the city or town where the bank is located." Under any other construction of the statute shares of stock in national banks would escape taxation altogether. This construction does no violence, as contended, to the language of the statute. The third subdivision of the section, hereinbefore quoted, does not, as claimed, exempt "the value of moneys, credits, or other personal property converted into bonds or other securities of the United States, or of this state" during the preceding year; for it expressly requires banks to list such items. Nor does the fact that the statute requires the listing of time deposits show that this construction was not intended. Such items constitute the working capital of the bank, and may well be considered in arriving at a correct estimate of the value of the assets of the bank or of its shares of stock.

It is contended that the assessment in this case discriminated against the shares of stock in this bank; and in support of this contention it is shown that the assessor and board of equalization had failed to assess the shares of stock of three state banks in the same county. This appears from an agreed statement of facts in the record. But we do not understand from this that the shares of stock escaped taxation altogether. What we understand the stipulation to mean is that the shares of stock in the state banks named were not separately assessed against the individual shareholders. There is no showing here that there was any discrimination against this bank in failing to assess the shares of stock therein in the same manner in which shares of stock in other like institutions were assessed.

We are of the opinion that the judgment of the circuit court is correct, and the same is affirmed.

LATHAM v. FIRST NAT. BANK OF FT. SMITH.

(Supreme Court of Arkansas. Nov. 22, 1909.)

1. VENDOR AND PURCHASER (§ 196*)—RIGHTS OF PARTIES—RENTS.

Where property conveyed in fee is rented at the time of the conveyance, rent falling due after the conveyance passes to the grantee, unless the conveyance reserves the same to the grantor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 404; Dec. Dig. § 196.*]

2. HUSBAND AND WIFE (§ 138*)—AUTHORITY OF HUSBAND AS WIFE'S AGENT—EVIDENCE.

Evidence held not to show that a husband, with authority as his wife's agent to collect her rents and use them for household purposes, had authority to use the rents for other purposes.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 527; Dec. Dig. § 138.*]

3. HUSBAND AND WIFE (§ 138*)—ACTS OF HUSBAND AS WIFE'S AGENT—KNOWLEDGE OF PRINCIPAL—EVIDENCE.

Evidence held not to show that the wife knew that the husband had exceeded his authority as agent by assigning her contract of lease to secure his note.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 527; Dec. Dig. § 138.*]

4. PRINCIPAL AND AGENT (§ 122*)—SELF-SERVING DECLARATIONS—AUTHORITY OF AGENT.

Declarations of an agent that he owned a lease contract belonging to his principal, and that a bank loaning him money could have it as security, and that his principal had lent him the rents to help him along, would not establish authority on his part to do such acts as against the principal, since the authority of an agent cannot be established by his own declarations.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 416, 417; Dec. Dig. § 122.*]

5. PRINCIPAL AND AGENT (§ 150*)—ACTS BEYOND SCOPE OF AGENCY—LIABILITY OF PRINCIPAL.

A principal is not bound by the acts and declarations of an agent beyond the scope of his authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 556, 557; Dec. Dig. § 150.*]

6. PRINCIPAL AND AGENT (§ 147*)—SCOPE OF AGENCY—DUTY OF PERSON DEALING WITH AGENT.

A person dealing with an agent is bound to ascertain the nature and extent of his authority, and has no right to trust to the mere presumption of authority, nor to the mere assumption thereof by the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 529; Dec. Dig. § 147.*]

7. APPEAL AND ERROR (§ 1009*)—REVIEW—CHANCERY CASES—EVIDENCE.

Where a chancery case reaches the Supreme Court, it must be decided on the competent evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.*]

Appeal from Sebastian Chancery Court, Ft. Smith District; J. Virgil Bourland, Chancellor.

Action by the First National Bank of Ft.

Smith against Daisy B. Latham. Decree for plaintiff, and defendant appeals. Reversed, with directions to enter decree for defendant and dismiss complaint.

On December 15, 1906, appellee loaned to W. F. Latham \$1,000, for which Latham executed his note, due 60 days after date. The note was not paid, and appellee brought this suit to recover the amount of the note. The complaint alleged that W. F. Latham, to secure the note, assigned to the bank a lease on a certain lot in the city of Ft. Smith; that Mrs. Latham claimed the lease, that the tenants would pay the rents to W. F. Latham or Mrs. Latham unless restrained. The prayer was for judgment on the note, for sale of the lease, and that the rents and the proceeds of the sale of the lease be subjected to the payment of the amount found due the bank, for which judgment was asked. A temporary restraining order was issued restraining the tenants under the lease from paying the rents to W. F. Latham or Mrs. Latham. Mrs. Latham answered the complaint, setting up, among other things, that she was the owner of the lot and of the lease mentioned in the complaint; that the lot was deeded to her by warranty deed from W. F. Latham, her husband, on the 5th day of October 1905; that if the lease was assigned to appellee as collateral security for the note, such assignment was without her knowledge or consent. She prayed that her rights to the rents under the lease be recognized; that the proceeds of the lease and the rents paid into the registry of the court be turned over to her; that the restraining order be dissolved etc.

The proof showed that W. F. Latham deeded the lot in Ft. Smith to his wife October 5, 1905. The consideration for the deed was several thousand dollars. There is no question as to the bona fides of the sale from Latham to his wife. He had used between \$4,000 and \$5,000 of her money, and the lot was deeded to her in consideration of this money. The deed was placed on record October 7, 1905. At the time the deed was executed there was a lease on the lot which would not expire until December 31, 1909. The deed did not contain any reservation in the grantor of the right to collect the rents under the existing lease. The deed, on the contrary, in the usual form, conveyed the lot "with all the privileges, appurtenances and improvements thereupon situate, appertaining and thereunto belonging." After the deed was executed and recorded, W. F. Latham February 20, 1906, borrowed of appellee \$1,500, for which he executed his note, and deposited with appellee the contract of lease on the lot as collateral security for the loan. This note was paid before the note in suit was executed. On December 12, 1906, W. F. Latham made application by letter for the loan in suit. He inclosed the note, and in his letter asking for the loan he says "You

15, 1907, the deed was made to Mrs. Latham, and after the note in suit was executed. As the rents accrued, W. F. Latham drew drafts on the tenants in favor of the Commercial Bank of Alexandria, La., for the amounts. The Commercial Bank sent the drafts to the American National Bank at Ft. Smith for collection, and credited W. F. Latham's account with the amount collected. One witness stated the drafts were given to secure a debt due the Commercial Bank. W. F. Latham collected the rents in this way until, and including, the month of July, 1907, when the payment to him was enjoined. In a letter to appellee after suit was brought Latham, complaining of the temporary order restraining him from collecting the rents, says: "Mrs. Latham has loaned me this money to help me along." It was alleged and not denied that W. F. Latham was a nonresident of the state of Arkansas, and that he owned no property in the state out of which the note in suit could be collected. Latham was in good financial condition when the deed to Mrs. Latham was executed, but has become insolvent since. Mrs. Latham testified that the rental was collected monthly by W. F. Latham, and that the money was used for living purposes for the family. She authorized Mr. Latham to collect it. She did not know that the lease contract was assigned by Mr. Latham to secure his note to appellee. If it was so assigned, it was without her knowledge or consent. If her husband assigned the rents to the Commercial Bank of Louisiana, to secure or pay money borrowed of that bank, she knew nothing of it. She did not know that her husband drew drafts on the tenants of the lot for the monthly rents, payable to the Commercial Bank of Alexandria, La.

The court rendered a decree in favor of appellee for the amount of the note and interest. The court found that to secure the payment of said note the said W. F. Latham placed in the hands of the said plaintiff a lease on the building No. 502 Garrison avenue, Ft. Smith, Ark.; that said W. F. Latham, on the 4th day of October, 1905, conveyed to said Daisy Latham, who was then and still is his wife, the said building and the ground on which it stands, but he retained the lease on said building and the rights to collect the rents therefrom and appropriated them to his own uses, and the said Daisy Latham gave to the W. F. Latham the rents arising from said building for his own use, and he collected the said rents and appropriated them to his own use with her consent; that the said W. F. Latham was the owner of said rents, and he had the right to pledge the same plaintiff for the payment of said note; that under an order made in vacation by the chancellor the said defendants, Dave

court directed the amount of the decree to be paid out of the funds collected as rents, and the balance, after "paying the amount of the interest and costs, to be paid to Winchester and Martin, the attorneys for Mrs. Latham." Mrs. Latham appeals.

Winchester & Martin, for appellant. Youmans & Youmans, for appellee.

WOOD, J. (after stating the facts as above). There is no evidence in the record to support the finding of the chancellor that, when W. F. Latham sold the lot in Ft. Smith to his wife, "he retained the lease on said building and the right to collect the rents therefrom." The deed contains no such reservation. On the contrary, Mrs. Latham, by the express terms of the grant, acquired the land mentioned and "all the privileges thereunto appertaining." That the fee simple title to the land carries with it the right to its absolute dominion is axiomatic; and, where the property is rented at the time it is conveyed, unless the deed reserves the right in the grantor to collect and use the rents, these pass, as a necessary incident, with the land, to the grantee. "Rent which does not become due till after a conveyance by the landlord goes to the grantee entire." *Jones, Landlord and Tenant*, § 658; *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233.

Mrs. Latham testifies that: "The rental was collected monthly by Mr. Latham. It was used for living purposes for our family." There is no evidence that she knew that Latham had assigned the lease contract to the appellee for any purpose. The evidence shows that Latham had authority as her agent to collect the rents and to use same for household purposes. But it does not show that he had authority to use the rents for some other purpose. His declarations were not competent to show that he had authority to use them for some other purpose. The fact that Latham assigned the lease contract as collateral to the appellee for the note in suit does not warrant the conclusion that Mrs. Latham knew of such assignment and consented thereto. Mrs. Latham testified that she did not know of such assignment. There is no evidence, direct or circumstantial, that she did know of it. Latham had no authority over the rents except as the agent of appellee. An inspection of the records of Sebastian county would have discovered that fact. The authority of an agent cannot be established by his own declarations. *Carter v. Burnham*, 31 Ark. 212; *Holland v. Rogers*, 33 Ark. 251; *Chrisman v. Carney*, 33 Ark. 316; *Howcott v. Kilbourn*, 44 Ark. 213. A principal is

thority. No one has the right to trust to the mere presumption of authority, nor to the mere assumption of authority by the agent. *City Elec. St. Ry. Co. v. First Nat. Exch. Bank*, 62 Ark. 33, 40, 34 S. W. 89, 31 L. R. A. 535, 54 Am. St. Rep. 282. These well-settled principles must determine this controversy in favor of appellant.

The declarations of Latham, the agent of appellant, that he owned the lease contract, and that appellee could have same as security, were wholly incompetent, as against appellee, to establish the authority of Latham to use the rents belonging to Mrs. Latham for the purpose stated, or to show that he owned the lease. Likewise was his declaration in the letter to appellee that Mrs. Latham had loaned him this money to help him along. The fact that W. F. Latham gave drafts for the rent to the Commercial Bank to pay or to secure the payment of his account with that bank does not prove that he was not using the rent money for other than household purposes. Latham's account with the Commercial Bank may have been for money that was used by him to pay his household expenses, and, if so, the drafts to pay that account were for the purpose designated by Mrs. Latham in the payment of household expenses. But even if these drafts were given to pay Latham's account for money used by him for some other purpose, there is no evidence that Mrs. Latham knew that the drafts were being so used. It has been often held that where a married woman permits her husband to use her separate estate as his own, and to obtain credit on the faith that the estate so used is his own, she will not be allowed afterwards to assert her claim to the property as against her husband's creditors. *Buck v. Lee*, 36 Ark. 525; *Driggs v. Norwood*, 50 Ark. 42, 6 S. W. 323, 7 Am. St. Rep. 78; *Davis v. Yonge*, 74 Ark. 161, 85 S. W. 90; *Roberts v. Bodman-Pettit Lumber Co.*, 84 Ark. 227, 105 S. W. 258; *Mitchell v. State*, 86 Ark. 486, 111 S. W. 806. But the case at bar is differentiated sharply from the above cases by the facts. Here there is no direct evidence that Mrs. Latham assented to the use of her rents for the payment of her husband's debts, nor are there any circumstances from which such assent should be implied. The competent evidence is to the contrary. When a cause in chancery reaches this court, it must be decided on the competent evidence. *Niagara Fire Ins. Co. v. Born*, 76 Ark. 156, 88 S. W. 915.

The decree is reversed, with direction to enter a decree for Mrs. Latham for the amount of the rents, and to dismiss appellee's complaint for want of equity.

1. INSURANCE (§ 435*)—CASUALTY INSURANCE—CONTRACT—CONSTRUCTION.

A casualty policy issued to a company engaged in furnishing electric light and power, which maintained no power house, but purchased its current, which policy provides that it shall cover all operations in connection with the business, including maintenance and ordinary extension of lines, including drivers, helpers, and stablemen, does not include employes in the engine and boiler rooms of an electric power house.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1144; Dec. Dig. § 435.*]

2. INSURANCE (§ 219*)—CASUALTY INSURANCE—CONTRACT—ASSIGNMENTS—EFFECT.

A transfer of a casualty policy does not extend its terms to cover a class of employes of the transferee not included in the policy at the time of its execution.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 219.*]

3. INSURANCE (§ 198*)—CASUALTY INSURANCE—EXTENSION OF TERMS OF POLICY.

The payment of an additional premium for a casualty policy, made on account of a report of wages of a class of employes not covered by the policy, does not broaden the terms of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 458; Dec. Dig. § 198.*]

4. INSURANCE (§ 198*)—PREMIUMS—VOLUNTARY PAYMENT—RECOVERY.

The voluntary payment of an additional premium for a casualty policy, made on account of a report of wages of a class of employes not covered by the terms of the policy, is a payment under a mistake of law, and as such is not recoverable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 457, 458; Dec. Dig. § 198.*]

Appeal from Circuit Court, Pulaski County, Second Division; Edward W. Winfield, Judge.

Action by the Maryland Casualty Company against the Little Rock Railway & Electric Company, in which defendant filed a counterclaim. From a judgment granting insufficient relief, both parties appeal. Affirmed.

Murphy, Coleman & Lewis and Downie, Rouse & Streepey, for appellant. Rose, Hemingway, Cantrell & Loughborough, for appellee.

HART, J. The plaintiff, Maryland Casualty Company, brought this suit against the defendant, Little Rock Railway & Electric Company, to recover an additional premium alleged to be due on a policy of casualty insurance. On the 28th day of December, 1902, plaintiff entered into a contract with the Little Rock Edison Electric Light & Power Company, a corporation organized under the laws of the state of Arkansas, whereby it agreed to indemnify said Edison Company against loss from liability for damages on account of bodily injuries accidentally suffered by its employes while on duty in any operation in connection with its business as an electric light and power company for a term of one

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

year from the date of the policy. The provisions of the policy with which we have to contend are as follows: Exhibit A: The schedule attached to the policy provides that it shall cover "all operations in connection with our business as Electric Light & Power Company, Little Rock and elsewhere in the service of the assured, including maintenance and ordinary extension of lines, including drivers, helpers and stablemen." The estimated pay roll is shown to be \$3,900. The indorsement attached to the policy is as follows: "Boston, Mass., Sept. 1, 1903. It is hereby understood and agreed that, all the interest of the Little Rock Edison Electric Light & Power Company having been acquired by the Little Rock Railway & Electric Company, this policy shall, on and after the above date, attach and cover in the name of said Little Rock Railway & Electric Company, ceasing to cover as originally written. Attached to and forms a part of policy No. 62-926 of the Maryland Casualty Company, of Baltimore, Md., issued to Little Rock Edison Electric Light & Power Company." Two of the material provisions of the policy are set forth verbatim, as follows:

"(6) No assignment of interest under this policy shall bind the company unless the written consent of the company is indorsed hereon by one of its officers."

"(C) The premium is based on the compensation to employes to be expended by the assured during the period of this policy. If the compensation actually paid exceeds the sum stated in the schedule attached hereto, the assured shall pay the additional premium earned; if less than the sum stated, the company will return to the assured the unearned premium pro rata."

The business of the Edison Company was furnishing electricity for light and power to the inhabitants of Little Rock and vicinity. It had no power plant and purchased whatever current it needed from a corporation engaged in operating a line of electric street railway in the city of Little Rock. In March, 1903, the Edison Company and the street railway company were purchased by the Little Rock Railway & Electric Company, the defendant in this action. After the sale, the Edison Company ceased to do business, and ceased to exist after March 3, 1903. The defendant continued the business of both companies. A report of the pay roll was made by defendant to plaintiff, which included all of the employes of the old lighting company for the entire year, and later an amended report was furnished, which included, in addition thereto, a certain proportion of the power house and boiler room employes from March 3 to December 28, 1903. It is the contention of the plaintiff that the policy after March 3, 1903, covered all the employes of the old lighting company and, in addition, all the boiler and engine room employes of the

defendant company. As above stated, this suit was brought to recover such additional premium. The defendant filed an answer and counterclaim, in which it denied liability and asked judgment for the amount of premium accruing between the 3d of March, 1903, when the lighting company ceased to do business, and the 1st day of September, 1903, when the indorsement of the transfer of the policy was written on it. The case was tried before the court sitting as a jury, and the court found: "That said policy of indemnity only covered, when transferred, that department that had been the Edison Electric Light & Power Company the same as was covered by it before the transfer, and that the wages of the men in the boiler and engine rooms were not covered by said policy; but, as the payment of the premiums on them had been voluntary after knowledge of the facts, they could not be recovered." Judgment was rendered in accordance with the findings of the court, and both parties have appealed.

We think the decision of the court was correct. The policy provides that it shall cover "all operations in connection with our business as Electric Light & Power Company, Little Rock and elsewhere in the service of the assured, including maintenance and ordinary extension of lines, including drivers, helpers and stablemen." That the conditions existing at the time the policy is written may be looked to in determining the extent of the risk covered is illustrated in the case of *Home Insurance Co. v. North Little Rock Ice & Electric Co.*, 86 Ark. 538, 111 S. W. 994. When the policy was issued, the lighting company was purchasing its current from the Electric Street Railway Company, and had no power house, and consequently no employes in the engine and boiler rooms. Hence it was not contemplated by the parties that employes engaged in such occupation should be covered by the policy. It follows that a transfer of the policy did not extend its terms, but only continued in existence the policy as it was originally written. In other words, the transfer of the policy did not extend its terms to cover a class of employes that were not included in the policy at the time of its execution. After the contract had expired, a payment of an additional premium was made on account of the report of the wages of a class of employes not covered by the terms of the policy. This act did not extend the terms of the policy. It was a voluntary payment made under a mistake of law, and as such cannot be recovered. *Ritchie v. Bluff City Lbr. Co.*, 86 Ark. 175, 110 S. W. 591.

The same may be said of the payment between March 3 and September 1, 1903. Mr. Trawick was the manager of both the Edison Company and the defendant company, and made the payments.

The judgment will be affirmed.

1. MASTER AND SERVANT (§ 83*)—DISCHARGE—UNPAID WAGES—TENDER—PENALTY.

Kirby's Dig. § 6649, amended by Acts 1905, p. 537, requires payment of wages to discharged railroad employes within seven days from demand, and on nonpayment, the wages shall continue from the date of the discharge until paid. *Held* that, where a railroad company has incurred a penalty under such section, a tender of the wages with interest, without a tender of accrued penalty, was effective to terminate the accumulation of penalty.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 78; Dec. Dig. § 83.*]

2. MASTER AND SERVANT (§ 83*)—WAGES—NONPAYMENT—PENALTY—TENDER.

A tender of wages and interest due discharged employes of a railroad company which had incurred a penalty for failure to pay within seven days, as required by Kirby's Dig. § 6649, amended by Acts 1905, p. 537, though effective to stop further accumulation of penalty, without tender of accrued penalty, did not preclude the employes from recovering the penalty so accrued.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 78; Dec. Dig. § 83.*]

3. MASTER AND SERVANT (§ 83*)—WAGES—PENALTY—SUFFICIENCY OF TENDER.

Where discharged railroad employes had sued for their wages and penalty before a justice of the peace, a tender of the wages to the justice the day before the trial, in the absence of plaintiffs and their attorney, and without their knowledge, during an adjournment of court, was not a sufficient tender to stop the penalty imposed by Kirby's Dig. § 6649, amended by Acts 1905, p. 537.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 78; Dec. Dig. § 83.*]

4. JUSTICES OF THE PEACE (§ 174*)—APPEAL—AMENDMENT.

After an appeal from the judgment of a justice of the peace, plaintiff may amend by adding claims against defendant not included in the original demand before the justice, not, however, amounting to new causes of action.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 670; Dec. Dig. § 174.*]

5. JUSTICES OF THE PEACE (§ 162*)—JUDGMENT—EFFECT OF APPEAL—MERGER.

A justice's judgment after appeal is not final, nor is the cause of action merged therein; the cause being triable anew as if originally brought in the circuit court.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 603; Dec. Dig. § 162.*]

6. MASTER AND SERVANT (§ 83*)—DISCHARGE OF SERVANT—WAGES—DELAY OF PAYMENT—"FURTHER EMPLOY."

Kirby's Dig. § 6649, amended by Acts 1905, p. 537, requires that railroads pay wages due discharged employes within seven days after demand, and on nonpayment the wages shall continue from the date of the discharge or refusal to "further employ" at the same rate until paid. *Held*, that the words "further employ" meant employment of the same class and kind and in the same locality in which the wages were earned, and hence, in an action for a penalty, evidence that defendant offered plaintiffs

Appeal from Circuit Court, Ouachita County; George W. Hays, Judge.

Action by W. M. Bryant and others against the St. Louis, Iron Mountain & Southern Railroad Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Kinsworthy & Rhoton, James H. Stevenson, and Robert Martin, for appellant. H. S. Powell and Daniel Taylor, for appellees.

FRAUENTHAL, J. The appellees, who were the plaintiffs below, were in the employ of the defendant, a railroad corporation, and they severally instituted suits in the court of a justice of the peace for the recovery of wages and penalties for the failure of the defendant to pay them their wages when they were discharged. Judgments were recovered in each of the several cases in favor of each of the plaintiffs, and the defendant appealed from all the judgments to the circuit court. In the circuit court all of the cases were consolidated. In its answer in the circuit court the defendant denied that it had discharged either or any of the plaintiffs, or that it had refused to further employ either or any of them; but alleged that defendant took the plaintiffs off the particular work they were doing, and offered them work of another kind, and at another point on its line of railroad. It further alleged that on December 18, 1907, it offered and tendered to each of the plaintiffs the full amount of the wages with interest then due to each of them, but that the tender was refused because the amount of the penalty to that date was not also tendered. It did not deny that it owed to the various plaintiffs the several amounts of the wages, and it tendered those amounts in court; but it denied that the plaintiffs were entitled to any penalty.

The evidence on the part of the plaintiffs established the following facts: The plaintiffs worked for defendant during the month of October, 1907, and up to November 5, 1907, when they were discharged by their foreman. They requested of their foreman to have the money due them sent to the station, Camden, where a regular agent was kept, and thereafter they applied to said agent for the payment of their wages within seven days from the date of the request and also thereafter, and that the wages were not paid to them. Thereafter they severally instituted suits in the justice of the peace court for the recovery of the wages and also of penalty, and recovered judgments in that court in November, 1907. From these judg-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

amount of his wages, with interest to that date, and also all costs of the court to that date. The tender was refused because the penalty was not also tendered. In the trial of the cause in the circuit court, the foreman under whom the plaintiffs had been working was asked by the defendant the following question, which the court refused to permit the witness to answer: "Q. At the time you discharged these men or pulled them off, did you offer them employment at any other place for the Iron Mountain Railroad Company?" It was agreed that a finding and judgment should be made in favor of each of the plaintiffs for the several amounts of their several wages, which amounts were also agreed on. The sole question then submitted to the jury was relative to the recovery of the penalty; and on that issue the court gave to the jury the following peremptory instruction: "The court instructs the jury to return a verdict for the plaintiffs for their wages at rate paid at time of discharge, November 5, 1907, to May 14, 1908, as penalty for nonpayment of wages within seven days after discharge." A verdict was returned in favor of the plaintiffs for the amounts of the penalties, which aggregated \$3,323. From the judgment entered on said verdict for penalties the defendant prosecutes this appeal.

The sole question presented by this appeal is whether or not the plaintiffs are entitled to recover penalties herein; and, if so, the extent of such recoveries. The right to the recovery of the penalty asked in this suit is founded upon the act of April 24, 1905, which is amendatory of section 6649 of Kirby's Digest. Acts 1905, p. 538. That act provides that, whenever any railroad corporation "shall discharge with or without cause or refuse to further employ any servant or employé thereof, the unpaid wages of any such servant or employé then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; and such servant or employé may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept and if the money aforesaid, or a valid check therefor does not reach such station within seven days from the date it is so requested, then as a penalty for such nonpayment the wages of such servant or employé shall continue from the date of the discharge or refusal to further employ at the same rate until paid." The plain object and purpose of this statute is to secure for the employé the prompt payment of the wages due by visiting upon the railroad company a penalty until the same are paid. The primary intent of this statute is not to secure the payment of a penalty, but the payment

the wages are paid, therefore, the penalty ceases. But the only way that the railroad company can make the payment of the wages is to make the offer or tender thereof. It cannot force its acceptance. If the tender is accepted, it then becomes a payment of the wages, and would cause the penalty to stop. When the railroad has, therefore, done all that it can to make the payment, it becomes in law equivalent to a payment, and so stops the continuance of the penalty. The statute provides that "as a penalty for such nonpayment the wages of such servant or employé shall continue * * * at the same rate until paid." The payment here referred to clearly only refers to the payment of the wages, and not to any penalty; and so, if that which is done which is equivalent to a payment, to wit, a tender of the amount of wages, then all is done that is required by the statute to stop the further running of the penalty. The acceptance of the wages would not be a payment of the penalty which had accrued to the date of such payment; and, as is held in the case of St. Louis, Iron Mountain & Southern Ry. Co. v. Pickett, 70 Ark. 226, 67 S. W. 870, after the payment of the wages, suit can be brought for the amount of the penalty which had then accrued. But this question is ruled upon and settled in the case of St. L., I. M. & S. R. Co. v. Paul, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154, wherein Mr. Justice Battle says in regard to this statute: "To enforce the performance of this duty, exemplary or punitive damages are imposed upon them for the failure to do so; that is, the liability to pay the wages at the contract rate until the wages earned on the day of the discharge or refusal to longer employ are paid. They are not necessarily more unreasonable than, or as much so as, those allowed by the Iowa statute. The railroad company can stop them by the payment or tender of payment of the amount due the employé for wages actually earned. No other amount need be tendered for that purpose." We are therefore of the opinion that the amount of the penalty ceased to run on the 18th day of December, 1907, when the defendant tendered to the plaintiffs the full amount of their wages, with interest; and that it did not also have to tender the amount of the penalty which had accrued to that day to stop the continuance of the accumulation of the penalty. The plaintiffs, upon said tender being made or upon the acceptance of that amount for the wages only, had still the right to recover the amount of the penalty which had accrued to that date and now have that right; but not to recover any further amount for penalty.

It is urged by the defendant that it offered to the justice of the peace before the day of trial the amount of the wages, and that this

We do not think this amounted to a tender so as to stop the penalty. It is also urged by the defendant that, when judgments were recovered by plaintiffs in the court of the justice of the peace, their causes of action were merged in the judgments, and that thereby the amount of the penalty was fixed to that date, and ceased running so as to make no larger amount of penalty. But the defendant took appeals from these judgments to the circuit court, and the actions were then transferred to that court. In that court the trials were de novo, and the causes were tried in the circuit court upon the whole case as if brought in the circuit court in the first instance. After this appeal, the plaintiff could amend by adding claims against defendant which were not included in the original demand before the justice, only keeping out new causes of action. The judgment of the justice of the peace after an appeal is taken, therefore, is not final, nor is the cause of action merged therein because the cause is tried anew in the circuit court as if brought in that court originally. *Hall v. Doyle*, 35 Ark. 445; *Tex. & St. L. Ry. v. Hall*, 44 Ark. 375; *Birmingham v. Rogers*, 46 Ark. 254; *L. R. & Hot Springs W. Rd. v. Castle*, 74 Ark. 539, 86 S. W. 838.

It is urged by the defendant that the plaintiffs could not recover any penalty herein in event there was at the time of the discharge of plaintiffs offered to them employment by defendant of any kind and at any point. We think that the object and purpose of the statute was to secure to the employe the prompt payment of his wages, or a continuance of his employment, so that he would have a livelihood and a means of maintenance. To secure that object, it would be necessary to give him that employment in which he was competent to perform the duties thereof and at a place where he could reasonably be in order to perform those duties of such employment. The employe by earning his wages shows under the contract of employment that he was competent and able to perform the duties of the employment in which the wages were earned; and, therefore, we are of the opinion that the "further employment" meant by the statute is employment of the same class and kind and in the same locality in which his wages were earned under the contract of employment. Otherwise the railroad company might offer to the servant employment, the duties of which he might be incompetent to perform, or at a point so remote or inconvenient to the servant that he could not reasonably accept it; and thus the railroad company could escape the penalty named in this statute. We are therefore of the opinion that

it offered further to employ them in the same kind of work and in the same locality.

For the error of the court in charging the jury that the plaintiffs could recover penalties accruing after the tender of the amount of wages made on December 13, 1907, the judgment is reversed, and this cause is remanded for a new trial.

W. T. ADAMS MACH. CO. v. CASTLEBERRY.

(Supreme Court of Arkansas. Nov. 22, 1909.)

1. SALES (§ 442*)—WARRANTIES—ACTIONS FOR BREACH—MEASURE OF DAMAGES.

While a representation is only an inducement to the contract of sale, a warranty is a part of the contract, and hence an action for breach of an express warranty is on the contract, and the measure of damages for false representations would not apply.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

2. SALES (§ 442*)—BREACH OF WARRANTY—ACTIONS—MEASURE OF DAMAGES.

In an action for a seller's breach of warranty that the machine sold for the operation of a sawmill would do as good work as similar machinery, the buyer could recover the part of the price paid, the freight and expenses of setting up the machinery, the expense of trying to run it as necessarily incurred because of the defect, as well as the value of an appliance purchased in attempting to operate the machine, which the seller sold with the machine upon retaking possession.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1281-1304; Dec. Dig. § 442.*]

3. SALES (§ 442*)—REMEDIES OF BUYER—BREACH OF WARRANTY—MEASURE OF DAMAGES—CONSEQUENTIAL DAMAGES.

As a rule, the damages recoverable for a manufacturer's breach of warranty of machinery sold for a known purpose are not limited to the difference between the value of the machinery as warranted and as it was, but include such consequential damages as are the direct and probable result of the breach, including the reasonable expense caused by the defect.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 1284-1301; Dec. Dig. § 442.*]

4. APPEAL AND ERROR (§ 728*)—ASSIGNMENT OF ERROR—GENERAL ASSIGNMENTS.

An assignment of error in admitting any and all evidence offered by plaintiff over objection is too general and indefinite to be considered on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3010-3012; Dec. Dig. § 728.*]

Appeal from Circuit Court, Scott County; James B. McDonough, Special Judge.

Action by R. A. Castleberry against the W. T. Adams Machine Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 84 Ark. 573, 106 S. W. 940.

T. B. Pryor, for appellant. A. G. Leming and Youmans & Youmans, for appellee.

HART, J. This is an appeal by the W. T. Adams Machine Company from a judgment of \$587.50 rendered against it in the Scott circuit court in favor of R. A. Castleberry for damages on account of a breach of warranty in the sale of machinery for a sawmill. Appellee purchased the machinery in question for the purpose of running a sawmill, and made that fact known to appellant at the time of the purchase. Appellee paid a part of the purchase price, and also the freight and expenses of putting up the machinery. When the machinery was set up, appellee could not do anything with it, and wrote to appellant, notifying it of the defect in the machinery. Quite a number of letters passed between them in regard to the matter, and appellant kept promising to make it all right, but never did. Appellee purchased a Curtis feed rig, and put it on in the place of the one on the machinery, and says that he could do pretty good work then, but that it would never do nearly as good work as other machinery of the same class and size. Afterwards appellant's agent took charge of said machinery, including the Curtis feed rig purchased by appellee, and sold the same. Appellee adduced evidence tending to show that the machinery was properly set and adjusted, but that it failed to do the work it was warranted to do because the machinery was defective; and on that account would not do as good work as machinery of the same class and size.

That part of the contract which contains the warranty reads as follows: "Warranty. The above-described machinery is warranted to be made, or that it will be made, of good material, and when correctly and properly set and adjusted that it will do as good work as machinery of the same class and size."

The principal contention of appellant is that the court erred in giving the following instruction: "(2) If the plaintiff is entitled to recover, and if the machinery was returned by the plaintiff, or if taken back by the defendant without fault of the plaintiff, the plaintiff is entitled to recover any sums plaintiff may have paid on the purchase price, and all expenses necessarily incurred in setting up said machinery in any efforts made to give the machinery a fair trial." Counsel for appellant rely upon the case of *Matlock v. Repy*, 47 Ark. 148, 14 S. W. 546, to sustain their contention. We do not think the case in point. That case was an action for damages for false representations, and the present one is for breach of an express warranty. A warranty is part of the contract of sale; but a representation is only inducement to it. *Inderman's Common Law Cases*, p. 20. Appellee's testimony shows that the part purchase price, the freight, the expenses of setting up the machinery and of trying to make it run, the cost of the Curtis feed rig, and the expense of taking off the feed rig of appellant, and of putting on the new feed rig amounted

to \$597. Appellant, when it took possession of the machinery it sold to appellee, also took the Curtis feed rig, and sold it, and appellee was entitled to recover its value.

Appellant having taken possession of the machinery sold to appellee, and the jury having found that there was a breach of warranty, appellee was entitled to recover that part of the purchase price paid by him, the freight and the expenses of setting up the machinery. He was also entitled to recover the expense of trying to make the machinery run after it was set up as expenses necessarily incurred in consequence of the defect in it. The amount of these items is not disputed, and we think were proper elements of damage under the facts of this case. The general rule in such cases is as follows: "The damages recoverable by a manufacturer or dealer for the breach of warranty of machinery which he contracts to furnish or place in operation for a known purpose are not confined to the difference between the machinery as warranted and as it appears to be, but includes such consequential damages as are the direct, immediate, and probable result of the breach." 30 Am. and Eng. (2d Ed.) 217, and authorities there cited. That reasonable expenses incurred in consequence of the defect in the machinery are recoverable. See *Murry v. Meredith*, 25 Ark. 164; *Tatum v. Mohr*, 21 Ark. 349.

It is also insisted by counsel for appellant that the judgment should be reversed "because the court erred in admitting any and all of the evidence offered by plaintiff, over objections of the defendant." This assignment of error points to nothing. It is too general and indefinite. *Edmonds v. State*, 34 Ark. 720. See, also, *Central Coal & Coke Co. v. Niemeyer Lumber Co.*, 65 Ark. 107, 44 S. W. 1122, 53 S. W. 570.

We find no error in the record, and the judgment will be affirmed.

LAWHON v. CROW.

(Supreme Court of Arkansas. Nov. 22, 1909.)

1. CHATTEL MORTGAGES (§ 172*)—REPLEVIN BY MORTGAGEE—CONDITIONS PRECEDENT.

Kirby's Dig. § 5415, providing that, before a mortgagee shall replevy mortgaged chattels under the mortgage, he shall deliver to the mortgagor a verified statement of his account, is mandatory, and compliance therewith is a prerequisite to the maintenance of a suit to replevin mortgaged property; the intent being to give the mortgagor an opportunity before suit to pay the debt.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 310; Dec. Dig. § 172.*]

2. CHATTEL MORTGAGES (§ 255*)—REPLEVIN BY MORTGAGEE—CONDITIONS PRECEDENT—OTHER REMEDIES.

The mortgagor does not forfeit his debt by failing to comply with the statute; but he still has the right to any other remedies provided for the enforcement of its payment, and may

8. CHATTEL MORTGAGES (§ 172*)—REPLEVIN BY MORTGAGEE—CONDITIONS PRECEDENT—WAIVER BY MORTGAGOR.

Compliance with the statute in replevin by mortgagee is not waived, when the mortgagor sets up noncompliance in defense by motion to dismiss.

[Ed. Note.—For other cases, see *Chattel Mortgages*, Cent. Dig. § 810; Dec. Dig. § 172.*]

Appeal from Circuit Court, Saline County; W. H. Evans, Judge.

Action by W. J. Lawhon against S. F. Crow. There was a directed verdict for defendant, and plaintiff appeals. **Affirmed.**

The suit at bar was first instituted by the appellant before a justice of the peace of Saline county to recover from the appellee a mule and two bales of cotton, which he had mortgaged to appellant to secure an open account for supplies advanced to him with which to make his crop. At each time appellee bought supplies of appellant, he was furnished with an itemized list of each purchase and its price. Before suit was instituted under the mortgage given by appellee to appellant, the appellee was served at three different times with a sworn statement of his account, showing the total balance due appellant. It is now admitted that these statements were not itemized, and it is further agreed that there were no credits due appellee, and that the amount of the account, so sworn to, was correct. The case was taken from the jury because of the appellant's failure to itemize his account, as required by section 5415 of Kirby's Digest.

Downie, Rouse & Streepey, for appellant. **J. S. Abercrombie and W. R. Donham**, for appellee.

WOOD, J. (after stating the facts as above). Section 5415 of Kirby's Digest is as follows: "Before any mortgagee, trustee or other person shall proceed to foreclose any mortgage, deed of trust, or to replevy under such mortgage, deed of trust, or other instrument, any personal property, such mortgagee, trustee, or other person shall make and deliver to the mortgagor a verified statement of his account, showing each item, debit and credit, and the balance due." The statute is mandatory. Compliance with its terms is a prerequisite to the maintenance of a suit to replevin mortgaged property. This has already been practically decided by this court in *Atkinson v. Burt*, 65 Ark. 316, 53 S. W. 404, where we held that failing to furnish a verified statement might have been pleaded to a suit to foreclose or to replevin the property. Where a failure to comply with the statute may be pleaded as a defense, necessarily the statute is mandatory.

and to settle any controversy over any items that might be in dispute without "going to law." The Legislature did not have in view the matter merely of saving the mortgagor the costs that might be incident to a lawsuit. Its purpose was not only to prevent that, but also any annoyance and inconvenience he might suffer by having his property taken from him by process of law before giving him an opportunity to adjust any differences with the mortgagee and to settle his account, if possible, without a lawsuit. The burden was therefore placed on the mortgagee, as a condition precedent to the maintenance of a suit to foreclose or for possession, that he comply with the statute. But the mortgagee does not forfeit his debt by failing to comply with the statute. *Atkinson v. Burt*, supra. He still has the right to his debt, and to any other remedies provided by law for the enforcement of its payment. He may still have his remedy of foreclosure by complying with the statute. It is a reasonable provision, and subserves a useful purpose. It is not a compliance with the law to furnish statements as the items are bought from time to time, nor to furnish a sworn statement of the account without the items that compose it.

Compliance with the statute is not waived, where the mortgagor sets up the noncompliance in defense, which was done in this case by his motion to dismiss. The ruling of the court was correct.

Affirmed.

WELCH STAVE & MERCANTILE CO. v. STEVENSON et al.

(Supreme Court of Arkansas. Nov. 15, 1900.)

1. INSURANCE (§ 9*)—REPORTS AS TO FINANCES—FAILURE TO FILE—INDEBTEDNESS—LIABILITY OF OFFICERS.

Kirby's Dig. § 848, provides that the president and secretary of every business corporation organized under the act shall annually deposit with the clerk of the county in which it transacts its business a certificate showing the condition of such corporation. Section 859 makes such officers, on failing to comply with section 848, liable for the debts of the corporation contracted during the period of any such failure. *Held*, that the president and secretary of a mutual insurance company organized under the general incorporation act are liable under section 859, although section 4349 provides that all domestic mutual insurance companies shall annually file with the State Auditor a statement of its financial condition on the 31st day of December next preceding.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 9; Dec. Dig. § 9.*]

2. INSURANCE (§ 4*)—MUTUAL COMPANIES—FINANCIAL STATEMENT—STATUTE—REPEAL BY IMPLICATION.

Kirby's Dig. § 848, provides that the president and secretary of every corporation organ-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ized under the general incorporation act shall annually deposit with the clerk of the county in which it transacts its business a certificate showing its financial condition. Section 4349 provides that all domestic mutual insurance companies shall annually file with the State Auditor a statement of its financial condition on the 31st day of December next preceding. *Held*, that section 4349 does not repeal by implication section 848, as the two sections are not repugnant; section 848 being passed for the information and benefit of creditors of the corporation, while section 4349 was to give information to the auditor to enable him to determine whether agents of such organizations are entitled to a certificate of authority to solicit business.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 4; Dec. Dig. § 4.*]

Appeal from Circuit Court, Sebastian County, Ft. Smith District; Daniel Hon, Judge.

Action by the Welch Stave & Mercantile Company against E. H. Stevenson and another. A demurrer was sustained to the complaint, and plaintiff electing to stand on its complaint, the case was dismissed, and plaintiff appeals. Reversed and remanded, with directions to overrule the demurrer.

Appellant (plaintiff below) alleged: That on and since February 26, 1906, the Ozark Insurance Company had been a corporation of this state organized under the provisions of section 837 and the following sections of Kirby's Digest, authorizing the organization of corporations "for the purpose of engaging in or carrying on any kind of manufacturing, mechanical, mining or other lawful business"; that defendant Stevenson was president, and defendant Klummons was secretary, of said corporation from and after said day of February; that said corporation was organized as a mutual insurance company for the purpose of insuring property against fire, and on February 26, 1906, issued to plaintiff its policy insuring certain property against loss by fire for 12 months from that date; that on August 3, 1906, the property so insured was destroyed by fire, and on April 4, 1908, plaintiff recovered judgment against said corporation in that court on account of said loss for \$500, with interest, which judgment remained wholly unpaid; that the defendant president and secretary did not, nor did either of them, file the certificates required by section 848 of Kirby's Digest during the years 1905 or 1906, and, by reason of the neglect to do so, had become liable to plaintiff for the amount of said judgment; and it prayed judgment accordingly. Defendant filed a general demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The court sustained said demurrer, and, the plaintiff electing to stand upon its complaint, the court dismissed the case at the costs of the plaintiff, and plaintiff appealed.

Mechem & Mechem, for appellant. Chas. E. & Harry P. Warner and T. W. M. Boone, for appellees.

WOOD, J. (after stating the facts as above). Section 848 of Kirby's Digest provides as follows: "The president and secretary of every corporation organized under the provisions of this act shall annually make a certificate showing the condition of the affairs of such corporation, as nearly as the same can be ascertained, on the first day of January or of July next preceding the time of making such certificate, in the following particulars, viz.: The amount of capital actually paid in; the cash value of its real estate; the cash value of its personal estate; the cash value of its credits; the amount of its debts; the name and number of shares of each stockholder; which certificate shall be deposited on or before the fifteenth day of February or of August with the county clerk of the county in which said corporation transacts its business who shall record the same in a book to be kept by him for that purpose." Section 858 requires the certificate to be made under oath, or affirmation by the person subscribing same. Section 859 makes the president or secretary who shall neglect or refuse to comply with the provisions of 848 jointly and severally liable to an action founded on the above statute for all debts of such corporation contracted during the period of any such neglect or refusal.

Appellees contend that, inasmuch as the complaint shows that the corporation was organized as a mutual insurance company for the purpose of insuring property against fire, therefore the requirements of section 848 supra do not apply, and that, instead thereof, the provisions of section 4349 are applicable. It is alleged in the complaint, and admitted by the demurrer, that the insurance corporation named in the complaint was organized under the provisions of chapter 31 of the general incorporation act (subdivision 2, Kirby's Dig.), for "manufacturing and other business corporations." The Legislature in express terms having made it the duty of the "president and secretary of every corporation organized under the provisions" of that act to file the certificate specified in section 848 supra, it is not within the province of the courts to say that they did not intend what they have expressed in such plain terms. In such case there is no room for construction.

Nothing remains but to give effect to the law, unless it has been repealed by some subsequent enactment. Section 4349 of Kirby's Digest, supra (act of May 23, 1901 [Acts 1901, p. 303, c. 159]), provides: "All mutual insurance companies of life, fire, etc., or other kind of mutual insurance organizations, organized under the laws of this state, shall annually file with the Auditor of State during the month of February, a full and complete sworn statement of its financial condition on the 31st day of December next preceding. Such statement shall plainly exhibit all real and contingent assets and liabilities

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

repealed. There is in the above no express repeal of section 848, and, applying the familiar rules that obtain, and that have been often announced by this court, with reference to repeals by implication, we are of the opinion that section 4349 does not repeal section 848. The two sections are not in irreconcilable conflict, nor can it be said that the provisions of section 4349 (the latter act) cover the whole subject of section 848 (the former act), and that the last enactment embraces new provisions in addition to the subject covered by the first, showing plainly an intention that the last should be a substitute for the first. Mr. Sutherland expresses the rule for repeals by implication as follows: "There must be such a manifest and total repugnance that the two enactments cannot stand. The earliest statute continues in force unless the two are clearly inconsistent with, and repugnant to, each other, or unless in the later statute some express notice is taken of the former, plainly indicating an intention to repeal it; and, when two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal by implication of the former." Sutherland, *Statutory Const.* (2d Ed.) p. 465. To the same effect, see: *English v. Oliver*, 28 Ark. 325; *Coats v. Hill*, 41 Ark. 151; *Chamberlain v. State*, 50 Ark. 137, 6 S. W. 524; *State v. Kirk*, 53 Ark. 337, 13 S. W. 925.

We deem it unnecessary to parallel the two sections in comment to show that they are not repugnant. They are set forth in the opinion, and the mere reading of them will discover that they may be readily harmonized. Section 848 was passed for the information and benefit of creditors of the corporation. Section 4349 was for the purpose of giving, primarily, information to the Auditor, and to enable him to determine whether the agents of such organizations are entitled to solicit business for same, and as to whether such agents are entitled to a certificate showing that they have authority to solicit business. See *McKee v. Rudd* (Mo.) 121 S. W. 312. In so far as the statements required by section 4349 may be of benefit to creditors, it is in this respect not repugnant, but supplemental, to section 848. The two sections were passed for a different purpose, as will be readily seen, and there is nothing to indicate that the last enactment was intended as a substitute for the first. As repeals by implication are not favored, it is for the Legislature, and not for the courts, to say that section 848 has no application to mutual insurance companies. Thus far the Legislature has not so declared.

The trial court erred in sustaining the demurrer to the complaint.

LEVY et al. v. McDONNELL.

(Supreme Court of Arkansas. Nov. 22, 1909.)

1. MORTGAGES (§ 27*)—EQUITABLE MORTGAGES.

Where a deed, which provided that it should be void on the grantee's failure to pay the purchase-money notes, after which the grantee should hold as tenant of the grantor and pay rent, did not expressly provide for a lien on the crop raised by the tenant, it was not an equitable mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 27.*]

2. LANDLORD AND TENANT (§ 9*)—RELATION.

Where land was absolutely conveyed, a subsequent provision of the deed that, if the purchase-money notes were not paid, the conveyance should be void, and the grantee should be entitled to hold as tenant, paying a rent which should be credited to him as purchase money, did not create the relation of landlord and tenant upon nonpayment of a note, as it would have done in case of an executory contract of sale; that relation being inconsistent with the fee-simple ownership conveyed to the grantee, as merely calling the debt "rent" after default did not make it such.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Dec. Dig. § 9.*]

3. DEEDS (§ 147*)—CONDITIONS—CONDITIONS REPUGNANT TO GRANT.

A condition in a deed which is repugnant to the grant is void.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. § 473; Dec. Dig. § 147.*]

Appeal from Jefferson Chancery Court; John M. Elliott, Chancellor.

Action by Minnie B. Levy and another against J. S. McDonnell. From a decree for defendant, plaintiffs appeal. Affirmed.

Taylor & Jones, for appellants. Crawford & Hooker, for appellee.

MCCULLOCH, C. J. Minnie B. Levy and her husband, W. J. Levy, two of the appellants herein, by their deed duly executed and delivered, containing covenants of general warranty of title, conveyed in fee simple to one Davis a tract of land in Jefferson county for the sum of \$5,000, payable in eight equal annual installments, as evidenced by the promissory notes of said Davis duly executed to them and recited in said deed. After the habendum and the warranty clauses of the deed, there follows this stipulation: "And when all of said notes are paid according to the tenor and effect thereof, then this instrument is to become absolute, and if the said Davis shall fail to pay said indebtedness for any year according to the tenor and effect of said notes, then in that event this conveyance shall be void and the grantors shall be entitled to possession and said grantee is to be held as a tenant of the said Minnie B. and W. J. Levy for any year he

be paid for each year to the amount as set out in said notes, then he is to have the same placed to his credit as purchase money." Davis failed to pay the second note, which fell due on November 1, 1905. He had mortgaged his crop on the land to appellee for supplies, and during the fall of the year he gathered the crop and delivered it to appellee, and the latter sold it and applied the proceeds in satisfaction of his mortgage debt. This action against appellee was subsequently instituted in chancery to recover from him the proceeds of said crop, and a lien on said crop is asserted under the above-quoted stipulation in the deed.

It will be noticed, in the first place, that the stipulation does not expressly purport to declare a lien on the crop. Therefore it cannot be held to constitute an equitable mortgage. If any lien exists at all, it is by virtue of the relation of landlord and tenant, which is declared to arise in the event that said Davis shall fail to pay either of said notes. Appellants rely upon the principle stated in the following quotation, approved by this court in *Thomas v. Johnston*, 78 Ark. 574, 95 S. W. 468: "The parties to an agreement for the sale of land may also contract with the right, at the election of either party in the future, upon the performance or non-performance of certain conditions, to treat the transaction either as a purchase and sale contract, or a lease; and, if the election is made to treat it as a tenancy, it relates to the time of making the contract, and the relation of landlord and tenant, with all the incidents and liabilities, will be regarded as having begun at that time." 18 Am. & Eng. Enc. Law (2d Ed.) pp. 168, 169. This principle applies, however, only to executory contracts for the sale of land, and not to contracts fully executed by delivery of deeds conveying the title to the purchaser. The two relations of vendor and vendee and of landlord and tenant are inconsistent and cannot exist at the same time; but the parties to an executory contract may establish either one or the other of these relations, and provide when the one shall end and the other shall begin. This is the controlling principle in *Thomas v. Johnston*, supra, and the cases which precede it; but when the fixed relation of vendor and vendee is created by the conveyance of the title, which is an executed contract, the other inconsistent relation cannot be created, for, the title being in the vendee, the relation of landlord and tenant cannot exist. Merely denominating the debt as "rent" in certain contingencies would not make it rent, where the relation of landlord and tenant does not in fact exist. *Walters v. Meyer*, 39 Ark. 560; *Watson v. Pugh*, 51 Ark. 218, 10 S. W. 493; *Quer-*

The deed exhibited in this case conveyed the title in fee simple to Davis, and the grantor could not burden the conveyance with a condition which defeated it. The condition is repugnant to the grant, and is void. *Carl Lee v. Ellsberry*, 62 Ark. 209, 101 S. W. 407, 12 L. R. A. (N. S.) 956, 118 Am. St. Rep. 60; *Whetstone v. Hunt*, 78 Ark. 230, 93 S. W. 979.

Other questions are raised which it is unnecessary to decide.

Decree affirmed.

NICHOLS v. STATE.

(Supreme Court of Arkansas. Nov. 23, 1909.)

1. SEDUCTION (§ 45*)—PROSECUTION—SUFFICIENCY OF EVIDENCE.

Evidence, in a prosecution for seduction, held sufficient to sustain a conviction under Kirby's Dig. § 2043, providing that no person shall be convicted of seduction on the testimony of the female unless corroborated by other evidence.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 80-82; Dec. Dig. § 45.*]

2. SEDUCTION (§ 46*)—PROSECUTION—EVIDENCE—CORROBORATION.

Under Kirby's Dig. § 2043, providing that no person shall be convicted of seduction on the testimony of the female unless corroborated by other evidence, in a prosecution for seduction under promise of marriage, the corroboration must be both as to the promise of marriage and the fact of sexual intercourse.

[Ed. Note.—For other cases, see Seduction, Cent. Dig. §§ 83-86; Dec. Dig. § 46.*]

3. SEDUCTION (§ 46*)—PROSECUTION—EVIDENCE.

In a prosecution for seduction under promise of marriage, evidence that accused courted the prosecuting witness a number of months, that during that time she kept company with no other man, that when her father charged him with the offense he promised to make it right in a few weeks, that accused was attending court as a witness on the trial of his brother for larceny when the father charged him with the offense, that he immediately fled the country without waiting for the trial, and that after his return, when he was told that it was his duty to marry the witness if he had promised to, he did not deny the promise, but hung his head, is admissible to corroborate the testimony of the prosecuting witness as to his promise to marry.

[Ed. Note.—For other cases, see Seduction, Dec. Dig. § 46.*]

4. CRIMINAL LAW (§ 741*)—TRIAL—QUESTION FOR JURY—WEIGHT OF EVIDENCE.

In a prosecution for seduction, the jury are the judges of the weight of evidence as to circumstances tending to corroborate the evidence of the prosecuting witness that accused promised to marry her.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1713; Dec. Dig. § 741.*]

5. CRIMINAL LAW (§ 696*)—TRIAL—OBJECTION TO EVIDENCE.

A motion to exclude all of the testimony of a witness is properly overruled if a part of it is competent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1643; Dec. Dig. § 696.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

tion, and appeals. Affirmed.

J. L. Short and C. E. Elmore, for appellant. Hal L. Norwood, Atty. Gen., and C. A. Cunningham, Asst. Atty. Gen., for the State.

FRAUENTHAL, J. The defendant, Walter Nichols, was convicted of the crime of seduction, and prosecutes this appeal from the judgment of conviction.

The evidence on the part of the state established the following facts: Dulcie Boydston was a young girl 18 years old and living with her parents. In December, 1906, the defendant began keeping company with her and to show her marked attention. He continued his attentions and visits to her for a number of months. Dulcie Boydston testified that in February, 1907, he asked her to marry him, and she promised to do so; but no definite date was set for the marriage. He continued to pay his suit to her, and then some time after their engagement he began to seek sexual intercourse with her by promising marriage in two months thereafter. Finally he overpersuaded her, and in March, 1907, succeeded in obtaining sexual intercourse by promising to marry her, and by telling her that all people who intended to get married "did that way." Pregnancy was the result of the intercourse. In August, 1907, the circuit court convened at the county seat of Fulton county, and at that time a brother of defendant was to be placed on trial for grand larceny, and the defendant was a witness in his brother's behalf and attended that court. The father of Dulcie Boydston met the defendant there, and accosted him and told him that he had ruined his daughter. The defendant told him that he would make it right in two or three weeks. The father told him that then was the time to make it right. The defendant desired to talk to the young girl privately, and, upon the father's refusal to permit him to do so, the defendant ran across the square and at once left the town, without attending the trial of his brother or awaiting to see its outcome. The testimony tends to prove that the defendant fled the country and went to Texas. After remaining away for some time, he returned and began seeking testimony in his behalf upon this charge. He saw a young man, Robt. Hightower, who had formerly waited on Dulcie Boydston. He asked this young man if he knew anything about the prosecutrix that would benefit him. Hightower told him that he did not, and said to him that if he were in the defendant's place, and had promised to marry her, he would do it. The defendant dropped his head, and thus remained for a short time without making reply, and then said he would not marry her; but in the conversation he

with Dulcie Boydston, but denied that he had promised to marry her.

It is provided by section 2043 of Kirby's Digest that no person shall be convicted of the crime of seduction upon the testimony of the female "unless the same be corroborated by other evidence." On a charge of obtaining carnal knowledge of a female by virtue of a false promise of marriage, the corroboration of the female is required both as to the promise of marriage and the fact of sexual intercourse. *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17; *Keaton v. State*, 73 Ark. 285, 83 S. W. 911; *Carrens v. State*, 77 Ark. 16, 91 S. W. 30; *Lasater v. State*, 77 Ark. 468, 94 S. W. 59. In this case it is contended that there is not sufficient evidence to sustain the verdict of the jury, for the reason that there is no corroboration of the testimony of the female as to the promise of marriage. In considering the character and sufficiency of the testimony necessary to corroborate the female in this particular, Mr. Justice Riddick, in the case of *Lasater v. State*, 77 Ark. 468, 94 S. W. 59, quotes with approval the following from Mr. Justice Folger of the Court of Appeals of New York: "It is settled that the supporting evidence is required as to two matters named in the act, and as to them only. They are the promise of marriage and the carnal connection. It is settled by the same authorities that the supporting evidence need be such only as the character of these matters admit of being furnished. The promise of marriage is not an agreement usually made in the presence or with the knowledge of third persons. Hence the supporting evidence possible in most cases is the subsequent admission or declaration of the party making it, or the circumstances which usually accompany the existence of the engagement, such as exclusive attention to the female on the part of the male, the seeking and keeping her society in preference to that of others of her own sex, and all those facts of behavior toward her which before parties to an action were admitted as witnesses in it, were given to the jury as proper matter for their consideration on that issue." And in the case of *Cooper v. State*, 86 Ark. 30, 109 S. W. 1023, it was held that the corroboration can be sufficiently made by circumstances showing the relation and conduct of the parties to each other. In the case at bar the defendant paid court to the young lady for a number of months and showed to her marked attention. During all that time she kept the society of no other young man. When the father charged him with the offense, he promised to right it in a few weeks, presumably by carrying out his promise of marriage, and then, although he was in attend-

to marry the young lady if he promised to do so. He did not deny that he had so promised, but hung his head as if convicted by the truth of the statement. These were all circumstances which it was proper for the jury to consider. Before them appeared all these witnesses, and they noted their manner and demeanor. They were peculiarly the judges of the weight of this evidence, and we cannot say that there is not sufficient evidence to support their verdict.

It is urged by counsel for the defendant that the court erred in permitting evidence showing that the brother of the defendant and one of his witnesses had been indicted for grand larceny; but this was not admitted for the purpose of impeaching this witness. The same testimony proceeded further, and showed that the case on said charge against the brother had been set for trial on a definite day, that the defendant had been subpoenaed in his brother's case as a witness, that on that day the defendant attended said court wherein said trial was to be had, and

evidence in that regard and for that purpose was competent. In this case a general objection was made to the introduction of this evidence. Part of it was clearly competent. A motion to exclude all of the testimony of a witness is properly overruled if a part of it is competent. *Central Coal & Coke Co. v. Niemeyer Lumber Co.*, 65 Ark. 106, 44 S. W. 1122, 53 S. W. 570; *Mallory v. Brademyer*, 76 Ark. 538, 89 S. W. 551; *St. L., I. M. & S. R. Co. v. Taylor*, 87 Ark. 331, 112 S. W. 745. Being competent for one purpose, it was not error to admit it, although a part of the testimony might have been incompetent. The defendant could, if he had so requested, have had the court to specifically instruct the jury for what purpose this evidence was competent, and that it was not competent for the purpose of impeachment.

We have examined the instructions that were given by the court and those that were refused, and we find no prejudicial error in any of the rulings thereon.

The judgment is affirmed.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. CRIMINAL LAW (§ 1024*)—APPEAL—APPEAL BY STATE—RIGHT.

As a rule, the state cannot appeal from a judgment for accused, whether it is upon a verdict of acquittal or upon the determination of a question of law, unless a right of appeal is unequivocally conferred by statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599-2611; Dec. Dig. § 1024.*]

2. CRIMINAL LAW (§ 1024*)—APPEAL—RIGHT OF STATE TO APPEAL.

Under Rev. St. 1899, § 2708 (Ann. St. 1906, p. 1592), allowing the state to appeal in criminal prosecutions only in the cases mentioned in the next section, and section 2709, permitting the trial court, in its discretion, to grant to the state an appeal, if the prosecuting attorney prays it, where any indictment is quashed or adjudged insufficient on demurrer, or where the judgment thereon is arrested, the state cannot appeal from a judgment overruling a demurrer to a plea in abatement of the indictment, based upon matters dehors the face of the indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2599-2611; Dec. Dig. § 1024.*]

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

Ivis Craig was indicted for setting up and keeping a poker table in violation of statute, and from a judgment overruling a demurrer to a plea in abatement of the indictment, and sustaining the plea, and discharging accused, the State appeals. Appeal dismissed.

E. W. Major, Atty. Gen., and John M. Atkinson, Asst. Atty. Gen., for the State. M. R. Lively, for respondent.

GANTT, P. J. On November 2, 1908, an indictment was returned by the special grand jury for Jasper county to division No. 1 of the circuit thereof, then presided over by Hon. Haywood Scott, charging defendant with the crime of setting up and keeping "one poker table," in violation of the statutes of this state. The indictment is in regular form, and is duly signed by the prosecuting attorney of Jasper county, and the foreman of the grand jury returned the same. On January 9th, thereafter, defendant filed his plea in abatement to said indictment, giving as a reason, among others, that said indictment was not returned into open court, but was returned to Judge Scott after the circuit court room had been by his orders closed and all persons excluded from the room, except the prosecuting attorney and a deputy clerk, and because persons not authorized by law were permitted in the grand jury room. On January 15th, thereafter, the prosecuting attorney of said county filed a demurrer to said plea in abatement. On January 23, 1909, said plea in abatement and demurrer thereto came on for hearing in said division

Bright. The court overruled the demurrer to the plea in abatement, and sustained the plea to the indictment, and discharged defendant. The state, through its prosecuting attorney, refused to plead further, duly saved an exception to the ruling of the court in overruling the demurrer to the plea, and in sustaining the plea in abatement to the indictment, and appeals to this court for a review as to the correctness of the ruling of the trial court in overruling the demurrer to the plea and sustaining the plea to the indictment. The indictment, plea in abatement, and demurrer to the plea are all set out at length in the record.

This is one of a number of appeals from the Jasper circuit, in all of which the right of the state to appeal from a judgment overruling a demurrer by the state to a plea in abatement of an indictment based upon matter dehors the face of the indictment itself is challenged, and of course the first proposition is whether this court can entertain the appeal. As a general rule, the state has no right to a writ of error or appeal in a criminal prosecution from a judgment in favor of a defendant whether upon a verdict of acquittal or upon the determination by the court of a question of law; unless it be expressly conferred by statute in the plainest and most unequivocal terms. 12 Cyc. p. 804; State v. Wear, 145 Mo. 162, 46 S. W. 1099. As early as State v. Rowe, 22 Mo. 328 (1855), this identical proposition was before this court for decision. In that case the defendant was indicted for taking unlawful toll. He appeared and filed his special plea. The state demurred to this plea, and the circuit court overruled the demurrer and rendered judgment thereon for defendant, discharging him from said indictment, and the state appealed. The only question was: Would an appeal be sustained on the part of the state upon that state of facts? Judge Ryland, speaking for the whole court, said:

"The statute concerning practice and proceedings in criminal cases must determine this question. Sections 9 and 10 of the eighth article of this act are as follows:

"Sec. 9. The state in any criminal prosecution shall be allowed an appeal only in the cases and under the circumstances mentioned in the next succeeding section.

"Sec. 10. When any indictment is quashed or adjudged insufficient upon demurrer, or judgment is arrested, the circuit court, either from its own knowledge or from information given by the prosecuting attorney, may cause the defendant to be committed or recognized to answer another indictment; or, if the prosecuting attorney prays an appeal to the Supreme Court, the circuit court may in its discretion, grant an appeal."

"Now this case is not within either of the classes mentioned in this tenth section. There

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

is no indictment quashed, nor is there any arrest of judgment, nor has this indictment been held insufficient on demurrer. Then by the express words of the ninth section an appeal will not be allowed. It is accordingly dismissed."

Sections 2708 and 2709, Rev. St. 1899 (pages 1592, 1593, Ann. St. 1906), are to-day to all intents and purposes reproductions and continuations of sections 9 and 10 of article 8 of the Code of Criminal Practice and Proceedings in Rev. St. 1845, p. 889. The decision in *State v. Rowe*, supra, has been uniformly followed since its promulgation. *State v. Bollinger*, 69 Mo. 577; *State v. Heisserer*, 83 Mo. 692; *State v. Ross*, 119 Mo. App. 401, 94 S. W. 842; *State v. Risley*, 72 Mo. 609. The adjudications of other states, with statutory provisions like ours just quoted, are to the same effect. *State v. Minnick*, 33 Or. 158, 54 Pac. 223; *People v. Snyder*, 44 Hun (N. Y.) 193; *People v. Dempsey et al.*, 66 How. Prac. 371.

It being obvious in this case that the indictment was not quashed on a motion to quash, nor was a demurrer thereto sustained, nor has the indictment been adjudged insufficient on a motion in arrest, and as an appeal is only permitted the state in these cases, the motion to dismiss the appeal must be sustained; and it is so ordered.

BURGESS and FOX, JJ., concur.

STATE v. SMITH.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

Bull York Smith was indicted for an offense, and from a judgment overruling a demurrer to a plea in abatement of the indictment, and sustaining the plea, and discharging accused, the State appeals. Appeal dismissed.

E. W. Major, Atty. Gen., and Jas. T. Blair and Chas. G. Revelle, Asst. Attys. Gen., for the State.

FOX, J. The record in this cause is substantially the same as that in *State v. Craig* (decided at the present sitting of this court) 122 S. W. 1006. At least, it presents the same legal proposition. We deem it unnecessary to repeat what was said in the *Craig* Case as to the right of the state to prosecute an appeal; but it is sufficient to say that, adopting the conclusions as reached by this court in that case, it follows that the appeal in the case at bar should be dismissed; and it is so ordered. All concur.

STATE v. BALLARD.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

Al Ballard was indicted for keeping gaming tables in violation of statute, and from a judg-

ment overruling a demurrer to a plea in abatement of the indictment, and sustaining the plea, and discharging accused, the State appeals. Appeal dismissed.

E. W. Major, Atty. Gen., and John M. Atkinson, Asst. Atty. Gen., for the State.

BURGESS, J. On November 2, 1908, an indictment was returned by the special grand jury of Jasper county to division No. 1 of the circuit court of said county, charging the defendant with a crime of setting up and keeping one crap table and two poker tables, in violation of the laws of the state. The indictment is regular in form; but on January 9, 1908, the defendant filed his plea in abatement of said indictment upon the same grounds as set forth in the case of *State v. Ivis Craig* (the opinion in which case is handed down at this delivery) 122 S. W. 1006.

As the two records are in all respects similar, for the reasons given in that case, the motion of the defendant to dismiss the appeal is sustained, because the state has no right of appeal from the judgment of the circuit court sustaining said plea in abatement. All concur.

STATE v. GEIER.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

Spooley Geier was indicted for an offense, and from a judgment overruling a demurrer to a plea in abatement of the indictment, and sustaining the plea, and dismissing accused, the State appeals. Appeal dismissed.

E. W. Major, Atty. Gen., and Jas. T. Blair and Chas. G. Revelle, Asst. Attys. Gen., for the State. R. M. Sheppard, for respondent.

FOX, J. The record in this cause is substantially the same as that in *State v. Craig* (decided at the present sitting of this court) 122 S. W. 1006. At least it presents the same legal proposition. We deem it unnecessary to repeat what was said in the *Craig* Case as to the right of the state to prosecute an appeal; but it is sufficient to say that, adopting the conclusions as reached by this court in that case, it follows that the appeal in the case at bar should be dismissed; and it is so ordered. All concur.

STATE v. FIREY.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. CRIMINAL LAW (§ 278*)—"PLEA IN ABATEMENT"—NATURE.

"Pleas in abatement" are founded on some defect apparent on the face of the indictment, or on some matter outside the record going to its insufficiency.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 638-642; Dec. Dig. § 278.*

For other definitions, see Words and Phrases, vol. 6, pp. 5406, 5407; vol. 8, p. 7755.]

2. CRIMINAL LAW (§ 278*)—"PLEA IN ABATEMENT"—MATTERS DEHORS THE RECORD.

That the indictment was not returned in open court, but to the trial judge, after all persons had been excluded from the courtroom excepting the prosecuting attorney and another, and that persons not authorized by law were

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

only raised by plea in abatement.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 641; Dec. Dig. § 278.*]

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

Fred Firey was indicted for keeping gaming devices and permitting persons to bet thereat, and from a judgment overruling a demurrer to a plea in abatement of the indictment, and sustaining the plea, and discharging accused, the State appeals. Appeal dismissed.

E. W. Major, Atty. Gen., and Jas. T. Blair and Chas. G. Revelle, Asst. Attys. Gen., for the State. R. M. Sheppard, for respondent.

GANTT, P. J. This is an appeal by the state from a judgment of the circuit court of Jasper county overruling a demurrer filed by the state to a plea in abatement filed by the defendant to an indictment against him for setting up and keeping certain gaming tables and devices and with enticing and permitting certain persons to bet and play for money at and upon said tables.

The indictment and plea in abatement are in all respects the same as that in State v. Ivis Craig (handed down at this delivery), 122 S. W. 1006. For the reasons assigned in that case, the appeal of the state must be dismissed, unless the contention of the state in this case that the plea was not in fact and in law a plea in abatement is sound. Pleas in abatement are founded on some defect apparent on the face of the accusation, or on some matter outside the record proceeding to the insufficiency of the accusation. "The rule is that all matters extraneous to the record must be taken advantage of by this plea; while such matters as appear by the accusation, errors apparent, are usually brought to notice by motion to quash, or demurrer, or left for motion in arrest in the event of conviction." Bassett's Crim. Pl. § 178; 1 Chit. Crim. Law, § 445; 1 Bishop's New Crim. Proc. 738; 12 Cyc. p. 718; Sampson v. State, 124 Ga., loc. cit. 779, 53 S. E. 332; State v. Salmon, 216 Mo., loc. cit. 503, 115 S. W. 1106; State v. Sullivan, 110 Mo. App., loc. cit. 80, 84 S. W. 105; State v. Bordeaux, 93 N. C., loc. cit. 563.

That the plea alleged facts dehors the record for which the indictment should be quashed in the estimation of the defendant is apparent, and the matters alleged were properly brought to the attention of the court in a plea in abatement. Wharton's Crim. Pl. & Prac. § 350, 3, b. Having reached the conclusion that these matters were correctly incorporated in the plea in abatement, and the circuit court having sustained the plea and abated the indictment, and the state not being entitled to an appeal in such a case, the correctness of the ruling in sustaining the plea upon the grounds therein set forth is

the reason that we have no jurisdiction of the appeal.

The appeal is dismissed.

BURGESS and FOX, JJ., concur.

STATE v. CHAMBERS.

(Supreme Court of Missouri, Division No. 2
Nov. 23, 1909.)

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

Lem Chambers was indicted for a crime, and from a judgment overruling a demurrer to a plea in abatement of the indictment, and sustaining the plea, and discharging accused, the State appeals. Appeal dismissed.

E. W. Major, Atty. Gen., and John M. Atkinson, Asst. Atty. Gen., for the State. Walden & Andrews, for respondent.

BURGESS, J. This is an appeal by the state from a judgment of the circuit court of Jasper county setting aside the indictment on a plea in abatement thereto by the defendant.

The record is in all respects similar to that in the cases of State v. Ivis Craig, 122 S. W. 1006, and State v. Fred Firey, 122 S. W. 1007, handed down at this delivery; and for the reasons therein given the appeal of the state must be and is dismissed. All concur.

STATE v. MILLER.

(Supreme Court of Missouri, Division No. 2
Nov. 23, 1909.)

Appeal from Circuit Court, Jasper County; Henry L. Bright, Judge.

Walter Miller was indicted for an offense, and from a judgment overruling a demurrer to a plea in abatement of the indictment, and sustaining the plea, and discharging accused, the State appeals. Appeal dismissed.

E. W. Major, Atty. Gen., and Jas. T. Blair and Chas. G. Revelle, Asst. Attys. Gen., for the State. R. M. Sheppard, for respondent.

BURGESS, J. This is an appeal by the state from a judgment of the circuit court of Jasper county setting aside the indictment on a plea in abatement thereof filed by the defendant.

The record in this case is in all respects similar to those in the cases of State v. Ivis Craig, 122 S. W. 1006, and State v. Fred Firey, 122 S. W. 1007, the opinions in which cases are handed down at this delivery; and for the reason therein given, that the state has no right of appeal from the judgment of the circuit court sustaining a plea in abatement, the appeal of the state is dismissed. All concur.

STATE ex rel. SCHOOL DIST. OF MEMPHIS v. GORDON, State Auditor.

(Supreme Court of Missouri. July 9, 1909. On Motion for Rehearing, Nov. 8, 1909.)

1. MANDAMUS (§ 159*)—PROCEEDINGS—DEMURRER.

Where in mandamus respondent waives the alternative writ and demurs, the petition stands as and for such writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 325; Dec. Dig. § 159.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ACTIONS (§ 184*)—PROPOSITIONS SUBMITTED TO PEOPLE.

By analogy to Const. art. 4, § 28 (Ann. St. 1906, p. 185), providing that no bill shall contain more than one subject, which shall be clearly expressed in its title, a proposition submitted to a vote of the people for their adoption must be "single" as that word is defined in the law; the vote of the people on such a proposition being in the nature of a legislative act.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 184.*]

3. STATUTES (§ 105*)—TITLES—SINGLE OBJECT—CONSTRUCTION OF STATUTE.

Const. art. 4, § 28 (Ann. St. 1906, p. 185), providing that no bill shall contain more than one subject which shall be clearly expressed in its title, should be liberally interpreted, so as not to unnecessarily limit legislative enactments, and, if the matters embraced in the bill are not incongruous, but have legitimate connection with each other, the generality of the title will not make the bill objectionable; the mode in which the subject is treated and the reasons which influence the Legislature not making the bill bad, if there is but one subject.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 117; Dec. Dig. § 105.*]

4. STATUTES (§ 107*)—TITLES—SINGLE SUBJECT.

In applying the constitutional provision against doubleness, each case is singular to itself, and will stand or fall on its own facts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 121; Dec. Dig. § 107.*]

5. ELECTIONS (§ 184*)—PROPOSITION TO BORROW MONEY—SUBMISSION TO PEOPLE.

Where a proposition to borrow money is submitted to the people, the object to which the borrowed money is to be appropriated is an integral part of the proposition, being necessary to make the proposition intelligible and to carry information to the voter.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 184.*]

6. ELECTIONS (§ 184*)—MATTERS SUBMITTED TO VOTE—DOUBLENES.

An entire subject of a statute, within Const. art. 4, § 28 (Ann. St. 1906, p. 185), providing that no bill shall contain more than one subject, which shall be clearly expressed in its title, and by analogy the entire subject of a proposition to be submitted to a vote of the people, may be composed of parts, and any part, by further refinement, may be composed of other parts.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 184.*]

7. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—BORROWING MONEY—SUBMISSION OF PROPOSITION—CONSTRUCTION OF STATUTE.

Rev. St. 1890, § 9752 (Ann. St. 1906, p. 4472), provides that for the purpose of erecting schoolhouses and furnishing them in school districts, the board of directors shall be authorized to borrow money and issue bonds for the payment thereof, the question of loan to be decided at a special election for that purpose, and that the qualified voters voting in favor of the loan shall have written or printed on their tickets "For the loan" and those voting against the loan, the words "Against the loan"; and, if two-thirds of the votes cast shall be "For the loan," the district board shall have power to borrow money in the name of the district to the amount and for the purpose specified in the notice of election. Section 9752a as added by Laws 1903, p. 266 (Ann. St. 1906, p. 4473), provides that the purposes for which such an election may be called may, in the judgment of the school directors include the purchasing of schoolhouse sites. *Held*, that the statutes contemplate that the lib-

erty of choice of the voter shall be exercised on the concrete whole encompassed by the statute if, in the judgment of the school board, the plan as a whole is a proper improvement to challenge a vote of the district.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

8. SCHOOLS AND SCHOOL DISTRICTS (§ 97*)—BORROWING MONEY—SUBMISSION OF PROPOSITION—SINGLE SUBJECT.

A proposition, submitting to the people, under the statute, the question of incurring an indebtedness for the school district in a specified sum, part of it to be used in building and furnishing a schoolhouse in one ward of the district, and the remainder to be used in the building of an addition to and improving the schoolhouse in another ward of the district, embraces a single general subject, and is not violative, by analogy, of Const. art. 4, § 28 (Ann. St. 1906, p. 185), providing that no bill shall contain more than one subject, which shall be clearly expressed in its title.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 226; Dec. Dig. § 97.*]

Graves, Burgess, and Fox, JJ., dissenting.

In banc. Mandamus by the State, on the relation of the School District of Memphis, against John P. Gordon, State Auditor. Absolute writ granted.

J. M. Jayne, for relator. El. W. Major, Atty. Gen., Chas. G. Revelle, Asst. Atty. Gen., Jas. T. Blair, Asst. Atty. Gen., for respondent.

LAMM, J. The State Auditor refuses to register and visé, under section 5167, Rev. St. (Ann. St. 1906, p. 2700), 45 school bonds, 5-20's, each of the denomination of \$500, dated May 1, 1906, interest at 5 per cent. payable semiannually, evidenced by coupons attached, payable at the Mercantile Trust Company in the city of St. Louis, and issued by the school district of Memphis, Mo., for building purposes. The Memphis school district sues out an alternative writ of mandamus. The Auditor enters his appearance through Mr. Attorney General and, waiving the alternative writ, demurs. In this condition of things the petition stands as and for such writ.

The cause being finally submitted on demurrer, we are called upon to determine but a single question, indicated by the second specification of the demurrer, viz.: "Because the petition upon its face discloses that two separate and distinct propositions were submitted and voted on jointly." The petition shows that the proceedings of the school board, the calling and notice of the election, the appointment of judges and clerks, the election itself, the canvass and formulation of the returns, showing the submitted proposition carried by a vote of 349 "For the loan" to 60 "Against the loan," and the execution of the bonds and coupons, were in due form; further, that the proposed indebtedness (\$22,500), with all other, does not ex-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the district, as shown by the last assessment.

The allegations relied upon to show the doubleness of the proposition are: First. An order by the school board, reciting that it was necessary for the welfare of the inhabitants of the district that a schoolhouse be erected in the First school ward, and an addition and improvements be made to the schoolhouse in the Second school ward. Second. An order that an election be called at a specified date and place, reciting, among other things, as follows: "For the purpose of submitting to the qualified voters thereof a proposition to incur an indebtedness for said school district in the sum of \$22,500 for the purpose of using \$20,000 of said amount in building a schoolhouse in the First school ward of said school district, and furnishing the same, and \$2,500 of said amount to be used in building an addition to, and improving, the schoolhouse in the Second school ward of said district," etc. Third. A similar recital in the election notice. Relator's counsel argue that the proposition is single, and within the purview of pertinent statutes relating to issuing school district bonds. Mr. Attorney General, contra.

Relator is organized under article 2, c. 154, Rev. St. (Ann. St. 1906, pp. 2699-2701), as a town school district, with the special privileges enumerated therein. Section 9865, Rev. St. (Ann. St. 1906, p. 4323), ordains that the school board, when sufficient funds have been provided, shall establish an adequate number of primary or "ward schools," and for this purpose shall divide the district into "school wards," and fix the boundaries thereof. Such board is authorized to select and procure a site in each newly formed ward and erect a suitable school building therein and furnish the same. If the money to build and furnish the schoolhouses be not on hand, it may be raised by direct taxation, under the provisions of section 9778 (page 4488), provided such is the judgment of the school board, and provided the voters of the district authorize the increased tax under that section. However, if the money be not on hand, the school board may borrow money under section 9752 (page 4472), first submitting the proposition to the voters. That is the section under which relator acted. It provides as follows (omitting matter not material): "For the purpose of erecting schoolhouses and furnishing the same in cities, towns and school districts, the board of directors shall be authorized to borrow money, and issue bonds for the payment thereof, in the manner herein provided. The question of loan shall be decided at * * * a special election to be held for that purpose. * * * The qualified voters at said election shall vote by ballot. Those voting in favor of the loan shall have written or printed on their tickets, 'For the loan;' those voting against the loan, the words 'Against the loan;' and if two-thirds of the votes cast shall be 'For the loan,' the

er to borrow money in the name of the district, to the amount and for the purpose specified in the notices aforesaid. * * * When bonds are voted under this section for the erection of one or more schoolhouses, to be erected on the same or different sites," etc.

In *Richardson v. McReynolds*, 114 Mo. 641, 21 S. W. 901, it was held that under the foregoing section there was no authority to issue bonds to purchase a schoolhouse site, and that funds for such purchase could be accumulated only on direct taxation and by the taxgatherer. To remedy this condition in 1903 the General Assembly enacted a new section, strictly in pari materia, numbered 9752a (Laws 1903, p. 286 [Ann. St. 1906, p. 4473]), reading: "The purpose for which an election may be called to borrow money and to issue bonds therefor under section 9752 of this chapter may, in the judgment of the school directors, include that of purchasing schoolhouse sites, and the purpose of which the annual rate of taxation may be increased under and in the manner provided for by section 9778 of this chapter may, in the judgment of said school directors, include that of purchasing school building sites and furnishing said buildings." The foregoing sections (9752 and 9752a) grant the statutory power to borrow money for the purpose of building schoolhouses and furnishing the same, and purchasing school sites. They are a code unto themselves.

The right determination of the case calls for: (a) An examination of the reasons supporting the proposition that questions submitted to voters should be single and not double; (b) a construction of sections 9752 and 9752a, supra, not hitherto under interpretation on the point now up; and (c) to those may be added whatever aid may be borrowed by parity of reasoning from adjudicated cases in this and other jurisdictions. Attending to the foregoing, we conclude the proposition submitted to the voters of the Memphis school district was well enough. This because:

1. The rule of law that a proposition submitted to a vote of the people for their adoption must be single (as "single" is defined in the law) finds voice in our constitutional provision (article 4, § 28 [Ann. St. 1906, p. 185]), providing that: "No bill * * * shall contain more than one subject, which shall be clearly expressed in its title." And the reasons underlying that constitutional interdiction are precisely the reasons supporting the proposition asserted by our learned Attorney General in the case at bar. Heretofore the principle has not been frequently before this court as applied to propositions voted by the people, yet the constitutional provision has been under exposition many times, and the correct interpretation of that provision is not only well established, but is germane to the case in hand, since

it is permissible for courts to reason from similars to similars.

At the threshold of the case, then, lies an investigation of the interpretation put upon said constitutional provision. In *State v. Miller*, 45 Mo., loc. cit. 497, in defining and illuminating the purpose, tenor, and scope of that provision, it was well said: "The courts in all the states where a like or similar provision exists have given it a very liberal interpretation, and have endeavored to construe it so as not to limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law. An exact and strict compliance with the letter would render legislation almost impracticable, and would lead to a multiplicity of bills which would make our statutes ridiculous. The principle is a correct one, and the intention was good; it was designed to strike down a most vicious and corrupt system which prevailed in our legislative bodies, and which operated as a surprise, and was productive of fraud and plunder. It was intended to kill 'logrolling' and prevent unscrupulous, designing men and interested parties from dexterously inserting matters in the body of a bill of which the title gave no intimation of the true character, or of comprising subjects diverse and antagonistic in their nature, in order to combine in its support members who were in favor of a particular measure, but who could not carry their object without an agreement to go for some other measure, when neither, on its merits, could command the requisite majority." Following these general observations, it was said in that case that, if the matters embraced in the bill were congruous, and had legitimate connection or relation to each other, the generality of the title would not make the bill objectionable, that if there was but one subject, the mode in which the subject is treated, and the reasons which influence the Legislature, do not make the bill bad, and that the provision does not call for a too vigorous and technical construction. This, because the application of rules of nice and fastidious verbal criticism would often frustrate the action of the Legislature without fulfilling the intention of the framers of the Constitution. Accordingly it was held that an act, entitled, "An act to prevent the issue of false receipts or bills of lading, and to punish fraudulent transfers of property by warehousemen, wharfingers and others," could include, under the designation of "others," all persons obtaining the possession of goods and having the indicia of ownership from transferring, hypothecating, or pledging them in fraud of the rights of the seller or vendor; the act being meritorious, and being intended to promote honesty and prevent fraud, and the subjects having a natural connection with one another.

Running through a long line of cases, the

reasoning adopted and propositions ruled in *State v. Miller*, 45 Mo. 495, have been steadily approved and followed. For example, in *State ex rel. v. Miller*, 100 Mo. 489, 13 S. W. 677, it was ruled that, where all the provisions of a statute fairly relate to the same subject, having a natural connection with it, and are the incidents or means of accomplishing it, then the subject is single. Accordingly it was held that an act entitled "An act fixing the number of directors in public school boards in certain cities, and providing for election of such directors and for districting said cities therefor" meets the requirements of the provision. To the same effect are *Ewing v. Hoblitzelle*, 85 Mo. 64; *State v. Morgan*, 112 Mo. 202, 20 S. W. 456; *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774; *State ex rel. v. Heege*, 135 Mo. 112, 36 S. W. 614; *State v. Bixman*, 162 Mo. 1, 62 S. W. 828; *Elting v. Hickman*, 172 Mo. 237, 72 S. W. 700. In other cases we have resolved that the object of the constitutional provision was to prevent incongruous matters being voted on together; that if the title is not misleading, and is not designed as a cover to vicious or incongruous legislation, it will do, although it does not descend to details. And in other cases we have resolved that matter germane to the subject does not constitute doubleness, but that matters having no material relation to each other are double in the sense interdicted. See a learned note under section 28, art. 4, Const. (1 Ann. St. 1906, p. 186) where many authorities are collated.

Recurring now to what has been already said, to wit, that the constitutional inhibition against doubleness in a bill to be voted by the lawmaker is one and the same in principle with the rule of law against doubleness in a proposition to be voted by the people, it is self-evident that the mischiefs struck at by that rule against doubleness, invoked by respondent to invalidate the bonds of the Memphis school district, are of kith and kin to the mischiefs struck at by the constitutional provision we have been considering; and courts deem them one and the same. Thus in *Hubbard v. Woodsum*, 87 Me., loc. cit. 95, 32 Atl. 804, a proposition alleged to be double was put to a vote of the people, and Peters, C. J., says: "The idea on which this contention of the complainants is grounded is found in the construction which courts have given to constitutional provisions existing in some of the states prohibiting their Legislatures from embodying two distinct and independent, private or local, subjects in one act. In such states two or more schemes of private legislation cannot be grouped together. The object is to prevent a combination of different interests where each one may help the other; 'to prevent,' as Folger, J., expressed it in a New York case, 'the joining one local subject with

another or others of the same kind so that each subject should gather votes for all.'"

The vote of the people on a proposition stands as in the nature of a legislative act. A successful vote on a proposition is in the nature of the adoption of a law. The proposition when adopted becomes, in a sense, law—a local act. Therefore, as already pointed out, the method of its adoption is within the principle of the constitutional provision controlling legislation. *McMillan v. Lee County and Boyles*, 3 Iowa, 311. Cases may be found whose facts called for judicial denunciation, where odious were united to good propositions in order to pull the former through, and where it has been ruled that such conduct amounted to "jockeying" and "logrolling" and unjust and unfair "maneuvering"—in short, a fraud upon the people. *Supervisors Fulton County v. Railroad*, 21 Ill., loc. cit. 373 et seq. In another case (*Gray v. Mount*, 45 Iowa, loc. cit. 595) the facts denounced were characterized as "the common device of an auctioneer, in disposing of worthless goods, whereby a good article is mingled with them and made to draw bids, or the cunning tricks of gamblers to induce wagers of the unwary." But all those similes, metaphors, and comparisons justify themselves in connection with the concrete facts discussed in the particular case, and I have seen no case, that discusses on principle the doubleness of a proposition submitted to a vote, which attempts to apply any different reasoning or principle than is applied to the constitutional provision limiting a legislative act to one subject. We are free then to borrow and apply the doctrines announced in the one to the other. It has been decided that in applying the constitutional provision against doubleness each case is singular to itself and must stand or fall on its own facts. Says Burgess, J., in *Witzmann v. Railroad*, 131 Mo., loc. cit. 618, 33 S. W. 182: "Adjudicated cases do not, as a general rule, afford us much assistance in passing upon questions of this character, other than in a general way, as each case must be adjudged according to its own peculiar facts and the directness or remoteness, as the case may be, of its provisions to matters in consonance with its title."

2. Recurring now to section 9752, to cognate sections and provisions in the Constitution, it will be seen that the controlling thought is the increase of taxation beyond the even, modest level of conventional and prescribed statutory rates. Bonds at end mean taxation. Taxation is a tender and jealous point. Therefore the school law has preserved to the people a right to a direct vote (not on any tax, but) on an increase over the statutory level implied by the issue of bonds; that is, the people vote the bonds, and under the Constitution and law the school board and the taxing officers must correspondingly increase the taxing rate. Under our statutory scheme it is ap-

parent that the division of a town district into school wards (thus necessitating more than one schoolhouse) is not deemed a matter of such quick and personal concern to the individual voter as is the increase in tax rates. The same may be said of the improvements of this or that schoolhouse, and of the number of schoolhouses built in a school district. The law contemplates that (absent an increase of taxation) the school patron and the taxpayer exercise only a representative voice in such matters, and must rest upon the informed judgment of the school board in that behalf. Of necessity this must be so. The members of such boards are charged with that discretion. They are selected and elected by the voters personally because of their stability and wisdom of judgment in that behalf, and because, presumably, they have a live and abiding affection for the common schools. Accordingly if no increase of taxation be necessary, and if the district has accumulated by gift, by sale of other school property, or otherwise through routine of taxation, a surplus sufficient to buy sites, build schoolhouses, and furnish the same in the school wards of a town school district, the statutes do not contemplate that the voter should be called upon for a direct vote on building one or more ward schoolhouses, on furnishing the same, or in buying schoolhouse sites. The board of directors may move and act on their own initiative—contra when money is to be borrowed or an extra tax levied. Nothing we say is to be construed as meaning that the object to which the borrowed money is to be appropriated is not an integral part of the proposition to be submitted to a vote. Necessarily it becomes an integral element in order to make the proposition intelligible and carry information to the voter. *City of Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311; *Thompson-Houston Electric Co. v. City of Newton* (C. C.) 42 Fed. 726, 727.

Manifestly the natural place a lamp should be hung out to guide school boards and courts to the right goal of interpretation is in the very statute itself. These statutes are not charts to those learned and skilled in subtle refinements and dialectics, but charts to guide plain, matter-of-fact, everyday folk. That fact, I think, is the master key to unlock the door of correct interpretation. Attending to the statutes, one would naturally expect that if the Legislature intended the proposition of building a schoolhouse in each of two wards should be split in twain, it would have said so; and if the matter of furnishing the schoolhouses when built was a separate and distinct proposition from building them, it should have said so, and if the proposition of buying schoolhouse sites on which to erect the houses was a distinct and independent proposition from building and furnishing, it would have said so. But sections 9752 and 9752a say

requisite) and the furnishing of schoolhouses, conjointly, in the plural, not as detached, independent, and incongruous propositions, but as related parts of one subject, not as a double subject, but as a single subject. Accordingly we should hesitate long before we split that subject by driving a wedge of interpretation between its elemental parts, on the theory the parts are incongruous, detached, and independent propositions, not to be joined within the principle interdicting doubleness. We doubt not many bonds of Missouri school districts are outstanding, voted on the theory that building two or more schoolhouses, buying two or more sites, and furnishing houses built on those sites, was a single statutory subject-matter, properly put to be voted up or down as one proposition. To place a bar sinister across such bonds is a matter of so much gravity to the commercial honor of the state that courts should approach that result allowing every reasonable intendment in favor of validity, and with something of the same hesitancy they approach the determination of the unconstitutionality of a statute; for, as said, the vote of the people stands in just relation to the enactment of a statute, and the proposition carried stands in just relation to a local law—they stand or fall on the same character of reasoning.

3. Any whole or entire subject or proposition may be composed of parts, and any part, by further refinement, may be found to be composed of other parts. To illustrate: Let us suppose that any use of school funds in the improvement of a school building could be made only on a vote of the people. The school board concludes that two windows are necessary in a schoolhouse. Are two windows a single or a double subject or proposition? If double, then is one window a double or a single proposition? Mark, a window necessitates a hole in the schoolhouse wall. It means sash, glass, a window frame, casing, weights, pulleys, catches, etc. It is not insupposable that the voter might have his own ideas about the number of panes of glass to go into the window, and his own idea on each of the elements making up a window, including the hole in the wall. Is each of these elements to be submitted to the voter as a separate proposition? It is obvious that such refinement produces ridiculous results, and is analysis run mad, precisely as pointed out in the *Miller Case* in 45 Mo. 495, *supra*. See, in this connection, the reasoning of Peters, C. J., in *Hubbard v. Woodsum*, *supra*.

If the law be as contended by the learned Attorney General, then a town school district, having no site in either of two wards, and no schoolhouse and no plumbing, furnace, or ought else to furnish the same,

sue bonds to buy a site in ward 2? (c) Shall it issue bonds to build a schoolhouse in ward 1? (d) Shall it issue bonds to build a schoolhouse in ward 2? (e) Shall it issue bonds to furnish the schoolhouse in ward 1 when built? (f) Shall it issue bonds to furnish the schoolhouse in ward 2 when built? Now it is obvious to my mind that no such absurd excess of detail was within the legislative intent; nor is it "logrolling," or "jockeying," or "maneuvering," or using the arts of the "auctioneer," or "gamester," to unite those parts into one sensible, congruous whole, and to put that whole to the people as one subject. No part of that general subject can be said to be odious or unworthy. Every part is germane and related. Every patron in the Memphis school district is interested in the uplift of the schools of the entire district; the high school being the capstone of the system, and the ward schools feeding into that. The board has determined, as it had the right to do, that the general improvement of school facilities was necessary; and sites, houses, and furnishing are but correlated and connected parts (incidents, and details) of the rounded improvement. Of course in the proposition submitted there was no element touching the purchase of schoolhouse sites, but what is said is applicable to a proposition absent that element.

Stress is laid by way of argument on preserving the liberty of choice of the voter. As to that we say: Liberty of choice is excellent, and quite worthy of the law's protection. But, observe, the prime thing in sections 9752 and 9752a is schools, schoolhouses, and liberty of choice is directed to providing the wherewithal to increase such school facilities as are determined necessary by the school board—not otherwise. Those acts relate to the business administration of school laws, and that central idea must not be obscured by side issues. We make no manner of doubt that the liberty of choice to the individual voter may be gently and reasonably restricted to a rounded proposition as distinguished from the elements of that proposition. No other course is feasible, or likely to result practically and sensibly. To illustrate: The slips and inadvertences of individual voters are proverbial. Let us suppose that propositions "a," "b," "c," "d," "e," and "f" are printed on a ballot, with the words "For the loan" and "Against the loan" after each proposition. The collection of those phrases on one ballot is confusing to the voter. So a failure to erase is fatal to the vote. Now, suppose "c" be voted and "a" fail, how stands the matter? Or that "a" and "c" are voted and "e" fail, what then? Or that "a" and "e" are voted and "c" fail? Other hypotheses of the same sort, and leading to the same

abortive end, might be put. Or suppose the group of propositions relating to ward 1 succeed, and the group relating to ward 2 fail. In that event there would not be sufficient school facilities for the district, and the school board might better build a larger and more expensive schoolhouse in ward 1 to supply the school wants, so that the proposition as to ward 1 is no longer sensible; vice versa, the same might be true if the proposition as to ward 1 fail, and that as to ward 2 carry. We are of the opinion that the statutes in hand contemplate that the liberty of the voter should be exercised on the concrete whole encompassed by the words of the statute, if in the judgment of the school board the plan as a whole was a proper improvement to challenge a vote of the district. There can be no doubt that if the proposition we are considering was an act of the Legislature, instead of a proposition voted by the people, the act would stand as against the criticism leveled at it in the case at bar. May we deal more coldly and fastidiously with the people acting as sovereigns than we do with the lawmaker moving in his orbit? If so, why?

4. The ruling announced is well within precedents. Thus:

In *State ex rel. Columbia v. Allen*, Auditor, 183 Mo. 283,¹ it was ruled that a proposition to purchase an existing waterworks and light plant, and to provide for their extension so as to meet the increased needs of the inhabitants, was a single subject, and might be voted on as such. It can be readily seen that by superfine analysis that proposition could have been split into parts, and that voters might well entertain a diversity of views on one or another part.

In *State ex rel. Canton v. Allen*, Auditor, 178 Mo. 555, 77 S. W. 868, it was ruled that an order to test the sense of the voters on the subject of issuing bonds for the purpose of constructing, maintaining, and operating or purchasing an electric light plant to supply the town and all persons and parties therein with light was a single proposition as singleness is defined and contemplated by the law. It can readily be seen that one of the parts of the foregoing proposition was whether the city of Canton would go into the manufacture and sale of electricity to consumers. Another was whether they should purchase a plant outright. Another was whether they should construct a plant from the ground up. All these parts were held to constitute one subject and one proposition, and that holding cannot be justified, unless we apply the test that the parts are related, congruous, and germane to one general municipal subject, to wit, light and bonds to pay therefor.

In *State ex rel. Bethany v. Allen*, Auditor, 178 Mo. 555, 77 S. W. 868, it was ruled that a proposition to issue bonds for the construction of a city hall, and for the improvement of a waterworks and light plant, was double.

Obviously the parts of that proposition were not germane or related, and were incapable of becoming one single municipal subject. There was no natural connection between a city hall and a municipal water and light plant. It was an omnibus bill pure and simple.

In *State ex rel. Chillicothe v. Wilder*, Auditor, 200 Mo. 97, 98 S. W. 465, a proposition to issue bonds for a waterworks and electric light plant was held single. The bonds being invalidated for other reasons, it was recommended that in the next vote the form of the proposition be changed so as to call for "a combined waterworks and electric light plant." While the waterworks and electric light plant might be run by the use of the same fuel, and in part the same machinery, and under the same management, and thus unified, yet it is manifest that building a schoolhouse in one ward, and improving one in another, has more elements of unity. In the Chillicothe case water and light were supplied. In the Memphis proposition the purpose is to furnish increased school facilities. If in the Chillicothe proposition water and light, by consumption of the same fuel under the supervision of one department and of the same agents of the city, become single, so much the more does the improvement of the school facilities in an entire district, though the houses may be in separate wards, become a single proposition.

In *State ex rel. Joplin v. Wilder*, Auditor, 217 Mo. 261, 116 S. W. 1087, the proposition submitted was for a "sanitary sewer" in one district and a "storm sewer" in another. The scheme involved two different systems of sewers, and it was ruled a double proposition. The Joplin Case may be distinguished from the case at bar, and therefore is not controlling.

In *People ex rel. Mariposa County v. Counts*, 89 Cal. 15, 26 Pac. 612, it was ruled that the proposition to issue bonds for the construction of two public wagon roads, one from Coulterville to Bear Valley, and the other from Mariposa to Yosemite, was composed of parts that were germane and related, and therefore not bad for doubleness; the said roads intersecting with an existing road.

In *People v. Dunn*, 80 Cal. 211, 22 Pac. 140, 13 Am. St. Rep. 118, it was ruled that providing a permanent site for the California Home for the Care and Training of Feeble Minded Children, and the erection of suitable buildings, was a single purpose.

In *Rock v. Rhinehart*, 88 Iowa, 37, 55 N. W. 21, Iowa county had salable swamp lands. Marengo was the county seat. There was no courthouse. A proposition was submitted to the voters to erect a courthouse in Marengo not to exceed the sum of \$50,000, and to pay for the same out of the sale of swamp land. It was held a single proposition. Obviously that ruling could only be sustained on the theory that the two parts of the proposition were germane, and were so related as to

¹ 82 S. W. 103.

In *Truelsen v. Duluth*, 61 Minn. 48, 83 N. W. 714, the proposition put to the voters was to erect or purchase a water and light plant, and issue bonds to pay for the same, and it was held not double. In that case the election was held invalid because other incongruous and self-destructive propositions were submitted.

In *Hubbard v. Woodsum*, 87 Me. 88, 32 Atl. 802, supra, it was ruled that a proposition "to erect new county buildings, including court-rooms, offices for the several county officers, jury rooms, library rooms, and fireproof vaults for the records of the probate office, register of deeds, clerk of the courts, and county treasurer, also jail and jailor's house, at a cost of not to exceed \$30,000," on a described lot, and to hire money to build all said buildings by issuing the notes and obligations of the county, was but a single proposition, and comprised but one subject.

In *People ex rel. Attorney General v. Caruthers School District*, 102 Cal. 184, 36 Pac. 396, it was ruled that a proposition to purchase a lot and build a schoolhouse by issuing bonds covered but one subject.

The identical proposition was resolved in the same way in *People v. Sisson*, 98 Ill. 335.

In *Wimberly v. County of Twiggs*, 116 Ga. 50, 42 S. E. 478, it was ruled that a proposition to build and furnish a courthouse, coupled with one to build and furnish a jail, setting apart a certain sum for one and a certain sum for the other, all to be paid by one issue of bonds, comprised but a single subject, and was not bad for doubleness.

In *Kemp v. Town of Hazlehurst*, 80 Miss. 443, 31 South. 906, it was ruled that a proposition was not double the purpose of which was to erect a waterworks and electric light plant.

We deem the cases cited persuasive authority for the conclusion announced, although cases may be found ruling the other way.

The premises considered, our order for an alternative writ of mandamus should stand, and an absolute writ should issue. It is so ordered.

VALLIANT, C. J., and GANTT and WOODSON JJ., concur. BURGESS and FOX, JJ., concur in the result. GRAVES, J., dissents.

On Motion for Rehearing.

PER CURIAM. Rehearing denied.

GRAVES, J. (dissenting). Being the original dissenter in this cause, and by our rules having 10 days after final disposition to express my reasons for such dissent, I feel that the importance of the public question involved in the case justifies a trespass both upon time and space for an expression there-

that, when a question has been settled in one case by a majority of the court, dissenters should not persist in repeating their views in a subsequent case involving the same question. But in my humble judgment that proposition is not in this case. To my mind we have departed from the beaten paths heretofore marked out by this court, and launched out upon an unknown sea, and this, too, without rudder or compass. Vacillating opinions have been the bane of every court, and to the end that such should not be charged to the door of this court, we should not change our own holdings without saying to the bench, and the bar, and the public state officials of the state, that we have so done. Viewing this case as I do, it occurs to me that we have departed from the previous well-considered causes, and that, too, without saying so in plain and explicit terms. That a court has the right to change its views goes without question, and that it has a right to overrule previous holdings is equally unquestioned. Courts are not infallible any more than individuals are infallible, because, after all, courts are made up of individuals, and oftentimes with individuals having varying minds. Not only do I think we have departed from precedent in this cause, but I am impressed that a properly pleaded and urged contention, made by the state and the State Auditor through the learned Attorney General, has been entirely unconsidered by the opinion of my learned Brother who wrote it, and by my learned Brothers who assented thereto. This necessitates a statement of the issues, as such issues appear from the record, rather than as such issues may appear from mere conclusions. I would not feel called upon to write, except for the fact that the opinion of the majority opens up the floodgates to fraud, and in addition compels a state officer to certify to things which a conscientious man should not be compelled to state in an official certificate. But sufficient by way of preamble. Let us now get to the facts of this case.

The school district of Memphis in Scotland county, Mo., presented 45 school bonds of \$500 each to the State Auditor for registration under the law. These bonds were all of the same character so far as the tenor and wording thereof were concerned. The Auditor refused to register them, and this action in mandamus was brought in this court to compel him so to do. The petition sets out in detail the acts of the school district and its officers, up to and including its application for the registration of said bonds. Inasmuch as my Brothers in the majority have not seen fit to fully cover the allegations of the petition for mandamus, and the demurrer thereto filed by the Attorney General, I

deem it proper to take from the record the actual facts therein contained.

The petition of relator is fully set out in the abstract of record furnished to this court by the learned Attorney General. Such petition charges the corporate capacity of relator. It then charges the official position of respondent and his duties as State Auditor, in so far as they relate to the registration of bonds such as are involved in this case. The petition of relator then charges that on December 22, 1908, the school board made an order "in the matter of calling an election for the purpose of submitting to the qualified voters of said school district a proposition to incur indebtedness to the amount of \$22,500 and to issue bonds therefor for the purpose of erecting a schoolhouse in the First ward of said school district, furnishing the same, and to erect an addition to and improve the schoolhouse in the Second school ward of said school district." The petition of relator then charges that it appeared to the board of said school district that it was desirable to erect this new schoolhouse, and to erect an addition to the other. This board likewise determined that the costs thereof would not be less than \$22,500. Afterwards the school board of said district made an order as follows: "That a special election be held in said school district under and pursuant to the provisions of said section 9752 of the Revised Statutes of Missouri of 1899, on Tuesday, January 26, 1909, in the men's waiting room of the basement of the courthouse in the city of Memphis, Mo., for the purpose of submitting to the qualified voters thereof a proposition to incur an indebtedness for said school district in the sum of \$22,500, for the purpose of using \$20,000 of said amount in building a schoolhouse in the First school ward of said school district and furnishing the same, and \$2,500 of said amount to be used in building an addition to and improving the schoolhouse in the Second school ward of said district, and issue bonds therefor; said bonds to become payable in 20 years, with privilege of payment at the end of 5 years and bear interest at the rate of 5 per cent. per annum, payable semiannually."

The petition of relator further says that the notice given of such election was in the following form: "Notice is hereby given to the qualified voters of the independent school district of Memphis, Mo., that by order of the school board of said independent school district of Memphis, Mo., made on the 22d day of December, 1908, it was ordered that a special election of the qualified voters of said school district be held in the men's waiting room of the basement of the courthouse in the city of Memphis, Mo., on Tuesday the 26th day of January, 1909, for the purpose of authorizing the said board of directors to borrow money to the amount of \$22,500 and issue bonds for the payment thereof, for the purpose of using \$20,000 of

said amount in building a new schoolhouse in the First ward of said district, and \$2,500 of said amount to be used in building an addition to and improving the schoolhouse of the Second ward of said district; said bonds to run 20 years, with the privilege of payment at the end of 5 years, and to draw 5 per cent. semiannual interest from the date of their issue. The qualified voters voting at said election shall vote by ballot. Those voting in favor of the loan shall have written or printed on their ticket 'For the loan.' Those voting against the loan the words 'Against the loan.'"

It is further charged in the petition of relator that upon a return of the vote the propositions heretofore submitted as specified in the order, and the notice hereinabove quoted, received the necessary vote for adoption. It then appears that said school district by and through its directors entered the following order:

"Whereas, at an election duly called and held in school district of Memphis, Missouri, after notice thereof had been duly given for the time and in the manner required by law, there were authorized to be issued the school building bonds of said district to the amount of twenty-two thousand five hundred dollars (\$22,500.00).

"Therefore, be it resolved that under the authority aforesaid, there are hereby directed to be issued forty-five (45) school building bonds of five hundred dollars (\$500.00) each of school district of Memphis, Missouri, dated May 1, 1909, and becoming due twenty (20) years thereafter, which said bonds shall bear interest evidenced by coupons at the rate of five per cent. per annum, payable semiannually. Both principal and interest of said bonds shall be made payable at the Mercantile Trust Company in the city of St. Louis, Missouri.

"Be it further resolved that the bonds hereby authorized shall be in substantially the following form:

"No. ———. \$500.00

"United States of America, State of Missouri, School District of Memphis, School Building Bond.

"Know all men by these presents that school district of Memphis, in the state of Missouri, acknowledges to owe and for value received hereby promises to pay to bearer five hundred dollars lawful money of the United States of America on the first day of May, 1929, with interest thereon from the date thereof at the rate of five (5) per centum per annum, payable semiannually on presentation and surrender of the annexed interest coupons as they severally become due. Both principal and interest of this bond are hereby made payable at the office of the Mercantile Trust Company in the city of St. Louis, Missouri.

"This bond is redeemable at the option of the school board of Memphis at any time after May 1st, 1914.

"This bond is one of a series of like tenor issued for the purpose of providing funds for the erection of a school building in and for said school district of Memphis under the authority of chapter 154 of the Revised Statutes of 1899 of the state of Missouri (Ann. St. 1906, pp. 4459-4568), and of an election duly called and held in said district; and it is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuing of the bond have been done, happened and been performed in regular and due form as required by law; that a direct annual tax has been duly levied upon all of the taxable property in said school district of Memphis for the payment of the principal and interest of this bond at their respective maturities, and that the total debt of said district, including this bond, does not exceed the statutory or constitutional limitations.

"In testimony whereof, the board of school directors of Memphis, Missouri, has caused this bond to be signed by its president and attested by its secretary, and has caused the annexed interest coupons to be executed with the fac simile signatures of said officers this first day of May, 1909.

"Attest: W. T. Reddish, Secretary,
G. E. Leslie, President."

It should be stated here that the bond set out in relator's petition, duly copied from the petition as above set out, is the bond that was presented to the Auditor for registration, and none other. In other words, the entire bond issue is in the form set out in relator's petition.

Upon the filing of relator's petition in this court, which said petition was duly verified by oath, and contained the bond hereinabove set out, the Attorney General, when called upon to plead thereto for and in behalf of the respondent, the State Auditor, filed the following demurrer: "Now comes the respondent, John P. Gordon, State Auditor of the state of Missouri, and, waiving the issue of an alternative writ in the above-entitled cause, demurs to the petition of the relator herein, and assigns the following as his grounds of demurrer, to wit: First, said petition fails to state facts sufficient to constitute a cause of action; second, because the petition upon its face discloses that two separate and distinct propositions were submitted and voted upon jointly; third, said petition and the matters and things therein as stated and set forth are not sufficient in law nor in equity to entitle the relator to the relief asked for in said petition, nor to authorize the issuing of the writ of mandamus therein prayed for. Respondent further says that by reason of the demurrer hereinabove set forth, he should be dismissed with his reasonable costs."

The case came on to hearing upon the petition of relator fairly abstracted as aforesaid, and the demurrer as aforesaid. Questions of law will be noted during the course of the opinion.

1. The foundation of the majority opinion is to the effect that we must determine whether or not a proposition as submitted to voters is double by the same rule that we determine a doubleness of a proposition in a title to a bill before the Legislature, under article 4, § 28, of the Constitution. This rule of construction we do not concede, nor do the cases in this state proceed upon any such theory, except the present opinion, in which we transplant the ideas of the Supreme Court of Maine to Missouri. In a way the two questions may be akin in that the prevention of fraud is a purpose to be attained in each. But the difference lies in the fact that in determining doubleness in legislative acts the courts do it under constitutional edict, whilst such is not true in determining doubleness of a proposition to be voted upon by the people. For a proper conception of the difference we must consider the duties of a court under the Constitution, and the duties of a court in the course of administering justice according to a proper understanding of the law. The people made the Constitution, and when in their sovereign power they have said that a thing must be done in a certain manner, it does not lie within the power of the courts, or any other creature of the Constitution, to gainsay such expressed will. Not so, however, where the court in dealing with a question not specifically provided for by the fundamental law, to wit, the Constitution.

The sovereign power which prescribes the things which might be and might not be done, likewise created the courts and other departments of government. If the voice of the constitutional making power—i. e., the people—said that under certain circumstances specific things must be done, it is not for the courts, the creatures of the same Constitution, to gainsay such constitutional mandate. If the Constitution (the express voice of the people) says an instrument must be framed in certain language, it is not for the courts, the mere creatures of the Constitution, to say that it shall not be done. For these reasons we have held, and rightfully held, that indictments must conform to what the sovereign power of the state has said must be done. *State v. Warner* (not yet officially reported) 119 S. W. 399; *State v. Campbell*, 210 Mo. 202, 109 S. W. 706; *State v. Skillman*, 209 Mo. 408, 107 S. W. 1071. In other words, the people who make and unmake Constitutions have spoken. In so speaking they not only prescribe a certain course of conduct, but likewise create the courts, and give to them the only powers which they possess. It is not the province of the creature to tear down and rebuild the structure of the creator. What the creator said as to how certain things could and should be done, if clearly expressed, is not a matter for the courts, the mere creatures of the same power. Of course, if the language is dubious and doubtful, the courts can consider it and interpret it, but not otherwise. So that we say that

the basis of the construction fixed by the majority opinion is improper, in that there is no analogy between things which must be done under constitutional mandates and things which may be done under the judgment of the courts in the administration of justice. Mandates of a Constitution may, and often do, appear to be unreasonable, yet if couched in plain language, and in no way dubious or uncertain, the courts, the creatures of the same instrument, must bow in humble submission to the constitutional mandate. We know that in some instances modern practices have been to hold as naught constitutional provisions, and for courts and other governmental agencies to write anew these venerable instruments. To this modern doctrine we have never adhered, and as long as constitutional government is to be ours, will never lend our assent.

But to the rule of construction adopted by the majority opinion in this case, let us now revert. Constitutional mandates, whether reasonable or unreasonable, must be followed by the courts, because the courts (the stream) can never rise higher than the source. There may be one or two expressions from the courts, now seized upon by the majority opinion, to place the construction of what is a double proposition upon the basis of a constitutional mandate concerning double propositions, but these cases are so few and far between that serious discussion of them can well be omitted. Doubtless of propositions in questions to be voted upon by the people did not have its origin in constitutional mandates, and, with one or two exceptions up to the present case, has never been reckoned along that line. Be it further said that such exceptions do not come from Missouri. It is true that we have studiously avoided in this state intrenchment upon the Constitution, and we have likewise through our courts as studiously undertaken to prevent and avoid frauds in all kinds of elections. We have denounced double propositions which were calculated to secure votes which could not otherwise be secured. We have done this in Missouri prior to the present opinion, on the theory that the courts would and could suppress frauds, and could and would see that there was a fair expression upon each and every question relating to taxation, but not on the theory that there was any special analogy between the performance of this duty and certain constitutional mandates. The difference lies in this: That constitutional mandates must be obeyed whether reasonable or unreasonable, but the fact as to whether or not the courts should permit a double proposition, which upon its face indicates that there was a purpose to obtain votes for the proposition which could not otherwise be obtained, rests upon an entirely different theory. The latter question rests upon the sound discretion of the courts in the administration of justice to prevent a fraudulent exercise of the tax-

ing power of the state, a power closely scrutinized by the courts.

So to our mind the discussion of what can and cannot be placed in the title clause of a bill pending before a Legislature has no special significance here. Not only so, but the construction given to said titles are and would be repugnant to what a court would say as to the exercise of the taxing power of the state. The title to a bill is only expected to be a fair index to the context of the bill. On the other hand, propositions relative to the taxing power of the state, and propositions to be voted upon by the plain people, must be plainly stated, and in single and substantial form. Not only so, but they must be so stated as to avoid what has been denominated by the courts as "logrolling" in the interest of a combined proposition, which would not occur in the interest of a single proposition. The courts in the administration of justice, and without any reference to constitutional mandates, have discovered that doubleness of propositions to be voted upon by the public was inductive of fraud, and that it was uncertain whether either of two or more propositions could have been carried by vote had they been submitted singly. To obviate this fraud upon the taxing power of the state this court, up to the present time, and excepting the present case, has consistently turned its face against doubleness of propositions and the frauds which are the necessary outgrowth thereof. However, before going to the holding of the courts of this state, it might be well to submit the general proposition of law resulting from the examination of all cases bearing upon the question.

In 21 American and English Encyclopedia of Law (2d Ed.) it is said: "Two propositions cannot be united in the submission so as to have one expression of the vote answer both propositions, as voters might be thereby induced to vote for both propositions who would not have done so if the questions had been submitted singly." This announcement of the general doctrine is not only in full accord with the cases in Missouri, but with all of the jurisdictions to which our attention has been called. And if we be called upon to assign a reason for this salutary rule, that reason would be that the taxing power of the state should be exercised with the utmost openness and fairness, and without opportunity for "jockeying" and "logrolling." In other words, the courts of the country generally, in matters which go to the exercise of the taxing power of the state, have been exceedingly cautious to see that such power was exercised by a fair expression at the election held for such purpose. The question is not whether a constitutional mandate has been followed, but whether the proposition submitted is one which tended within itself and upon its face to induce "jockeying" and "logrolling" in order to carry a combined proposition. That

extremely anxious to have voted a large sum for buildings in that ward, it would be easy to have a proposition submitted to make nominal improvements in the other four wards in order, by "jockeying" and "logrolling," to secure the necessary votes. Against this proposition the courts of this state, and in my judgment in most other states, have turned a deaf ear. Yet that is the proposition that confronts us in the present case.

As expressive of the latest views on this proposition, this court, in the case of *State ex rel. v. Wilder*, 217 Mo. 281, 116 S. W. 1087, said: "But there is another reason why a peremptory writ should not be awarded in this case, and that is that the proposition submitted to the voters embraced two separate and distinct propositions; one for the construction of a public sanitary sewer in district No. 7, in West Joplin, and another for the construction of a storm sewer in Willow Branch district, in said city. In the way this was submitted to the voters they had no alternative than to vote, if they voted at all, for or against both propositions. They could not vote for one and against the other, however much they might have desired to do so. In *State ex rel. v. Allen*, 186 Mo. 673, 85 S. W. 531, the proposition voted upon at the election was 'for said city to become indebted in the sum of twelve thousand dollars in excess of its annual revenue for the following purposes, to wit: Forty-five hundred dollars to be used for the purpose of purchasing a site and the erection and construction of a public building thereon or the purchase of a site and building to be used as a city hall, city prison and hose house and for furnishing the same, and the further sum of seventy-five hundred dollars to be used in making repairs and improvements in waterworks and electric light plant and extension of water mains and electric lines belonging to said city.' This was all submitted as a single proposition. It was held that this submission contained at least two separate and distinct propositions, one for an increase of municipal indebtedness to a certain amount for one purpose, and one for an increase of municipal indebtedness for another and different purpose, and 'that two propositions cannot be united in the submission so as to have one expression of the vote answer both propositions, as voters thereby might be induced to vote for both propositions who would not have done so if the questions had been submitted singly' (21 Am. & Eng. Ency. Law [2d Ed.] 47), a principle recognized by this court in the recent case of *State ex rel. v. Allen*, 178 Mo. 555, 77 S. W. 868. The voters should have been given the opportunity to vote for and against each object. As submitted, the voters could vote for or against both, but not

are not contiguous, nor do they lie in the same part of the city, nor in the same natural drainage area, and the proposed sanitary sewer in district No. 7 would not in any manner connect with, or have any relation to, said storm sewer; nor would the citizens of Willow Branch district have any interest in the proposed sanitary sewer for district No. 7, nor would the people of the city of Joplin, outside of said proposed sewer districts, be served or benefited by either of them."

And in the case of *State ex rel. v. Allen*, 186 Mo., loc. cit. 675, 85 S. W. 532, cited supra, written by our Chief Justice Brace, the following was said: "That this submission contained at least two separate and distinct propositions, one for an increase of municipal indebtedness to a certain amount for one purpose, and another for an increase of municipal indebtedness to another and different amount for another and different purpose, is beyond question. And it being manifest that such a submission was in the teeth of the well-recognized principle of law 'that two propositions cannot be united in the submission so as to have one expression of the vote answer both propositions, as voters thereby might be induced to vote for both propositions who would not have done so if the questions had been submitted singly' (21 Am. & Eng. Ency. of Law [2d Ed.] 47), a principle recognized by this court in the recent case of *State ex rel. v. Allen*, 178 Mo. 555, 77 S. W. 868, the motion to quash the alternative writ was unanimously sustained, orally, by the court en banc, on the submission of the case on the 24th of December, 1904, by which it was, in effect, held that the bonds issued in pursuance of such election were invalid, and the Auditor under no obligation to register them. This opinion is written simply to make that ruling more explicit." Of course it does appear in the opinion last quoted that the writer of the majority opinion in this case did not sit, possibly for the reason that he was not present at the time of the argument, although that reason does not appear.

These, however, like the case in 217 Mo. 281, 116 S. W. 1087, above cited, were opinions by this court en banc. Not only so, but the opinion in each case was unanimous, with the exception aforesaid.

It will be noted that Chief Justice Brace quoted with approval 21 Am. & Eng. Ency. of Law (2d Ed.) p. 47, and in our humble judgment in so doing he gathered to his case the summarized views of the vast majority of the courts.

From the cases above mentioned, and from all other Missouri cases, it will be observed that we have adhered to the doctrine that doubleness of a proposition to be submitted

theory that the voter has not had the privilege of casting a separate and distinct vote upon each proposition, and not on the theory that any constitutional mandate as to the title of a bill has been violated.

To hold that doubleness should be determined by the construction which the courts placed on constitutional mandates can easily be shown to be erroneous. In the first place, courts generally hold under such constitutional mandates that, if the title is a fair index to the bill, and the questioned subject-matter is germane to the subject expressly provided for in the title, then the title meets the constitutional mandate. Yet, whilst this is true, and our courts have so held, who for a moment would say that where the taxing power of the state was to be called into question, the proposition, the purpose of which was to carry the tax, should not be specifically and plainly stated? In other words, in cases of that character the question as to whether or not the subject-matter is germane to the proposition is not a matter of consideration. There can be no such a thing as a germane matter to the proposition to be voted upon in the exercise of the taxing power of the state, however true this may be as to the doubleness of propositions in legislative matters. It occurs to us therefore that the very foundation of all the reasoning expressed by the majority opinion absolutely falls with a consideration of the difference between propositions which involve the taxing power of the state and propositions relative to what may not be germane subject-matters in the title to a bill. At most be it said that up to this opinion nowhere in the annals of the state has such a comparison been made. The rule of construction is wrong. What might be doubleness of propositions in the title to a bill is determined by many considerations which could not be applied to what is meant by doubleness of propositions as applied to questions involving the taxing power. The two questions are akin only to the end that they both tend to suppress fraud. If we were to apply the rule "germane to the subject," as we do in construing the constitutionality of laws, to the propositions submitted in exercising the taxing powers of the state, where would be the end? In our judgment the Missouri cases cited above, together with several others, should be overruled, in the present opinion, if it be correct, so as to no longer be stumbling blocks to public officials in the discharge of their duties.

2. Not only does the Supreme Court of Missouri place this doubleness of proposition on the basis of violating the right of a full and fair public expression upon matters pertaining to taxation, but other courts have been equally expressive.

In *Leavenworth v. Wilson*, 69 Kan., loc. cit. 78, 76 Pac. 401, that court says: "The subject of purchasing a particular water-

diverse from that of building a new one. It needs neither argument nor illustration to make this plain truth apparent to any mind of ordinary capacity. The judgment of the mayor and council upon one of these subjects might well be approved by the people through a majority vote in favor of bonds, although the judgment of the same officials upon the other subject-matter would be overwhelmingly repudiated at a bond election. The ballot required to be used at the election in question obliged the voter to approve bonds for both purposes, or to reject bonds for both purposes. If he favored one plan and disapproved the other, he was allowed no opportunity to indicate his view. Because of the dual ballot persons adverse to purchase may have voted with persons adverse to building, for bonds which, thus supported, carried, although both propositions would have failed ignominiously had they been separately submitted. Therefore the election was not a fair one to the people of the city of Leavenworth."

Likewise, in the case of *Gas and Water Co. v. City of Elyria*, 57 Ohio St. 374, 49 N. E. 335, the court, among other things, said: "And it is the policy of the statute that the proposition for each separate improvement shall stand on its own merits, unaided by combination with any other measure, and be so acted upon by the council in the first instance, and then, if adopted, be so submitted for approval by the electors that each may be voted upon as a separate measure uninfluenced by combination with others. The reason is that the requisite majority of the council, and of the electors, may be in favor of one measure, and against the others, or against each, while, by uniting them as one, and submitting them to be acted upon in that form, the members of the council, and the electors, are required to vote for or against both propositions combined, or abstain from voting at all, and thus denied the right to express their will with respect to each."

In *Truelson v. City of Duluth*, 61 Minn. 48, 63 N. W. 714, it was said: "If the city council desired to place a proposition to erect a water and light plant fairly and reasonably before the voters, as against a proposition to purchase the existing plant, the propositions should have been submitted so as to allow a free and full expression on the real merits of each."

A very similarly worded proposition comes from the state of Washington. We say similarly worded because, in this proposition, the first statement made is in reference to a proposition to borrow \$25,000, which was followed by a subdivision of the \$25,000 into particular parts, as in the case at bar. That court, speaking of such proposition, said: "By ordinance 178 the city council ordered the submission of a proposition to borrow \$25,000 upon time bonds, under the act of

March 7, 1891 (Acts 1891, p. 261, c. 128). The purposes for which this money was to be borrowed were set forth in the ordinance as: (1) To pay outstanding indebtedness, \$20,000; (2) for the purchase of fire apparatus, \$1,500; (3) for the purchase of a lot of land, and the erection of a city hall and jail thereon, \$3,500. But one ballot was used, 'Bonds, yes,' and 'Bonds, no,' and appellant contends that this was irregular, inasmuch as there were two propositions, involved, viz., a proposition to fund \$20,000 of old debts, and a proposition to borrow \$5,000 for future purposes. We agree with him in this, notwithstanding the argument of the respondent that the statute is broad in its permission to borrow money for municipal purposes, and that the acquisition of money to pay debts is a strictly municipal purpose." *McBryde v. Montesano*, 7 Wash. 69, 72, 34 Pac. 559, 560. See, also, 20 A. & E. Encl. of L. (2d Ed.) 1111; 21 A. & E. Encl. of L. 47.

In *Lewis v. Commissioners of Bourbon County*, 12 Kan. 186, even stronger language than we have used was employed by the court to express its disapproval of doubleness of propositions under the taxing power. "It may be conceded that two or more questions may be submitted at a single election, provided each question may be voted on separately, so that each may stand or fall upon its own merits. But that is a very different matter from tacking two questions together, to stand or fall upon a single vote. It needs no argument to show the rank injustice of such a mode of submission. By it several interests may be combined and the real will of the people overslaughed. By this combination an unpopular measure may be tacked onto one that is popular, and carried through on the strength of the latter. A necessary matter may be made to carry with it some private speculation for the benefit of a few. Things odious and wrong in themselves may receive the popular approval because linked with propositions whose immediate consummation is deemed essential. It is against the very spirit of popular elections."

In the case of *Keane v. Ft. Scott*, 14 Fed. Cas., loc. cit. 162, the proposition under which bonds were issued thus read: "\$75,000.00 to the capital stock of the Missouri, Kansas & Texas Railroad, and \$25,000.00 for the purpose of procuring the right of way for the road of said company through the corporate limits of this city, and the purchase of grounds for depot and machine shops to be donated to the company." The city attempted to defend in the suit upon the bonds in the hands of a bona fide purchaser. In discussing this contention Judge Dillon uses this language: "The objection to the submission would probably have been well taken in a suit to prevent the issue of bonds, but it comes too late now."

3. By petition in this case relator has pleaded and fully set out the different steps taken. Relator has further furnished in said pleadings a copy of the bond, and copy of the questions voted upon, and all other things necessary to show the exact proceedings had by the school district. From that petition it will be noticed from our statement that the school board directed that there be submitted to the qualified voters a proposition to incur indebtedness and issue bonds therefor in the sum of \$22,500; this sum to be used for a schoolhouse in the First ward, and furnishing the same, and to erect an addition to and improve the schoolhouse in the Second ward. It will further be noticed from the record, which we have purposely set out at length, that the notice which was caused to be published said nothing about furnishing the new schoolhouse in the First ward, and in that manner departs from the order of the school board. Lastly, when we go to the order for the issuance of the bonds and the bonds themselves, we find that the order shows nothing as to dividing the funds for two separate purposes, but the bonds themselves say on their face: "This bond is one of a series of like tenor issued for the purpose of providing funds for the erection of a school building in and for said school district of Memphis."

It will be observed that, whilst the proceedings show that two schoolhouses were to be built, yet they issue 45 bonds of \$500 each, being the full amount of \$22,500, and recite that these bonds are to build "a school building," but do not recite that they are for the double purpose of building one new building and remodeling or rebuilding an old one. Under section 5167, Rev. St. 1899 (Ann. St. 1906, p. 2700) the Auditor of State is required, when bonds are presented to him, to make a certificate to this effect: "And who shall certify by indorsement on such bond that all the conditions of the law have been complied with in its issue, if that be the case, and also that the conditions of the contract under which they were ordered to be issued have also been complied with, and the evidence of that fact shall be filed and preserved by the Auditor." Notwithstanding this provision of the statute, this court by its majority opinion has sought to compel the Auditor to certify that he had evidence on file in his office showing that, by proper and legal proceedings, these bonds, 45 in number, and of the value of \$500 each, had been duly authorized for "a school building."

It was the duty of the relator by his petition to aver facts to show that he was entitled to the relief sought. That relief is prescribed by section 5167. When relator set out all the proceedings, as was done in this case, and the respondent by the first terms of his demurrer, set out in full in our statement, challenges the sufficiency of that petition in every respect, then it be-

on this demurrer, to see that all proceedings to entitle the registration of the bonds fully appear. Nor will it do to say that this question was not pressed upon the court. The first brief filed by the learned Attorney General suggested to this court that the recitation of the bonds were at variance with the proceedings in the case, and in the motion for rehearing it is most strenuously urged, and in my humble judgment we have handed down an opinion which directs the registration of any bond which may hereafter be tendered. Throughout the entire school proceedings part of these bonds were to be for one schoolhouse and part for another and yet we say, by the opinion of our Brothers in the majority, that the state official, charged with scrutinizing the proceedings, shall register a bond which recites upon its face that it is one of the number which covers the entire appropriation, and is for "a school building," and not for two buildings.

We have lengthened this dissenting opinion, in the way of elucidating facts, more perhaps than ought to have been done. We thought it due, at least to the public and to public officials, that a full statement of the proceedings which authorized the registration of these bonds should appear.

We are clearly of the opinion, for at least two reasons, that these bonds should not have been registered: First, because of the doubleness of the proposition; and, second, because the bonds tendered for registration are not in conformity, by way of their recitations, with the other proceedings had by the school district.

BURGESS and FOX, JJ., concur in these views, and are of the opinion that the motion for rehearing should have been sustained.

MEEK v. HURST.

(Supreme Court of Missouri, Division No. 1. Nov. 27, 1909.)

1. REFORMATION OF INSTRUMENTS (§ 19*)— GROUNDS—MUTUAL MISTAKE.

To justify the reformation of an instrument on the ground of mistake, the mistake must have been mutual, which may arise from a mistake made by a scrivener, who was acting as mutual agent of both parties in drafting the instrument.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 75-78; Dec. Dig. § 19.*]

2. REFORMATION OF INSTRUMENTS (§ 36*)— GROUNDS—PLEADING.

Though a contract may be reformed and subsequently enforced in the same suit, a reformation will not be granted, unless the elements necessary to justify it are pleaded as grounds for relief.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 141; Dec. Dig. § 36.*]

MENT OF PART OF CONTRACT.

A purchaser may, at his option, have specific performance of that part of the contract susceptible of specific performance whenever a decree will, in the sound discretion of the court, result in equity between the parties.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 20; Dec. Dig. § 10.*]

4. PLEADING (§ 214*)—DEMURRER—ADMISSIONS.

A demurrer admits substantive facts well pleaded, but mere conclusions of law, such as the pleader's construction of a written instrument forming the basis of the action, are not admitted.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 523, 527; Dec. Dig. § 214.*]

5. CONTRACTS (§ 176*)—CONSTRUCTION—QUESTION FOR COURT.

The construction of an unambiguous and entire contract, pleaded as the basis of the action, is for the court.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 767-770; Dec. Dig. § 176.*]

6. VENDOR AND PURCHASER (§ 3*)—SALE OR AGENCY—CONSTRUCTION OF CONTRACT.

A contract by an owner of land, authorizing an agent to sell the land on terms specified, and which binds the owner to execute conveyances, and declares that the authority is irrevocable for a specified time, does not give the agent an option to purchase, but is a power of attorney irrevocable for the specified time, and imposes on the recipient of the power the duties of an agent.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. § 3.*]

7. PRINCIPAL AND AGENT (§ 69*)—DUTIES OF AGENT TO PRINCIPAL—PURCHASE OF PRINCIPAL'S PROPERTY.

The doctrine which forbids an agent to buy from or sell to himself is based on the idea of preventing the commission of fraud.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 138-139; Dec. Dig. § 69.*]

Appeal from Circuit Court, Livingston County.

Action by B. J. Meek against John B. Hurst. From a judgment of dismissal rendered on sustaining a demurrer to the plea, plaintiff appeals. Affirmed.

Davis & Son and Kitt & Taylor, for appellant. L. A. Chapman, for respondent.

LAMM, P. J. Plaintiff claims to have purchased defendant's land in Livingston county by written contract, and sues for reformation and specific performance. Cast nisl on a general demurrer to his first-amended bill, he refused to plead over, suffered judgment, and appealed.

The reformation sought relates to the contract description of the real estate, which is: "S. W. ¼, sec. 14, and 6½ acres out of S. E. ¼ sec. 14. All in Twp. 59, R. 24, containing in all 165½ acres." Referring to the "6½ acres," plaintiff's bill charges said contract description is not the true one, but related to an agreement to sell two small parcels of land, viz., an acre off the south end of the S. W. ¼ N. E. ¼ of section 14, and 4½ acres, more or less, described by given metes

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

and bounds, in the S. E. $\frac{1}{4}$ of said section. In that regard the bill charges "that by a mistake of the scrivener in drawing said contract" the said two small parcels were described as "6 $\frac{1}{2}$ acres out of the S. E. $\frac{1}{4}$, sec. 14, instead of the true description" as set forth. It is not alleged in the bill that the scrivener in drafting the contract was the mutual agent of plaintiff and defendant; nor is it alleged that the mistake was a mutual mistake of the parties to the contract. It is charged that plaintiff is a real estate agent, plying his vocation at Chillicothe as a dealer in buying and selling land. The record shows the contract was partly in print and partly in writing. Presumably it is a blank form used by plaintiff in his business. While not material to any question to be determined, it is fair to presume, from the usual course of business, that the "scrivener" was the plaintiff himself, who filled out his own blank.

Referring to the phase of the bill anent specific performance, it will not be necessary to set forth the entire bill. In brief, it alleges the contract consisted of two parts, both in writing, bearing different dates, but relating to each other, and both pleaded in *hæc verba*: the first part reading: "Authority to Sell. No. ——. I, John B. Hurst, of Chula, P. O., Livingston county, state of Missouri, hereby authorize B. J. Meek, of Chillicothe, Mo., to sell the following described real estate, situate in the county of Livingston, state of Mo., to wit: S. W. $\frac{1}{4}$ sec. 14, and 6 $\frac{1}{2}$ acres out of S. E. $\frac{1}{4}$, sec. 14. All in Twp. 59, R. 24, containing in all 165 $\frac{1}{2}$ acres, and to make contract therefor in my name, subject to the condition herein-after named. I agree to accept in full payment of said farm the sum of \$3900.00 net to me, and cure title. In payment of the above-mentioned sum net to me, I agree to accept \$——. All (or not less than \$—— All) cash. I would want \$500.00 to bind sale, balance March 1, 1906. I agree to give possession of said premises Mar. 1—1906. I agree in case of sale to give purchaser a general warranty deed to the above-described premises, and to furnish him a complete abstract, which shall show a fee-simple title in me. This authority is irrevocable for a period of 30 days from its date, after which it can be terminated by giving notice in writing of the intention to withdraw. Witness my hand at Wagon Road date April 25, 1905. [Signed] J. B. Hurst, Owner." The second part reads: "May 9, 1905. Received of B. J. Meek \$500.00, in part payment of my land situated in Livingston county, Missouri, consisting of 165 $\frac{1}{2}$ acres, in compliance with a contract entered into by me on the 25th day of April, 1905. [Signed] J. B. Hurst." For convenience, that part of the contract headed "Authority to Sell," of date April 25, 1905, will be called "A," and the receipt of date, May 9, 1905, "B."

The bill is not drawn on the theory there was an oral contract between plaintiff and defendant relating to the purchase of real estate, followed by such possession in (or performance by) the vendee, or payment in whole or in part, or valuable improvements made as would operate to take the case out of the statute of frauds and perjuries. Nor is it drawn on the theory that the written contracts were modified by an after oral agreement, accompanied by such possession and performance, etc., as would take the case out of the statute of frauds and perjuries. Contra, the bill is drawn on the theory that the whole contract was in writing, and consisted of "A" and "B." The pleader's construction of the written contract is set forth in the bill to be that plaintiff had an option to buy the land for a period of 30 days from April 25, 1905, and that defendant desired "to sell the land to plaintiff, or to place the same in his hands for sale," and to that end executed "A"; that on May 9, 1905, it was agreed that plaintiff should buy, and to that end defendant executed "B"; that plaintiff thereby made his choice under "A" to buy in his own proper person. The pleader next assumed that his pleaded construction of "A" and "B" was correct, and, on that assumption, charges in his bill that defendant, under the terms of "A" and "B," was bound to make him a good and sufficient warranty deed on making full payment. He then avers a tender of the full contract price on March 1, 1906; also that prior to that time, to wit, 4 days after the receipt of the cash payment, defendant repudiated the contract, refused to make a deed and tendered back to him (plaintiff) the cash payment, whereupon plaintiff then and there tendered the balance of the purchase price, and demanded a deed, which demand and tender defendant refused. That we have put the right construction on plaintiff's bill is evidenced by the following excerpt from his counsels' brief, viz.: "Defendant is the owner of the 165 $\frac{1}{2}$ acres situate in section 14, township 59, range 24, in Livingston county, Mo. On April 25, 1905, he entered into a contract with plaintiff for the sale of said land for the sum of \$3,900; \$500 to be paid in cash, and the remainder, \$3,400, to be paid on March 1, 1906, and on May 9, 1905, plaintiff, in compliance with the terms of said original contract, paid defendant the \$500 which was to be paid in cash, and defendant executed his written receipt therefor, which receipt shows, in connection with said original contract, that defendant is the seller of said land, that plaintiff is the purchaser thereof, and that said \$500 was paid on said land in compliance with said original contract, made April 25, 1905." The foregoing is enough of the record to pass upon the demurrer.

1. Absent any express averment of surprise, misrepresentation, or other form of fraud, or that the mistake was a mistake of

or an averment from which mutuality could be fairly inferred, the bill did not state a cause of action in equity for the reformation of a contract on the ground of mistake; for it is the general doctrine of equity that a mistake common to both is an indispensable element to the reformation of a contract. 1 Story Eq. Juris. (13th Ed.) § 155; Castleman v. Castleman, 184 Mo. 432, 83 S. W. 737; Benn v. Pritchett, 163 Mo. 560, 63 S. W. 1103; Williamson v. Brown, 195 Mo. 313, 93 S. W. 791. Mutuality might arise from the fact that the mistake was the mistake of a scrivener, who acted as mutual agent of both parties in drafting the contract, but plaintiff's bill is dark on that score. It may be conceded to appellant that by the same suit in equity a contract may be reformed and also specifically enforced, but reformation will not go, and the bill will be bad in that regard, unless elements necessary to the application of that equitable doctrine are pleaded as grounds for the relief.

2. But the question of reformation is not decisive of the case; for we take it as accepted doctrine that a vendee (at his option) may have specific performance of that part of the contract susceptible of specific performance whenever a decree can go which, in the sound discretion of the chancellor, will do rounded equity between parties litigant. Attending to the sufficiency of the bill in stating a cause of action for specific performance, we conclude the demurrer was well taken. This, because:

(a) For the purposes of a demurrer, all allegations (not absurd or impossible) of substantive fact well pleaded are taken as true. But this doctrine goes hand in hand with another, viz., that for the purposes of a demurrer these allegations of the bill announcing mere conclusions of law are not admitted; and, akin to the last proposition, there is another, viz., that the pleader's construction and interpretation of a written instrument lying at the root of his cause of action and set forth in the bill are not taken as true on demurrer. To the contrary, it is for the court, not the pleader, to put a construction upon an unambiguous and entire contract pleaded as the basis of recovery or relief, as here. We have so lately and fully ruled this question in *Donovan v. Boeck*, 217 Mo., loc. cit. 83, 116 S. W. 543 et seq. (q. v.), that further exposition is out of place. This is a typical case calling for the application of that doctrine.

(b) Applying it, we deem the interpretation put upon "A" by the pleader is a strained one. Construed by its terms and plain intendment, it is bare of any element giving plaintiff an option to buy defendant's land. There is no word in it showing their minds met on that proposition. "A" is obviously power of attorney, irrevocable for 30 days, authorizing plaintiff, as defendant's agent, to sell the land, and to contract for such

defendant, binding defendant to accept a partial cash payment of \$500 as earnest money, or all cash, furnish an abstract showing a fee-simple title, and make a general warranty deed on payment of the balance of the agreed net price by March 1, 1908. In other words, the confidential relation of principal and agent was created between plaintiff and defendant; and, since no man can contract with himself, that relation forbade the use of the authority to sell, to consummate a purchase in his own person. Unquestionably that fiduciary relation could be brought to an end and, in that event, Hurst and his sometime agent could deal in relation to the subject-matter at arm's length, and make any new valid contract they saw fit to make, but there is no allegation of that sort in plaintiff's bill. It does not allege that the relation of principal and agent, once existing, had come to an end; nor does it allege a new contract in that the agent made all disclosures to his principal by giving him the benefit of full information, and that the principal elected to deal with the agent as purchaser under a valid contract then entered into. To the contrary, this plaintiff alleges (and plants himself upon the proposition in his brief) that the instrument called "A," in and of itself, gave him an option to purchase, and that he acted on such option as of clear legal right. In that view of the case plaintiff's learned counsel must be held to contend, in effect, that if Mr. Meek, as agent of Hurst, had entered into a written contract with himself as the other contracting party, it would not have been contrary to good morals, but would have been in compliance with the terms of "A"—a position bad in morals and law, and which learned counsel would concede to be bad when baldly stated as above. We are of the opinion that under the allegations of this bill the payment and receipt evidenced by "B" was a pursuance of the authority given in "A," which in turn implies and presupposes that plaintiff had sold to a third party, and received \$500 to bind the bargain.

The doctrine of the law that forbids an agent to buy from or sell to himself is not necessarily based on the idea that such deal in dirt is (to speak colloquially) a "dirty" deal; that is to say, resulted in an injury to or a fraud upon him. But it is rather based on the idea of closing the door to the temptation to commit fraud. It tends to keep the agent's eye single and clear to the rights and welfare of his principal. To allow one acting in the fiduciary relation of agent to buy from or sell to himself is a solecism in the realm of law; for the moral stamina of the average man is inadequate to preserving a fine glow of fidelity to his trust and confidential relation in such transaction, and the interdiction is enforced with a strong hand in courts of justice. *Montgomery v. Hundley*, 205 Mo., loc. cit. 148, 103

S. W. 527, 11 L. R. A. (N. S.) 122 et seq.; Moore v. Mandlebaum, 8 Mich. 434; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304; Evans v. Evans, 196 Mo., loc. cit. 23, 93 S. W. 969. Under "A" plaintiff had the right to collect the first cash payment; he having power to contract on condition that \$500 be paid simultaneously to bind the bargain. Receipt "B" comports with that idea. It is impossible to read it as constituting a binding contract, in and of itself, between plaintiff and defendant enforceable in a court of equity. Accordingly, to entitle plaintiff to specific performance, he must connect that receipt with the power of attorney, "A," and make one contract of the two instruments. He undertook to do that, but to do so puts a construction upon that power of attorney its terms do not import.

The ruling below on the demurrer was well enough. The judgment is affirmed. My Brethren all concur in these views.

SHOHONEY v. QUINCY, O. & K. C. RY. CO.
(Supreme Court of Missouri, Division No. 1.
Nov. 27, 1909).

1. REMOVAL OF CAUSES (§ 89*)—DETERMINATION—REVIEW.

Where a petition and bond for the removal of a cause to the federal court is duly filed, and on the record made defendant is entitled to removal, its right is preserved, not only for review in the state court, but also in the Supreme Court of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 200, 201; Dec. Dig. § 89.*]

2. REMOVAL OF CAUSES (§ 95*)—FILING PETITION AND BOND—EFFECT.

It is not the order of a state court removing a cause that gives a federal court jurisdiction, but it is the application for removal in the form prescribed; and, if the petition for removal, read in the light of the pleadings in the case, show a removable cause, and the bond tendered is sufficient, the cause is removed without reference to the action of the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 204; Dec. Dig. § 95.*]

3. COURTS (§ 300*)—FEDERAL COURTS—JURISDICTION.

A federal court has no jurisdiction of a suit between two citizens of the same state on a cause of action arising within the state and under its laws.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 847, 850; Dec. Dig. § 300.*]

4. REMOVAL OF CAUSES (§ 25*)—RIGHT OF REMOVAL—ALLEGATIONS OF PLAINTIFF'S PETITION—PRESENTATION OF FEDERAL QUESTION.

A defendant by his petition to remove cannot change plaintiff's cause of action as stated in his petition, so as to bring it within a federal law, nor can plaintiff so state his cause of action as to deprive defendant of the right of removal, if defendant by his answer or plea shows that he relies for his defense on an act of Congress or a provision of the federal Constitution.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25.*]

5. COMMERCE (§ 13*)—INTERSTATE AND INTRASTATE COMMERCE.

That a railroad company is engaged in interstate commerce does not deprive it of the right also to engage in intrastate traffic, or relieve it of its obligation to obey the law of the state while so engaged.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 7; Dec. Dig. § 13.*]

6. EVIDENCE (§ 20*)—JUDICIAL NOTICE—INTERSTATE COMMERCE.

Courts will take judicial notice that all trunk line railroads in Missouri are engaged in interstate and intrastate commerce.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 24; Dec. Dig. § 20.*]

7. COURTS (§ 289*)—FEDERAL COURTS—JURISDICTION—INTERSTATE COMMERCE.

Where a railroad company while operating its railroad in Missouri violates the law of that state to the injury of a person therein a cause of action arises under the state laws, and not under an act of Congress; and hence the fact that the railroad's business includes interstate transportation is immaterial so far as the question of state or federal jurisdiction is concerned.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. § 289.*]

8. REMOVAL OF CAUSES (§ 19*)—FEDERAL QUESTION—JURISDICTION.

Where plaintiff, in an action for injuries, stated a cause of action at common law only, and defendant's application to remove the cause to the federal court as depending on an act of Congress was denied, error in permitting plaintiff to take the benefit of an act of Congress, either in his evidence, instructions, or argument, could be corrected on appeal, and did not oust the state court of jurisdiction.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 37; Dec. Dig. § 19.*]

9. REMOVAL OF CAUSES (§ 107*)—DENIAL OF REMAND—RES JUDICATA.

Plaintiff, a railroad switchman, brought suit for injuries, based on an alleged violation of defendant's duty to equip its cars with automatic couplers that would couple by impact, etc., as required by the federal safety appliance act (Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]). On removal to the federal court and the denial of a motion to remand, plaintiff dismissed the cause, and brought another suit in the state court at common law, alleging negligence in the operation and equipment of the engine that was being used at the time of his injury. Held, that the order denying defendant's motion to remand the first cause to the state court was not res judicata of the question of jurisdiction of the cause of action stated in plaintiff's second petition.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. 107.*]

10. REMOVAL OF CAUSES (§ 107*)—DENIAL OF MOTION FOR REMAND—FAILURE TO APPEAL.

Where a federal court has no jurisdiction of the subject-matter of the suit, an order overruling plaintiff's motion to remand unappealed from does not confer jurisdiction, which cannot be conferred by consent.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 107.*]

11. MASTER AND SERVANT (§ 110*)—INJURIES TO SERVANT—APPLIANCES—LOCOMOTIVES.

Since a master is only required to use reasonable care to provide for the safety of his servant according to the character of the business, a railroad company was not negligent in providing a road engine instead of a switch engine for the doing of certain switching in a railroad yard, in the doing of which plaintiff

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes
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safe for such purpose when handled with ordinary care, though not as convenient or as well adapted to the work as a switch engine.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 214, 214½; Dec. Dig. § 110.*]

12. MASTER AND SERVANT (§§ 101, 102*)—INJURIES TO SERVANT—"SUITABLE APPLIANCES."

The term "suitable" as used with reference to a master's duty to provide "suitable appliances" for the use of his servants, means compatible with safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 178; Dec. Dig. §§ 101, 102.*]

[For other definitions, see Words and Phrases, vol. 7, p. 6780.]

13. MASTER AND SERVANT (§ 129*)—INJURIES TO SERVANT—PROXIMATE CAUSE.

Plaintiff, a switchman, was injured in endeavoring to couple a Leeds coupler, with which the pilot of the engine he was using was equipped, to a Tower automatic coupler on the end of a car. The couplers would have coupled by impact but for the fact that the car was standing on a curve, so that the couplers were not aligned. Plaintiff, being unable to shove over the Tower coupler, which had a lateral motion of three or four inches, with his hand, endeavored to do so with his foot, when the engine came forward without signal, the coupling was made, and plaintiff's foot was caught and crushed. Held that the equipment of the engine with the Leeds coupler, which had a lateral motion of but an inch and a half, was not the proximate cause of the accident, on the theory that if it had been equipped with a Tower coupler plaintiff could have moved it while standing on the pilot, since the lateral motion of the Tower coupler on the car afforded every facility for making the coupling.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 261; Dec. Dig. § 129.*]

14. MASTER AND SERVANT (§ 286*)—INJURIES TO SERVANT—NEGLIGENCE—STATUTES—QUESTION FOR JURY.

The fact that a Leeds automatic coupler would not couple automatically with one of its kind, and therefore did not comply with the safety appliance act of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) did not render the use of such a coupler negligence per se, in the absence of proof that it was not reasonably safe for the uses to which it was put.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1019, 1020; Dec. Dig. § 286.*]

15. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—ABANDONMENT OF APPLIANCE—EVIDENCE.

Evidence of the general abandonment of an appliance the use of which was alleged to have caused injury to a servant, is not competent, unless the evidence shows, and the circumstances indicate, that it was abandoned because another appliance was safer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 921; Dec. Dig. § 270.*]

16. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—INSTRUCTIONS.

In an action at common law for injuries to a switchman resulting from the defendant's alleged negligence in providing a switch engine equipped with a Leeds coupler, an instruction, authorizing the jury to consider evidence that the Leeds coupler had been generally abandoned in determining whether or not it was safe,

ing the reason for such abandonment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1151; Dec. Dig. § 293.*]

17. MASTER AND SERVANT (§ 270*)—INJURIES TO SERVANT—EVIDENCE.

In an action at common law for injuries to a switchman while operating certain automatic couplers, there being no law other than the federal safety appliance act (Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) requiring the abandonment of a Leeds coupler, which did not comply therewith, evidence of an interstate commerce inspector that all railroads were doing away with the Leeds coupler and adopting automatic couplers "because the law makes them" was inadmissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 915, 921; Dec. Dig. § 270.*]

18. MASTER AND SERVANT (§ 293*)—INJURIES TO SERVANT—SAFETY APPLIANCE.

In an action at common law for injuries to a switchman while using a Leeds coupler, there being no law requiring the abandonment of such coupler except the federal safety appliance act (Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), an instruction that, if the railroads have generally abandoned the Leeds coupler, and it was not reasonably safe, suitable, and adapted for switching purposes, and the other kind was easily accessible and obtainable, it was defendant's duty to have discarded the Leeds and obtained the other kind, was erroneous.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1149, 1151; Dec. Dig. § 293.*]

19. NEW TRIAL (§ 66*)—VERDICT CONTRARY TO INSTRUCTIONS.

Where a cause on trial has drifted from the control of the trial judge, and is decided against his rulings, it is his duty to set aside the verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 132-134; Dec. Dig. § 66.*]

20. MASTER AND SERVANT (§ 286*)—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

In an action for injuries to a switchman, evidence of the engineer's negligence in running his engine forward a second time after a coupling had failed without signal from plaintiff held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1032-1034; Dec. Dig. § 286.*]

Appeal from Circuit Court, Grundy County; Geo. W. Wanamaker, Judge.

Action by Ora T. Shohoney against the Quincy, Omaha & Kansas City Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Hall & Hall, J. G. Trimble, and Willard F. Hall, for appellant. E. M. Harber, A. G. Knight, and Edwin R. Sheetz, for respondent.

VALLIANT, J. This cause was heard at the last term of this court, and a judgment was then rendered reversing the judgment of the trial court and remanding the cause for a new trial. But in going over the case again on the motion for rehearing it was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

noticed that the action of the trial court in overruling defendant's motion to require the plaintiff to make his petition more definite and certain was not mentioned in the motion for a new trial, although exception thereto was otherwise duly preserved, and we thought the point was sufficiently doubtful to require a rehearing of the case. Therefore the motion for rehearing was sustained.

In the opinion delivered at the last term it is stated that, before answering, the defendant filed motion to require the plaintiff to make his petition more definite and certain; that the motion was overruled; that defendant excepted, and the exception was duly preserved in the bill of exceptions. In the motion for rehearing it was said that there was no such motion filed, and that there was no exception whatever taken to the overruling of the motion. The plaintiff, in making that statement that there was no such motion filed, was mistaken. The filing of such motion, and the ruling of the court thereon, can be shown only by entries in the record proper. The printed record before us on page 23 shows the entries in the record proper, showing that this motion was filed, and that it was overruled by the court, and that after the motion was overruled, the defendant filed its answer. The motion itself appears in full in the only place it should appear, that is, in the bill of exceptions, as shown on pages 27 and 28 of the record, and the exception to the action of the court in overruling the motion also appears in the only place it should appear, that is, in the bill of exceptions, as will be seen by reference to page 28 of the record. The language of the bill of exceptions on this point is: "Which said motion was by the court taken up, considered, heard, and overruled, and to the action of the court in overruling said motion the defendant at the time saved its exception." Plaintiff therefore was mistaken when he said in his motion for rehearing that there was no such motion filed, no such motion overruled, and no exceptions whatever taken to the ruling.

The ruling on a motion to require the plaintiff to make his petition more definite and certain occurs before the trial, and it may be at a former term, when exception thereto can be preserved only by a term bill of exceptions. Whether it is necessary or proper to bring it to the notice of the trial court again in a motion for a new trial is a question that some of our decisions have rendered a little doubtful. In *Boatmen's Bank v. McMenamy*, 35 Mo. App. 198, loc. cit. 203, the court said: "A motion to strike out part of a pleading is not part of the record, and the court's ruling on such motion must be excepted to and the exception preserved, both in the motion for new trial and by bill of exceptions; and, unless done by both, the exception is lost."

As authority for that ruling the court cites the following cases: *Cowan v. Railroad*, 48 Mo. 556; *Saxton v. Allen*, 49 Mo. 417; *Margrave v. Ausmuss*, 51 Mo. 568; *Carver v. Thornhill*, 53 Mo. 283; *Curtis v. Curtis*, 54 Mo. 352; *Lancaster v. Ins. Co.*, 62 Mo. 121; *McCoy v. Farmer*, 65 Mo. 247; *Acocock v. Acocock*, 57 Mo. 156. It is noticed that in the above case cited from the Court of Appeals there is no discussion of the question, but the decision rests solely on the authorities cited, and, taking the cases cited in the inverse order of their citation, they run back for authority to the earliest case, or to cases based on the earliest, and decide the point as on that authority. In the first case (*Cowan v. Railroad*) the point was an alleged error in admitting testimony, and so it was in the second case (*Saxton v. Allen*), and also in the third (*Margrave v. Ausmuss*), and again in the fourth case (*Carver v. Thornhill*). In *Curtis v. Curtis* the appeal was from an order of the court allowing the wife alimony pendente lite, which, of course, was a trial of that issue. In the case next in line (*Acocock v. Acocock*) it appears that on motion a part of the petition was stricken out, and this court, after otherwise disposing of the cause on its merits, said: "The action of the court in striking out a part of the plaintiff's petition we will not review. It was not embodied as one of the errors or points insisted upon in the motion for a new trial, and therefore must be disregarded"—citing *Curtis v. Curtis*, and cases there cited. In that case it does not appear that there was an exception taken in any form to the striking out of part of the answer. In *Lancaster v. Ins. Co.* what the court said in reference to the necessity of assigning the error in the motion for a new trial was in reference to the introduction of the testimony. In the latest case cited by the St. Louis Court of Appeals in the case first above mentioned (*McCoy v. Farmer*, 65 Mo. 244) the suit was begun by a corporation as plaintiff, but pending the suit the life of the corporation expired, and on application of the last board of directors the suit was revived in their names as trustees. They filed a new petition stating inter alia the expiration of the corporation, and that they were the last board of directors and entitled, as trustees, to prosecute the suit. The defendants answered that petition, and denied those allegations. Those facts were therefore in issue at the trial, and any adverse ruling of the court occurring during the trial on those issues should of course have been brought to the attention of the court in the motion for a new trial, which was not done, and for that reason this court said they would not be considered.

Those are all the decisions of this court to which our attention has been called that can in any way be claimed to be authority for the proposition that the rulings of the

of those cases relate to the admission of evidence at the trial, or relate to points that arose in the trial. The chief reason for requiring rulings complained of to be embodied in a motion for a new trial is that the trial court should be afforded an opportunity to correct its own error, if error there be, and also to apprise the opposite party of what is complained. But that reason is not of universal application, for example, the appellate court will review the ruling of the trial court on a demurrer which appears on the face of the record proper, although there be no exception. *Spears v. Bond*, 79 Mo. 467; *Hannah v. Hannah*, 109 Mo. 236, 19 S. W. 87; *Meissner v. Railway Equipment Co.*, 211 Mo. 112, 109 S. W. 730. In *St. Louis v. Brooks*, 107 Mo. 380, 18 S. W. 22, it was held that a motion for new trial or rehearing, on the ruling of the court on a motion after final judgment, was not necessary. In *Crossland v. Admire*, 118 Mo. 87, 24 S. W. 154, the court said: "A motion for a new trial must be predicated upon some error committed in the trial by which the verdict or finding was improper." In *Rigdon v. Ferguson*, 172 Mo. 49, 72 S. W. 504, the defendant's answer had been stricken from the files, and there was a judgment for the plaintiff. Defendant filed a motion for a new trial. The only grounds stated in the motion were that the court erred in refusing leave to file the answer and in striking it from the files. This court said: "If exception was not otherwise preserved to the action of the court in refusing leave to file the answer, it was not saved in the exception taken to the action of the court in overruling the motion for a new trial. A motion for a new trial relates only to that which occurred during the trial. The ruling on the application for leave to file the answer was no part of the trial, and could not be embraced in a motion for a new trial." In *Sternberg v. Levy*, 159 Mo. 617, 60 S. W. 1114, 53 L. R. A. 438, the trial court had sustained a motion to strike out a part of plaintiff's interplea. Plaintiff's exception to that ruling was preserved in the bill of exceptions, but not in a motion for new trial. This court said: "The plaintiff has properly saved the right to have the action of the trial court on the motion to strike out reviewed by this court. No motion for a new trial was necessary to preserve this right." In 8 Ency. P. & P. p. 829, it is said: "Errors in ruling on demurrers and motions relating to the pleadings may be reviewed on exceptions without a motion for a new trial. Such errors of law are not grounds for a new trial." And on page 830 the same author says: "A motion for a new trial is generally not necessary to secure a review of decisions on motions

one pertaining to the trial or an issue of fact." The above-mentioned cases show the condition of the question as the decisions of this court have left it, and we have gone through them for the purpose of pointing out the doubt in our minds that led us to grant a rehearing in this case. But, after all, we will not decide that question now, because it is not necessary to a decision of this case, since it relates to that paragraph in the opinion delivered at the last term which holds that the ruling of a trial court on a motion to require the plaintiff to make his petition more definite and certain is, when the exception is properly preserved, reviewable on appeal, as to which two of the judges of this Division dissented, and therefore there was as to that point no decision. Besides the point is now unimportant, because the plaintiff's case was fully developed at the trial.

Returning now to the case itself, we have discovered no reason for changing our views expressed in the opinion delivered at the last term, which is as follows:

"Defendant is a Missouri corporation operating a railroad in this state. Plaintiff was in its service in the capacity of yard master in its switchyard in Milan. His duties were, with the aid of other employes under him, to switch cars and make up trains in that yard. In attempting to couple an engine to a freight car his foot got caught in the couplers and was crushed. He sues for damages, alleging that the accident was the result of the defendant's negligence. He recovered a judgment for \$5,000 in the circuit court, and defendant appealed.

"There are two acts of negligence alleged in the petition: First, that the engine furnished by the defendant for use in the yards was not suitable for that purpose, and not equipped with reasonably safe appliances for coupling; second, the engineer negligently ran the engine against the cars where the plaintiff was to make the coupling, without having received from the plaintiff a signal to do so.

"Before answering, defendant filed a petition and bond to remove the cause to federal court, on the ground that it was engaged in interstate commerce, and that the action was bottomed on sections 1 and 2 of the act of Congress entitled 'An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving wheel breaks and for other purposes.' Approved March 2, 1893 (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]). The petition for removal also alleged that the plaintiff had theretofore instituted a

remand the cause to the state court, on the ground that the federal court had no jurisdiction of it, which motion was by court overruled, and thereafter plaintiff dismissed his suit in that court and instituted this suit in the circuit court of Grundy county. The circuit court of Grundy county denied the defendant's petition to remove, whereupon defendant caused a transcript of the record in this cause, as it stood up to that date, to be filed in the federal court, and thereafter this cause proceeded to trial in the state court.

"1. It is now insisted by defendant that the state court lost its jurisdiction of the cause by reason of the petition and bond for removal to the federal court; and since, if that contention is well founded, there will be no use in our looking any further into this record, we will give that point first consideration. If, on the record made, the defendant was entitled to the removal prayed, its right is preserved, not only for the purpose of review in this court, but also in the United States Supreme Court. It is not the order of a state court removing the cause that gives the federal court jurisdiction, but it is the application for removal in the form prescribed by the act of Congress. If the petition for removal, read in the light of the pleadings in this case, shows a proper case for removal and the bond tendered is sufficient, it makes no difference what action the state court may take, or that it take any action, the cause is rightfully in the federal court.

"But a federal court has no jurisdiction of a suit between two citizens of the same state on a cause of action arising within the state and under the laws of the state. Such jurisdiction it has never been claimed has been or could be conferred by an act of Congress, even under the interstate commerce power. Nor can a defendant by his petition to remove change the plaintiff's cause of action to make it different from that stated in the plaintiff's petition so as to bring it under the federal law. Neither can a plaintiff so state his cause of action in his petition as to deprive the defendant of the right of removal if the defendant, by his answer or plea, shows that he relies for his defense on an act of Congress or a provision of the federal Constitution. This we understand to be the interpretation given this law by the Supreme Court of the United States in *Colorado, etc., M. Co. v. Truck*, 150 U. S. 138, loc. cit. 143, 14 Sup. Ct. 35, 37 L. Ed. 1030. The mere fact that a railroad company may be engaged in interstate commerce does not deprive it of the right to engage also in intrastate traffic, or relieve it of its obligation to obey the

reason for saying that the driver and the wagon and team are engaged in interstate commerce as there is in some other instances where it has been so considered, yet if the driver should so negligently manage the team as to run over a child in the street and kill it, the defendant could hardly claim the right to remove the cause to the federal court on the ground he was engaged in interstate commerce while he was doing the deed complained of.

"In the case at bar the plaintiff's petition does not state that the defendant railroad company is engaged in interstate commerce, and appellant complains that that was an intentional omission of a fact to defeat the removal; but, if the petition had stated that fact, it would not have affected the question of removal. The court will take judicial notice that all the trunk line railroads in the state are engaged in interstate commerce, but the court will also take judicial notice that they are also engaged in intrastate traffic, and, if while operating its instrumentalities in this state a railroad company should violate a law of this state to the injury of a person in this state, the cause of action would arise under our state law, not under an act of Congress; and, when that is the case, the fact that the business of the defendant included interstate transportation is immaterial so far as the question of state or federal jurisdiction is concerned.

"The plaintiff's petition makes no reference to the act of Congress. It states a cause of action at common law that would be perfectly good if there had never been an act of Congress on the subject; it is bottomed on the law that requires a master to furnish his servant a reasonably safe instrument with which to work, and on the state statute which makes the defendant company liable for the negligence of the plaintiff's fellow servant. Defendant does not undertake to frame a defense under the act of Congress, if it did, then, under the decision of the Supreme Court in the case last cited, there would be a case for removal, but defendant says that the plaintiff's cause of action is based on that act, which, as we have already said, is not correct. It is argued on behalf of defendant that plaintiff's petition is skillfully drawn to avoid using terms that would give the federal court jurisdiction, yet enable the plaintiff at the trial to claim the benefit of the act of Congress. Whatever may have been the design, the petition states only a cause of action at common law; and if at the trial the plaintiff was allowed to take benefit under the act of Congress, either in his evidence, his instructions, or his argument, it

on appeal. It does not go to the point of jurisdiction.

"It is also argued that the Sullivan county case being based on the same cause of action, and that case having been removed to the federal court, and the motion to remand having been there overruled, the point of jurisdiction is *res adjudicata*. There are some differences between the petitions in the two cases. The petition in the Sullivan county case looks very much as though the pleader had the mind to bring his case under the act of Congress, although that act is not mentioned by name. It states that the defendant was engaged in interstate commerce, which fact, under what we have already said, even if it was the intention to bring the suit under that act, was perhaps unnecessary, because it was a fact of which the court would take judicial notice, yet it is a circumstance to show what the pleader had in his mind; and the petition also stated, which is more to the point, that it was the duty of defendant to have its cars equipped with automatic couplers that would couple by impact, and that it failed to have such couplers, and by reason of the failure the plaintiff was injured. There was at that time no law that required a railroad company to have such couplers, except the act of Congress referred to. Therefore the plaintiff pleaded that act. The plaintiff might have had a cause of action at common law and also one under the act of Congress, and, if he had both, he might have sued on either, or, having sued on one, he might have dismissed that one and brought suit on the other. If in the first place plaintiff had brought his suit in the United States Circuit Court bottomed on the statute, and had afterwards dismissed that suit and brought this one in the state court bottomed on the common law, his position would have been exactly as it is now. The order of the federal court overruling plaintiff's motion to remand the cause to the state court, if it was a final judgment on the question of jurisdiction, as defendant contends it was, it was so only in reference to that case, which as we have said was different from this one. After that order was made the plaintiff dismissed that suit, and defendant does not question his right to do so, or contend that it barred another suit on the merits.

"But what is more important still to observe in this connection is this: The question of a court's jurisdiction over the subject-matter is never settled until it is settled right. If the federal court has no jurisdiction of the subject-matter of this suit, the order of the court overruling the motion to remand the other suit, and plaintiff's dismissing that suit without appealing from that order, cannot give the court jurisdiction. Consent of parties cannot confer ju-

isdiction where the law has not conferred it.

"We hold that the circuit court of Grundy county has jurisdiction to try this cause, and did not err in refusing to order its removal.

"2. We turn now to a consideration of the case on its merits. The petition states that plaintiff was in the service of the defendant as yard master in its yards at Milan, and his duties were to assist in the switching of cars and making up trains; that the cars handled by defendant were, and for a long time had been, usually 'equipped with couplers and coupling apparatus designed and intended to couple with other couplers and coupling apparatus of other cars and engines to which they were to be, and it became plaintiff's duty to attach and couple the same; that it was the duty of defendant to furnish an engine for plaintiff to use in those yards that could with reasonable safety be used for that purpose, but defendant negligently failed to do so and instead furnished an engine wholly unsuitable, not properly adapted, equipped, or provided, as aforesaid, for said uses and purposes, and which had generally by all railroads been abandoned for such use and purpose; that said engine was not provided with coupler or coupling apparatus which would with reasonable safety and convenience, or could be with safety and convenience, coupled with said cars, and was not provided as it should have been with footboards upon the sides or end thereof, upon and for which plaintiff to stand in the discharge of his duties'; that it was a road engine, not a switch engine; that by reason of the defect when the engine came to couple to the car it failed to couple, and it became necessary for plaintiff to go in between the engine and the car to effect a coupling, and while he was there, the engineer negligently without signal to come, moved the engine on with great force, and caught the plaintiff's foot in the jaws of the coupler and crushed it. Before answering, defendant filed a motion to require the plaintiff to make his petition more definite and certain, first, as to the supposed defects in the engine; and second, as to the conduct of the engineer. The motion was overruled, and defendant excepted, and the exception is duly preserved in the bill of exceptions. After the overruling of the motion and the preserving of the exception, defendant filed its answer to the merits.

"The first question on this motion is, Was the exception to the overruling the motion to make the petition more definite and certain waived by the filing of the answer? There are three decisions of this court that seem to answer that question in the affirmative, but it may be doubted if it was a question seriously in dispute in either case. *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W.

981; *State ex rel. v. Bank*, 160 Mo. 640, 61 S. W. 676; *Dakan v. Chase*, 197 Mo. 238, 94 S. W. 944.

"The first of those cases was a suit on two promissory notes; the original petition being in one count. A demurrer to it was sustained. Then the plaintiff filed an amended petition in two counts, alleging in each that the note sued on was lost. Defendant filed first a general demurrer which was overruled; then a motion to strike out the amended petition, which was overruled; then a motion to make more definite and certain as to the time when the notes were lost, which was also overruled. Glancing at the briefs in that case, we see no reference to the motion to make more definite and certain. The counsel seemed to treat it, as well they might, as frivolous. The appellant on that part of the case complained only of the overruling of his motion to strike out the amended petition, and respondent said that if there was error in that ruling, it was waived by pleading to the merits. The only discussion of that part of the case in the opinion relates to the motion to strike out, and, after that discussion was ended and cases cited, the court added: 'The same rule applies to the motion to make the petition more certain. Bliss on Code Pleading, 425a.' That is all there is in that case on that point; and, if we go to the authority cited we find that it does not sustain the proposition, but is rather to the contrary. In section 425, Bliss on Code Pleading, the author quotes our statute, showing that the court may cause the pleading to be made more definite and certain by amendment. Then he refers to other Code states where the statute authorizes the court to strike out a pleading that is indefinite and uncertain or else the fault may be made the ground for demurrer. Then in the next section, (425a) the author proceeds to show how the different decisions and dicta in the different states may be reconciled; that is, *inter alia*, a pleading may be so uncertain and indefinite that facts sufficient to constitute a cause of action cannot be gathered from it, or a petition may contain statements of evidence which ordinarily should be stricken out as redundant, but if it contain nothing else, and there would be no substantial pleading left if those statements should be stricken out, then the author says they should not be stricken out, and he concludes the subject by saying: 'The only remedy, then, must be to move for an order to make the pleading more definite and certain—an efficient remedy for slovenly, ambiguous, and argumentative statements.' If that is the only remedy a party has to apply to a material feature of his defense, and if he has done his best to avail himself of that remedy, and the right has been denied him, what justice is there in saying that he must abandon his right to have that adverse ruling

reviewed by the appellate court, or else abandon all further defense at that stage and leave his adversary master of the field?

"In the second case above referred to (*State ex rel. v. Bank*, 160 Mo. 640, 61 S. W. 676) there was a motion to make the petition more definite and certain, but it was treated with indifference by appellant, and no argument was made in its defense. The following is all that appellant said in its brief on the subject: 'The motion to make the petition more definite and certain was certainly well taken, and it is unnecessary to argue this point, as it speaks for itself. But the vital point in the case is the assessment.' The case being presented by appellant in that way, the court, without going into an investigation, and without discussion, said that the filing of the answer and going to trial on the merits was a waiver of the motion.

"In the third case cited (*Dakan v. Chase*, 197 Mo. 238, 94 S. W. 944) what was said on this subject was *obiter dictum*, because, as said in the opinion in that case, the motions and the exceptions were not preserved in the bill of exceptions on which the case came here. The writer of this opinion feels less hesitancy in criticising what was said in the opinion on this point in that case because he wrote that opinion himself.

"Although, therefore, it appears that we have said in those three cases that the filing of an answer is a waiver of the exception to the overruling of a motion to make more definite and certain, yet upon an examination of them we see that the point was not seriously contended, for there was no discussion of the subject. Therefore we ought not to hesitate to enter into a consideration of the question as though it was a new one. The reason for our ruling in case of an overruled demurrer has no application in a case of an overruled motion to make more definite and certain. When the demurrer is overruled, everything of substance, as contradistinguished from the matters of form and convenience, is preserved to the end, and is subject to review in the appellate court, but in an overruled motion to make more definite and certain nothing is preserved, if it is not preserved in a bill of exceptions.

"We say that filing an answer after a demurrer to a petition is overruled waives every objection that the demurrer could make to the petition, except that the court has no jurisdiction of the subject, or that the petition does not state a cause of action, and our reason for that is that all else reached by the demurrer is nonessential, or does not deprive the defendant of any defense. That the plaintiff is a minor; that there is another suit pending on the same cause of action; that there is a defect of parties; that several causes of action are improperly united; that a party named in the petition is not a necessary party—all

that they do not prevent the defendant from knowing exactly what he is sued for or from making his defense. But not so when a petition is so vague and indefinite that defendant does not know what he is to answer.

"It is the duty of a plaintiff to state his case with such clearness and definiteness that his adversary may know exactly what the complaint against him is. Our statute says the petition must contain 'a plain and concise statement of facts constituting a cause of action without unnecessary repetition.' Section 592, Rev. St. 1899 (Ann. St. 1906, p. 612). That duty devolves on the plaintiff, and it is one that appeals to our sense of justice and fair play. There are no words in the Code of Civil Procedure more significant of the spirit which actuated its authors than the words just quoted. The requirement is that the facts be stated, not mere conclusions of law. If the servant complains that his master furnished him a defective implement, he must state in what respect it was defective, unless it is a case in which the thing speaks for itself. In *Sidway v. Missouri L. & L. Co.*, 163 Mo. 342, loc. cit. 375, 63 S. W. 705, 714, the court said: 'The theory of our Code is that the facts in a pleading are constitutive, and in order to be proved must be alleged. *Pler v. Heinrichoffen*, 52 Mo. 333. Every substantial fact which the plaintiff, in order to recover, must prove he must also allege, so that an issue can be made thereon. *Lanitz v. King*, 93 Mo. 513, 6 S. W. 263. In close connection with the section above quoted follows section 612, in which it is declared: 'And when the allegations or denials of a pleading are so indefinite or uncertain that the precise nature of the charge or denial is not apparent * * * the court may require the pleading to be made more definite and certain.'

"In an early case, discussing the above provisions of the Code in their application to an answer filed in the case, the court said: 'The object of the present practice act was to introduce truth and simplicity in pleadings.' And again the court said: 'The parties cannot expect to obtain an advantage by evasive pleading. If the pleading is insufficient, it ought to be disposed of before going to trial. * * * Indeed the failure or neglect of the inferior courts to comply with the plain requirements of the statute renders it almost impossible to do anything with the practice act now in force.' *Atterberry v. Powell*, 29 Mo. 429, 77 Am. Dec. 579. Thus we see how important the lawmaker regarded this point, and how important this court has regarded it. The motion to make more definite and certain is the only remedy the opposite party has against a pleading that is so evasive and indefinite as to leave him in the dark as to what issue he must prepare to meet;

the motion, that remedy is lost, unless he abandons the case at that point and allows his adversary to take judgment. Is there any justice in that? The appellant may bring us a record showing that the pleading of his adversary failed to comply with that important requirement of the statute; that he resorted to the method pointed out by the statute for relief; that the trial court erroneously overruled his motion; that, submitting, as he was compelled to do, at his peril to the erroneous ruling, he went to trial in the dark, and issues were sprung on him that ought to have been tendered in the pleading—yet we say we will give no relief. How can we say that an error materially affecting the merits of the case was committed, and the exception was preserved in the manner provided by law, and the injury can be remedied in no other way, yet we will not hear it? Such ruling not only places a party at the mercy of the trial court, but its tendency is to belittle the motion, and it does not stimulate care in considering it.

"This court, in *Melvin v. Railroad*, 89 Mo. 106, 1 S. W. 286, in a short per curiam memorandum, reversed a judgment of the kind just supposed, and said it was error to have overruled the motion to make more definite and certain. If the overruling of such a motion was error, and the party aggrieved has no other remedy, why should we not correct the error? To correct error which cannot be elsewhere corrected is what this court was created for.

"We have no fault to find with what we said in *Sauter v. Leveridge*, 103 Mo. 615, 15 S. W. 981, *State ex rel. v. Bank*, 160 Mo. 640, 61 S. W. 676; *Dakan v. Chase*, 197 Mo. 238, 94 S. W. 944, concerning any of the questions seriously in dispute in those cases, but what was said to the effect that filing an answer and going to trial after the overruling of a motion to make more definite and certain is a waiver of the error, if any, in such ruling does not, on mature consideration, meet our approval and should not be followed.

"The motion to require the plaintiff to make his petition more definite and certain should have been in part sustained, or, if overruled altogether, on the ground that in part it was sufficiently specific, the order of the court should have so indicated, so that the issues to be tried should be limited to those specifically tendered. The petition was sufficiently specific in charging negligence on the part of the engineer, whose duty it was to hold the engine until he received a signal from the plaintiff to come forward, yet who, the petition said, came on without signal. The petition is also specific enough in saying that the engine used was defective in the fact that it did not have footboards on the sides for the switchman to stand on. Therefore the

try in his case on either of those theories. There was evidence tending to show that the engineer was negligent in the respect specified, but the plaintiff did not ask an instruction that entitled him to recover for that negligence. The only reference to the engineer's alleged negligence in plaintiff's instructions was on the question of plaintiff's contributory negligence. There was evidence tending to show that there were no footboards on the sides of the engine, but there was no evidence tending to show that the absence of the footboards had anything to do with the accident.

"The theory on which the plaintiff tried his case was that the engine was unsafe because it had a defective coupler, and that is the theory on which he gained his verdict, but the petition does not specify in what respect the coupler was defective, and the motion to make more definite and certain called for such specification. The petition states that it was a road engine, whereas it should have been a switch engine; that it was not adapted to such use; that the coupler on it was not 'reasonably safe and convenient' to be used in coupling cars for switching purposes; that the engine was wholly unsuitable for such purpose. To say that the engine is unsuitable, and that the coupler was unsafe, is but to state a conclusion. It is not a 'plain and concise statement of the facts constituting the cause of action.' Why was the engine not suitable? In what particular was the coupler defective? The insufficiency of the petition in these particulars is clearly illustrated by the facts of this case. The point on which the case seemed at last to turn was that in the coupler on the engine there was not as much lateral movement as in another kind of a coupler in general use. Counsel for plaintiff at the trial said that he had himself just been informed of that defect. If plaintiff thought that that was a defect, and defendant was to be held liable in damages therefor, what justice was there in not requiring the plaintiff to state in his petition the fact on which he relied?

"The ruling of the court denying the plaintiff's motion to make more definite and certain, and allowing the case to be tried on the vague and indefinite statements as to the insufficiency of the engine, was error.

"3. In his opening speech at the trial the attorney for the plaintiff stated that there were two special causes of negligence alleged in the petition; one the drawhead or coupler of the engine, the other the act of the engineer putting the engine in motion without a signal for him to do so. Whilst the testimony was quite voluminous, and wandered sometimes from the real issues,

show as follows: Plaintiff was, as stated in the petition, yardmaster in defendant's switchyard at Milan, or, as stated by him in his testimony, foreman of the engine, by which term we understand he meant that the engine should move only on his signal. His duties were to attend to the switching of cars and making up of trains; he was foreman of the switching crew. He had been in the service of the defendant in this capacity at this place about six or seven months prior to the accident. The engine furnished by defendant for switching purposes in that yard was not a regular switch engine, but was a road engine. A part of the time they used a switch engine, but most of the time a road engine. There was opinion testimony of one of plaintiff's witnesses, over defendant's objection, that a road engine was not suitable for, or adapted to, switching. He stated that the engine in question was reasonably safe for the purposes for which it was being used, but was not as safe as a switch engine, and not adapted at all for switching. Plaintiff himself testified that when the switch engine was in the yard they used it in preference to the road engine 'because it was more convenient; better to work with.' Nearly all the cars coming into defendant's yards were equipped with an automatic coupler called the Tower coupler, which was a later invention than the Leeds coupler, and had come into general use by nearly all railroads in preference to the Leeds. The difference in the mechanisms of the two couplers was described in the evidence. The engine that was in use in this instance was equipped with a Tower coupler on the rear end, and a Leeds on the front end. The Tower coupler was so contrived that it would couple automatically by impact with another coupler of the same kind, or with Leeds, but the Leeds would not automatically couple with another Leeds, because it had a solid case head that did not open to receive the knuckle of the other. All of the plaintiff's witnesses on this subject but one testified that the Leeds was an automatic coupler, and that one said he did not so consider it, because, whilst it would couple automatically with other standard couplers, it would not so couple with one of its kind. Two Tower couplers would not couple automatically by impact, unless the jaws of one were open and those of the other closed, and if the jaws of a Tower were open, a Leeds would couple with it as effectually as with another Tower. One of the plaintiff's witnesses explained that, if there had been a Tower coupler on the front end of the engine, the switchman could have opened the jaws of it while standing on the front footboard. But that

fact could have had no influence in this accident, because in order to make the coupling, even if it was with two Towers, it was necessary to have the jaws of one open and those of the other closed; if both were open they would not couple. In this instance the jaws of the coupler on the car were already open, therefore if it had been a Tower instead of a Leeds on the engine the switchman would not have opened it, but would have left it with a drawhead as rigid as that of the Leeds.

"The accident occurred in the effort to couple the Leeds, which was on the front end of the engine, with a Tower, which was on a car to be switched. The jaws of the Tower, as already said, were open to receive the drawhead of the Leeds, and the engine, under the direction of the plaintiff, moved forward to make the connection, but it so happened that that end of the car was on a curve leading from the main track, on which the engine was moving, to a sidetrack on which the car was standing, and that condition threw the two couplers a little out of line with each other, and therefore, when the two bodies came together, the Leeds coupler struck to one side of the Tower, and they failed to unite. Then, according to the plaintiff, he got off the foot-board of the engine where he was riding, and signaled to the engineer to back, and when the engine had backed, plaintiff went to the end of the car and endeavored to shove the Tower coupler with his hand into position where it would be in line with the Leeds, but, not being able to shove it with his hand, he attempted to do so with his foot, and he placed his right foot on the inside of the Tower's jaws, standing on his left leg, and while in that position the engine came without signal, and by the impact the Leeds coupled with the Tower and caught the plaintiff's foot and crushed it.

"Thus far there is nothing in the evidence tending to show that the appliances furnished were not reasonably safe when handled with ordinary care. The road engine was not as convenient or as well adapted to switching work as an engine made for that purpose, but however clumsy or inconvenient the implement may be the master is not to blame if it is reasonably safe. The law does not hold the master liable for not providing for the convenience of his servants if he exercises reasonable care to provide for their safety. The master complies with all that the law requires when he uses reasonable care to provide for the safety of his servants; the care required varying in degree according to the character of the business—that is, what would be reasonable care in a business involving little danger might not be so esteemed in another business involving great danger—but the standard of measurement is reasonable care for the safety of the servant under the circumstances. *Huhn v. Railway*, 92 Mo. 440, 4

S. W. 937; *Blanton v. Dold*, 109 Mo. 64. 15 S. W. 1149; *Friel v. Railroad*, 115 Mo. 503. 22 S. W. 498; *Steinhauser v. Spraul*, 127 Mo. 541, 28 S. W. 620, 30 S. W. 102, 27 L. R. A. 441.

"We find the term 'suitable appliances' used by the law writers, but 'suitable' in that connection means compatible with safety. Some of the plaintiff's witnesses said that a road engine was not suitable for switching, and that was evidently correct in a certain sense, but none of them said it was not reasonably safe. The plaintiff himself only said that the switch engine was more convenient. This engine had been used there for a long time, and it had performed the work of a switch engine with reasonable safety. Whilst some of the witnesses were allowed to express the opinion that it was not suitable, yet none of them ventured to show in what way it was not safe. It would not require a very learned expert to be able to say that a road engine was not as suitable for switching purposes as a regular switch engine—every man of common experience knows that—but when that is said, it is far from saying that a road engine cannot be used for switching cars with reasonable safety, when handled with ordinary care. No witness in this case said so.

"This engine as equipped would have effected the coupling automatically by impact if the coupler on the car had been in line with it. The only reason for the failure was that the car was on a curve. The plaintiff was the master of the operation. The jaws of the Tower coupler on the car had been opened by him, or under his supervision, to receive the Leeds drawhead, and he could have adjusted it to do so at the same time he opened the jaws if he had observed the situation, but he overlooked the fact that the end of the car was on a curve, and therefore his first attempt to couple was a failure. Who was to blame for that? Certainly not the Leeds coupler.

"A great deal was said in the course of the trial about the desirability of having couplers that would not require the switchman to go between the cars, borrowing in that respect the language of the act of Congress regulating interstate commerce, but, whilst the act of Congress had nothing to do with this case, yet, even if it had, this Leeds coupler did not require the plaintiff to go between the cars. The jaws of the Tower coupler could be opened by a device of its own without going between the cars; and, when open and in line, the Leeds would couple by impact. But it is said that the Tower coupler has a lateral movement—that is, it may be moved three or four inches to the right or left, and thus bring it in line with the coupler with which it is aimed to unite—whereas the Leeds has a lateral movement of only about an inch and a half, and the argument is that, if there had been

a Tower coupler on the front end of the engine, the plaintiff could have stood on the footboard of the engine, and have shoved it to one side, and thus have brought it in line; and the plaintiff's whole case, as far as it is bottomed on a defect of the engine, was reduced to that point, and on that point he went to the jury and obtained his verdict. But that defect, if defect it was, was not pleaded in the petition, and if it was known to the plaintiff, and considered by him a defect, he did not mention it to his counsel, because, as the counsel himself said at the trial, it had just then come to his knowledge. But suppose it had been pleaded, and suppose it was a defect, that might have caused an accident, the vital question still remains, did it have anything to do in causing this accident?

"The aim was to couple the Leeds coupler on the front end of the engine with the Tower coupler on the end of the car. The engine came forward under plaintiff's direction to make the coupling; the plaintiff riding, as he now claims, on the pilot of the engine. When the contact came, the effort to couple failed because the couplers were not in line. Then the plaintiff gave the engineer the signal to back, and when the engine had backed, plaintiff got off the engine and walked to the car, and undertook to adjust the coupler by shoving it with his foot. Then the engine came and caught him. When the plaintiff was coming forward standing on the pilot of the engine, he expected the coupling to be made by the impact when the coupler on the engine should strike that on the car, and it was not until the contact had come, and the failure to couple had resulted, that the plaintiff discovered the necessity of a lateral movement of one coupler or the other. Then he got off the engine and went to the car. If there had been a Tower coupler on that end of the engine, the plaintiff would have had the choice of moving either that one or the one on the car, and he might have chosen the one or the other; but the purpose would have been served as well in moving the one as the other. If the alleged defect in the Leeds was obviated by the presence of the Tower, where was the danger in having a Leeds? If the coupler on the engine had been a Tower instead of a Leeds, and plaintiff had choice which he would move, it is not difficult to imagine why he would have preferred to stand on the ground to move the coupler on the car than to stand on the footboard of the pilot of the engine to move the other, especially if the engine was moving, and more especially if it was necessary for him to use his foot in the operation, which would involve standing on one leg. But however that may be, the plaintiff makes out no case of negligence on account of the lack of lateral movement in the Leeds when there was a Tower at hand to perform the same service.

plaintiff the jury for the plaintiff coupler attached 'by reason of a play or movement to the other coupler was undertaken plaintiff's foot was by reason of said engine with negligence on the part of the plaintiff was error to submit that issue.

"4. The plaintiff in a preceding case first brought his Congress therein having been renounced by plaintiff, preferred dismissed that case founded on the case a perfect right to action in that plaintiff's learned counsel to avoid saying in this case that calling this an accident, and, since court, as they have wise in so careful. But, having put aside of the act of negligence, they ought to their evidence and the jury.

"The act of Congress engaged in interstate automatic couplers in contact, without requirement between the cars. The plaintiff, as it was before us, was not required to place a guard over the coupling between the cars, yet the plaintiff couple automatically. It did not measure prescribed by the act of Congress is not per se negligence, because it fails to measure the statute. Failure to crossing is not negligence per se, but is so under the law, but is so under the law to place a guard over the coupling per se at Congress by statute under the law, although the Leeds under the ban of the act unless it could be reasonably safe for the plaintiff in this case.

"Sometimes the mechanical device which was used, but had been used in favor of another method of the idea that the because the latter

abandonment is competent on the question of safety; but, unless the evidence shows or the circumstances indicate that it was abandoned for that reason, it is not competent, and the jury should not be instructed to consider it. Many mechanical devices that at one time were in popular favor have been generally abandoned because later inventions are more efficient; that is, will produce more for the same amount of investment. This is as true of railroad equipments as it is of manufacturers. Even the air brake, whilst it is perhaps safer than the old-fashioned hand instrument, yet has its economic characteristics that commend it to men whose chief aim in business is financial success.

"All the trunk line railroads in the country are engaged in interstate commerce, and they must all conform to the acts of Congress passed in pursuance of the federal Constitution on that subject. Therefore it is easy to account for the fact that nearly all, if not all, the railroads in the country have abandoned the Leeds coupler. Since the passage of that act of Congress they have abandoned it because it has been considered as condemned by the act of Congress. But that does not justify a court, while trying a cause of action arising under the common law, in instructing the jury that, if the evidence shows that the Leeds coupler had been generally abandoned, without anything to show why, they may take that fact into account in determining whether or not it was safe. But that is what the court did in the second instruction given at the request of the plaintiff.

"One of the plaintiff's witnesses was an inspector of safety appliances of the Interstate Commerce Commissioners, and one reading his evidence cannot fail to see that all his opinion evidence was derived from the standpoint of his official connection with the Interstate Commerce Commissioners and the act of Congress under which he held his office. In spite of the objections on the part of the defendant, and rulings of the court sustaining the objections, this witness was constantly (and perhaps unconsciously) conveying to the jury the idea that the Leeds coupler had been condemned by the act of Congress; for example: 'Q. What has become of that coupler [the Leeds]? A. All railroads are doing away with that and adopting automatic couplers. Q. For what reason? A. Because the law makes them.' There was, of course, no law but the act of Congress so requiring, and the court should not have allowed that evidence to go in, but the court not only allowed it, but instructed the jury in the second instruction that, if the railroads in the country had generally provided their switch engines with automatic couplers that would couple by impact without the necessity of going between cars, and that the

had generally been abandoned, 'and was not reasonably safe, suitable, and adapted' for switching purposes, and the other kind were easily accessible and obtainable, then it was the duty of defendant to have discarded the Leeds and obtained the other kind. Not only was the requirement of the act of Congress, and the failure of this coupler to meet that requirement, carried by the evidence of this witness to the mind of the jury, but counsel for the plaintiff in their arguments were unable to restrain themselves within their common-law lines. Several times the defendant objected to their remarks, and the objections were sustained, but it did no good; the thought was planted in the minds of the jury, and could not be eradicated by the court's merely sustaining the objection. It sometimes happens that a trial judge is conscious that a cause on trial has drifted away from his control, and is decided against his rulings, and, when that is the case he has but one course of duty; that is, to set aside the verdict.

"For the reasons above stated the court erred in giving the second instruction for the plaintiff. Instruction 3 for the plaintiff contained the same infirmities as above mentioned in instruction 2, and it also should have been refused.

"5. There was evidence tending to show that it was the duty of the engineer to have held the engine in place, after the first effort to make the coupling had failed, until he received a signal from the plaintiff to come on, and that he neglected to observe that duty, but came on without signal. The testimony on that point was conflicting, but still there was sufficient to entitle the plaintiff to go to the country on that issue. That question was not submitted to the jury in a form that authorized a recovery if decided in plaintiff's favor. On a retrial the plaintiff will be entitled to have that issue presented to the jury.

"The judgment is reversed, and the cause remanded to be retried according to the law as herein expressed."

LAMM, P. J., and WOODSON, J., concur in all except paragraph 2, as to which their views are expressed in the dissenting opinion of LAMM, P. J. GRAVES, J., concurs in all, except that in his opinion an exception to the overruling of a motion to make a petition more definite and certain is not preserved unless it is assigned for error in the motion for a new trial.

LAMM, P. J. No system of jurisprudence can be so wise and all-embracing that hard cases cannot be put in matters of practice. Might it have been better to allow appeals from orders overruling motions to make more definite and certain, or to strike out? Much can be said against that plan because

it would clog the machinery of justice and breed delay. Now delay tends towards a denial of justice. Justice shall be administered without delay said the Great Charter, and so says our Constitution. Experience-taught, we have reached the settled rule of practice that joining issue on the merits is a waiver of interlocutory rulings on motions and demurrers, except where the petition does not state a cause of action, or there is a lack of jurisdiction of the subject. We should stand by that rule; for we have said so so often that the profession understands our position. If we unsettle the rule, the door is opened wide for confusion to come in; certainty being of the very essence of good law. If the rule inherently and necessarily tended to injustice in the end, it would be different. But it will be found to rarely, if ever, so result.

(a) Take the case of a motion to elect. If causes of action are commingled which contradict each other, and are self-destructive through repugnancy, the point can be saved after answering, for in such case the petition does not state a cause of action. *White v. Railroad*, 202 Mo., loc. cit. 562, 101 S. W. 14; *Jordan v. Transit Co.*, 202 Mo., loc. cit. 426, 427, 101 S. W. 11. Or if such repugnant causes go to the jury, and a general verdict comes in, a motion in arrest lies. Or if there is no repugnancy, and the evidence sustains the whole charge, what injury is done if the jury be properly instructed? Take another case. If the petition commingle good with bad causes of action, and a motion to strike out, or to elect, or a demurrer on that score is overruled, and a general verdict comes in afterwards for plaintiff, the defendant ultimately suffers no wrong, because a motion in arrest lies. *Mooney v. Kennett*, 19 Mo. 551, 61 Am. Dec. 576, *Christal v. Craig*, 80 Mo., loc. cit. 371. Take the case of a motion to make more specific and certain. If it be inadvertently overruled, and issue is thereafter joined by answer, and if the petition states a cause of action at all, the interest of defendant may be guarded in the introduction of testimony, or in instructions, or if, on the trial to the merits, a just result has not been reached, justice can be attained in the trial court by sustaining a motion for a new trial. Therefore, in the long run, no harm is done. If, however, a defendant refuse to stand on his motion to make more specific (lacking faith, maybe), but answers over and invokes and takes his chance of winning or losing on a trial on the merits, that chance, so invoked and taken, waives his motion by abandoning it, and heals the error, if any, in overruling it. Otherwise a court becomes a place of gambling on chances, and the time and expense of a trial are wasted if on appeal we lose sight of the

very judgment appealed from, cutting behind it (though it may have been rendered on a fair trial free from error) and treading back and tripping up a respondent's heels on an interlocutory ruling not affecting the merits of the judgment a whit. To overturn a verdict and judgment in that way is not in accord with our practice act. Rev. St. 1899, §§ 602,865 (Ann. St. 1906, pp. 628, 812). My learned Brother's opinion explodes, it seems to me, the doctrine of a line of cases, if we rule as he has written. For example: *White v. Railroad*, supra; *Jordan v. Transit Co.*, supra; *Ewing v. Vernon Co.* (just handed down, and not yet officially reported) 116 S. W. 518; *O'Brien v. Transif Co.*, 212 Mo., loc. cit. 69, 110 S. W. 705 et seq.; *Scovill v. Glasner*, 79 Mo. 454 et seq.; *Paddock v. Somes*, 102 Mo., loc. cit. 235, 14 S. W. 746, 10 L. R. A. 254; *McMillen v. City of Columbia*, 122 Mo. App. 34, 97 S. W. 953. See, also, the cases criticised by him. Therefore, I dissent to paragraph 2 of the opinion.

(b) Moreover, in this case the attention of the trial court was not called by the motion for a new trial to the error, if any, in the ruling on the motion to make more specific. Such motion for a new trial, as its name indicates, assembles the reasons and grounds for a new trial, and presents them to the trial judge anew in order that he may have one last chance to heal his own errors by opening the case to be heard without error. Under our practice act all motions must specify the grounds the movement relies on. If the ruling on the motion to make more specific was such ground, then it should have been so stated in the motion for a new trial. If it was not such ground, it need not be stated, but, if it was no such ground below, it is no such ground above. If a ruling on a motion to make more specific need not be challenged in the motion for a new trial, then, by the same token, rulings on continuances, applications for changes of venue, motions to strike out, motions to suppress depositions, motions for judgment on the pleadings, or for this, that, or the other thing, need not be challenged in the motion for a new trial, but all of them come here for review, though abandoned by that motion. I do not agree to that. Since, then, by discussing the motion to make more specific in paragraph 2 of his opinion, my Brother necessarily assumes it is here to discuss, it would seem the opinion by implication will mean to the profession that such motion gets here though the ruling nisi be not challenged by the motion for a new trial.

Therefore I dissent to such apparent inferential holding. In all other respects I concur.

WOODSON, J., agrees with these views.

HAYS v. FOOS.

(Supreme Court of Missouri, Division No. 1.
Nov. 27, 1909.)

1. APPEAL AND ERROR (§ 586*)—RECORD—ABSTRACT.

The record proper must show the filing of the motion for a new trial and the ruling thereon; but an exception to the ruling must be preserved in the bill of exceptions, and not in the record proper, and the fact that the exception has been preserved must appear in the abstract of the bill of exceptions, and, if it does not so appear, the appeal presents nothing for review except the record proper.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 586.*]

2. APPEAL AND ERROR (§ 539*)—RECORD—STIPULATION—RULES OF COURT.

It is not within the power of counsel, by agreement, either expressed or implied, to obviate the requirements of the rules of the Supreme Court as to the contents of the record on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2357, 2358, 2464; Dec. Dig. § 539.*]

Appeal from Circuit Court, Nodaway County.

Action by James T. Hays against James C. Foos. From a judgment for defendant, plaintiff appeals. Affirmed.

B. R. Martin and Anothony & Ford, for appellant. John M. Dawson, for respondent.

GRAVES, J. This is an action under section 650, Rev. St. 1899 (Ann. St. 1906, p. 667), to quiet title to about 2½ acres of land in Nodaway county, Mo.

The chief error assigned is that the trial court misjudged the facts in evidence. Respondent challenges the abstract of record on the ground that appellant's abstract fails to set out all the evidence. It will not be necessary to go into this contention, for the reason that in underaking so to do it appears that the abstract before us fails to mention the motion, for new trial under the head of "Bill of Exceptions." In what purports to be "Appellant's Statement, Abstract, and Brief," we find, first, a "statement." This is followed by what is headed "Abstract of Record." Under this heading we find entries showing the filing of the petition and the petition itself, a demurrer and the ruling of the court thereon, the filing of an answer and the answer itself, an entry showing that after the hearing of the testimony a continuance of the cause for argument was made, an entry showing the filing of the motion for new trial and the overruling thereof, and in this record entry it is stated that there was an exception taken to the action of the court in overruling the motion. The judgment also appears under this heading. After these things, which appear under the heading of "Abstract of the Record," as aforesaid, we find the heading "Bill of Exceptions." Under

this heading, and in abstracting the bill of exceptions, the motion for new trial, or the ruling thereon, is nowhere mentioned. No exception to the action of the court in overruling this motion is found under the heading of "Bill of Exceptions." It has long been ruled that the bill of exceptions is the place wherein an exception to the action of the court in overruling a motion for new trial should be lodged. Such an exception has no place in the record proper. The record proper must show the filing of the motion, and the action of the court thereon; but, if an exception to the action of the court is to be taken, it must be preserved in the bill of exceptions, and in abstracting such bill of exceptions the fact that the exception has been preserved must appear. It does not so appear in this record. For this reason the case is only here upon the record proper. Whilst counsel for respondent have not raised the question, yet in undertaking to enforce our rules we must see that the record is in proper shape. If counsel by expressed agreement, or even a tacit agreement, can obviate our rules, the efficacy thereof would be destroyed. It is not within the power of counsel by agreement, either expressed or implied, to obviate the provisions of the rules of this court. Those rules were established with the purpose of facilitating the business of the court, and to permit counsel to obviate the effect thereof by either a tacit or expressed agreement would leave the court powerless.

So that in this case we hold that there is nothing before us except the record proper, and this alone can we consider. *Reno v. FitzJarrell*, 163 Mo., loc. cit. 413, 63 S. W. 808; *Clay v. Union Wholesale Publishers Co.*, 200 Mo., loc. cit. 672, 673, 98 S. W. 575; *Stark v. Zehnder*, 204 Mo., loc. cit. 448, 102 S. W. 992; *Gilchrist v. Bryant*, 213 Mo., loc. cit. 443, 111 S. W. 1128; *Harding v. Bedoll*, 202 Mo., loc. cit. 629, 100 S. W. 638. A number of other cases along the same line might be cited, because in this court they have been numerous. This, however, is sufficient to explain to the profession that there is a difference between what is nominated the record proper and the bill of exceptions. Not only so, but there is a difference in what is the nominated abstract of the record proper, and the abstract of the bill of exceptions.

Examining the record proper in this case, it is shown that the judgment is one which could have properly been entered upon the pleadings therein. In other words, the pleadings were broad enough, if proper proof had been made, to sustain the judgment. We are precluded to go into the proof by reason of the fact of the deficient abstract of the bill of exceptions. Being so precluded, we are bound by the record proper.

For the reasons aforesaid, the judgment should be, and is, affirmed. All concur.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

NALL et al. v. CONOVER.

(Supreme Court of Missouri. Division No. 1.
Nov. 27, 1909.)

1. QUIETING TITLE (§ 10*)—TITLE OF PLAINTIFF—SUFFICIENCY—COMMON SOURCE.

Where, in a suit under Rev. St. 1890, § 650 (Ann. St. 1906, p. 667), to quiet title there was an agreed common source of title or both parties assumed a common source of title, plaintiff need not as a general rule go back of the common source in establishing his case, but, where he relies on a paper title from the government, he must show an adequate and complete paper title.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 37; Dec. Dig. § 10.*]

2. PUBLIC LANDS (§ 61*)—SWAMP LANDS—SALES.

Under Act March 1, 1855 (Laws 1855, p. 154), permitting the sale of swamp lands, requiring the issuance of a certificate of purchase and triplicate receipts on the presentation of the certificate of purchase and the payment of the price and providing for the issuance of a patent to the purchaser on filing the receipt with the required abstract, one relying on the purchase of swamp lands who merely shows the issuance of a certificate of purchase, without attempting to prove payment and the issuance of the receipt and patent, fails to establish any legal or equitable title which will support an action to quiet title.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 192-213; Dec. Dig. § 61.*]

3. QUIETING TITLE (§ 10*)—TITLE OF PLAINTIFF—COMMON SOURCE OF TITLE.

Where, in a suit to quiet title, plaintiff claimed under a certificate of purchase of swamp land issued to a third person, and defendant proved a title bond executed by the third person and another to a grantee, and title through him, there was no admitted or assumed common source of title, and plaintiff, relying on a paper title from the government, must fail unless his title was complete.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 37; Dec. Dig. § 10.*]

4. LIMITATION OF ACTIONS (§ 11*)—LIMITATIONS AGAINST COUNTIES.

Limitations run against a county and in favor of one in adverse possession of its swamp lands.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 35-39; Dec. Dig. § 11.*]

5. ADVERSE POSSESSION (§ 16*)—ACTS OF OWNERSHIP.

In 1872 a grantee in a warranty deed of 400 acres in one tract entered into possession and cleared a part and claimed the whole. In 1870 he conveyed the entire tract to his son, who for more than 10 years actually claimed title to the whole and lived thereon and cultivated a part thereof. He obtained from another part his rails for his entire farm, and he also cut and sawed timber therefrom, and he paid taxes on the whole tract. His successors in title paid taxes. Held to establish title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 82-89; Dec. Dig. § 16.*]

Appeal from Circuit Court, Pemiscot County; Henry C. Riley, Judge.

Action by Fannie Nall and others against J. R. Conover. From a judgment for defendant, plaintiffs appeal. Affirmed.

Jere S. Gossom and S. J. Corbett, for appellants. Ward & Collins, for respondent.

GRAVES, J., Plaintiffs, the heirs at law of Robert C. Nall, deceased, bring this action under section 650, Rev. St. 1899 (Ann. St. 1906, p. 667), to have the court declare their interest in and to 80 acres of land in Pemiscot county. The petition is practically in usual form. Therein they allege that Robert C. Nall was the owner in fee simple of this land, and died so seised thereof, and aver that they, his heirs at law, are now "the absolute owners in fee simple and claim that title" to the real estate mentioned. They charge that defendant claims some title, estate, or interest in the land; the nature of such claim being unknown. They then ask the court to ascertain and determine title. By answer the defendant first denies that plaintiffs were owners of the land, and admits that he claims title thereto, and avers that he is the owner thereof in fee. For a second count in the answer, denominated "Another and counterclaim," the defendant sets up what is usually found in a petition under section 650, and winds up with the usual prayer for the court to ascertain and determine title. Reply was general denial of all new matter in the answer. The cause was tried before the court. By its judgment the court found and decreed the title to be in defendant, and, from such judgment, the plaintiff has appealed.

Plaintiffs, to make their case, introduced in evidence the act approved March 28, 1901 (Laws 1901, p. 251), making Carleton's Abstract Books, or certified copies of the entries therein contained, evidence of land titles of Pemiscot county. There were four entries from these abstract books introduced by plaintiffs, only one of which may be required to be noted in detail. Entry No. 1 shows that the land in dispute passed by act of Congress to the state of Missouri, said act of Congress of date September 28, 1850 (Act Sept. 28, 1850, 9 Stat. 519, c. 84). Entry No. 2 shows title passing from the state to Pemiscot county by patent dated December 24, 1875. Entry No. 3 thus reads: "Pemiscot County to Thomas C. Powell, Certificate of Entry No. 951, dated May 8, 1858; consideration \$100.00; recorded in Register's Book No. 1, at page 34; lands conveyed, the West half of the North West quarter of Section No. 17, in Township No. 17 North, of Range No. 13 East." Entry No. 4 shows a warranty deed from Thomas C. Powell and wife to Robert C. Nall, dated October 24, 1859. Plaintiffs then showed the death of Robert C. Nall on December 18, 1879, and that they were his lawful heirs and rested their case.

Defendant offered instruments effecting the title thus: From Carleton's Abstracts the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

Powell to William Johnson. Title Bond. Dated August 15, 1857. Filed and recorded March 18, 1858. Book A. Page 535. Consideration \$480.00. Acknowledgment regular. The above Bond is for the Northwest quarter of Section 17, Township 17, Range 13, East. Containing 160 acres." Then a warranty deed from Jesse Huffman and wife to John Cotton of date January 25, 1872, conveying this and other lands. By his deed of September 22, 1879, John Cotton conveyed the same lands to Milliard F. Cotton. Milliard F. Cotton conveyed the N. W. $\frac{1}{4}$ of section 17, township 17, range 13 E., to S. N. McAdow. This includes the land in dispute in this case. April 18, 1895, S. N. McAdow conveyed the same land to George W. Alvey. May 15, 1895, George W. Alvey conveyed to Nelson J. Ball the same land, except the southeast 40 thereof. November 3, 1900, Nelson J. Ball conveyed the same 120 acres to T. L. Price. May 8, 1901, T. L. Price conveyed the same 120 acres, which includes the 80 acres in dispute in this case, to W. P. Carter. July 18, 1903, W. P. Carter conveyed the same 120 acres to the defendant, J. R. Conover. Defendant then proved by witnesses that Thomas C. Powell admitted that they had received the pay for the land mentioned in the bond for a deed. They also showed by parol that the same land was sold at an administrator's sale of the William Johnson estate, and that Jesse Huffman was the purchaser. In addition to the record title above disclosed and to the facts above stated, the defendant attempted to show title under the statute of limitations. In so doing it appears that most of the active parties were dead. Johnson was dead, Powell was dead, Huffman was dead; in fact, all of the leading factors in the transaction were shown to be dead. It was shown, however, that Jesse Huffman, the alleged purchaser at the administrator's sale of William Johnson, deceased, sold and conveyed about 400 acres of land to John Cotton, which land was contiguous, and which tract included the 80 acres in dispute. This transfer, as above indicated, was by a warranty deed in January, 1872. Later, in September, 1879, John Cotton conveyed the same lands to his son, Milliard F. Cotton. This tract of 400 acres or more included lands in section 18 and section 17, and section 20, in township 17, range 13 E., so situated as to be one continuous body. It is shown by the evidence that John Cotton had built a house and cleared the land on that small portion thereof located in section 20. He had also cleared a portion of the east half of the S. W. $\frac{1}{4}$ of section 18, which corners with the land in dispute in section 17. Milliard F. Cotton upon his purchase took and held the possession of the entire tract from the date of his deed on to the time he sold it as indicated in the record evidence above stated. By the parol proof it was fur-

the land in question in connection with the whole tract, hereinabove mentioned; that he actually lived upon and farmed a part of the 400 acres cornering with the 80 in dispute, and that, in connection with said occupancy, he used the 80 in dispute for the purpose of obtaining firewood, rails for the balance of his farm, and, in addition, cut and sold timber therefrom. In addition to these facts, it appears that Milliard F. Cotton so occupied and claimed said land from the date of his deed in 1879 to his conveyance thereof in April, 1895. Tax receipts were introduced showing payment of taxes on this land by Milliard F. Cotton from 1889 up to and including 1895, and, further, that from that time on his subsequent grantees likewise paid the taxes to the time of this suit. There is no evidence as to what John Cotton did toward payment of taxes, but there is evidence showing that he took possession of and cleared portions of the 400 acres of land located in sections 17 and 18.

It must be borne in mind that all the records were destroyed when the courthouse of Pemiscot county was burned in 1882, which, of course, included the probate records and the tax records prior thereto. There is no evidence of a substantial character tending to show that the plaintiffs or any of them or their predecessor in title, ever paid any taxes on this land. There is substantial evidence tending to show that John Cotton claimed the entire tract from the date of the deed from Jesse Huffman, and much stronger evidence tending to show that Milliard F. Cotton claimed title to this land and exercised acts of ownership thereover from the date of his deed in September, 1879.

This substantially states all facts necessary for a disposition of the cause.

1. As a preliminary question, it should be determined whether or not there is a common source of title proven, and, if so, what such common source of title is; for the record contains no admitted common source of title. To the end of fully discussing this point we have set out in full the two record entries bearing thereon. The plaintiffs claim that a common source of title has been established by the proof; that such common source of title is Thomas C. Powell. In this contention they rely upon record entry No. 3 introduced by them, which shows a certificate of entry No. 951 to Thomas C. Powell, as recorded in Register's Book No. 1 at page 34. To this certificate of entry they add the title bond executed by Thomas C. Powell and John H. Powell to William Johnson, the record of which was introduced by the defendant.

We agree with the doctrine of *Harrison Machine Works v. Bowers*, 200 Mo., loc. cit. 235, 98 S. W. 770, wherein Judge Lamm, in effect, held that the trend of our cases was to the effect that if there was an agreed

common source of title, or both parties assume a common source of title, subject to certain exceptions, the plaintiff need not go back of such common source in making his case. It should be added now that, if no such common source of title is assumed, admitted, or proven, then, under section 650, the plaintiff must prove his interest in the land beginning with the government. In other words, if he relies upon a paper title, as in this case, such paper title must be complete and adequate. To start with, the plaintiffs in this case were not relying upon an admitted common source of title, nor upon an assumed common source of title, nor did they attempt to prove a common source of title. When they closed their case, they relied upon what they thought was a clear paper title, when supplemented by proof of the death of deceased and proof that they were the legal heirs of the last grantee in their chain of title. Had they stopped there, as they did, and the defendants stopped at the same point, and had there been a missing link from their chain, the court could not have declared title in them. The question now is: Was there a missing link in the chain of title as evidenced by the record evidence, and, further, if so, has the defendants' evidence supplemented theirs so as to change the result?

Let us take first the paper title of the plaintiffs. One link of that title was a register's certificate under the act approved March 1, 1855 (Laws 1855, p. 154). Section 4 of that act reads: "When any of said lands shall be sold in any of the modes pointed out in this act, the register shall make triplicate certificates of the fact, describing the land so sold by its numbers and quantity, to whom sold, and the amount of the purchase money per acre, and in the aggregate—one of which certificates he shall deliver to the purchaser, file one in his office, and transmit the other to the register of lands at Jefferson City, with an abstract containing the number of the certificate, the name of the purchaser, the number of the land, and the amount of purchase money." From the certificate, or, rather, the copy from Carleton's Abstract Books, it would appear that Thomas C. Powell had taken the first step toward purchasing the land in question. But section 5 of the same act provides a further step to be taken. This section reads: "When a certificate of purchase shall be presented to the receiver of public moneys, and the money paid, he shall issue triplicate receipts to the purchaser, stating the numbers and quantity of the land, the name of the purchaser, and the amount paid per acre, and in the aggregate—one of which receipts shall be delivered to the purchaser, one filed in his office, and the other transmitted to the register of lands at Jefferson City, with such an abstract as is required to be transmitted by the register in the next preceding section." And section 6

of the same act further provides: "Upon the receipt of said certificates, receipts and abstracts at the office of register of lands at Jefferson City, agreeing with each other, the Governor shall cause a patent to be issued to the purchaser for the lands he shall have purchased." The record in this case fails to show any patent to Powell. It fails to show any compliance with section 5 of the act set out, *supra*. It only shows that under section 4 of the act, *supra*, Powell selected or located the land as a purchaser. Of course, had it been proved that Powell in pursuance of his selection or location as evidenced by the certificate of the register had followed it up by a payment of the amount to the receiver of public moneys as provided in section 5, then there would have been in him an equitable title, even though a patent had not issued as provided for by section 6, *supra*. But such is not this case. Two questions are here presented: (1) Is the register's book of selections or locations such a book affecting land titles as was contemplated by the act of 1901, which made Carleton's Abstracts evidence of title; and (2), even if it is such a book, does the mere selection or location for purchase of a tract of land evidence any title, either legal or equitable, until something further is done? An examination of the act approved March 1, 1855, will show that it relates to ten counties of which Pemiscot is one. The act provides that as to all the counties named therein, except Scott, Dunklin, and Pemiscot, the county clerk shall be *ex officio* register of lands, and the county treasurer shall be *ex officio* receiver of public moneys. In the three excepted counties—i. e., Scott, Dunklin, and Pemiscot—a register of lands and a receiver of public moneys were to be elected by the voters. They were required to give bond, but not a word said about their keeping a record either public or private. Not being a record required to be kept by law, we hardly see how a mere abstract thereof can be made evidence of land titles, any more than the abstract of any other private record or memoranda. Nor do we think that when the act of 1901, together with its preamble, was passed, that it was intended to make Carleton's Abstract Books evidence of title further than they undertook to abstract instruments effecting titles which were required to be made public by record. But we need not pass upon this question now. The other matter is fatal to the paper title of plaintiffs. The only thing that plaintiffs claim is a certificate of purchase as provided in section 4, *supra*. These certificates are made out in triplicate, one going to the purchaser, one to be retained by the register, and one to be sent to the register of lands at Jefferson City. No provision here for any other record, except the copies aforesaid. Then by section 5, *supra*, when the purchaser presents his certificate of purchase from the register to the receiver, and pays the money, then the receiver issues trip-

licate receipts, one to the purchaser, one to be retained at his office and the other to be transmitted to the register of lands at Jefferson City. Then by section 6, supra, if the certificate from the county register and the receipt from the county receiver as transmitted to the register of lands at Jefferson City agree with each other, then the Governor caused a patent to issue.

It is clear under this law that the plaintiffs failed by their entry No. 3 from Carleton's Abstracts to show either a legal or equitable estate. No attempt is made to prove the loss of the triplicate certificates, for at least one of them should have been in Jefferson City. No attempt was made to prove payment, either from the receiver's books, or from the triplicate copy of the receipt on file in Jefferson City, if, in fact, any payment was made. No patent was in evidence. Had it been shown that the money had been paid, an equitable title might have resulted from that proof, but there is no such proof or even an attempt to make it. Under the proof presented by the plaintiffs, neither a legal or equitable title was established in plaintiffs. Certificates of this character were held in judgment by this court in the recent case of Phillips v. St. Louis Union Transit Co., 214 Mo. 680, 113 S. W. 1065.

2. It thus appears that there is a missing link in plaintiffs' chain of title, and therefore no decree could go for them unless there was a proven common source of title, behind which neither party could go. There is no admitted common source of title, and we think no assumed common source of title, because defendant by way of defense and in support of his cross-bill undertook to prove title by adverse possession under the 10-year statute of limitations. Going to the evidence as to whether or not it shows a common source of title, we find that plaintiffs claim under a certificate of purchase from Pemiscot county to Thomas C. Powell of date May 8, 1858. The only thing outside of the statute of limitations introduced by defendants is a title bond executed by Thomas C. Powell and John H. Powell to William Johnson, of date August 15, 1857, and by parol and record evidence they undertake to deraign title from that title bond forward. Whether they did so or not is immaterial on the question under discussion now. Does this record evidence prove a common source of title? We think not. Plaintiffs claim through Thomas C. Powell alone. Defendant attempted to deraign title from Thomas C. Powell and John H. Powell. There is a difference between a single grantor and two grantors. Plaintiffs claim through one, who had no paper title, and defendant claims through two, neither of whom had a paper title. Under these circumstances, it cannot be said that a common source of title was either assumed or shown. Nor was such admitted. In Phillips v. Trust Company, supra, we had to deal with a certificate of pur-

chase in New Madrid county which is one of the 10 counties mentioned in the act of 1855. One August E. Shields had a certificate of purchase. This he assigned to Shapley R. Phillips. The following receipt was introduced in evidence: "Received of Shapley R. Phillips two thousand two hundred and thirty-three dollars and seventy-four cents in payment of land bought of the county by Edward Coleman, Wm. D. Walthrop and Augustus E. Shields, and in final payment of all land they bought at the May Term, of our county land sales, in 1857. Geo. W. Dawson, Treasurer." Phillips was depending upon that receipt in conjunction with his assigned certificate from Shields for title or at least equitable title. Discussing this receipt, this court then said: "It will be observed by reading the register's certificate of sale of the land to August E. Shields, dated May 23, 1857, that Shields paid nothing whatever to John T. Scott, the register, for that certificate of purchase, and the only evidence offered tending to prove Phillips paid the county for the land described in that certificate was the receipt of George W. Dawson, treasurer of the county, dated August 14, 1860. By reading that receipt it will be seen that it does not mention the land described in the certificate of sale, dated May 23, 1857, signed by John T. Scott, register of the swamp lands, but, upon the contrary, it in express terms acknowledges the receipt of the purchase money for lands sold by the county to Edward Coleman, Wm. D. Walthrop, and Augustus E. Shields. No court could be warranted in finding that the lands sold by the county to the three persons named in the treasurer's receipt were the same lands described in the certificate of sale, dated May 23, 1857. The legal import of the language employed in the treasurer's receipt is that those three gentlemen purchased the lands therein mentioned as tenants in common, and cannot be tortured into meaning that it referred to separate tracts of land purchased by each of them in severalty. That being true, then there is no evidence that plaintiff nor any of those through whom he claims title ever paid the county one cent for the land sued for; and it cannot be claimed that Phillips was the equitable owner of the land, or that the county held the legal title thereto as trustee for the benefit of the plaintiff. The county, therefore, having never disposed of the legal or equitable title to the land, she had the perfect legal right to convey it to defendants' grantors."

So in this case it cannot be said that when one party relies upon Thomas C. Powell alone for title, and the other relies upon Thomas C. Powell and John H. Powell, there has been proven a common source of title. Therefore, the evidence failing to show either an admitted, an assumed, or a proven common source of title, and the plaintiffs

of title. There was no error in the judgment wherein it held that plaintiffs had no title to the land involved herein.

3. Was the decree right in decreeing title to the defendant? We think so. Concede that plaintiffs have failed to deraign title from the county, and concede, further, that defendant has failed to deraign by conveyances a title from the county, then how stands the case? Plaintiffs claim that the common source of title is Thomas C. Powell, but the evidence shows that they did not rely thereupon, and attempted to deraign title from the government. Taking the proof both pro and con, it does show that Pemiscot county owned the land. It falls to show that by legal conveyance either the legal or equitable title passed from the county. It did not pass to Thomas C. Powell, as we have hereinabove shown. Neither did it pass to Thomas C. Powell and John H. Powell, so far as disclosed by this evidence. But, whilst this is true, the statute of limitations will run against a county. In the case of *Dunklin County v. Chouteau*, 120 Mo., loc. cit. 595, 25 S. W. 557, it is said: "Distinction must also be made between property held for strictly public purposes, as for streets, parks, commons and the like, and property held by the corporation in its private character. 2 Dill. on Munic. Corp. § 675. This distinction is made in our own present statute of limitations. Rev. St. 1889, § 6772. These swamp lands would not come within the terms of that section, and hence the statute of limitations would run in favor of one in adverse possession, even as against the county." It should be remembered that Dunklin county is one of the 10 counties coming under the act of 1855, as is also Pemiscot county.

Conceding, then, as this case and others hold, that the statute of limitations will run against the county, it then becomes necessary to consider, in behalf of the defendant, whether or not either he or he and his predecessors in title have acquired title by adverse possession as against the county. We need not in this inquiry consider plaintiffs and their immediate predecessor in title because they never acquired even an equitable title against the county. Under the proof, John Cotton in 1872 by warranty deed acquired what he evidently thought was title to 400 acres of land in one contiguous body. On this tract he moved and cleared a portion thereof, claiming the whole. A part of the land actually cleared and cultivated by him was in section 18, which adjoined to the west the land in dispute. In 1879 and whilst plaintiffs' predecessor was yet living, this land (400 acres) was conveyed to Mil-

ner and other portions of the 400 acres. As to the land in question, he got for more than 10 years his firewood therefrom. He got his rails therefrom for his entire farm, including the tract in dispute, although the tract in dispute was never fenced. He cut and had sawed timber therefrom. He cut and sold timber therefrom. He paid the taxes thereon, and his successors in title have paid the taxes thereon since his conveyance. Plaintiffs and their predecessor in title have paid no taxes, as shown by the evidence. There are some general statements of paying taxes upon this and other lands owned by Mr. Nail, but no county officer could find a record thereof, and the testimony is nothing more than mere hearsay. Under the evidence in this record, we are of opinion that when John Cotton in 1872 took possession of this tract of 400 acres, including the land in dispute under a warranty deed from Jesse Huffman, he took possession of the whole tract, and, when his son followed in the possession in 1879, he likewise was in the possession of the whole tract, and that prior to the time Milliard F. Cotton conveyed a complete title under the statute of limitations had ripened in him, and, when he conveyed, he conveyed a complete title in fee simple, which title has regularly passed by mesne conveyances to the defendant herein.

So believing, the judgment below is correct, and should be and is, affirmed. All concur.

BERRY v. ST. LOUIS & S. F. R. CO. et al.
(Supreme Court of Missouri, Division No. 1.
Nov. 27, 1909.)

1. RELEASE (§ 52*)—SUFFICIENCY OF REPLY
RAISING ISSUE OF FRAUD.

A reply tendering to defendants the amount received by plaintiff for a release set up in the answer, and alleging that the release was obtained by coercion, fraud, and deception used by defendants by and through a claim agent named and another; that they told plaintiff her lawyer had gone back on her; that her neighbors and friends were all going to testify against her; that they would pay her lawyer; all of which statements were untrue; and that she, being old and poor, was finally scared and persuaded by them into the settlement, and that she was led to believe that the paper she signed contained stipulations to the effect that defendants would pay her lawyer, which it did not; and that the alleged settlement was not the one she understood she was making; and that her actual damages were in excess of the amount in the settlement—was sufficient.

[Ed. Note.—For other cases, see Release, Cent. Dig. § 92; Dec. Dig. § 52.*]

2. JURY (§ 10*)—RIGHT TO JURY TRIAL—
CONSTITUTIONAL GUARANTY—CONSTRUCTION.

The provision of Const. art. 2, § 28 (Ann. St. 1906, p. 162), that "the right of trial by

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jury, as heretofore enjoyed, shall remain inviolate" means that, if prior to the adoption of the Constitution defendant by law or practice is entitled to a jury, such right must remain inviolate, and the only inhibition on the Legislature was to prevent depriving a party of a jury trial where he had theretofore enjoyed the right.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 15, 16; Dec. Dig. § 10.*]

3. JURY (§ 13*)—RIGHT TO JURY TRIAL—ISSUE OF FRAUD AS TO RELEASE SET UP IN ANSWER.

Rev. St. 1899, § 654 (Ann. St. 1906, p. 670), permitting a reply alleging that a release set up in the answer was fraudulently procured from plaintiff, and that the issue thus raised shall be submitted to the jury, is not violative of Const. art. 2, § 28 (Ann. St. 1906, p. 102), providing that the right of trial by jury "as heretofore enjoyed" shall remain inviolate, since such an issue was triable by jury before the adoption of such constitutional provision.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 59; Dec. Dig. § 13.*]

Appeal from Circuit Court, New Madrid County; Henry C. Riley, Judge.

Action by Julia A. Berry against the St. Louis & San Francisco Railroad Company and another. From a judgment for plaintiff, defendant above named appeals. Affirmed.

W. F. Evans and Moses Whybark, for appellant.

GRAVES, J. The plaintiff originally brought her suit against the St. Louis, Memphis & Southeastern Railroad Company. Petition, filed to the March term, 1905, of the New Madrid circuit court, was in two counts. By the first she sought to recover damages to crops growing on certain lands belonging to her by reason of defects in the right of way fences belonging to defendant. Damages were alleged in the sum of \$600 and judgment asked in double that sum. By the second count damages were sought in the sum of \$50 to be doubled under the statute for injury to a horse alleged to have been occasioned by the negligent construction of a farm crossing. Upon this count verdict went for the defendant, and further notice need not be taken. Later, and at the March term of said court, the St. Louis & San Francisco Railroad Company was on motion of plaintiff made a party defendant. At the September term following, defendants answered, by the terms of which answer they denied the charges in both counts contained, and, further answering, averred that the suit had been fully settled for \$130 and the money paid to plaintiff by the last-named defendant, specifically pleading a stipulation signed by the plaintiff acknowledging the payment of the \$130, and agreeing that the suit abate and be dismissed at the costs of defendant. Then follows averments to the effect that the first-named defendant was the owner of the road, but that the latter defendant had operated the same since June 1, 1904; that said settlement was

in satisfaction of plaintiff's claims as to both defendants, but that she thereafter sued the latter defendant for the same causes of action which had been thus settled. To this answer the plaintiff filed the following reply: "Comes now the plaintiff, and first tenders to the defendant the amount received in the alleged settlement, and says that said settlement was obtained by coercion, fraud, and deception used by the defendants by and through J. O. Livesay, claim agent, and W. E. Robertson; that they told her her lawyer had gone back on her; that her neighbors and friends were all going to testify against her; that they would pay her lawyer, all of which statements as made were untrue, and that she, being old and poor, was finally scared and persuaded by said parties into said settlement, and that she was led to believe that the paper signed by her contained stipulations to the effect defendants were to pay her lawyer, which it does not contain, and that said alleged settlement is not in fact the one that she understood she was making; that her actual damages in said matters were in excess of said amount in said settlement; and, having made reply, again asks for judgment." To this replication defendants demurred, and, when the same was overruled, duly excepted. At the September adjourned term of said court for the year 1905, the plaintiff dismissed as to the first defendant, and the trial proceeded as to the remaining defendant, the appellant here. Verdict upon a trial before a jury was returned for plaintiff on the first count for \$350. Upon the second count the verdict was for defendant. On motion of plaintiff the damages were doubled and judgment accordingly entered for \$700. Later and at the same term, and whilst the motion for new trial was pending, the plaintiff remitted the sum of \$135.90, and a new judgment for \$564.10 was entered, and the motion for new trial overruled. Defendant excepted to both acts of the court; i. e., that of permitting the remittitur, and the act of overruling the motion for new trial. Within proper time motion in arrest of judgment was filed and overruled, defendant excepting. When the case was called for trial, the defendant requested that the matter of settlement set up in the answer and the issues thereon made in the reply be tried by the court without the intervention of a jury, and in such request it is charged that section 654, Rev. St. 1899 (Ann. St. 1906, p. 670), in so far as it undertakes to make such an issue triable by a jury violates section 28, art. 2, Const. Mo. (Ann. St. 1906, p. 162). This was overruled and the whole case submitted to the jury.

This and kindred questions are the only questions urged in the elaborate and excellent brief filed by the defendant. Plaintiff has not favored us with a brief. The questions urged therefore are purely questions of law.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. To what has been said in the statement it should be added that to the reply a demurrer was filed and the court overruled the same. This demurrer charged that the replication failed to state sufficient facts to constitute a defense to the new matter set up in the answer. This, to our mind, is only one way of stating the real issue between these parties. Defendant claims that section 654, Rev. St. 1899, is invalid, and for that reason the question of fraud, as pleaded in this reply, could only be heard in a court of equity, and not in a court of law and before a jury. If, however, it is meant that the replication does not state a proper defense in either branch of the court, equity or law, we cannot give our assent to the insistence. The replication pleads facts properly raising the issue of fraud in the procurement of the settlement and release. To this end, we have purposely set it out. The replication charges certain representations which induced the settlement. It then charges the falsity of these representations and the reliance of the plaintiff thereon. Not only so, but there is a tender of the sum so paid in settlement. The reply was at least a proper defense to the new matter (the settlement) pleaded in the answer. Whether such matter should have been tried before a chancellor or a jury remains to be seen. Suffice it to say for the present that the reply was sufficient to raise the issue of fraud in the procurement of the settlement, and the question of the forum for the trial of the issue we will consider in due order. Cases cited by appellant are not opposed to the idea that this reply properly presented an issue of fraud, which is cognizable in some court. We therefore pass to the real question urged in this case.

2. As indicated above, the real issue urged by the defendant in this case is the unconstitutionality of section 654, Rev. St. 1899, which section reads: "Whenever a release, composition, settlement or other discharge of the cause of action sued on shall be set up or pleaded in the answer in bar to plaintiff's cause of action sued on, it shall be permissible in the reply to allege any facts showing or tending to show that said release, composition, settlement or other discharge was fraudulently or wrongfully procured from plaintiff, and the issue or issues thus raised shall be submitted with all the other issues in the case to the jury, and a general verdict or finding upon all the issues, including the issue or issues of fraud so raised, shall be sufficient." This section appears as a new section in the revision of 1899. It will serve no good purpose to rehearse at length the diverse opinions of this court prior to the enactment of this section. The section evidently had its origin in the opposing views of the judges of this court prior to its enactment. *Girard v. St. Louis Car Wheel Co.*, 123 Mo. 358, 27 S. W. 648, 25 L. R. A. 514, 45 Am. St. Rep. 556; *McFarland*

v. Mo. Pac. Ry. Co., 125 Mo. 253, 28 S. W. 590; *Och v. Railway Co.*, 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 442; *Homuth v. Street Ry. Co.*, 129 Mo. 629, 31 S. W. 903. These various cases and others which might be cited evinced varying views among the members of this court as to what matters of fraud were cognizable before the law side of the trial court and what matters should be heard in equity. Releases of different character were submitted by the trial courts to juries, and thus the division of opinion. These varying views run up to the date, or practically so, of this statute, and the statute was no doubt passed to meet the emergency. But, be that as it may, this statute is challenged on the ground that it is violative of section 28, art. 2, Const. Mo. This section of the Constitution reads: "The right of trial by jury, as heretofore enjoyed, shall remain inviolate; but a jury for the trial of criminal or civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment or a true bill." The defendant, after invoking this section of the Constitution, says that its right to a trial by jury, where there has been executed a release which is pleaded in bar of an action, and fraud in the execution thereof is alleged by the plaintiff, that this statute violates its Constitutional right, in that it forces the trial of that issue to be before a jury. The Constitution says: "The right of trial by a jury, as heretofore enjoyed, shall remain inviolate." In discussing that right we have held it to mean that such matters that were triable by jury prior to the Constitution of 1875 could not be shifted to the equity side of the court. In other words, the status of what must be tried by a jury was fixed by the conditions existing at the time of the adoption of the Constitution.

In *State v. Bockstruck*, 136 Mo., loc. cit. 358, 38 S. W. 322, Division 2 of this court, through Sherwood, J., used this language: "This being the case, it cannot be said that defendant has been denied 'the right of trial by jury as heretofore enjoyed,' since whatever was the status of that right at the time of the adoption of the Constitution of 1875 was the status referred to in that instrument. 1 Bishop, *Crim. Proc.* (3d Ed.) § 892; 3 Am. & Eng. *Ency. of Law*, 720, and cases cited." Again, in the recent case of *Lee v. Conran*, 213 Mo., loc. cit. 412, 111 S. W. 1153, *Woodson, J.*, for this division, says: "Section 28 of article 2 of the Constitution of 1875 provides that 'The right of trial by jury, as heretofore enjoyed, shall remain inviolate.' This court, in the case of *State v. Bockstruck*, 136 Mo., loc. cit. 358, 38 S. W. 322, held that the constitutional guaranty of 'the right of trial by jury as heretofore enjoyed' has reference to the status of that right as it existed at the time of

the adoption of the Constitution. And this court, in the case of *State ex rel. v. Withrow*, 133 Mo., loc. cit. 519, 34 S. W. 245, 36 S. W. 48, held that said section 28 'means that all the substantial incidents and consequences which pertained to the right of trial by jury are beyond the reach of hostile legislation, and are preserved in their ancient substantial extent as existed at common law.' In order to determine whether the case at bar comes within the meaning of that section of the Constitution as interpreted by those adjudications, we must first determine what the issue tendered by the pleadings is, and, after doing so, we must then ascertain how that issue was triable before the adoption of that constitutional provision. If by jury, then either party is entitled to a trial of that issue by a jury regardless of any statutory provision; but, if it was not triable by jury prior to that time, then the Constitution does not govern, and we would then look to the statutes and the common law for a rule by which to solve the question."

Now, viewing these contentions of the defendant in this light, what do we find? Has it been deprived of any right under the Constitution by reason of this statute? In our judgment the Constitution means that, if theretofore (that is, prior to the adoption of the Constitution) the defendant by law or practice was entitled to a jury, then such right must remain inviolate. Prior to that time some questions of fraud were triable by a jury in a court of law and some by the chancellor in a court of equity. The only inhibition on the Legislature fixed by the Constitution was to prevent the Legislature from depriving a party from a trial by a jury where he had theretofore enjoyed that right. No inhibition is found in the Constitution preventing the Legislature from extending the right of trial by jury. Not a word is said to the effect that the Legislature cannot make matters theretofore tried in equity, triable by a jury, where the cause of action in the first instance was one at law, and the equity only arises by reason of fraud of some kind being pleaded to obviate a release pleaded in the answer. In our judgment the matters pleaded in this reply could have properly been tried at law prior to the Constitution of 1875. Fraud vitiates all contracts, and whether the contract is absolutely void by reason of the fraud, as held in *Girard v. St. Louis Car Wheel Co.*, supra, or whether it be merely voidable, as suggested in some of the cases, yet, if in the latter class of cases the party tenders back the consideration and disclaims the contract thus induced by fraud, then the question of whether or not the release is void or valid may be properly tried before a jury. And we think it was so triable even before the statute in question. The foundation of the present defense is a receipt for so much money in settlement of a claim. Of course,

collateral thereto is an agreement to dismiss the suit on that claim at the cost of the defendant. Even under the *Och Case*, supra, we believe this question was triable by a jury without this statute. It was certainly so under the statute. But, if it was not allowable under the ruling in the *Och Case*, it was made so by the more recent ruling in *Courtney v. Blackwell*, 150 Mo., loc. cit. 278, 51 S. W. 676, whereat Marshall, J., in concurring in an opinion by Brace, J., gave special reasons for his concurrence in this language: "I concur in the foregoing opinion, and believe it is the only proper conclusion under the circumstances disclosed by this record, especially in view of the opinion in this case on former appeal, but in my judgment that opinion was erroneous in holding that the issue of fraud in the procurement of the release could not be raised in a reply to the answer setting up the release. In my opinion release is an affirmative defense, and, when pleaded by a defendant, the plaintiff can meet it in the reply by a plea of fraud in its procurement, and this is the rule prescribed by sections 2042, 2052, Rev. St. 1889. The plaintiff may anticipate an affirmative defense of release by a count in his petition setting out the fraud in its procurement, and asking its cancellation, but should not be required to do so, nor should a plaintiff be reverted to a separate bill in equity for such purpose, for the whole question can logically be determined when the release is pleaded by the defendant, if it is pleaded, by an issue of fraud raised by the reply, and tried by the chancellor, before the action at law is tried. For these reasons, I think the opinion on former appeal was incorrect in not so holding, and in requiring the plaintiff to resort to a proceeding in equity or to amend her petition. Gantt, C. J., Sherwood and Brace, JJ., concur herein."

The case had formerly been tried in which the fraud in the procurement of the release had been raised by reply. *Hancock v. Blackwell*, 139 Mo. 455, 41 S. W. 205. At that time the whole court concurred that the release should be set aside in equity, although several members thereof had persistently opposed that rule in the *Och Case*, supra, and by the majority vote opposed the doctrine in the *Girard Case*. In the *Girard Case*, written by Barclay, J., and concurred in by a majority of the judges, it was held proper to plead the fraud in the procurement of a release in a reply, but in a later case, the *Och Case*, Burgess, J., who had dissented in the *Girard Case*, distinguished his case from the *Girard Case*, and held that the release pleaded in his case should have been set aside in equity. To this opinion Barclay and Brace, JJ., filed a vigorous dissenting opinion. Then came the case of *Hancock v. Blackwell*, supra, in which Burgess, J., again followed the *Och Case*, and it would appear that the dissenting judges

yielded to the majority in the Och Case. But when the Hancock Case, supra, again reached this court, under the name of Courtney v. Blackwell, 150 Mo., loc. cit. 278, 51 S. W. 668, it appears that Marshall, Brace, and Sherwood, J.J., and Gantt, C. J., concurred in the doctrine that, when a release was pleaded, the fraud in the procurement thereof could be pleaded in a reply and tried before a jury. And be it said that the fraud in that case covers just as broad a ground as in this case. I am of opinion that even under the Och Case, as ruled by Burgess, J., the fraud in procuring the receipt in this case at bar could be pleaded by way of reply, but all doubt is removed by the latter case just mentioned. This latter case, Courtney v. Blackwell, supra, was passed upon at the April term, 1899, and, as section 654 first appeared as a new section in the revision of 1899, it must have been passed about that time. However, the case is not bottomed upon the statute, so that prior to this statute, and without considering the statute, this court has held that fraud in the procurement of a release was properly pleaded in a reply and properly triable before a jury. The statute, therefore, does not go further than this court had done about the time of the passage thereof. The statute does not undertake to abolish all equitable jurisdiction, and has never been so considered by bench or bar. If it did, another question might be here. We are of opinion that the Legislature violated no portion of the Constitution in the enactment of the statute. The other cases from this state relied upon by defendant are not out of line with these views.

Thus believing, and this being the only real question in this case, the judgment nisi is affirmed. All concur.

JONES v. EDEMAN et al.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. PROCESS (§ 96*)—SERVICE BY PUBLICATION—AFFIDAVIT FOR ORDER.

Rev. St. 1899, § 2022, provides that if plaintiff shall file an affidavit stating that part or all of the defendants are nonresidents of the state, or is a corporation of another state, kingdom, or country, and cannot be served in this state in the manner prescribed in this chapter, or have absconded or concealed themselves so that ordinary process cannot be served on them, the court or the clerk in vacation shall make an order directed to the nonresidents or absentees, etc. *Held*, that the clause "cannot be served in this state in the manner prescribed in this chapter" referred to the corporation of another state, kingdom, or country, and not to natural persons who were or are nonresidents of this state, and hence jurisdiction may be acquired over nonresident defendants of the latter class, by an order of publication, and ordinary process could not be served on them, and in such case an affidavit for publication was not

defective in not stating that process could not be served "in this state."

[Ed. Note.—For other cases, see Process, Cent. Dig. § 118; Dec. Dig. § 96.*]

2. HUSBAND AND WIFE (§ 171*)—MORTGAGE OF WIFE'S LAND TO SECURE HUSBAND'S DEBT—WIFE AS SURETY.

As it is competent for a wife to mortgage her lands to secure her husband's debt, when she does so, she stands in the relation of a surety for him.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 682; Dec. Dig. § 171.*]

3. HUSBAND AND WIFE (§ 171*)—RELEASE OF MORTGAGE BY WIFE TO SECURE HUSBAND'S DEBT.

A wife's mortgage of her lands to secure her husband's debt is not released on the taking of a judgment against him.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 683; Dec. Dig. § 171.*]

4. JUDGMENT (§ 501*)—COLLATERAL ATTACK—MERITS OF JUDGMENT.

The merits of a judgment in a case where in the court had jurisdiction of the subject-matter and the parties cannot be inquired into collaterally.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 941; Dec. Dig. § 501.*]

5. HUSBAND AND WIFE (§ 238*)—JUDGMENT—COLLATERAL ATTACK.

On foreclosure of a mortgage given by a husband and wife on her land to secure his debt, a defense that the mortgage was released by the taking of a personal judgment against him was open to her, and neither she nor he can collaterally attack the judgment by urging such release in a subsequent action of ejectment as against the title acquired through the purchaser on the foreclosure.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 802; Dec. Dig. § 238.*]

Appeal from Circuit Court, Chariton County; Jno. P. Butler, Judge.

Action by Charles T. Jones against Ben J. Edeman and others. From a judgment for defendants, plaintiff appeals. Affirmed.

L. H. Waters, for appellant. J. A. Collet and H. J. West, for respondents.

GANTT, P. J. This is an action in ejectment for 160 acres of land, the N. E. $\frac{1}{4}$ of section 12, in township 53 N., of range 21 W., in Chariton county, Mo. Edeman, the original defendant was the tenant of Lois and Edna Kennedy. The Kennedys were made defendants on their application. Harriet E. Rolfe is the common source of title. Plaintiff's title was acquired by deed from Harriet E. Rolfe and husband, of date May 4, 1905. Defendants' title was deraigned from W. S. Woods, who purchased under a judgment foreclosing a mortgage given by Harriet E. Rolfe and husband to Charles Jewett, bearing date January 20, 1890, to secure the husband's note for \$1,500 of which Woods was the owner at the time of the foreclosure in 1893. Previously thereto Woods had obtained a judgment against Rollin M. Rolfe, the husband, on said note in Oteo county, Neb., which fact appears in the petition to fore-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

woods purchased the lands at the execution sale under said judgment, on October 21, 1893. In the foreclosure proceedings the defendants were summoned or notified by publication, and the judgment was by default. The plaintiff herein asserts the invalidity of the decree of foreclosure on two grounds: First, that the affidavit on which the order of publication was based was insufficient to authorize said publication; and, second, that the effect of the Nebraska judgment was to discharge Harriet E. Rolfe, the owner of the mortgaged lands. The affidavit alleged that "Rollin M. Rolfe and Harriet E. Rolfe are nonresidents of the state of Missouri, and the ordinary process of law cannot be served on them."

1. Plaintiff insists the affidavit was fatally defective in not stating that the ordinary process of law could not be served on said defendant in this state. This action seems to have been commenced soon after the promulgation of the decision of the St. Louis Court of Appeals in *Hedrix v. Hedrix*, 103 Mo. App. 40, 77 S. W. 495, which sustained the contention of counsel for plaintiff in this suit but the St. Louis Court of Appeals overruled that decision. *Harbert v. Durden*, 116 Mo. App. 512, 92 S. W. 746, and the Kansas City Court of Appeals in *Paddock v. Paddock*, 91 S. W. 398, ruled adversely to *Hedrix v. Hedrix*. In the very recent decisions of this court in *Keaton v. Jorndt et al.*, 119 S. W. 629, *Huiskamp v. Miller et al.*, 119 S. W. 633, and *Van Natta v. Real Estate Co.*, 120 S. W. 738, the legislation on this topic which has finally eventuated in section 575, Rev. St. 1899 (Ann. St. 1906, p. 601), was traced by this court. The Revised Statutes of 1889 were in force at the time of the commencement and prosecution of the foreclosure suit. Section 2022 of the Revised Statutes of 1889 was in these words: "If the plaintiff or other person for him shall allege in his petition, or at the time of filing the same, or at any time thereafter shall file an affidavit stating that part or all of the defendants are nonresidents of the state, or is a corporation of another state, kingdom, or country, and cannot be served in this state in the manner prescribed in this chapter, or if absented or absconded themselves from their usual place of abode in this state, or if they have concealed themselves so that the ordinary process of law cannot be served on them, the court in which said suit is brought or in vacation the clerk thereof shall make an order directed to the nonresidents or absentees notifying them of the commencement of the suit and stating briefly the object and

of said suit, section 515, Rev. St. 1889. As pointed out in *Huiskamp v. Miller*, supra, prior to the revision of 1889, a foreign corporation might be served by publication even though it had an office and was doing business in this state and the purpose of this change was to require service by ordinary process of law in this state whenever such service was possible. Prior to this provision, a corporation of another state, kingdom, or country might be served by publication upon the mere affidavit that it was a nonresident, and if the section as revised had been intended to apply to all nonresidents the words "or is a corporation of another state, kingdom, or country" would not have been added. We think it is clear as was ruled in *Huiskamp v. Miller*, and *Keaton v. Jorndt*, supra, that the clause "cannot be served in this state in the manner prescribed in this chapter," has reference alone to the corporation of another state, kingdom, or country, and has no reference whatever to natural persons who were or are nonresidents of this state. See, also, *Tufts v. Volkening*, 122 Mo. 631, 27 S. W. 522. The plaintiff's contention therefore that the circuit court acquired no jurisdiction over Rolfe and wife by the order of publication is unsound.

2. It was perfectly competent for Mrs. Rolfe to mortgage her land to secure her husband's debt, and it is true as contended by plaintiff that when she did this she stood in the relation of a surety for her husband. But the taking of a judgment in Nebraska against her husband on this debt which was primarily his obligation did not have the effect of releasing Mrs. Rolfe on her mortgage. It is also plain that this defense is not open to the plaintiff at this time because the circuit court of Chariton county had jurisdiction of the subject-matter of said suit and of the parties and the merits of that judgment cannot be inquired into now in this collateral proceeding. Had it been a defense at all it was open to Mrs. Rolfe in the foreclosure proceedings and neither she nor the plaintiff can be heard to urge it now. *Gray v. Bowles*, 74 Mo. 419; *Holt County v. Cannon*, 114 Mo. 514, 21 S. W. 851. As the defendants established title to the land by a perfectly valid paper title, it is entirely unnecessary to inquire into the propriety of the giving of the eighth instruction on their right to claim title by adverse possession.

The judgment of the circuit court was right and is affirmed.

BURGESS and FOX, JJ., concur.

1. APPEAL AND ERROR (§ 21*)—JURISDICTION—SUPREME COURT—CONSENT OF PARTIES.

Consent of the parties cannot give the Supreme Court jurisdiction of the action, if it does not in fact have jurisdiction.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 88-97; Dec. Dig. § 21.*]

2. COURTS (§ 231*)—SUPREME COURT—JURISDICTION—CONSTITUTIONAL QUESTIONS.

That the trial court misconstrued the act of Congress as to the removal of causes, or erroneously decided that a defendant was not entitled to remove the cause under the facts presented in the petition, would not draw into question the validity of the act of Congress (Act March 2, 1875, c. 137, § 2, 18 Stat. 470 [U. S. Comp. St. 1901, p. 509]), within Const. art. 6, § 12 (Ann. St. 1906, p. 218), giving the Supreme Court jurisdiction, where the validity of a statute of, or authority exercised under, the United States is drawn into question, so that the Supreme Court would not have jurisdiction of an appeal from its decision.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 231.*]

3. COURTS (§ 231*)—JURISDICTION—SUPREME COURT—"AMOUNT IN DISPUTE"—INTEREST ON JUDGMENT.

Act June 12, 1909 (Acts 1909, p. 397), which contains an emergency clause, gives the Courts of Appeals jurisdiction of cases where the amount in dispute, exclusive of costs, shall not exceed \$7,500; they having theretofore had jurisdiction only where the amount in dispute did not exceed \$4,500. *Held*, in view of other language in the act directing the transference of causes pending in the Supreme Court, showing that it was intended to apply where appeals had been taken years before, that the amount in dispute was to be determined as of the date the judgment appealed from was rendered, and not the passage of the act, so that, where the amount of the judgment appealed from was \$7,500, interest to the time of the passage of the act could not be added to enable the Supreme Court to retain jurisdiction of the appeal; interest not being a part of the "amount in dispute," but an incident of the judgment added by operation of the law.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 659; Dec. Dig. § 231.*]

For other definitions, see Words and Phrases, vol. 1, pp. 377, 378; vol. 8, p. 7574.]

Appeal from Circuit Court, Daviess County; J. W. Alexander, Judge.

Action by Albert H. Schwyhart against Martin A. Barrett and others. From a judgment for plaintiff, defendants appeal. Cause transferred to the Court of Appeals.

Hicklin, Leopard & Hicklin and Brown & Dolman, for appellants. K. B. Randolph, for respondent.

VALLIANT, J. Plaintiff sued the defendants, the Chicago, Rock Island & Pacific Railway Company, Martin A. Barrett, Frank Novak, and H. L. Reed, for damages for personal injuries alleged to have been sustained by him through the negligence of the defendants. The negligence of the railway company consisted, as the petition

alleged, in neglecting the operation of its engine and cars which caused the injuries. Plaintiff recovered a judgment against all the defendants for \$7,500 on December 14, 1906, from which judgment the defendants appealed to this court, and the record was duly lodged here January 19, 1907. At the date of the appeal and the date of the filing of the record here, the amount in controversy was sufficient to give this court jurisdiction; but by an act of the General Assembly approved June 12, 1909 (Acts 1909, p. 397), the Courts of Appeals were given jurisdiction in causes "where the amount in dispute, exclusive of costs, shall not exceed the sum of seventy-five hundred dollars," and by that act all cases within its purview then pending in this court, not under submission, were to be transferred to the proper Court of Appeals to be there heard and determined. Counsel on both sides have agreed that this court has jurisdiction, and insist that it be not transferred; but, of course, consent cannot give jurisdiction of the subject. Counsel for defendants are of the opinion that there is a federal question involved, which gives this court jurisdiction under section 12, art. 6, of our state Constitution (Ann. St. 1906, p. 218); the question being the right of the railway company to have the cause removed to the United States Circuit Court for trial. Counsel on both sides are of the opinion that, in estimating "the amount in dispute" with reference to the act of 1909, interest must be added to the amount of the judgment appealed from, \$7,500, from its date, December 14, 1906, to the date of the act of the General Assembly above mentioned, to wit, June 12, 1909, which would raise the sum beyond the jurisdiction by that act conferred on the Courts of Appeals.

1. The federal question: The words used in that clause of section 12, art. 6, of our state Constitution, which gives this court jurisdiction, are: "In cases where the validity of a treaty or statute of or authority exercised under the United States is drawn in question." To give this court jurisdiction under that clause, there must be a question of the validity of a treaty or the validity of a statute or the validity of an authority exercised under the United States. Of course, there is no treaty or statute in question, and the only suggestion is that, by proceeding to try the cause after the petition to remove was filed, the validity of an authority exercised under the United States was denied. No one has questioned the validity of the act of Congress under which the application for removal was made, or that the cause should have been removed if it was one which under the terms of that act was

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

removable. Act Cong. March 3, 1875, c. 137, § 2, 18 Stat. 470 (U. S. Comp. St. 1901, p. 509). Even if the state court had misconstrued the act, the misconstruction would not have drawn in question its validity. In *Vaughn v. Wabash R. R. Co.*, 145 Mo. 57, 46 S. W. 952, the defendant pleaded as a defense a compliance with a section of the interstate act of Congress, which compliance was denied in the reply. The court said: "The validity of that federal statute was not drawn in question. The reply put in issue the averment of compliance with the law, not its validity." In *White L. S. Com. Co. v. Railway Co.*, 157 Mo. 518, 57 S. W. 1070, the court said: "While by the Constitution exclusive appellate jurisdiction is vested in this court in cases where the validity of a statute of the United States is drawn in question (article 3, § 12), we know of no constitutional provision vesting such exclusive jurisdiction in this court in cases merely involving the construction of a federal statute." In *Carey v. Schmeltz*, 221 Mo. 133, 119 S. W. 946, where the right of action was based on a statute of Colorado, it was claimed by appellant that a federal question was involved, because the trial court having construed the Colorado statute to be a penal statute refused to enforce it, thereby refusing to give full faith and credit to the public act of another state as required by section 1, art. 4, of the Constitution of the United States; but this court held in that case that, even if the trial court had misconstrued the statute and had based its judgment on such misconstruction, yet it did not question the validity of the statute, and decisions of the Supreme Court of the United States are cited in the opinion in that case sustaining that view. Therefore even if the trial court in the case at bar had misconstrued the act of Congress in reference to removal of causes, or if it had erroneously decided that, under the facts of the case, as presented under the petition for removal, the defendant had not made out a case for removal under the act of Congress, still the validity of the act was not questioned, or the authority to remove when a case under the statute was made. The worst that the defendant can say is that the trial court misconstrued the statute, or misinterpreted the pleadings, or misunderstood the facts, all of which questions the defendant would have the right to ask any appellate court which has jurisdiction of the cause to review; but they raise no federal question, and we neither give or intimate any opinion concerning them. We hold that there is no federal question in the case, and that we have no jurisdiction on that ground.

2. Until the act of June 12, 1909 (Acts 1909, p. 397), the pecuniary limit to the jurisdiction of the Courts of Appeals was \$4,500; but by that act those courts were given jurisdiction of causes "where the amount in dispute, exclusive of costs, shall not ex-

ceed seventy-five hundred dollars." Does that mean "the amount in dispute" at the time the judgment appealed from was rendered, or does it mean the amount in dispute at the time the General Assembly spoke, June 12, 1909? Other language in the act directing the transference of causes pending in this court shows that it was intended to apply to cases where judgments had been rendered and appeals had been taken years before, and the emergency section of the act shows that the General Assembly took cognizance of the overburdened condition of the docket of this court. We think the natural inference to be drawn is that the mind of the lawmaker was directed to cases where the amount in dispute at the time the judgment appealed from was rendered did not exceed \$7,500, and that there was no thought given to the date of the passage of the act or of the influence that date would have on the effect of the act itself. If a plaintiff brings suit for damages, and states in his petition the amount for which he sues, if he is cast in his suit and appeals, we go back to the petition, and say that the amount there claimed is the amount in dispute. If the plaintiff should, in such case, recover judgment for a certain amount, and the defendant appeals, the amount then in dispute is the amount of the judgment. The date of the dispute in the one case is that of the filing of the petition, in the other it is that of the rendition of the judgment, and in either case the amount in dispute is the amount for which the dispute could at that date have been settled. If not settled then, and interest is added, it is added by operation of law, not as a part of the amount in dispute, but as a consequence of withholding it. Interest in such case is a mere incident, a mere sequence. Interest has been running on this judgment three years or more; but, if interest is to be considered as affecting the question of jurisdiction, it would take a case in which the judgment was for \$7,500 out of the operation of the statute if the interest had run but a few days or even one day. Therefore if a judgment for \$7,500 should be rendered in a circuit court to-day, and application for the appeal should be made a few days hence, the amount in dispute at the date of the appeal would be more than \$7,500, and hence the Court of Appeals would not have jurisdiction. Or if the amount of the judgment was \$7,200, and the appeal was taken within a few days of its rendition, it would go to the Court of Appeals; but, if the party aggrieved should wish to get his case into this court, he could wait 10 months, during which the interest would accumulate to an amount, which, added to the original judgment, would make the amount in dispute exceed \$7,500, and he could then sue out a writ of error and bring his cause to this court. We are satisfied that the General Assembly intended to give the Courts of

Appeals jurisdiction of causes wherein the amount in dispute at the date of the judgment did not exceed \$7,500.

There is nothing in what this court said in *Pittsburg Bridge Co. v. Transit Co.*, 205 Mo. 176, 103 S. W. 546, to which we are referred, that is in conflict with what we have above said. In that case, although the judgment was for an amount beyond the then pecuniary jurisdiction of the Courts of Appeals, yet the record showed that the defendant at the trial admitted that it owed the plaintiff the amount sued for, but pleaded two counterclaims, one for \$4,300, the other for \$142-74. The plaintiff admitted that it owed the last-mentioned counterclaim, but denied the other one for \$4,300, and the trial resulted in allowing the defendant \$1,850 on the disputed counterclaim, and deducted that amount from the amount sued for, and gave judgment for the balance, and defendant appealed. This court said that the only amount in dispute was the difference between \$4,300, which defendant claimed as due him on his first counterclaim, and \$1,850, which the court allowed him on that claim, and therefore the case was within the jurisdiction of the Court of Appeals. In that case we took the pleadings and the judgment at its date.

In *Vanderberg v. Gas Co.*, 199 Mo. 455, 97 S. W. 908, the plaintiff had sued in an action *ex delicto*, alleging her damages \$5,000 compensatory, and \$5,000 penal. The trial court sustained a demurrer to the evidence, and plaintiff appealed. The record showed that there was no ground for the claim of punitive damages, and that, if she was entitled to any compensatory damages they were not more than \$100 or \$200. There is nothing in that case bearing on the question now in hand.

In *State ex rel. v. Broadus*, 212 Mo. 685, 111 S. W. 508, it was held that after a judgment had been rendered for \$5,500, and several months' interest had accrued, a remittitur of \$1,000 was entered, but the old judgment was not set aside, and a new judgment entered, as it should have been, the remittitur was to be treated only as a credit on the amount due on the original judgment, which, with interest accrued at that time, amounted to \$5,632, which left the amount due on the judgment \$4,632 at the time the appeal was taken. It was held in that case that, if, when the remittitur was entered, the old judgment had been set aside and a judgment for \$4,500 entered, it would have been within the jurisdiction of the Court of Appeals.

We are referred to some decisions of the Supreme Court of the United States; but we do not think they sustain the position of the learned counsel. When we are construing a statute of our own state relating to the jurisdiction of our state courts, it is not always safe to follow a decision of a federal court construing an act of Congress relat-

ing to the jurisdiction of federal courts, because those courts exercise a peculiar jurisdiction, and the acts of Congress concerning the subject are to be viewed from that peculiar standpoint. In *Zeckendorf v. Johnson*, 123 U. S. 617, 8 Sup. Ct. 261, 31 L. Ed. 277, the judgment of the trial court was for \$4,304.92, the cause was appealed to the Supreme Court of the territory of Arizona, where a judgment of affirmance was had, and from that judgment—that is, the judgment of the Supreme Court of the territory—appeal was taken to the Supreme Court of the United States. The court said: "The value of the matter in dispute is to be determined by the amount due at the time of the judgment brought here for review, to wit, the judgment of the Supreme Court of the territory, and not the time of the judgment of the district court." That is what we say in this case; that is, that the amount in dispute is to be determined by the amount due at the date of the judgment from which the appeal is taken. And to the same effect is *District of Columbia v. Gannon*, 130 U. S. 227, 9 Sup. Ct. 508, 32 L. Ed. 922. In that case the court quotes with approval what it said on the same subject in *Railroad v. Trook*, 100 U. S. 112, 25 L. Ed. 571: "In cases brought here on writ of error for re-examination of judgment of affirmance in the Supreme Court of the District of Columbia, the value of the matter in dispute is determined by the judgment affirmed, without adding interest or costs." *Benson M. & S. Co. v. Alta M. & S. Co.*, 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762, is to the same effect.

Our conclusion is that "the amount in dispute" in this case, within the meaning of that term as it is used in the act of June 12, 1909 (Acts 1909, p. 397), is \$7,500, which is the amount for which the judgment was rendered December 14, 1906.

The cause is therefore transferred to the Kansas City Court of Appeals. All concur.

SANFORD v. KERN.

(Supreme Court of Missouri, Division No. 1.
Nov. 27, 1909.)

1. EASEMENTS (§ 36*)—WAY—SUFFICIENCY OF EVIDENCE.

Evidence in a suit to establish a right to a private way across defendant's land and to remove obstructions placed in the way by defendant held sufficient to establish such way originating in a contract with one in possession of the land, ratified by the owner, and adverse user of the right, openly and uninterruptedly, for more than 10 years.

[Ed. Note.—For other cases, see *Easements*, Dec. Dig. § 36.*]

2. EASEMENTS (§ 9*)—ADVERSE POSSESSION—CLAIM UNDER CONTRACT.

The claim to an easement for a passageway across land by virtue of adverse possession for more than 10 years can only be invoked by a

a bad title into a good one, unless possession is under a claim of right.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 25; Dec. Dig. § 9.*]

3. EASEMENTS (§ 12*)—CREATION BY CONTRACT—EXECUTION BY CONTRACT.

Where the owner of land gives an easement for a passageway across his land on condition that the grantee build a fence near the grantor's line separating the land over which the easement extends from the remainder of the tract, and the grantee builds the fence, and it is accepted by the grantor, the contract is performed, and the consideration passes.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35-41; Dec. Dig. § 12.*]

4. EASEMENTS (§ 12*)—CONTRACTS—ADEQUACY OF CONSIDERATION.

A boundary fence becoming out of repair, so that cattle on the adjoining lands broke through the fence, the owner of the land contracted with plaintiff to allow him a passageway along the boundary line, providing he would build a fence parallel to the line fence. *Held*, that the building of the fence and the furnishing of material for it, and the benefit conferred upon the grantor, by preventing stock from trespassing, was an adequate consideration in law for the grant of the easement.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 35-38; Dec. Dig. § 12.*]

5. EASEMENTS (§ 8*)—CREATION—PRESCRIPTION.

Adverse possession sufficient to establish a right to a passageway across land is not destroyed by the use of the passageway by others with the acquiescence of the person claiming under adverse possession, as, under Rev. St. 1899, § 9468 (Ann. St. 1906, p. 4346), private roads shall be free to be traveled by all persons as a public road.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 33; Dec. Dig. § 8.*]

6. EASEMENTS (§ 9*)—ADVERSE POSSESSION—CLAIM OF RIGHT.

Use of a passageway across land under a contract allowing such use is under an adverse claim of right, where the person using it performs a condition of the contract requiring him to build a fence along the passageway, and keeps the way in repair and uses it continually and claims the passageway as a right, whenever a question is raised relating to his right to use it, and such claim was recognized by the owners of land over which the way extended.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 25; Dec. Dig. § 9.*]

7. EASEMENTS (§ 5*)—PRESCRIPTION—ADVERSE POSSESSION.

The right to a way by prescription may be established in the same way as the title to land, to wit, by adverse possession under a claim of right uninterrupted for 10 years.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 13-26; Dec. Dig. § 5.*]

8. EASEMENTS (§ 26*)—RIGHT OF PASSAGE—CREATION BY CONTRACT—REVOCATION—ESTOPPEL.

An easement for a passageway across land, though without consideration at its inception, may not be revoked at will where the licensee was expected to go to great expense in order to enjoy it, and where that expense had been incurred, as in such case, equitable estoppel arises, and the easement may not be destroyed by the act of the licensor alone.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 72½-82; Dec. Dig. § 26.*]

LISH BY CONTRACT.

The right to an easement for a passageway across land is not affected by the fact that the person with whom the licensee contracted for the easement did not have the legal title to the land, where she was in possession and clothed with the powers of an apparent owner, and exercised those rights by leasing the land to tenants and enjoying the returns, and the legal owner, who was her father, had knowledge that she was dealing with and contracting in relation to it, and this was done with his acquiescence, and the licensee thought he was dealing with the owner and such person subsequently became the owner, and all subsequent owners of the land claimed under such person, and, when they bought the land, had actual notice of the licensee's claim by the fact that the passageway extended through an open fenced lane across the land.

[Ed. Note.—For other cases, see Easements, Dec. Dig. § 12.*]

Appeal from Cape Girardeau Court of Common Pleas; B. F. Davis, Judge.

Action by Linus Sanford against Joseph Kern. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with direction to enter judgment for plaintiff.

Oliver & Oliver and Linus Sanford, for appellant. Wilson Cramer, for respondent.

LAMM, P. J. Suit to establish a right in plaintiff to a private way in Cape Girardeau county, and to remove obstructions put in the way by defendant. The ultimate facts relied on to show a user as of prescriptive right, or adverse possession under a claim of right, are set forth in the petition with sufficient particularity to permit the sufficiency of the petition, it will not be further noticed. The answer raised the general issue. Judgment for defendant. Plaintiff appeals.

There is little or no dispute on material facts. In 1889 plaintiff owned a body of timber land (the rise of 100 acres) in section 30, township 32, range 13, with no access to it by public road or private way. A half mile east, following the meandering of Hubble creek, ran an old north and south public road, known as the "Jackson and Pocahontas road." Between that road and the south part of plaintiff's woodland lay a tract of cultivating land we will call "A." North of and bordering "A," between the north part of plaintiff's land and said public road, lay another tract we will call "B." There was an east and west partition fence between "A" and "B." At that time one Flynn owned tract B, and Nannie E. Baldwin, the daughter of Thomas W. English, was in possession of tract A. Whether she was covert or discreet at the times in hand is dark. As a matter of fact she seems to have claimed the land, but the legal title was in her said father. She did not reside on it, but for several years, by her father's consent, occupied it through her tenants, and, with his con-

sent, exercised acts of proprietorship over it, contracting with relation thereto, and enjoyed the rents and profits. She was commonly reputed to be the owner, and Sanford thought she was. Evidently she held the land under some domestic arrangement not fully developed. Whether by a gift resting in parol accompanied by possession, or whether it was turned over to her because of, or anticipating, a will devising the land to her, or some undisclosed contract, we do not know. At any rate, about five years later Mr. English died. At that time it was found he had made his will giving Nannie tract A. In 1889 the party fence between tracts A and B had run down at the heel through decay and inattention. Lured by growing crops and a broken fence, the Flynn stock trespassed on the crops of Nannie's tenant, and wrangles and squabbles sprang up between the Flynn's and her tenant, Fullenwider. At this immediate time Sanford was clearing his woodland to make a farm of it, and desired a right of way opening it to the Jackson and Pocahontas public road. To that end, he opened negotiations with Nannie, thinking her the owner of tract A, and made a proposition to her to furnish the labor and material for a 10-rail fence in consideration of a private way 30 feet wide and half a mile long off of the north end of tract A, running from his woodland to said road. The proposition was accepted by her. There is evidence indicating it was considered by her and her friends, including her father, a good proposition, in that it would furnish her protection against the ravages of the Flynn stock, fence tract A securely in, and keep the cows out of her corn. Accordingly she instructed her tenant, Fullenwider, to stake out a strip a half mile long and 30 feet wide off said north end, and act in her stead in accepting the fence Sanford was to build as per contract. Presently, at his own expense in labor and rails, he built a new 10-rail fence on the line marked off by Fullenwider, "every corner locked" or "cross-railed." We assume it was an old-fashioned, "stake-and-rider" worm fence. Mrs. Baldwin testified that Sanford was to furnish all the rails, but failed to do so, using some rails out of her half of the old partition fence. As she did not live on the place, the record indicates that her testimony in that behalf was not based on personal knowledge. Contra, there is substantial evidence from her tenant, Fullenwider, and from parties who built the fence for Sanford, that he furnished his own rails from his own land, fully performed his contract, and that Fullenwider accepted the fence. There is other uncontradicted testimony to the effect that a 30-foot lane was then opened, fenced on both sides and remained an open, used lane from 1889 until a year and a half before the filing of the petition in this cause, August 29, 1905, say 14 years. The negotiations between Sanford and Mrs. Baldwin seem to have been conducted by correspondence (now lost) and

the contents of letters were proved by parol. Fullenwider testified without contradiction that the old line fence was very bad; that, when he rented the farm from Mrs. Baldwin, the poor fence was objected to by him; that she promised to fix it, but did not; that the Flynn stock jumped in and annoyed him; that in September, 1889, (quoting) "she wrote me that Mr. Sanford had made her a proposition that he would build her a fence if she give a road through here. She asked me what I thought about it, in a letter." In response to that letter he told her "it would be a very good thing because they were wrangling about the stock." He further testified: "I know Mrs. Baldwin was to give Mr. Sanford 30 feet of land through there for that fence, and I know that because I had letters from her." Again, he testified: "She wrote me that if Mr. Sanford would build her a good fence, 10-rail fence, * * * for me to stake off 30 feet, which I did, and for me to receive the fence. Mr. Sanford built the fence according to contract, and I received it and wrote to her." There was other testimony, substantially uncontradicted, to the foregoing effect, and we think it satisfactorily established that, in consideration of Sanford's building the fence to protect her tenant's crops and inclose her own land for renting and cultivation purposes, Mrs. Baldwin agreed to give and did give him said roadway from his woodland to the Jackson and Pocahontas public road.

It seems after the lane was open and in use Sanford discovered the legal title to the strip was in Mr. English. While on the stand and being examined in chief it was sought to show the substance of a conversation between the two. Objection was lodged against this testimony (English being dead) and sustained. Subsequently, on cross-examination, it cropped out that, when Sanford went to English, he, English, told him to use the road and keep it in repair; that Flynn (quoting) "ought to have given part of the lane, but it was the best thing Nannie could do"; further, that when Sanford found out that Mrs. Baldwin was only to get the land at Mr. English's death, and, as said, went to see him, he, English, (quoting) "laughed and said the road ought to be through there, and that none of them would interfere with me." We think the testimony establishes that from 1889 up to the time the road was closed by Kern, Sanford on all occasions kept the roadway in repair by working it and repairing a bridge thereon (except that the Flynn's helped a little in working a part of the road at a certain time). There is no testimony on the value of the 30-foot strip of land (something less than two acres) in 1889; nor as to the cost at that time of making and hauling rails and building a good 10-rail fence a half mile long. There is nothing to show it was not a fair trade on an adequate consideration passing. The testimony indicates that the title to the fence, when built and accepted,

was to be in Mrs. Baldwin, that she treated the fence as her own, and that the title thereto passed to her grantees hereinafter mentioned. Nothing was said about Sanford keeping the fence in repair. Such repairs seem not within the scope of the contract. Accordingly, he did not repair it. All the testimony shows it remained a fair fence down to a short time before the road was closed. Some of the testimony shows it was a fair fence at that time, but there was testimony it was then out of repair.

The main question in the case turns on whether Sanford's use of the road was under a revocable license—i. e., merely permissive and in a neighborly way, or whether his user was of right, and his claim adverse under his executed contract. It will therefore be not amiss to set forth the testimony with more particularity. There is no dispute but what Sanford and his tenants and those having business with them or on his farm used the road openly and continuously for 14 years or thereabouts without any question raised as to the right of such use by the owners of tract A. Sanford says, among other things, that his proposition in writing to her was that he would build a half mile of fence and furnish all the material "if she would give me a roadway"; that the fence was the consideration for the road; that his proposition was accepted and performed; that the road, when opened, became his only way to market his wood and farm products; that, before Kern bought tract A, he came to see him, Sanford, about buying Sanford's said land, and inquired "how he could get out if he bought it." Thereupon Sanford told him plainly of the lane, and that he had bought it, and paid for it, and had a right of way there. Sanford further testified in effect, that he always claimed it as a private way as of right after he had built the fence and opened the lane.

One Green testified he was a tenant on Sanford's land and hauled a great deal of cordwood over the road to Jackson, and that Mr. Sanford had him work the road and keep it in repair for the eight or nine years of his tenancy.

Bolinger, Sanford's succeeding tenant, testified the same way.

Mrs. Baldwin testified she did not "sell" the strip to Sanford, and gives her reason for not selling it in these words: "No; I did not sell it, because at the time I did not own it." She admits, however, that Sanford wanted a roadway, that he offered to open up the road at his own expense and build the fence, and says (quoting): "I consented to allow the road to be opened under those conditions: That he bear all the expense of making a good fence so as to fence the farm on that side." Being inquired of whether there was any "consideration," she answered: "Well, there was no money paid in the matter; * * * nothing more than the building of the fence and opening of the road."

She says there was nothing said about the time the road was to continue. The land having been devised to her by her father's will, probated in 1895, she sold it to one Burford by a deed of April 18, 1896, by a description including the lane. Burford held the land for three months, and sold it to one Clippard by a similar deed. Clippard owned the land about a year and transferred it back to Burford. Burford then held it about two years and conveyed to the defendant Kern.

Burford was not put on the stand, but Clippard was by defendant. He testified that the corners of tract A were pointed out to him before he bought; that he saw the lane in use; that it was a fenced lane then open and being traveled by Sanford and his tenants; that the corners of tract A included the Jackson and Pochontas public road as well as the lane, and there was no reservation in his deed in regard to either; that, when he sold back to Burford, the lane was still open and being used just as he saw it before he bought.

The defendant, Kern, testified in his own behalf to the effect that he bought the land from Burford in 1899 and moved on it; that Burford pointed out the corners to him; that these corners included the lane; and that he understood he was buying the lane. He admits, however, that Burford told him "Mr. Sanford used that lane." He testified that about three years before the trial (Sanford then having used the lane for several years during Kern's ownership) Sanford wanted to buy a road on his, Kern's, south line, and in that connection he, Sanford, (quoting) "told me I could close up that lane over there. It belonged to me anyhow." As we gather, this last conversation was after the road had been obstructed, and litigation was brewing or had commenced. On cross-examination he admitted that Sanford's proposition relating to closing up the lane was conditioned on Kern's selling him a shorter and more convenient road on the south side of tract A. He further admitted that, when he bought from Burford, Burford told him that Sanford had "fixed a fence through there and is using the road"; further, that Sanford had tried to sell to him before he bought from Burford, and had told him in response to his question, how he would get out of there, that he, Sanford, "claimed the road," and that the lane so claimed by Sanford was open until he, Kern, and Flynn closed it. He also admitted that, while his understanding was that he got the lane because his deed included it in the description of the land, yet that the same description included the Jackson and Pochontas public road. Further along he admitted that, when Sanford talked about buying a road on the south, he, Sanford, told him that, if he "shut up the lane, he would make trouble for him," and reiterated on cross-examination that Mr. Burford had told him before he bought his land that Sanford had that fence put there and had the right to that

amination by defendant's attorney, Mr. Sanford reiterated that he had all along asserted his right to the road, and had claimed to own it as against English, Mrs. Baldwin, Burford, Clippard, and Kern.

Plaintiff asked and was refused instructions based on his theory of the law. Defendant asked none. Considering the instructions immaterial to a decision here, they are omitted.

Any other necessary facts will appear in the opinion.

(a) The law of easements is applied to work out justice in cases differing so widely in essential elements that it may be well at the outset to get at the concrete case here by a process of exclusion. For instance, as shown by the record, this is not a case where an easement, resting in a mere permissive license without any consideration passing and having for its basis a mere act of neighborly good will, is sought to be enforced. Nor is it a case where an easement is not claimed as of right, and where the user was not of right. Such cases, therefore, as *Pitzman v. Boyce*, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. Rep. 536, *Fleld v. Mark*, 125 Mo. 502, 28 S. W. 1004, and *Anthony v. Building Co.*, 188 Mo. 704, 87 S. W. 921, are not in point. Plaintiff's case at bottom rests on prescription; that is, on adverse user as of right openly and uninterruptedly for more than 10 years. The blunt question, then, is: Do the record facts make such a case? We think so.

(b) In the first place, Sanford's claim to an easement originated in contract. He was not an interloper, squatter, or mere trespasser. This is important as furnishing a foundation for a claim of right, because the statute of limitations, borrowed to effectuate prescriptive rights, can only be invoked by a person claiming by right, and not by wrong. No flux of time will ripen a bad title into a good one unless possession is blessed by a claim of right. In the second place, the contract was executed; that is, performed and the contract consideration passed, the lane was opened, the fence built and accepted. In the third place, the consideration was adequate in law, viz., a fence built by plaintiff for the benefit of Mrs. Baldwin and a detriment suffered by Sanford by furnishing the material and outlay in building that fence in return for a benefit conferred on him, to wit, a private way from his timber land to the Jackson and Pocahontas road. For aught appearing here, the consideration paid was equal or more than equal to the value of the strip of land, as prices ranged in that region in 1889. It is argued for respondent there was no benefit to Mrs. Baldwin, that the whole affair from end to end was simply the gracious bounty of a neigh-

value of her holding evidently was impaired by a bad partition fence. Now, breachy stock and a low or broken line fence are the devil's own invention for discords and squabbles between coterminous proprietors—a fecund womb of a miserable brood of infelicities, viz., bad blood, bickering, bloodshed, fuss, litigation. In this case some of those things were hatching. Accordingly, for the good of her pocket and peace of mind, she gave the roadway in return for a fence, presumably horse-high, bull-strong, and hog-tight, as the saying runs. Again, under that contract fully performed, possession was turned over to Sanford. That the neighbors used this open lane when they liked in no way impairs his possession of right. Such acquiescence on his part did not destroy his easement. Such use is usual, and is recognized by our statute, in ways of necessity. Rev. St. 1890, § 9468 (Ann. St. 1906, p. 4346). The possession Sanford took and held was not the possession a proprietor would take and hold of his meadow, cornfield, or dooryard, but it was the possession usually taken of an open lane, cut off on both sides by fences, bridged where necessary, kept fit for use by annual repairs, and used continuously by him, his tenants, and those having business on his land as his means of egress and ingress—his market road. It was the best possession the subject-matter was susceptible of. The user was confessedly open, notorious, continuous, and without a word said or finger lifted in antagonism to it until defendant, after the flight of 14 years, built a fence across the lane and visibly asserted a hostile right to the strip.

(c) Was Sanford's use under an adverse claim of right? We think so. The reason of the thing is that a claim of right in essence rests in intent. As there is no window through which we may look into the soul of a man and use our eyesight in spying out his intent, the proof of intent, ex necessitate, rests in acts and words. There may be cases in which acts speak louder than words—where the thing done drowns out the thing said. But in this case the acts of Sanford unmistakably point to a claim of right in the way. So, the things said by him point in the same direction. He claimed the road as of right whenever a question was raised relating to his right during the time he was using it. Not only so, but his claim was recognized by the owners of tract A. We find no difficulty with the case on that score, and, unless something else is in the way, it must be said that he asserted his adverse right to the road by acts and words continuously for more than 10 years accompanied by uninterrupted possession for that time. That a prescriptive right is by a fiction of the law deemed to rest in a grant, or

small significance in modern jurisprudence; for it is settled law that the right to a way by prescription may be established in the same way as the title to land, to wit, by adverse possession under a claim of right uninterrupted for ten years.

Says Goode, J., in a well-decided case (*Power v. Dean*, 112 Mo. App., loc. cit. 297, 86 S. W. 1102): "As she executed no deed, the argument is that an easement, or right to use the strip as a private way, was never granted, because such a grant must be by deed. This proposition is sound, too. But an easement in the nature of a private way may be acquired by prescription or 10 years' adverse use, which is equivalent to a grant. In most cases the law allows the prescriptive right on the fiction of a prior grant of which the evidence is lost. In this case a fictitious grant need not be presumed, as there is proof of a futile attempt at an actual grant. Old theories about prescriptions and presumed grants, though still alluded to in opinions for the sake of seeming consistency, do not have much force in modern law. The question of a prescriptive right depends on adverse use for the limitation period. *House v. Montgomery*, 19 Mo. App. 170, 179; *Pitzman v. Boyce*, supra. A right to the private way acquired by adverse use is a vested right and not a license. *Autenrieth v. Railroad*, 36 Mo. App. 254, 260." The learned judge's formulation of the law is acceptable to us, and is in accord with modern doctrine.

(d) There is a further doctrine comporting with reason and justice and recognized as clear equity, viz., that a license to use a way or an easement, though without consideration at its inception, may not be revoked at will where, from the very nature of the license, the licensee was expected to go to great expense in order to enjoy it, and where that expense has been incurred. In such case equitable estoppel arises and the relations of the parties may not be severed and the easement destroyed at the whim and by the act of the licensor alone. They must be severed, if at all, on equitable principles. *Cape Girardeau & T. B. T. R. Co. v. St. L. & G. Ry. Co.* (not yet officially reported) 121 S. W. 300; *Baker v. Railroad*, 57 Mo. 265; *Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484; *Chiles v. Wallace*, 83 Mo., loc. cit. 92 et seq.; *School District v. Lindsay*, 47 Mo. App. 134; *State v. Macy*, 72 Mo. App. 427; *Gibson v. St. L. A. & M. Ass'n*, 33 Mo. App. 165; *House v. Montgomery*, supra.

(e) In arriving at the conclusions announced, we are not unmindful that Mrs. Baldwin did not have the legal title to the land at the time she contracted with Sanford. She was in possession, clothed with the powers of an apparent owner, and exercised those powers by leasing the land to tenants and enjoying the usufruct. We think she was allow-

ing to have had knowledge she was dealing with it by contracting in relation to it and this with his acquiescence and consent. The evidence is clear that Sanford thought he was dealing with the owner when he contracted with her. Burford, Clippard, and Kern are subvendees holding under her. They bought the land with actual notice of Sanford's claim. We deem it sound doctrine that they were put upon inquiry when they saw an open fenced lane in actual use by Sanford and his tenants, and are charged with the facts inquiry would reveal. But, and this is closer to the point, Kern had actual notice of Sanford's claim. Burford told him of it, and Sanford told him of it before he bought. Under such circumstances, the running of the statute of limitations flowed on in an even, uninterrupted current. Under the facts of this record, it would run against English had he lived and sued after 14 years, and, a fortiori, would it run against Mrs. Baldwin and those claiming under her. We hold the 10 years ripened Sanford's right to an easement and that it became vested in him.

The premises considered, the judgment is reversed, and the cause is remanded, with directions to enter one establishing plaintiff's easement in the strip of land described in the petition, and decreeing that defendant remove his obstructions out of the way. The case-made is not directed to the proof of any amount of damages. The judgment, therefore, should be entered for nominal damages of one cent and costs. All concur.

RUTTER et al. v. CAROTHERS et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 27, 1909.)

1. APPEAL AND ERROR (§ 171*)—CHANGE OF THEORY ON APPEAL.

Where the action, being to quiet title, was necessarily based upon an adverse claim by defendants, and the petition alleged plaintiffs' ouster and defendants' hostile possession, plaintiffs are estopped from contending, on appeal, that the purchase of the land by defendants at foreclosure sale prima facie inured to plaintiffs' benefit as tenants in common with defendants, because the agreed statement of facts did not expressly negative such tenancy by asserting an adverse holding.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1053-1055; Dec. Dig. § 171.*]

2. STIPULATIONS (§ 14*)—CONSTRUCTION.

The pleadings and the trial theory of the action are necessarily a part of the agreed statement of facts, and should be considered in construing it.

[Ed. Note.—For other cases, see *Stipulations*, Cent. Dig. § 34; Dec. Dig. § 14.*]

3. JUDGMENT (§ 1*)—NATURE.

A judgment is the conclusion of the law on the pleadings and evidence.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1, 3; Dec. Dig. § 1.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ces of the case without regard to the statute of limitations or any fixed period.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 242-244; Dec. Dig. § 87.*]

For other definitions, see Words and Phrases, vol. 5, pp. 3969-3972; vol. 8, p. 7700.]

5. QUIETING TITLE (§ 29*) — DEFENSES — LACHES.

In an action to quiet title brought September 4, 1904, by the children of the ancestor's child by his first wife against his second wife and his children by her to recover a third interest in land, it appeared that the ancestor died before plaintiffs' mother, leaving land subject to mortgage; that the land was purchased by one of defendants May 12, 1898, upon foreclosure; and that plaintiffs' mother died, a married woman, July 26, 1898, leaving plaintiffs as her only heirs. *Held*, that the facts showed no element of equitable laches so as to bar the action.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. § 63; Dec. Dig. § 29.*]

6. STATUTES (§ 181*)—CONSTRUCTION—LEGISLATIVE INTENDMENT—CONSEQUENCES.

The letter of the statute must give way somewhat to its obvious intendment, and it should not be construed so as to unnecessarily cause unreasonable results or impute injustice to the Legislature.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 263; Dec. Dig. § 181.*]

7. STATUTES (§ 225*)—CONSTRUCTION—RELATED STATUTES.

All statutes related to the same subject-matter should be construed together, if possible, so as not to render any provision of the law meaningless or repugnant.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 303; Dec. Dig. § 225.*]

8. LIMITATION OF ACTIONS (§ 5*)—CONSTRUCTION OF STATUTES.

Statutes of limitation, being enacted to protect litigants from the infirmities of memory as well as to end litigation, are based upon sound public policy, and should be construed so as to effectuate the legislative intent.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 13; Dec. Dig. § 5.*]

9. LIMITATION OF ACTIONS (§ 78*)—TACKING DISABILITIES.

Tacking or cumulating disabilities under the statutes of limitations is not allowable.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 422, 423; Dec. Dig. § 78.*]

10. LIMITATION OF ACTIONS (§ 73*)—ACTIONS FOR REAL ESTATE—TIME OF RUNNING—DISABILITIES—REMOVAL.

Rev. St. 1899, § 4262 (Ann. St. 1906, p. 2335), provides that no action to recover land shall be maintained unless plaintiff or his ancestor was possessed thereof within 10 years before the commencement of the action. Section 4263 provides that an action must be commenced within one year after making entry, and within ten years from the time the right of entry descended or accrued. Section 4265 provides that the time during which a disability continues is not deemed any part of the time limited, and the action may be brought within three years after such disability is removed, provided it shall not be maintained after 24 years after its accrual, and section 4267 provides that, if one die during the continuance of such disability without any judgment on the cause of action, his heir

additional time in certain contingencies, so that the heirs of a married woman to whom an action to recover land accrued May 12, 1898, could bring the action within 10 years thereafter, and were not bound to bring it within 3 years after her death, which occurred on July 26, 1898.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 399-412; Dec. Dig. § 73.*]

Appeal from Circuit Court, Shelby County; Nat M. Shelton, Judge.

Action by Retta Rutter and others against John H. Carothers and others. From an order granting a new trial, after judgment for plaintiffs, they appeal. Reversed and remanded, with directions to overrule motion for new trial and reinstate judgment.

Dysart & Mitchell and H. A. Wright, for appellants. V. L. Drain, for respondents.

LAMM, P. J. In a suit under section 650 to declare and establish title in 176 acres of land in Shelby county, judgment went for plaintiffs for an undivided one-third interest, subject to a charge of \$383 in favor of defendants. Afterwards a new trial was awarded on defendants' motion. From that order plaintiffs appeal.

Summarized, the petition charges, and the agreed statement of facts shows, that James H. Carothers was twice married. His first wife died. By her he had one child, Alvira. Alvira married Chatman Speight, and died leaving children, married and unmarried, minors and adults, who, with their father, Chatman Speight, are parties plaintiff. By his second wife, Millie G., he had two sons, John F. and James A., who, with Millie G., are parties defendant. On an undisclosed day in 1892 James H. Carothers died seised of the S. E. $\frac{1}{4}$ and the E. 16 acres off of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ in section 36, township 58, range 12, in Shelby county—all in possession of defendants. It is charged in the petition that defendants claim title, to the exclusion of plaintiffs, and are seeking to exclude and bar plaintiffs from any right or interest in the land; that defendants' claim of exclusive title is based upon a purchase made by the defendant John F. Carothers at a trust deed sale under a defaulted trust deed executed by his parents, James H. and Millie G.; that, if such is the basis of defendants' claim, it is not valid, for that the children of Alvira are entitled by inheritance and descent to a one-third undivided interest in the real estate, and that the purchase by John F. at foreclosure sale inured to the benefit of all the heirs of James H. Carothers as tenants in common. The prayer of the petition was that the court declare and quiet the title as between plaintiffs and defendants, and ascertain and determine

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ants and each of them, or to be forever barred from claiming any right, title, or interest in the part adjudged to plaintiffs; that the cloud upon their title be removed, and "for such other relief as they may appear to be entitled to in the premises." The answer of Millie G. admits her marriage with James H., that she is his widow, and that he died seised of the land described, and charges that Alvira, the mother of plaintiffs, died in July, 1898; further, that plaintiffs have no right to maintain this action because of section 4267 of the statute of limitations (Rev. St. 1890 [Ann. St. 1906, p. 2342]). As a further defense, she pleads generally that plaintiffs have been guilty of such laches as prevent a recovery. Defendants John F. and James A. file a joint answer, admitting that James H. Carothers died seised of the land, but they deny plaintiffs have any interest or rightful claim in the premises, in that they say James H. and Millie, his wife, executed a deed of trust on the land securing to the Jarvis-Conkling Trust Company borrowed money, which trust deed was spread of record; that, after the death of James H., the note evidencing said borrowed money and so secured was assigned to one Whitby; that on May 12, 1898, said deed of trust was duly foreclosed; that John F. Carothers purchased at said foreclosure sale for \$1,400.50 and received a trustee's deed on the payment of said sum; that John F. afterwards conveyed an interest in the land to James A.; that the right, if any, of plaintiffs to bring this action, terminated in three years after the death of their mother in the month of July, 1898. Wherefore they plead the three-year statute of limitations, to wit, section 4267, Rev. St. 1890, as a defense, and that plaintiffs have been guilty of laches abating the suit. The trial was to the court as in equity, and (as said) was upon an agreed statement of facts. In addition to the facts admitted, already set forth, it stipulated that rent offset betterments; that, if the court ruled against defendants on law questions tendered by their answer, then a decree might go adjudging one-third of the land in controversy to plaintiffs, subject, however, to a charge of \$383 to be paid defendants by them (i. e., one-third of a mortgage debt presently explained), nothing in such stipulation to preclude either party from appeal. It was further agreed that James H. Carothers died seised of the real estate in controversy subject to a recorded mortgage (viz., said deed of trust) given by himself and wife to secure a note therein described, which mortgage was foreclosed on the 12th of May, 1898; that at such foreclosure sale John F., one of the defendants, purchased the land; that afterwards John F. conveyed an undivided one-half interest to James A., his brother and codefendant;

were the only children of James H. Carothers; that Alvira died July 26, 1898, leaving the plaintiffs as her only heirs; that the foreclosure was not made until nine months after the death of James H.; that the present suit was filed September 2, 1904; that Alvira was at the time of the foreclosure and up to her death a married woman; that certain of her children are minors, who sue by their next friend; that the trustee's deed to John F. is dated May 12, 1898, and is duly of record, and that the purchase price was \$1,400.50. It was further stipulated that by a proper proceeding in the probate court of Shelby county the personal estate of James H. Carothers was found to be the absolute property of the widow, and that administration was dispensed with. Such is a summary of the record.

1. Assuming, as a postulate, that, as a general rule, tenants in common bear a confidential relation to each other, that the possession of one is the possession of the others, and that the protection of the common title by one co-tenant in the payment of taxes or other liens or a purchase at execution or foreclosure sale, on the one hand, creates a common burden on all the tenants in common, and, on the other hand, creates a common benefit to be shared by all, and, assuming that such purchase as a general rule is presumed to be for the benefit of all (*Hinters v. Hinters*, 114 Mo. 26, 21 S. W. 456; *Cockrill v. Hutchinson*, 135 Mo. 67, 36 S. W. 375, 58 Am. St. Rep. 564), it is argued by plaintiffs' counsel that, since the agreed statement of facts does not in terms assert an adverse holding or claim on the part of defendants as against plaintiffs, therefore there arises a prima facie presumption that said purchase of John F. Carothers inured to all the heirs of James H. Carothers, and (they say) the judgment rendered in the first instance in favor of plaintiffs can well stand on that proposition if on no other. But, under the facts of this record, we deem that contention unsound. Plaintiffs are estopped to take that position; for it runs counter to the very theory upon which they bottomed their case, and on which they invoked the aid of the law. Observe there were no grounds upon which an action to quiet title would lie unless there was an adverse claim asserted by defendants. Accordingly the petition alleges plaintiffs' ouster by defendants, and the suit proceeds on the theory of an adverse claim and hostile possession by them. So the answers are in the nature of a confession and avoidance, viz., admitting the original co-tenancy, but alleging the exclusion of plaintiffs from possession and from title and interest under a hostile claim predicated of a purchase at the foreclosure sale. On that theory the case was brought and tried, and it will not do to

must be read into and illuminate the words of the stipulation. To rule otherwise would be the same as to allow A. to recover a judgment against B. on one theory, and, when the judgment is challenged and set aside, allow A. to re-establish the judgment on a different theory and one outside of the pleadings, which in this case would be the theory that there was no occasion for any suit to quiet title, and no use of any judgment at all in that behalf. As it is an unbending rule of appellate practice that a cause must proceed above on the same theory it was tried below, and that a judgment is the conclusion of the law on the pleadings and facts, the point is ruled against plaintiffs.

2. It is argued here that plaintiffs were guilty of such laches as bar recovery. Attending to that contention, it will be observed that, though the answers plead laches as a defense, yet laches is not admitted by the pleadings, and there are no facts in the agreed statement relating to laches and on which to predicate such defense. Laches gives rise to an equitable doctrine, free from artificial or fixed rules, having regard to the relations of the parties to each other and to the subject-matter to be applied to each case in accordance with its own particular circumstances in order to reach substantial justice—for instance, where plaintiff lies by an unreasonable length of time awaiting a rise in land or some future event to determine his course, or where by acquiescence or by sleeping upon his rights he creates the belief in others that those rights are abandoned whereby he influences them to act on such belief, or where something has intervened whereby the party asking relief would obtain an unconscionable advantage if the relief were given. Under these or like conditions, where there is some natural justice behind the claim, the defense of laches is allowed independently of the statute of limitations. *Cockrill v. Hutchinson*, 135 Mo., loc. cit. 75 et seq., 36 S. W. 375, 58 Am. St. Rep. 504; *Stevenson v. Smith*, 189 Mo., loc. cit. 447 et seq., 88 S. W. 86; *Landrum v. Bank*, 63 Mo., loc. cit. 56 et seq.; *Bucher v. Hohl*, 199 Mo., loc. cit. 330, 97 S. W. 922, 116 Am. St. Rep. 492. The case at bar being barren of essential facts upon which to predicate the defense of staleness or laches, the point is ruled against defendants. With the foregoing subsidiary questions at rest, we confront the main proposition in the case.

3. The foreclosure was on May 12, 1898, and the trustee's deed bears date that day. Alvira died on the 26th day of the following July. Suit was brought by her children on September 2, 1904—that is, more than three years after her death, but within ten years of the time a cause of action accrued

until her death on July 26, 1898; that (she being then under disability) her heirs, under Rev. St. 1899, § 4267, had three years after her death, and no more, to sue and establish their rights in the property. Learned counsel for plaintiffs contend, contra, that the statute of limitations would not run for ten years after May 12, 1898, and that the three-year provision of the statute must be construed so that it will not impinge upon nor destroy the ten-year provision, which latter, they say, is a general rule of statutory law relating to limitations on real actions. A solution of the problem thus presented calls for a construction of certain sections of our statute of limitations relating to real actions, viz., sections 4262, 4265, 4267, Rev. St. 1899 (Ann. St. 1906, pp. 2335, 2338, and 2342). The general language employed in these sections creates obscurity, and sometimes makes their construction exceedingly troublesome when the courts are called upon to apply them to a given case. The trouble is accentuated not a little by the use of unhappy expressions on the part of the lawmaker. We have come to the conclusion that the contention of defendants' counsel is unsound, and that an equitable construction of the statute (by which we mean an interpretation of the written law in accordance with its spirit and true intentment) sustains the position of plaintiffs' counsel. This because:

(a) Conceding that courts may not enlarge the written law by additions or diminish it by writing exceptions into the law obviously absent from the legislative mind, conceding, moreover, that the law must be obeyed notwithstanding the apparent rigor and hardship of its application (*ita lex scripta est*), conceding withal that, if the intent of the lawmaker is plain and single, then courts are relieved from the burden of finding a reason for the law (*stat pro ratione voluntas*); yet the practical administration of the law through the courts would quite miss refined and elevated justice in many instances if the naked and cold words of the statute were not warmed into life and good sense by seeking, finding, and reading into the law its true spirit and intentment. Not only so, but obviously this delicate and high judicial task is not to be put to one side because it may be one difficult of performance; for in law, as in life, the more difficult the task imposed by duty, the more occasion for caution and pains. "The construction of all statutes of this state," says the lawmaker (Rev. St. 1899, § 4160 [Ann. St. 1906, p. 2252]), "shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the Legislature or of the context of the same statute" (here follow certain rules). Referring to the exceptions just mentioned, the Legislature in a prior section (4159) again

points to the judicial duty and power of construing statutes by certain fixed rules, "unless there be something in the subject or context repugnant to such construction." That rule of interpretation, as has been often said in the venerable language of great judges, is but the application of the divine injunction that the letter killeth while the spirit maketh alive. Accordingly, from the Year Books to this year of grace, those are recognized canons of construction which ordain that the naked letter of the law must gently and a little give way to its obvious intentment; that those who interpret the laws must not impute injustice to the lawmaker by so interpreting his language as to unnecessarily produce harsh and unreasonable results, or impute to him a disposition callous to natural justice. We must say other rules of interpretation construe all statutes relating to the same subject-matter in *pari materia*, throw the light of the context upon the passage to be interpreted, and so rule, if possible, that other provisions of the law are not destroyed or made meaningless, or repugnant, thus marring the symmetry of the whole body of the enactment. *Perry v. Strawbridge*, 209 Mo., loc. cit. 636 et seq., 108 S. W. 641, 16 L. R. A. (N. S.) 244, 123 Am. St. Rep. 510; *Keeney v. McVoy*, 206 Mo., loc. cit. 64 et seq., 103 S. W. 946. It may not be amiss to remind ourselves of a general proposition applicable to statutes of limitations. It has been said that such statutes are as beneficial as any to be found in the books; that they rest upon sound public policy and tend to the peace and welfare of society; that they are construed so as to effectuate the intention of the Legislature, although they in individual cases may produce hardship. While one obvious purpose to be subserved is repose, yet the philosophy of these statutes connects itself with the infirmities of human memory. Accordingly, it has been well said that: "If parties will not settle their business matters within reasonable periods before human testimony is lost and human memory fail, on pain of losing the right to a remedy thereon, not the law, but the party, is responsible for the hardship entailed." *Wood on Limitations* (3d Ed.) § 4.

Giving effect to the foregoing general observations by holding in mind the rules of interpretation set forth, a scholar in statutory law or in general jurisprudence would not expect to find in the statute of limitations a rule of written law dealing with a person under the disability of infancy or other disability, or the heirs of those under such disability, more harshly than it dealt with others not so handicapped. Conceding that such scholar would approach his investigation charged with knowledge that the policy of the law does not allow the cumulating or tacking of disabilities, yet he would be astonished to find that a Legislature had given to a person not under disability 10 years to bring his real action, and, if he die within

the 10 years, the same law gave his heirs what was left of the 10-year term to sue, and that the same Legislature had granted to a person under disability the grace of 24 years in which to sue if the disability continue so long, or 3 years after the disability was removed, if removed after 10 years and within the 24; and then had faced about, and had said to the mother or infant child under disability: If you are so unfortunate as to die presently after your cause of action had accrued, say, in a day, a month or a year, your heirs (themselves peradventure under disability) shall have only three years plus the day, the month, or year you lived after your cause of action accrued. What is this but supplementing the terrors of death with a heavy burden at the hands of the law—a burden not laid on the shoulders of others more fortunate? Yet to that complexion we must come if we adopt the theory of defendants' counsel. If Alvira had been a man or unmarried (i. e. *sui juris*), she, and her heirs in case of her death, would have 10 years in which to sue after her cause of action accrued. But, being a woman and married, her heirs (some of them minors), it is contended, have only three years after her death in which to sue, which added to the days between May 12 and July 26, 1893, make the total term of limitations allowed in the case at bar 3 years, 2 months, and 14 days, instead of 10 years. A bare statement of the proposition shows the harsh inequality in such interpretation of the statute—a discrimination, too, against a class of persons the law holds in tender regard. It seems to me a court would be justified in hesitating and doubting much, and looking long and well to the reason and words of the law, before reaching that conclusion.

(b) Fortunately such conclusion is not a necessary one as will presently be seen. Section 4262 reads: "No action for the recovery of any lands, tenements or hereditaments, or for the recovery of the possession thereof, shall be commenced, had or maintained by any person, whether citizen, denizen, alien, resident or non-resident of this state, unless it appear that the plaintiff, his ancestor, predecessor, grantor or other person under whom he claims was seized or possessed of the premises in question within ten years before the commencement of such action." Contemplating an entry upon land in certain contingencies, the next section provided for commencing an action after entry, and directs that an action must be commenced within one year after making such entry, "and within ten years from the time the right to make such entry descended or accrued." Section 4263 reads: "If any person entitled to commence any action in this article specified or to make any entry be, at the time such right or title shall first descend or accrue, either within the age of twenty-one years, or insane, or imprisoned on any criminal charge or in execution upon some conviction

of a criminal offense for any time less than life, or a married woman, the time during which such disability shall continue shall not be deemed any portion of the time in this article limited for the commencement of such action or the making such entry; but such person may bring such action or make such entry after the time so limited, and within three years after such disability is removed: Provided, that no such action shall be commenced, had or maintained or entry made by any person laboring under the disabilities specified in this section, after twenty-four years after the cause of such action or right of entry shall have accrued." Section 4267 (the one relied upon by defendants) reads: "If any person entitled to commence such action or to make such entry die during the continuance of any disability specified in section 4265, and no determination or judgment be had of the title, right or action to him accrued, his heirs, or any person claiming from, by or under him, may commence such action or make such entry after the time in this article limited for that purpose, and within three years after his death, but not after that period." Obviously section 4262 gives to all persons *sui juris* or non *sui juris*, under disability or not, whether ancestor or heir, a main right, viz., 10 years in which to institute suit for the recovery of land or for the recovery of the possession thereof, said 10 years commencing with the accruing of a cause of action. That section and the ensuing sections (with some modifications immaterial here) have been the statute law of this state for three-fourths of a century. Without any legislative direction to that effect that section and those following it would be construed together as relating to the same subject-matter, and so dove-tailed together by interpretation as to make a symmetrical code. But we see the Legislature itself intended they should be construed together. They refer to each other in words. They are all found in article 1, c. 48, Rev. St. 1899. Section 4265 is plainly intended as a benefit to those under disability. It is a shield, not a sword. It does not shorten the 10-year rule prescribed in section 4262, but adds something of value by tolling the statute in the interest of those under disability by ordaining that the time such disability shall continue "shall not be deemed any portion of the time in this article limited for the commencement of such action." The "time in this article limited" is 10 years, and section 4265 ordains that a person under the specified disability may bring his action "after the time so limited, and within three years after such disability is removed." We think it obvious that section 4265 assumes that persons under disability have the 10 years at all events and under any circumstances, but also have an additional time in certain emergencies and contingencies. If we did not construe the phrase, "after the time so limited and

within three years after such disability is removed," as perpetuating in any event the 10-year statute, we would have an absurd and unjust result easily put. For instance, if A., a married woman, has a right of action accruing to her on Monday, and if on Tuesday she become discover, she would have only three years and one day in which to sue, for her disability was removed on Tuesday, and some of the words of section 4265 seem to require her to sue in three years after that event. But this interpretation "corrodes the bowels" of the text, and therefore is vicious in taking no note of the words "after the time so limited," which evidently refer to section 4262 giving to her and every one else the general, plain, unlimited right to sue within 10 years. When we come to section 4267, we find the same phraseology connecting that section with "the time in this article limited for that purpose." While the language used lacks precision and the law is so unhandsomely written as to breed doubts and obscurities, as said, yet, if we read the 10-year rule into sections 4265 and 4267 to the extent that it is to be preserved as a general statute of limitations with (in named contingencies) certain extensions and benefits to those under disability, we think in that way some of the obscurities will be better resolved than in any other.

(c) The foregoing conclusion lies well with the trend of the judicial mind. In *Gray v. Yates*, 67 Mo. 601, this court announced that: "If the disability has existed for a period of time less than 10 years, the person laboring under such disability must institute his suit within three years after the removal of the disability, unless said three years, together with the period of the disability, are less than 10 years, in which event such person is entitled to the unexpired portion of the 10 years; for all persons are entitled to 10 years in any event. When a party has the 3 years given by the fourth section, and the whole period of the 10 years given by the first section, the right of action or of entry is barred. In other words, when 10 years have elapsed since the right of action accrued, and 3 of those years have been free from disability, the right of entry is barred. A like construction has been given to a similar statute in New York in the following cases: *Smith v. Burtis*, 9 Johns. (N. Y.) 180; *Jackson v. Johnson*, 5 Cow. (N. Y.) 93, 94, 15 Am. Dec. 433; *Wilson v. Betts*, 4 Denio (N. Y.) 208, 209." The *Gray Case* seems never to have been overruled or criticised, but, contra, has been frequently cited with approval. *De Hatre v. Edmonds*, 200 Mo. 246, 98 S. W. 744, 10 L. R. A. (N. S.) 86, was a troublesome case, and the different provisions of the statute of limitations on real actions were held under review. The exposition there given of those provisions was cautious, painstaking, and full. Our learned Brother Graves, speak-

Allison, 192 Mo. 366, 91 S. W. 115, quotes liberally from that case, but differentiates and discriminates. Referring to its exposition of section 4267, he said: "Of course, if the limit of 3 years named in this section added to the time already run from the date of the accrual of the right to sue would make the time less than the 10 years named in section 4262, the party would have the full 10 years given by that section, but no more. On the other hand, if the 3 years served to extend the 10 years, the party entitled to sue would have the full benefit of the 3 years, but no more." In the Robinson Case, supra, and in Reed v. Painter, 145 Mo. 354, 46 S. W. 1089, there are remarks, somewhat obiter, we think, and by way of argument, seemingly running counter to the doctrine announced in the Gray and the De Hatre Cases. But it would seem those remarks were not necessary; for, as we read those cases, in both of them the integrity of the 10-year rule of limitations was preserved.

The premises considered, we conclude the judgment entered below on the pleadings and agreed statement of facts was right. Hence it was error to grant a new trial. Accordingly the order granting one is reversed and the cause is remanded, with directions to overrule that motion and reinstate the original judgment in favor of plaintiffs. All concur.

STATE v. PAYNE.

(Supreme Court of Missouri, Division No. 2.
Nov. 23, 1909.)

1. CRIMINAL LAW (§ 206*)—PRELIMINARY EXAMINATION—STATUTES—RETROACTIVE OPERATION.

Since the act securing the right of a preliminary examination did not become effective until July 14, 1907, accused was not entitled to a preliminary examination in a prosecution for larceny under an information filed April 1, 1907.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 206.*]

2. CRIMINAL LAW (§ 1167*)—APPEAL—HARMLESS ERROR—RULINGS ON INFORMATION.

Under Rev. St. 1899, § 2522 (Ann. St. 1906, p. 1503), providing that, if two indictments for the same offense be pending against an accused at the same time, the indictment first found shall be deemed suspended and shall be quashed, and that the first information was not formally quashed on the record when the amended information was filed, is not available as a ground for reversal on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3100-3106; Dec. Dig. § 1167.*]

3. CRIMINAL LAW (§ 1202*)—EVIDENCE—ADMISSIBILITY—FORMER CONVICTIONS.

Under Rev. St. 1899, § 2379 (Ann. St. 1906, p. 1461), imposing an additional punishment upon one who has previously been convicted for an offense punishable by imprisonment in the state penitentiary and discharged, upon his subsequent conviction, in a larceny prosecution the state could plead accused's former conviction for grand larceny and imprisonment in, and discharge from, the state penitentiary, and could

education and the penitentiary records showing service of the sentence imposed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3261; Dec. Dig. 1202.*]

4. WITNESSES (§ 359*)—IMPEACHMENT—FORMER CONVICTION.

In a larceny prosecution, the court records, showing accused's former conviction for larceny, and the state penitentiary records, showing her service of sentence and discharge, were competent to impeach accused's testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1161; Dec. Dig. § 359.*]

5. CRIMINAL LAW (§ 1204*)—EVIDENCE—IDENTITY.

In a larceny prosecution, in which the information charged an aggravated offense under the habitual criminal statute (Rev. St. 1899, § 2379 [Ann. St. 1906, p. 1461]), the state penitentiary records were admissible to identify accused as the person who had served sentence in the penitentiary under the former conviction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1204.*]

6. CRIMINAL LAW (§ 1172*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS—PREJUDICIAL EFFECT.

In a larceny prosecution, under an information containing a count under the habitual criminal statute (Rev. St. 1899, § 2379 [Ann. St. 1906, p. 1461]), error in an instruction submitting the case on that count for not requiring a finding that the larceny was committed in the county of the venue did not prejudice accused, where she was not convicted under the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3169; Dec. Dig. § 1172.*]

7. CRIMINAL LAW (§ 741*)—PROVINCE OF COURT AND JURY—WEIGHT OF EVIDENCE.

Where the evidence tended to prove every material fact necessary to conviction, requested instructions in the nature of demurrers to the evidence were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1705-1728; Dec. Dig. § 741.*]

8. CRIMINAL LAW (§ 829*)—INSTRUCTIONS—REQUESTS—CHARGES ALREADY GIVEN.

Requested charges, which were covered by charges given by the court, were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.*]

9. CRIMINAL LAW (§ 1137*)—APPEAL—ESTOPPEL TO ALLEGE ERROR—INVITED ERROR.

Under Rev. St. 1899, § 2535 (Ann. St. 1906, p. 1509), providing that the judgment shall not be affected by any error committed at the instance of defendant, accused cannot complain on appeal of a charge given for her.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. § 1137.*]

Appeal from Circuit Court, Pettis County; Louis Hoffmann, Judge.

Susie Payne was convicted of larceny, and she appeals. Affirmed.

C. C. Kelly, for appellant. E. W. Major, Atty. Gen., and Chas. G. Revelle, Asst. Atty. Gen., for the State.

GANTT, P. J. This prosecution was commenced by an information filed by the prosecuting attorney of Pettis county, charging the defendant with larceny from the person of Homer Arnold in the nighttime. After-

wards, on April 1, 1907, an amended information was filed charging the defendant with the same offense, with the addition of a charge of a former conviction of the same offense, and that she had been imprisoned in the penitentiary, and, having fully complied with the sentence, had been discharged therefrom. After unavailing motions to quash and strike out certain portions of the information, the defendant was duly arraigned and entered her plea of not guilty. She was put upon her trial before a jury duly impeached and sworn and found guilty of larceny from the person in the nighttime, as charged in the information, and her punishment assessed at five years in the penitentiary. Motions for new trial and in arrest of judgment were duly filed and overruled, and the defendant sentenced in accord with the verdict, and an appeal was granted to this court.

The testimony on the part of the state tended to establish the truth of the charge of larceny from the person of Homer Arnold in the city of Sedalia on or about January 5, 1907, by the defendant placing her hand in his left-hand trousers pocket, abstracting \$2 and some additional change therefrom and then running away. This occurred about 9 o'clock in the night of that day. The records of the circuit court of Pettis county were also introduced in evidence showing a former conviction of the defendant on the charge of grand larceny, and the record of the penitentiary showed that she had complied with the judgment and sentence and had been discharged therefrom. There was evidence on the part of the defendant tending to show that Arnold did not have the money, and on the part of the defendant herself denying that she took from him the sum of \$2, or any other amount, but that he gave her 50 cents. The defendant is not represented in this court by counsel, and we are driven to an examination of the record and to her motions for new trial and in arrest to discover whether any reversible errors were committed against her.

1. The information is in the usual and often approved form, and is entirely sufficient. The objection to the information on the ground that defendant had not been accorded a preliminary examination was without merit for the reason that the act securing that privilege to defendant did not go into effect until July 14, 1907. Equally unavailing is the point that the first information was not formally quashed on the record when the amended information was filed. Section 2522, Rev. St. 1899 (Ann. St. 1906, p. 1503); *State v. Williams*, 191 Mo., loc. cit.

212, 90 S. W. 448. Unquestionably the state had the right to plead the former conviction as substantive fact constituting an aggravated offense under section 2379, Rev. St. 1899 (Ann. St. 1906, p. 1461), and by the same token the right to prove it by the record. *State v. Manicke*, 139 Mo. 545, 41 S. W. 223; *State v. Vaughan*, 199 Mo. 111, 97 S. W. 879. This evidence was likewise competent to impeach the defendant's testimony and to establish her identity as the party who had served her sentence in the penitentiary.

2. The first instruction given for the state was defective in not requiring the jury to find that the larceny was committed in Pettis county; but, as defendant was not convicted under section 2379, Rev. St. 1899, it could not possibly have prejudiced her rights. *State v. Waters*, 144 Mo. 841, 46 S. W. 173.

3. Instruction No. 2 given by the court properly defined the offense of which the defendant was convicted. It required the jury to find all the elements and facts essential to the crime. Instructions 3, 4, 5, 6, and 7 are such as are usually given in criminal prosecutions, and are in accordance with long approved precedents. Instructions 1 and 2 requested by the defendant and refused by the court were in the nature of demurrers, and were properly denied, as the evidence tended to prove every material fact necessary to the conviction. The court gave instructions numbered 3, 4, and 7, wherein the jury were instructed that the information was a mere formal accusation and no evidence of guilt, and on the presumption of innocence, and an instruction to the jury on the credibility of the witnesses in addition to that which the court had already given of its own motion. Instructions 5 and 6 prayed by the defendant were properly refused, as the law involved therein had been correctly declared by the court to the jury in other instructions. As to instruction No. 8, the record discloses that this was given at the instance of the defendant, and she therefore cannot complain. Section 2535, Rev. St. 1899 (Ann. St. 1906, p. 1509); *State v. Palmer*, 161 Mo., loc. cit. 175, 61 S. W. 651; *State v. Summar*, 143 Mo. 230, 45 S. W. 254.

4. The exception based upon the remarks of the prosecuting attorney, we think, is without any substantial merit and in our opinion furnishes no ground whatever for the reversal of this judgment.

We have been unable to find any error, which in the least tends to the prejudice of the defendant's substantial rights.

Accordingly, the judgment is affirmed.

BURGESS and FOX, JJ., concur.

SEILERT v. McANALLY et al.

(Supreme Court of Missouri, Division No. 1.
Nov. 27, 1909.)

1. EXECUTORS AND ADMINISTRATORS (§ 43*)—PERSONAL PROPERTY.

Title to the personality of an intestate passes to his administrator, and the title to the personality of a testator passes to his executor.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 279; Dec. Dig. § 43.*]

2. EXECUTORS AND ADMINISTRATORS (§ 39*)—REAL ESTATE.

Title to real estate of an intestate vests directly in his heirs.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 280; Dec. Dig. § 39.*]

3. GUARDIAN AND WARD (§ 34*)—TITLE OF GUARDIAN.

The property of a ward is not vested in the guardian; but, in the absence of an express trust, the title thereto remains in the ward, and his title cannot be disturbed without his being a party to the suit involving the issue.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 103; Dec. Dig. § 34.*]

4. GUARDIAN AND WARD (§ 126*)—ACTION—PARTIES.

In a suit to divest title to real estate out of an infant and vest it in plaintiff, the infant must be sued in his own name, and his guardian must defend the action.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. § 431; Dec. Dig. § 126.*]

5. HOMESTEAD (§ 181*)—PRESUMPTIONS.

It will be presumed that the status of a homestead continues until the contrary appears, and the burden of proving that the homestead has ceased to exist is on him who asserts it.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 351-353; Dec. Dig. § 181.*]

6. FRAUDULENT CONVEYANCES (§ 52*)—CONVEYANCE OF EXEMPT PROPERTY—EFFECT.

A voluntary conveyance by a debtor of his homestead is not fraudulent as against his creditors, in the absence of any statutory prohibition.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 118-127; Dec. Dig. § 52.*]

7. VENDOR AND PURCHASER (§ 231*)—NOTICE—RECORDS.

Under Rev. St. 1899, § 923 (Ann. St. 1906, p. 845), providing that conveyances of real estate shall from the time of the recording thereof of impart notice to all persons of the contents thereof, and all subsequent purchasers are purchasers with notice, and section 3309 (page 1933), providing that no conveyance shall be deemed void in favor of a subsequent purchaser where the conveyance has been recorded, etc., a subsequent purchaser cannot sue to set aside a prior conveyance, which was duly recorded at the time of the subsequent purchase, though the subsequent purchaser was an unlettered man and did not understand the facts.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 513-539; Dec. Dig. § 231.*]

8. FRAUDULENT CONVEYANCES (§ 282*)—ACTIONS—EVIDENCE.

Under Rev. St. 1899, § 3309 (Ann. St. 1906, p. 1933), providing that no conveyance shall be void in favor of a subsequent purchaser unless the grantee in such conveyance was a party to the fraud, a subsequent purchaser,

seeking to set aside a prior voluntary conveyance of the grantor to his wife, must, to recover, show that the wife participated in the grantor's fraud.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 817, 818; Dec. Dig. § 282.*]

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Action by C. P. Seilert against William F. McAnally, J. W. White, as guardian, etc., of John and Curtis McAnally, and others. From a judgment for plaintiff, defendant White, as guardian, etc., appeals. Reversed, with directions.

Houck & Houck, for appellant. Ralph Wammack, for respondent.

LAMM, P. J. Plaintiff sues in equity to set aside two certain deeds to Stoddard county land, as a cloud on his title, and to vest title out of defendants and into him. Defendant William F. McAnally does not appeal. A decree going, the defendant guardian and curator appeals.

Summarized, the bill alleges: That on the 23d day of July, 1897, said Wm. F. was seised in fee of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, section 25, township 26, range 10 (80 acres). That on said day he and his then wife, Martha Isabell, conveyed the land to one Alex. McAnally for an alleged consideration of \$1,500; the deed put of record presently. That three days later Alex. reconveyed the land to Martha Isabell for a like alleged consideration, which deed was put of record on the same day as the other. That on the 16th of September, 1899, over two years later, Wm. F. and his then wife, Alice (Martha Isabell having died intestate), sold the land to plaintiff, conveying it by warranty deed for full value paid, putting plaintiff in possession. That being unlettered, unfamiliar with land titles, or how to trace them, plaintiff had to depend on others. That he intended to buy an unincumbered fee-simple title, and to that end used reasonable diligence and caution by requiring said McAnally to furnish him an abstract of title. That such abstract was furnished showing perfect fee-simple title in him. That relying on and induced by said abstract, and by the fraudulent representation of Wm. F., viz., that he had a fee-simple title, plaintiff purchased the land, paid his money, and took a conveyance and possession. That in truth and fact the title was defective not only in respect to said two conveyances, but in respect to other matters (immaterial here). That later, to wit, in January, 1905, Wm. F. McAnally notified plaintiff that he did not own the land at the time he conveyed to plaintiff, but had theretofore conveyed to Martha Isabell, and that "they had better fix up the title * * * while they were both alive." That plaintiff then caused the records to be searched and found the two

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1897 deeds. That said abstract of title failed to show either of them. That "said deeds were falsely and fraudulently executed by the parties thereto with intent to cheat and defraud prior and subsequent creditors and probable purchasers of said land. That they were voluntary conveyances and were made without any consideration, and no change of possession was ever had thereunder." That the heirs of Martha Isabell are William F., her husband, and John and Curtis, her minor children. That defendant White is the duly appointed, qualified, and acting guardian and curator of said minors. That, though often requested to do so, defendants "have failed and neglected to perfect his title to said land." And that said deeds "constitute a cloud on plaintiff's title." Wherefore, etc. The answer was a general denial by the guardian and curator in his own behalf and for said minors. Defendant McAnally defaulted.

Plaintiff, to sustain the averments of his bill, put in proof as follows: (1) A warranty deed to him from W. F. and Alice, his second wife, of date September 16, 1899; consideration, \$800. (2) A warranty deed in regular form by W. F. and Martha Isabell, his first wife, to Alexander McAnally; consideration, date, and record as alleged in the petition. (3) A warranty deed from Alexander to Martha Isabell and recorded the same day as No. 2. Supplementing his documentary proof, plaintiff took the stand and testified that he bought the land on the 16th day of September, 1899, now lives on it as a home, knew McAnally for some time, always considered him a man of his word and honorable, and knew he had lived on it several years and had rented it out, collecting the rent when not living on it. McAnally came to him and offered to sell. Told McAnally he might trade if he had a good title. McAnally said he had a good, straight title—"not a flaw in it." Plaintiff said to him he "was ignorant and did not know a thing about land titles." McAnally replied he would fix that matter by getting an abstract. Plaintiff told him to do so. He would have it examined and would take the land if the title was all right. McAnally got an abstract showing the title all right. (Note: This abstract omitted the 1897 deeds and certified the title clear.) Thereupon the deed was made, and plaintiff paid \$800. Plaintiff firmly believed at the time that McAnally had a good title; would not have traded if he had doubted it. Plaintiff knew nothing about McAnally's deed to Alexander and Alexander's to Martha Isabell, and never heard of them till years afterwards. McAnally was reputed to be the owner of the land—had paid taxes, lived on it, or rented it just like an owner. Plaintiff bought the place for a home, and since purchasing had built a barn and fences and had otherwise improved the place, never having been disturbed in his possession or enjoyment of it. In 1905 plaintiff got a letter

from McAnally telling him that he had deeded the land to his first wife before she died. Put on inquiry, plaintiff then searched the record and found deeds putting title in Martha Isabell. He then went to Alexander McAnally (Wm. F.'s father, now dead), and on inquiry was told that he (Alexander) paid nothing for his deed, and got nothing on Martha Isabell's. Plaintiff had no schooling, could neither read nor write. The land in question is all he has. William F. McAnally told plaintiff he conveyed to Isabell to keep Mr. Houck, an attorney, from enforcing the collection of some machine notes he held against him and one Miller, and that there was no consideration for the conveyance. On cross-examination plaintiff admitted that neither William F. or Martha Isabell was ever indebted to him in aught, and that he had had no dealings with Wm. F. except as detailed in his direct examination.

To further sustain his bill, plaintiff offered the deposition of defendant, William F. McAnally. In substance, his testimony follows: Witness sold the land to C. P. Seilert; bought it from one Hunt; owned it seven or eight years; used his own money in paying for it; his first wife, Martha Isabell, resided on the land; witness was living on it when he sold it to Seilert. Asked under what circumstances the conveyances were made to Alexander and Martha Isabell, he answered that he owed a debt to a machine company for a binder bought by him and one Miller; they giving joint notes. These came into the hands of Mr. Houck for collection. Witness was about to sell the place he was then on and move on the land in controversy, so he sold his interest in the machine to Miller, who was to take up the notes. Afterwards Houck wrote witness that he held a note overdue. Witness told Houck Miller was to pay—he must look to him. Houck promised to look to Miller. Witness then went to Dunklin county. While there, Houck wrote him threatening to sue if the note was not paid and to sell the land. The letter said it could not be held any longer as a home-stead. At that time Martha Isabell was in bad health and nervous. She insisted witness should transfer the land to her to save it from being sold. Witness consented to do it. A deed was made and acknowledged, and his wife came to Stoddard county and had "the changes made." No money passed from witness' father, Alexander, to him, or from Martha Isabell to Alexander. The only object of the transfer was to keep the property from being sold for the machine debt. Witness was allowed to say that it was not intended that the title was to pass for her use and benefit, but (quoting) "she was just to hold it for me." Nothing was ever said, however, about her deeding it back. The possession never passed out of witness under the deeds in question; but, when those deeds were made, witness and his wife were not living on the land. Witness collected the

rent after the conveyances. Martha Isabell, after the deed to her (quoting), "made no claim of ownership to these lands." They were always assessed in witness' name, and the rent notes ran that way. Martha Isabell died about six weeks after she got title. Witness narrated at length how Martha Isabell got \$200 as a present from her father, which he (witness) put into a piece of land and took title to himself. Sale was made, and the purchase money used to buy other land; witness taking title. This was about 13 years before he bought the Hunt land. His wife made no claim to any interest in any of the lands, and witness could not say he used his wife's money in buying the Hunt land. The conveyance to her was not on account of the advancement made by her father about 21 years ago. Witness had four children by his first wife; two now living, John and Curtis. One died after Martha Isabell. He stated his reason for not telling Mr. Sellert that he had conveyed the property to his wife to be that he had "no notice of this other conveyance, except what my wife had told me." Witness said he did not know the deeds were recorded. He knew about making one deed, but not the other, and, not knowing they were recorded, did not tell Sellert. He intended to convey him a clear title. His wife told him the deeds had been made and recorded, and that is what made him write Sellert that, if they were on record, he (witness) "wanted to fix it." Witness was "positive" there was an agreement between them that she take the land and hold it to prevent its sale for the machine debt. On cross-examination he stated that the \$200 received by his wife from her father was put into land which was sold, and the proceeds reinvested in other land, and so on down until the Hunt land was bought. Witness and Martha Isabell lived together as husband and wife until she died. Never was sued on the machine note. Denied knowing that Miller had paid it before his wife got title to the land. Knew nothing in regard to it, except from Houck's letter, and the transfer was on its heels.

The guardian and curator, on behalf of his wards, introduced no testimony. Such is the case on the facts. At the close of plaintiff's testimony, an unsuccessful demurrer was interposed, and exception saved. The decree narrates: That the case was heard on the petition and on the "answer of J. W. White, as guardian and curator of John and Curtis McAnally, minor defendants"; that defendant William F. made default; that plaintiff and the guardian and curator came in person and by counsel. The issues were found for plaintiff. The assailed conveyances were found to be falsely and fraudulently executed by the parties thereto "with intent to cheat and defraud prior and subsequent creditors and probable purchasers of said land," voluntary, etc., and that no change of possession followed them. After other recitations relat-

ing to plaintiff's purchase in good faith on full consideration paid for a fee-simple title with no "actual knowledge" of said conveyances, etc., it was adjudged and decreed that the deeds (describing them) be canceled and held for naught, and that the legal title to the real estate (describing it) "be divested out of defendants and fully vested and confirmed in the plaintiff," and that plaintiff have his costs and execution therefor.

On such record, can the decree stand? Clearly not, because:

(a) The style of this case, the verbiage of pleadings, decree, and of the whole record, indicate that John and Curtis were neither sued nor summoned as parties defendant. Defendant William F. had parted with his title, whatever it was, to plaintiff, and had no interest left subject to a decree. That is, if he had a paramount title, he had conveyed it to Sellert with covenants of warranty. Likewise, if he was tenant by the curtesy, as widower, then his life estate, with the right to possession, passed by his said warranty deed. Moreover, it cropped out in evidence that he had four children by Martha Isabell, three of them alive at the time of her death. One died since. We assume one died before. Now, the petition does not count on the theory that W. F. inherited an undivided interest from the child dying after its mother, but on the theory that the mother had no title in equity. If William F. inherited an interest as one of the heirs of his deceased child, and if descent was cast on him before he made his deed to plaintiff, then that interest, whatever aliquot part it was, passed by his deed to plaintiff. If such was cast on him after he made that deed, then such after-acquired undivided interest inured to the benefit of plaintiff under his prior warranty. But there is nothing of this sort in the bill. Its theory is that the mother died seised of a legal title in the land; that such title descended to her children, John and Curtis; that her title was fraudulent. Hence the title of John and Curtis as privies in estate was tainted. Wherefore plaintiff sought to clear up his own title by removing the cloud of the minors' tainted title. In that view of the case, why Wm. F. was made a party is not clear to me.

It is primer law that the title to personal property of one dying intestate passed to his administrator. If he die testate, then to his executor or administrator cum testamento annexo. But the title to real estate vests directly in the heir. So, the title to personal property belonging to the ward (absent an express trust) is not vested in his guardian and curator, as a matter of law, but in the ward. Accordingly, the ward's title to either his real or personal estate cannot be disturbed without his being a party to the suit duly summoned and having his day in court. He cannot be sued and bound vicariously by haling into court his guardian and curator.

Rev. St. 1899, § 558 (Ann. St. 1906, p. 589); *Webb v. Hayden*, 166 Mo., loc. cit. 50, 65 S. W. 760; *Judson v. Walker*, 155 Mo., loc. cit. 179, 53 S. W. 1083; *Payne v. Masek*, 114 Mo., loc. cit. 636, 21 S. W. 751 (a case taking color from the peculiar wording of the partition act). Mr. White, as guardian and curator, had no title to the real estate of his wards. His duty was to defend their title when they were summoned by due process in a suit relating to it. It is not clear therefore to us why he was made a party defendant. These preliminary observations are made in order there may be no misconception about the proper parties defendant in a real estate action, or mischief rush in through the open door of a bad precedent. A judgment vesting the title of infant heirs out of them and into another (as does this), without their being sued and summoned, has no legal foot to stand on, and would be brushed away on appeal. However, there is bare chance that (present obscurities) we do not understand the record. It may be that under an unhappy title of the case, and despite unhappy record language, John and Curtis were actually summoned, and their guardian and curator answered for them. Extending grace to plaintiff by throwing that doubt in the scale, we shall dispose of the merits.

(b) Under this record the land in controversy was once the homestead of William F. and Martha Isabell. That status is presumed to continue until the contrary appears. The burden, then, was on the plaintiff to show it ceased to exist, and, until he successfully carried that burden, the McAnally title could not be fraudulently dealt with by them. Such has been the law in this state since *Vogler v. Montgomery*, 54 Mo. 577. The homestead is forbidden fruit to the creditor. He may not take it or eat thereof. Wherefore, as to the world at large, the homesteader (absent a statutory prohibition) may convey his homestead at his own sweet will, fraud or no fraud. This because, as said by Lord Halsbury, in *Derry v. Peek*, 14 App. Cas., loc. cit. 343, quoting language his lordship said was some centuries old: "Fraud without damage and damage without fraud" do not give rise to actions for fraud. There are exceptions to this rule, notably when parties deal with each other in a fiduciary relation; but the case at bar is not within any exception. There is no testimony that the McAnallys had abandoned their homestead in Stoddard. It is true they lived a little while in Dunklin; but nothing shows they intended to remain there permanently, or that the intention to return (the *animus revertendi*) did not exist. We find they came back presently. True, too, Mr. Houck wrote McAnally that he had lost his homestead. But may a decree stand on that letter? The learned attorney doubtless had the crowning virtues of a good lawyer, viz., diligence, tact, learning, integrity. Yet the aim of the letter was merely to press a spur into the side of a balking debtor, not

to establish a proposition of law and fact. Observe, he did not pass on the issue of homestead or no homestead as a judge in a court of justice, or as an arbitrator or referee in a rustic tribunal, and decide the question, *rusticum iudicium*, so to speak. Ergo, his proclamation that the homestead was lost did not operate as an estoppel of record or in pais binding on all men, courts included. We conclude the judgment should be reversed on the ground (if no other) that there was no proof such as would vitiate the conveyances of the homestead. The fact that they were voluntary amounts to nothing; nor does the fact that Martha Isabell, during the six weeks she lived, took no possession, and that McAnally continued in possession up to the sale amount to anything. He was entitled to possession under his curtesy.

(c) Section 3399, Rev. St. 1899 (Ann. St. 1906, p. 1933), in the chapter on Fraudulent Conveyances, reads: "No such conveyance or charge shall be deemed void, in favor of a subsequent purchaser, if the deed or conveyance shall have been duly acknowledged or proved and recorded, or the purchaser have actual notice thereof at the time of the payment of the purchase money, unless it shall appear that the grantee in such conveyance, or person to be benefited by such charge, was party or privy to the fraud intended." The foregoing section is also an insurmountable barrier to plaintiff's recovery. This because:

(1) The deeds sought to be vacated were on record for two years before plaintiff took his own conveyance. Now, section 923, Rev. St. 1899 (Ann. St. 1906, p. 845), requires instruments in writing conveying or affecting real estate to be recorded in the county where such real estate is situate. The next section reads: "Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice." In the face of that section, it is a vain thing for plaintiff to say (as he does) that he had no "actual notice" of these conveyances. He was bound to take notice. The statute makes no exception in favor of a blind man, or an unlettered man, or infant, or married woman, or any other person who may be an object of anxious care to a court of chancery; and it would be audacious for us to write in an exception. That the due and timely record of a properly acknowledged deed conveying real estate is conclusive notice to the whole world of its contents is a property rule in this state not to be trifled with or whittled away by judicial construction. Those who walk, as well as those who run, must be held to read the record of a deed. It is one case in which those who cannot read must read, and where all are presumed to be well read.

or privy to the fraud intended." In this case, conceding for present purposes that fraud was intended, yet it was a fraud against a specified creditor. Plaintiff defined, earmarked, and circumscribed the fraud by the evidence of McAnally, and showed it alone aimed at the machine company, a creditor, and not at subsequent purchasers, or, to use the language of the petition, "probable purchasers." The idea was to save the home to themselves, and it would not do to say they had purchasers in mind. Furthermore, it matters not what McAnally had in mind, the controlling question is what Martha Isabell had in mind. Davidson v. Dockery, 179 Mo., loc. cit. 697, 78 S. W. 624, and cases cited. We doubt not from this record that the afflicted wife of McAnally had no purpose to wrong innocent purchasers of the land, and never contemplated that her husband, after her death, would conspire with a scampish or slovenly abstracter to concoct a lying abstract and wrong a purchaser in that way. If it were ruled that such covinous or reckless performance wiped out the notice given by the deed record, under express statutory mandate, no vendee who held title by a voluntary conveyance as a gift would be safe in his estate so long as a subsequent purchaser from his donor could show that he was imposed upon by an inefficient, insolvent, or rascally abstracter.

(d) It is insisted that McAnally was not a competent witness to overturn the deeds in question. Up to this time we have treated his testimony as competent. McAnally's confession is all the evidence on the point, and appellant timely and aptly objected to its introduction, without avail. In my opinion he was clearly incompetent to reveal confidential conversations with his wife or overturn his own grant; but the question is not necessary to a decision of the case, and is therefore reserved.

The case in some of its features is a hard one; but plaintiff's possessory rights during the life of William F. McAnally do not, at first blush, seem to be in jeopardy, and, if his warranty deed conveyed any interest cast on McAnally by inheritance from one of his children, then, as already said, plaintiff may be a tenant in common with John and Curtis. If so, his betterments are not likely to be in jeopardy, and may be protected whenever partition will lie. However hard the case, we may not spoil the symmetry of the law or give relief to plaintiff at the expense of the minor heirs of Martha Isabell, who did plaintiff no wrong. Says Lord Campbell (See East India Co. v. Paul, Moore, P. C. 111): "It is the duty of all courts of justice to take

tiff's bill as on a hearing on the merits, and render judgment against him for costs. All concur.

GARDNER v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 1.

Nov. 27, 1909.)

1. EVIDENCE (§ 474*)—OPINION EVIDENCE—SUBJECT-MATTER OF TESTIMONY.

Persons who had observed and measured railway tracks with a yardstick or straight edge and a tape line could testify that one rail at a curve was an inch higher than the other, though they did not appear to be experts in such matters, and it was not shown that the measurements were made with a spirit level.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2203; Dec. Dig. § 474.*]

2. TRIAL (§ 98*)—RULINGS OF COURT.

Rulings of a court should be unequivocal and so definite in character as to leave no room for doubt by the jury as to what evidence is admitted and what excluded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 193, 249; Dec. Dig. § 98.*]

3. APPEAL AND ERROR (§§ 288, 289*)—RESERVATION OF GROUNDS—FAILURE TO ASSIGN ERROR IN MOTION FOR NEW TRIAL.

Where a court's rulings excluding various offers of testimony, and remarks of the judge made during the trial in the nature of comments on the evidence and mild criticisms of counsel were not assigned as grounds for new trial, so that the court could correct itself, they will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1691, 1677; Dec. Dig. §§ 288, 289.*]

4. EVIDENCE (§ 271*)—HEARSAY—REPORTS—PASSENGER—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action for injuries to a street car passenger struck by a beam near the track, a report of the motorman to the company giving his version of the accident was inadmissible, as an ex parte account, not under oath, and affording no opportunity for cross-examination by plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1087; Dec. Dig. § 271.*]

5. WITNESSES (§ 255*)—EXAMINATION—REFRESHING MEMORY.

If the date of an accident is in doubt, a motorman could refresh his memory from a written report made by him to the company without admitting it in evidence.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 875; Dec. Dig. § 255.*]

6. CARRIERS (§ 280*)—CARRIAGE OF PASSENGERS—STREET RAILWAYS—CARE REQUIRED.

It is the duty of a street railway company to exercise that high degree of care for the safety of passengers that a very careful person would use under like circumstances.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1089-1091; Dec. Dig. § 280.*]

7. CARRIERS (§ 292*)—INJURY TO PASSENGER—OBSTRUCTION NEAR TRACK—CROSS-BEAM ON TROLLEY POLE.

If a cross-beam on a pole carrying cross-wires to support the trolley wire has been placed

nearer to the track than a very careful person would have permitted under like circumstances, and the company knew of such condition, or by the exercise of such high degree of care might have known it in time to have remedied it, and prevented injury to a passenger therefrom, and failed to do so, it would be liable for the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1275; Dec. Dig. § 292.*]

8. CARRIERS (§ 292*)—CARRIAGE OF PASSENGERS—STREET RAILWAYS—DUTY TO PASSENGERS.

Where a street railway company maintains a cross-beam carrying feed wires and bolted to one of the poles supporting a cross-wire which supports the trolley wire, the pole, cross-beam, and wire are necessary parts of the equipment used in furnishing the motive power for the cars, and the law imposes the same degree of care in providing such equipment as it does in furnishing safe cars in which passengers may ride.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1175; Dec. Dig. § 292.*]

9. TRIAL (§ 243*)—INSTRUCTIONS—INCONSISTENT INSTRUCTIONS.

An instruction which in one clause states that a street railway company must exercise, for the safety of passengers, that high degree of care that a very careful and prudent person would use under like circumstances, and in another place states that it is only required to use ordinary care in that regard, being contradictory, is erroneous, as the jury had no means of knowing which one properly declared the law, and an appellate court has no means of knowing which one the jury followed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 564-566; Dec. Dig. § 243.*]

10. CARRIERS (§ 317*)—STREET RAILWAYS—INJURIES TO PASSENGERS—ADMISSIBILITY OF EVIDENCE.

In an action for injuries to a street car passenger struck by a cross-beam near the track on a curve, evidence that one track at that place was higher than the other causing a car passing the beam, in rapid motion, to lurch, throwing the car near to the beam, was admissible on the question of the company's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1301; Dec. Dig. § 317.*]

11. CARRIERS (§ 316*)—STREET RAILWAYS—INJURIES TO PASSENGERS—BURDEN OF PROOF.

The rule that a passenger makes out a prima facie case of damages against a carrier for personal injuries when he shows that he was injured by a collision, and was himself free from negligence, applies only where the petition charges negligence in general terms, and does not apply where it specifically pleads the negligent acts which caused the injury, in which case the burden is upon plaintiff to prove his case and continues with him throughout the case.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1283-1294; Dec. Dig. § 316.*]

12. PLEADING (§ 433*)—SUFFICIENCY—CONTRIBUTORY NEGLIGENCE—CURE BY VERDICT.

An answer pleading contributory negligence in general terms like a plea of negligence in general terms is good after verdict.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1473; Dec. Dig. § 433.*]

13. CARRIERS (§ 347*)—STREET RAILWAYS—INJURY TO PASSENGERS—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE.

In an action by a street car passenger for injuries from being struck by a beam near a track, evidence tending to show that he was riding with a portion of his arm protruding through the car window is sufficient to take the case to

the jury on the question of contributory negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1380, 1402; Dec. Dig. § 347.*]

14. CARRIERS (§ 347*)—STREET RAILWAYS—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Such an act of the passenger would not be negligence per se, preventing a recovery.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1380, 1402; Dec. Dig. § 347.*]

15. CARRIERS (§ 315*)—STREET RAILWAYS—INJURIES TO PASSENGERS—PLEADING—ALLEGATION AND PROOF.

In an action by a street car passenger for injuries, the very act of negligence alleged must be proved, and, where it was alleged that plaintiff was injured on a south-bound car on the west side of a viaduct, he could not recover upon proof that he was injured on a north-bound car on the east side of the viaduct.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1281, 1282; Dec. Dig. § 315.*]

Appeal from Circuit Court, Jackson County; Jno. G. Park, Judge.

Action by Alfred G. Gardner against the Metropolitan Street Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for a new trial.

The plaintiff was a passenger upon one of defendant's street cars, and while being carried as such he sustained the injuries complained of. He brought this suit in the circuit court of Jackson county to recover the sum of \$5,000 damages for those injuries. The trial resulted in a judgment for the defendant, and the plaintiff appealed.

The petition upon which the cause was tried, formal parts omitted, was as follows: "For his cause of action plaintiff states: That each of the defendants is a corporation, duly incorporated and existing according to law, and that both the defendants have their general offices in Kansas City, Mo. That at all the times hereinafter mentioned or concerned the defendants owned, controlled, and operated a street railway in Kansas City, Wyandotte county, Kan., extending from Fifth and Central streets, in said Kansas City, Kan., in a southwesterly direction to the northern approach of a viaduct, extending northward and southward over certain railway tracks, on Seventh street in said city, and thence southward over said viaduct, and thence southward and eastward in said Kansas City, Kan., and finally to the stockyards which are located in both said Kansas City, Kan., and Kansas City, Mo. That at all said times said street railway was what is known as an electric railway; that is to say, the motive power which propelled the cars thereon was electricity, and was applied by means of what is known as a trolley wire running along above the tracks, and over the center of the cars, together with what is known as a trolley pole extending upward from the cars and fitting with a grooved pulley to the underside of said wire. That in constructing said railway the de-

way, and about 40 feet south from the north end of said viaduct, and stretched a cross-wire from the upper end of said pole across and over said railway for the purpose of supporting said trolley wire, which trolley wire ran lengthwise with said railway. That the defendants also placed a cross-beam upon said pole, extending horizontally eastward and westward, for the support of two heavy cables, which rest upon the west end of said cross-beam. That said cross-beam is of hardwood, and is about 4 or 5 inches square and 4 or 5 feet long, and is placed upon said pole about 5½ feet above the car track. That the defendants negligently and carelessly placed said cross-beam upon said pole in such a way that the east end thereof extends about 2½ feet eastward from said pole, and at all times mentioned herein has extended so near to the north rail of said railway that it almost scrapes upon the cars as they pass along toward the south in crossing said viaduct. That the defendants negligently laid the tracks of said railway, on the west side of said viaduct, in such a manner that the east rail of said western track, at the point opposite to said cross-beam, was at all times herein concerned about one inch higher than the west rail thereof, and in that manner caused the cars—as they passed said point—to lean or pitch over to the westward; and, when said cars were running rapidly, said inequality in said rails caused them to lean or pitch further toward the west than when running slowly. That said railway where it crosses said viaduct is a double-track railway, and at all times herein concerned the cars ran southward on the west track and northward on the east track thereof. That the defendants negligently ran their cars (including the car on which plaintiff was injured, as hereafter mentioned) along said west track and passing said dangerous cross-beam without placing the proper guards to the windows thereof for the protection of passengers upon said cars. Plaintiff states: That on the 19th day of June, 1904, he boarded one of defendants' cars at said Fifth and Central streets, Kansas City, Kan., for the purpose of being carried as a passenger to said stock-yards, and paid his fare, to wit, five cents, to defendants' conductor in charge of said car. That said car had one seat on each side thereof running lengthwise with said car, and that the seat on the west side did not extend fully to the rear or north end of the car but that there was a space of about two feet between the end of the seat and the end of the car. That, when plaintiff entered said car, he found that both of the seats therein were fully occupied by passengers, and plaintiff was obliged to stand, and that the most convenient and comfortable place that plaintiff saw in which he could stand

That plaintiff stood in said space with his face toward the front of said car, and with his right elbow and lower arm resting upon the window sill of the rear window on the west side of the car, and that said window was pushed down from the top thereof until the top of said window was about even with the window sill. That, through the negligence of the defendants, there was no guard or other protection to said window, except that there were two or three bars placed horizontally across the window about four or five inches apart, and that the lower rod or bar was about 11 inches above the window sill. That plaintiff did not know of said dangerous cross-beam or of said inequality of said rails. That, as said car approached said cross-beam, the servants of the defendants in charge of the same negligently ran said car at a rapid rate of speed, so that, when the car struck said point where said rails were unequal as aforesaid, the car leaned or pitched over toward the west, and thus caused plaintiff's elbow to slip upon said window sill toward the west and slightly outside of the car, whereupon said cross-beam struck plaintiff's arm over the ulna bone, and just below the elbow, and cut plaintiff's arm to said ulna bone, and bruised and fractured the same, and thus forced plaintiff's arm backward and against the rear frame of said window, and broke the bone of plaintiff's arm just above the elbow, and forced the ends of said broken bone through the flesh and muscles of plaintiff's arm, and greatly bruised, wrenched, and dislocated plaintiff's elbow. Plaintiff states: That, by reason of said injuries, he has suffered and still continues to suffer great physical pain and mental anguish, and was confined to his house about six weeks, and has not been able to perform his usual labor since said injury occurred, and was obliged to expend and to obligate himself to expend about \$130 for the services of physicians, and about \$10 for medicines, and was obliged to be nursed and cared for by his wife and children, and that their services in so doing were of the reasonable value of \$75. That said injuries have resulted in a stiffening and malformation of plaintiff's right elbow joint, and in weakening plaintiff's entire right arm, and that said elbow and arm are thus permanently injured. Plaintiff states that he is a tailor by trade and has been such all his life, and has no other trade or calling by which to support himself and family, and that, by reason of the injuries aforesaid, he is permanently disabled from pursuing said trade, and has lost and will lose his earnings in said trade during the remainder of his life, and that all said injuries have resulted from the negligence of the defendants in placing said cross-beam too near said car tracks and permit-

to be laid unequal in height and to remain so, in failing to protect the window of said car in the proper manner as above mentioned, and in running said car at too great a speed at said dangerous place, and that the defendants knew of the dangerous condition of said cross-beam and said car and said tracks, or by the exercise of reasonable diligence could have known of the same. Plaintiff states that, by reason of said injuries resulting from the defendants' negligence as aforesaid, he has been damaged in the sum of \$5,000," etc.

The answer of the Metropolitan consisted of a general denial and a general plea of contributory negligence. The cause was dismissed as to the Kansas City Elevated Railway Company. The reply was a general denial. Plaintiff's evidence tended to prove all of the allegations of the petition, and that of the defendant tended to prove that the plaintiff was injured while a passenger on one of its cars on the day and at the hour, as shown by plaintiff, and on the same viaduct, but that the injury occurred while the car was going north, on the east side of the viaduct, instead of on the west side of the viaduct, while the car was going south, as alleged by plaintiff. Defendant's evidence also tended to show that the injury occurred about 150 yards south of where plaintiff claims it occurred, and that the injury was caused by plaintiff's arm coming in contact with a trolley pole, which stood on the west side, some 10 or 12 inches from the line of the car, as it passed, instead of coming in contact with a cross-beam which stood on the east side, about the same distance from the line of the car, as plaintiff's evidence tended to show. In other words, there was no question raised as to the fact that plaintiff was a passenger, and that he was injured by defendant while he was being carried as such; the difference between them being as to when and where the injury occurred, and the question of negligence and contributory negligence.

The plaintiff asked the court to instruct the jury as follows:

"(1) The court instructs the jury that if you find from the evidence that the plaintiff was a passenger on one of the cars then being operated by the defendant in Kansas City, Kan., on or about the 19th day of June, 1904, and that said car was at that time being run southward over a viaduct which passes over certain railroad tracks on Seventh street in said city, and if you further find from the evidence that there was at said time a pole standing on said viaduct, and just west of the track on which said car was so running, and that there was a cross-beam bolted onto said pole in such a way that the east end of the same was very close to and within a few inches of said car as it was so passing along, and if you further find from the evidence that at said time,

beam, the plaintiff's elbow or lower arm was brought into contact with said cross-beam, and that plaintiff was injured thereby, and if you further find from the evidence that at said time and place the defendant was guilty of negligence such as is defined in other instructions given you by the court, and that said injuries to plaintiff, if any, resulted from such negligence, then your verdict must be in favor of the plaintiff, unless you further find from the evidence that the plaintiff was guilty of negligence on his own part which directly contributed to said injuries.

"(2) The court instructs you that, if you find from the evidence that the plaintiff was a passenger on a car which was being operated by the defendant at the time and place referred to in other instructions, then it was the duty of the defendant to use and exercise that high degree of care, caution, and foresight for the safety of the plaintiff that a very careful and prudent person would use and exercise under like circumstances. And if you find from the evidence that at said time and place there was a post or pole standing at the west side of the track on which said car was running, and that there was a cross-beam bolted onto said pole in such a way that the east end of the same extended near enough to said track to endanger passengers on said car, and nearer to said track than a very careful and prudent person would have permitted under like circumstances, and that defendant knew of said condition of said cross-beam, or by the exercise of said high degree of care and caution might have known the same in time to have changed said cross-beam, and thereby prevented the injury to plaintiff, if any, then the defendant was negligent in said particular. Or, if you find from the evidence that at said time and place the window of said car at which the plaintiff claims to have been standing was not as well guarded or protected for the safety of passengers as a very careful and prudent person would have guarded or protected the same under like circumstances, and that defendant knew of such condition of said window, or by the exercise of said degree of care and caution might have known the same in time to have changed the same, and thereby prevented the injury to plaintiff, if any, then the defendant was negligent in said particular. Or if you find from the evidence that at said time and place the east rail of said track was higher than the west rail thereof, and that said inequality of the rails caused the car to lean or pitch over toward the west as it was passing said point, and thereby endanger passengers on said car, and that such inequality was greater than a very careful person would have permitted under like circumstances, and that defendant knew of said condition, or could have known the same by the exercise of said degree of care in time

such injuries to plaintiff, if any, then defendant was negligent in said particular.

"(3) The court instructs you that the defense of contributory negligence, which is set up and charged by the defendant in this action, is an affirmative defense which must appear from the evidence, and that you cannot find a verdict against the plaintiff on this ground alone, unless it has been shown in the evidence that the plaintiff was guilty of some negligent act or acts on his own part which directly contributed to the injuries complained of. And such negligent act or acts must be such as a reasonably prudent person would not have been guilty of under like circumstances. In determining whether or not the plaintiff was guilty of contributory negligence, as herein defined, you will take into consideration all the facts and circumstances shown in the evidence, and, unless it has been shown in the evidence that the plaintiff was guilty of some act or acts of negligence which a reasonably prudent person would not have been guilty of under like circumstances, and that such act or acts directly resulted in the injuries complained of, you will not find a verdict against the plaintiff upon the ground of contributory negligence alone.

"(4) You are further instructed that, if you shall find a verdict in favor of the plaintiff, you may assess his damages at such a sum, not exceeding \$5,000, as you may believe from the evidence will be a fair and reasonable compensation to him: First. For such pain of body and mind, if any, as you may believe from the evidence that he has already suffered, and such bodily pain, if any, as you may believe from the evidence he is reasonably certain to suffer hereafter, as a direct result of the injuries complained of. Second. For such loss of earnings, if any, as you may believe from the evidence that he has sustained, or is reasonably certain to sustain hereafter, as a direct result of the injuries complained of. Third. For such permanent injuries to plaintiff's body, if any, as you may believe from the evidence that he has sustained as a direct result of said injuries. Fourth. For such expenses for doctor's bills, if any, not exceeding \$100, as you may find from the evidence that he has necessarily incurred and expended as a result of the injuries complained of."

The court gave said instructions numbered 1, 3, and 4, but refused to give 2 as asked, but modified it by striking out the words "said high degree of care and caution," and inserting in their stead the words "ordinary care," and by detaching and eliminating therefrom the following clauses: "Or if you find from the evidence that at said time and place the east rail of said track was higher than the west rail thereof, and that said inequality of the rails caused the car to lean or pitch over toward the west as it was passing said

said car, and that such inequality was greater than a very careful person would have permitted under like circumstances, and that defendant knew of said condition, or could have known the same by the exercise of said degree of care, in time to have repaired said track and prevented such injuries to plaintiff, if any, then defendant was negligent in said particular." The court gave instruction numbered 2 in its modified form. To which action of the court the plaintiff duly excepted.

The defendant, upon its part, prayed the court to instruct the jury as follows:

"(1) The court instructs the jury that the burden of proof is on the plaintiff to prove to your satisfaction by the preponderance of the credible testimony that defendant was guilty of negligence as submitted to you in these instructions, and this burden of proof continues and abides with the plaintiff throughout the entire trial; and, unless you believe and find from the evidence in this case that the plaintiff has proven by a preponderance of the credible testimony to your reasonable satisfaction that the defendant was guilty of negligence as defined in these instructions, and that such negligence was the proximate cause of the injuries complained of, then your verdict must be for the defendant. By 'preponderance of the evidence' is meant the greater weight of credible testimony.

"(2) The court instructs the jury that you are the sole judges of the credibility of the witnesses and the weight and value to be given to their testimony, and, in determining what weight and credit you will give to the testimony of any witness, you should consider his or her conduct and demeanor on the stand, his or her interest in the case on trial, his or her opportunity to know and be informed as to the facts on which they undertake to give testimony, and their ability to clearly remember and to clearly state such facts, their willingness or unwillingness to testify to any facts of which you may believe they have knowledge.

"(3) It was the duty of the plaintiff to exercise ordinary care for his own safety, and if he failed to do so, and such failure on his part directly contributed to the injuries complained of, then he cannot recover in this case, and your verdict will be for the defendant, even though you may find that the defendant was also negligent as defined in these instructions. By ordinary care, as used in this instruction, is meant such care as would be exercised by an ordinarily prudent person under like circumstances.

"(4) The court instructs the jury that there is no evidence that the car of defendant was run at a negligent rate of speed at the time and place of the accident.

"(5) The court instructs the jury that this case should be considered by you the same as if it was a contest between two persons of equal standing in the community. The fact

that one of the parties is a corporation should not and must not affect your minds in any way in the consideration of the case. The rights of the parties should be and must be determined upon the evidence introduced and the instructions given to the jury, which are the law and the only law to guide you in your deliberations.

"(6) The court instructs the jury that if you find and believe from the evidence that the plaintiff knew or by the exercise of reasonable and ordinary care and diligence might or could have known, that if he put his arm out of the window, or through the bars upon the side of the car, there was danger of his arm being struck and injured, and that he negligently put his arm out of the window or through the bars, and was thereby struck and injured, then your verdict will be for the defendant.

"(7) The court instructs the jury that, unless you find and believe from the evidence that the plaintiff has proven by a preponderance of the testimony to your satisfaction that he was struck by a cross-beam on the west side of the viaduct about 80 feet south of the north end thereof while riding south upon defendant's car, your verdict must be for the defendant.

"(8) If you find from the evidence that plaintiff was injured on a north-bound car and on the east side of the viaduct, and not on a south-bound car on the west side of the viaduct, your verdict will be for defendant."

The court, over the objections of plaintiff's counsel, gave to the jury the foregoing instructions. To which action of the court in giving same the plaintiff at the time duly excepted.

The errors assigned by counsel for appellant relate to the admission and rejection of testimony, and to the giving and refusing instructions. We will mention such parts of the evidence and such of the instructions during the course of the opinion as may be necessary for a proper determination of the questions presented for our consideration.

Theoph L. Carns, for appellant. Jno. H. Lucas, for respondent.

WOODSON, J. (after stating the facts as above). 1. We will first consider the errors assigned regarding the rulings of the court as to the rejection of testimony offered by the appellant. Appellant offered the testimony of some two or three witnesses who had observed and measured with a yardstick or straight edge and a tape line the tracks of respondent just opposite the cross-beam mentioned in the evidence, to the effect that the top surface of the east rail of the west track was one inch higher than the west rail thereof. This evidence was offered for the purpose of proving that, when the car passed the cross-beam in rapid motion, it was thereby caused to lurch or pitch to the westward until the line of the car passed so near to said beam as to throw appellant's arm

against the same, and thereby inflicted the injury complained of. This evidence was by the court excluded, for the reasons that it was not shown that the witnesses who took the measurements were experts in such matters, and because it was not shown that the measurements were made with the assistance of a spirit level. The exclusion of that evidence was clearly erroneous, as will appear by reading the following authorities: 17 Cyc. 102, 104; Eyerman v. Sheehan, 52 Mo. 221; Heman Construction Co. v. O'Brien, 81 Mo. App. 639; McPherson v. Railroad, 97 Mo. 253, 10 S. W. 846; Charlton v. Railway, 200 Mo. 413, 98 S. W. 529; Hovey v. Sawyer, 5 Allen (Mass.) 554; Eastman v. Amoskeag, etc., 44 N. H. 143, 82 Am. Dec. 201; Vermillion v. City of Vermillion, 6 S. D. 466, 61 N. W. 802; Morrisette v. Railway, 76 Vt. 267, 56 Atl. 1102; Posachane Water Co. v. Standart, 97 Cal. 476, 32 Pac. 532; Galveston, etc., Ry. v. Ford, 22 Tex. Civ. App. 181, 54 S. W. 37; Olson v. Oregon Short Line, 24 Utah, 460, 68 Pac. 148; Lightfoot v. Traction Co., 123 Wis. 479, 102 N. W. 30.

The rule respecting measurements is stated as follows in 17 Cyc. p. 102: "An observer may state his estimate of size, including height, depth, breadth, thickness, and width, and any change in those or other dimensions. The statement is merely one of fact, as to which any person who has applied the measurements may testify, with weight proportionate to his age and experience." And on page 104 of same volume it is said: "In the absence of adequate measurements, any person of adequate knowledge and judgment may state the grade of a ditch, of a hill, or a railroad track." In 5 Allen, 554, the Supreme Court of Massachusetts said: "As to where the highest point of a hill is, is a question upon which one man could not have any more or better means of forming an opinion than any other person of ordinary intelligence; and it is not a question for expert testimony." In Eastman v. Amoskeag, 44 N. H. 143, 82 Am. Dec. 201, the Supreme Court said: "In questions relating to heights and distances, and as to the number, quantity, and dimensions of things, a witness may not be able to testify without an implied expression of opinion; but this is no objection to the testimony upon such points and subjects." It has also been held competent for a witness to testify as to the height to which a stream of water was thrown, when his only criterion was the height of a house nearby, and he did not know the height of the house (Vermillion v. Vermillion, 6 S. D. 466, 61 N. W. 802), and for a witness to testify as to the size of a lantern simply upon inspection (Morrisette v. Railway, 76 Vt. 267, 56 Atl. 1102). So also held competent for a witness to testify that the grade of a ditch was not more than five feet to the mile. Here the appellant contended that, since the grade was a matter susceptible to exact measurement, the judgment of the witness was not competent. But

the court held otherwise, and stated that, although this evidence might be overcome by a showing of the exact measurements, still the evidence was competent. *Posachane Water Co. v. Standart*, 97 Cal. 476, 32 Pac. 532. It has been held competent for a witness to testify that there was a sharp curve and a sharp grade on the railroad at the point of accident. *Galveston, etc., Ry. v. Ford*, 22 Tex. Civ. App. 131, 54 S. W. 37; *Olson v. Oregon Short Line*, 24 Utah, 460, 68 Pac. 148. It is competent for a witness to estimate the height of a wood wagon. *Lightfoot v. Traction Co.*, 123 Wis. 479, 102 N. W. 30. In this state a witness was permitted to give his estimate of the depth, or thickness, of broken stone. And the court further held that the witness might add his opinion under certain circumstances. *Eyerman v. Sheehan*, 52 Mo. 221. This court also held that it was competent for a witness to give his estimate of the distance of a crane from a passing train from his observation alone. *Charlton v. Railway*, 200 Mo. 413, 98 S. W. 529.

Counsel for respondent do not contend said evidence was not competent; but their insistence is that said evidence was in fact admitted by the court, and not excluded, as contended for by counsel for appellant. By reading page 56 of the abstract of the record, it will be seen that witness Carns testified as follows: "The east track was about an inch higher than the west track at that point. The east rail of the west track was about an inch higher than the west rail at that point, and, when Mr. Gardner and Mr. Gilley went over it, the track was in the same condition that it was when I first went there." And on page 59 appellant testified: "Well, we measured the east track, and we found it about an inch higher than the west one; that is, on the curve." While the record shows that Carns and appellant made the foregoing statements accredited to them, yet the ruling of the court is not clear and definite upon their admission until we reach the ruling of the court upon the admission of the testimony of the witness Bullock. On pages 109 and 110 of the abstract the following occurred: "Q. State to the jury what was the condition of the track over the viaduct, Mr. Bullock, with reference to its being either rail level with the other along the other side. A. The track was perfectly level. Mr. Carns: I object to that question until it is shown that the witness had knowledge of that particular time. The Court: Yes; and unless he put a level to it. Mr. Loomis: The other gentlemen did not. The Court: I held it was no evidence. There is no issue on that." This ruling of the court made definite and certain that which was before indefinite and uncertain. The rulings of the court should always be unequivocal and so definite in character as to leave no room for doubt in the minds of the jury as to what evidence is admitted and as to what is excluded. With-

out the jurors know positively what evidence is to be considered by them, they are in no position to properly consider the case, or to return an intelligent verdict. Even without the last ruling of the court, its previous rulings were so indefinite and uncertain as to afford just grounds for complaint on the part of appellant; and, with the last added, there can be no doubt but what the effect thereof was to exclude all the evidence which tended to show the rails of the track were uneven at the place of the accident. This is also made clear by the action of the court in striking out of appellant's second instruction all reference to his right to a recovery on account of the uneven condition of the rails. This instruction will receive further consideration presently. The exclusion of this evidence was error. The exclusion of that evidence virtually took from the jury the charge of negligence regarding the throwing of appellant against the cross-beam.

2. Counsel for appellant also complains of the action of the court for excluding various offers of testimony; but by an examination of the motion for a new trial, as suggested by counsel for respondent, we find that none of those rulings was assigned as a ground for a new trial. This court will not reverse a judgment of the trial court for error which was not called to its attention in the motion for a new trial. *Coffey v. Carthage*, 200 Mo., loc. cit. 629, 98 S. W. 562; *State v. Miles*, 199 Mo. 530, 98 S. W. 25; *State ex rel. v. Trust Co.*, 209 Mo., loc. cit. 494, 108 S. W. 97.

3. Certain remarks of the judge made during the progress of the trial, in the presence and hearing of the jury, in the nature of comments upon the evidence and mild criticisms of counsel for appellant, constitute the basis of this complaint. Whatever merit there might have been in this assignment appellant is in no position to complain, for the reason that the attention of the court was not called to those matters in the motion for a new trial. See authorities cited under the preceding paragraph.

4. The same is true with regard to the objection lodged against the testimony of the witness Ithry Fitzhugh giving his opinion as to appellant's condition at the time the injury was inflicted. The motion for a new trial did not call the attention of the court to this alleged error; consequently the court had no opportunity to correct its ruling regarding the admission of that testimony.

5. Over the objection of counsel for appellant, the court admitted in evidence the following written report of the injury, made by Joseph Floerke, motorman, who was in charge of the car which injured appellant:

Office of Metropolitan Street Railway Company. Kansas City Elevated Railway Company, 621 Temple Block, Kansas City, Missouri, 6-20, 1904. No. 49656. Mr. Jas. Floerke, 1512 North 19, Ka.: Your name having been returned to us by a conductor as one of the several witnesses to an accident which is said to have occurred on our line at 7th and Kansas—4:30 p. m. June

19, we therefore ask you, as a favor, to answer the following questions, in order to have as complete an account as can be obtained.

Respectfully,

Bernard Corrigan, President.

Questions.	Answers.
What is your full name?	Joseph Floerke.
Address?	1909 Dora Ave. K. C. Mo.
Occupation?	Junk dealer.
Did you see the accident?	
Give date and time.	June 19th, 4:30 p. m.
Where did it occur?	7th St. Wydock, K. C. Ka.
Where were you when the accident took place?	In front platform.
Was the train in motion?	Yes.
Was the bell ringing?	Not necessary at the point.
Do you know any one else that saw the accident?	No.
If so, give name and address.	
Who in your opinion is to blame for the accident?	The injured man.
Please give full account of the accident as witnessed by you, showing no favor to either side.	I have seen the man leaning or resting white his arm in railing or window protachen on car and the first post came in contact and the man got sick.

Date, June 19, 1904.

Joseph Floerke. [Signature.]

Address: 1909 Dora avenue, Kansas City, Missouri.

It was stated by the court that this report was admitted for the purpose of showing the date of the injury. Clearly the admission of this report was erroneous. There was no dispute as to the date of the injury. The petition stated that it occurred on June 19, 1904, and all of the evidence bearing upon that point which was introduced by both appellant and respondent showed the injury occurred upon that date. If the date of the injury had been in dispute, then the motorman could have refreshed his memory from the report, but the report itself was not competent, and should have been excluded. By its admission the jury was permitted to hear read the ex parte account of the injury made by the motorman, not under oath, nor was he cross-examined by any one on behalf of appellant. That evidence was highly prejudicial to him, and should have been excluded. *Sharp v. Railway Co.*, 213 Mo. 517, 111 S. W. 1154. But, notwithstanding this error was committed, we cannot reverse the judgment therefor, for the reason that appellant did not complain of that error in his motion for a new trial. Consequently he cannot avail himself of it. *Coffey v. Carthage*, supra.

6. The action of the court in refusing to give for appellant instruction numbered 2, as asked by him, and in modifying it, and giving it in said modified form, is complained of as error by counsel for appellant. There are two errors assigned to that ruling.

It is first insisted that it was the duty of the respondent to use and exercise that high degree of care, caution, and foresight for the safety of the appellant that a very care-

ful and prudent person would have used and exercised under like circumstances. And that the court should have told the jury that if they believed said cross-beam was placed nearer to the track in question than a very careful and prudent person would have permitted under like circumstances, and that respondent knew of said condition of said cross-beam, or, by the exercise of said high degree of care and caution might have known the same in time to have changed it and thereby prevented the injury, and that it failed to do so, then appellant was entitled to a recovery. This is clearly the law of this state, as has been held by this court in scores of cases. *Lemon v. Chancellor*, 68 Mo. 340, 30 Am. Rep. 799. This cross-beam was bolted to one of the poles which supported the wire which supplied the feed wire which furnished the electricity for the trolley wire. The pole, cross-beam, and wire were all necessary parts of the equipment furnished and used in furnishing the motive power for the cars. And the law imposed the same degree of care upon respondent in providing and furnishing that equipment as it did in furnishing safe cars in which passengers were to ride. In discussing this question, this court in the case of *Och v. M., K. & T. Ry. Co.*, 130 Mo., loc. cit. 51, 31 S. W. 968, 36 L. R. A. 442, said: "While carriers of passengers are not insurers of their safety, and are not responsible when all reasonable care, skill, and diligence, prudence, and foresight have been employed, the law imposes upon them the utmost care and skill in selecting and furnishing safe means of transportation, and to that end to provide safe coaches and appliances, necessary for that purpose, including every part and parcel thereof, which very prudent men would exercise under like circumstances, and, when the injury to the plaintiff was shown to have been occasioned by the falling upon her head of a ventilating window from the coach in which she was riding, then it devolved upon the defendant to show by a preponderance of the evidence that the injury was caused by something not under its control, and not from any fault, want of care, or watchfulness upon its part. The same degree of care was required of defendant as to all parts and all kinds of its property used in the transportation of its passengers as compared with liability to cause injury to them. The same rule applies when the injury is caused by the want of diligence or care by those employed by the carrier. In *Meler v. Railroad*, 64 Pa. 225, 8 Am. Rep. 581, it was said: 'Prima facie, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the onus of disproving it.' * * * This is the rule when the injury is caused by a defect in the road, cars, machinery, or by a want of diligence or care in those employed, or by

any other thing which the company can or ought to control as a part of its duty, to carry the passengers safely; but this rule of evidence is not conclusive." See, also, *Clark v. Railroad*, 127 Mo. 197, 29 S. W. 1013; *Dougherty v. Railroad*, 81 Mo. 325, 51 Am. Rep. 239. The refusal of the court to give appellant's instruction which so declared the law was error. But counsel for respondent insists that the court so instructed the jury. In a sense that is true, but it is also true that in the same instruction at another place the court told the jury that respondent was only required to use ordinary care in that regard. So the most that can be said of this instruction is that the two clauses mentioned are inconsistent with and contradictory of each other. Such an instruction is erroneous. The jury had no means of knowing which of the two properly declared the law of the case, and we have no means of knowing which of the two the jury did follow.

And the second error urged against the ruling of the court relates to its action in striking therefrom the paragraph submitting to the jury the question of respondent's negligence in constructing and maintaining the east rail of the track in question higher than the west rail thereof, and that, in consequence thereof, the car was caused to lurch or pitch so near to the cross-beam as to injure appellant's arm. The evidence which tended to prove those facts should have been admitted, as before stated, and this clause of this instruction should have been given, submitting that question to the jury. This question came before this court in the case of *Gage v. St. Louis Transit Co.*, 211 Mo. 139, 156, 109 S. W. 13, 18. This language was there used: "Plaintiff complains of the action of the court in refusing to permit her to prove that street cars while in motion will rock and sway from side to side on account of the inequalities of the track. We are of the opinion that said ruling was not error, for the reason that it is common knowledge that a car being propelled by steam or electricity over a railroad track will be swayed by inequalities of the track. *Geitz v. Railroad*, 72 Wis. 307, 39 N. W. 866; *Railroad v. Smith*, 25 App. D. C., loc. cit. 271 (5 L. R. A. [N. S.] 274). The juror's knowledge of those facts is equal to that of any witness who might testify upon the subject. The swaying of the car is caused by the operation of the law of gravity and the mechanical forces used in propelling the car. When a wheel of the car comes to a low place on the rail, the law of gravity carries it to the lowest point, and the mechanical forces operating upon the car in turn, raises it to the highest point of the rail. This motion of the car will cause the car to rock from side to side where there are inequalities in the surface of the two rails; and if there are no inequalities, but both

rails are depressed alike, then the motion of the car will be from end to end, and not from side to side. All men of ordinary intelligence and observation know those facts; and the testimony of witnesses explaining those motions and their causes would shed no additional light upon the question. It is proper, however, to show whether or not the surface of the rails and tracks at the point of the injury were even or uneven at the time of the accident."

We are therefore of the opinion that the court erred in excluding said evidence and in refusing appellant's second instruction as asked; and also in modifying it and giving it in its modified form.

7. Instructions numbered 1 and 7, given on behalf of respondent, are complained of by counsel for appellant. They, in effect, told the jury that the burden of proof was upon appellant to prove his case, and that said burden continued with him throughout the case. Appellant invokes the doctrine that a passenger makes out a prima facie case of damages against a common carrier for personal injuries when he shows that he was injured by a collision and was himself free from negligence. *Olsen v. Citizens' Ry. Co.*, 152 Mo. 426, 54 S. W. 470; *Orcutt v. Century Building Co.*, 214 Mo. 35, 112 S. W. 532. This rule only applies where the petition charges negligence in general terms, and does not apply where it specifically pleads the negligent acts which caused the injury, as the petition in this case does. *Beave v. Transit Co.*, 212 Mo. 331, 111 S. W. 52; *Klebe v. Distilling Co.*, 207 Mo. 480, 105 S. W. 1057, 13 L. R. A. (N. S.) 140; *Kirkpatrick v. Metropolitan St. Ry. Co.*, 211 Mo. 68, 109 S. W. 682. We therefore hold under the pleadings in this case there was no error in giving the instructions complained of.

8. It is the next insistence of counsel for appellant that the court erred in submitting to the jury the question of contributory negligence. It is first claimed the court erred in that regard for the reason that contributory negligence was not pleaded. Counsel is in error in this. The answer pleads contributory negligence in general terms, which, like a plea of negligence in general terms, is good after verdict. The second contention is that there was no evidence which tended to show appellant was guilty of contributory negligence. Counsel is also in error in this matter. The evidence tended to show that appellant was riding with a portion of his arm protruding through the car window. This alone was sufficient to justify the court in submitting to the jury the question of contributory negligence. *Gage v. St. Louis Transit Co.*, 211 Mo. 139, 109 S. W. 13. There was no error in submitting the question of appellant's contributory negligence to the jury. But the court should not have told the jury that such act constituted negligence per se, and would prevent a recovery. *Gage*

v. St. Louis Transit Co., *supra*; Murphy v. Railway, 115 Mo. 111, 21 S. W. 862; Seymour v. Citizens' Ry. Co., 114 Mo. 266, 21 S. W. 739.

9. The final insistence of counsel for appellant is that instructions numbered 7 and 8 given by the court on behalf of appellant are erroneous. They, in effect, told the jury that, if unless they found from the evidence that appellant was struck by a cross-beam on the west side of the viaduct about 80 feet south of the north end thereof while he was riding south upon one of respondent's cars, then their verdict should be for respondent. The petition charged and appellant's evidence showed that he was injured on a south-bound car and on the west side of the viaduct; while the evidence of respondent tended to show that he was injured on a north-bound car and on the east side of the viaduct. Appellant contends that, if it be conceded the respondent's version of the facts was true, still that was not such a total departure between the allegations of the petition and the proof as would prevent a recovery, but was simply a variance which was not fatal to a recovery. We are unwilling to lend our assent to this insistence, but are in full accord with the following views expressed by counsel for respondent upon that subject. "It was charged that a certain combination of circumstances produced the injury. These were: A cross-beam placed too close to the west track, about 80 feet south of the north end of the viaduct; that the east rail of the west track, at that particular point, was an inch higher than its mate; that this car was run over this spot at an excessive rate of speed, which caused the car to lurch or lean toward this cross-beam, and the injury was thus produced. Plaintiff can only recover by proving that he was hurt by some one or all of these acts. No law is better settled than this." There is no pretense that these same conditions existed at the place where respondent's evidence showed the injury occurred; but concede that the same condition did exist. Still they were not the same as those charged in the petition, and which appellant's evidence showed did exist in fact, and which caused the injury. "The very act of negligence alleged must be proven, if a specified act is alleged." *Spiro v. Transit Co.*, 102 Mo. App. 261, 76 S. W. 684; *McCarthy v. Hotel Co.*, 144 Mo. 397, 48 S. W. 172; *Fuchs v. St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136; *Hite v. Railroad*, 130 Mo. 132, 31 S. W. 262, 32 S. W. 33, 51 Am. St. Rep. 555. The court properly gave said instructions.

The judgment is reversed for the errors before pointed out, and the cause is remanded to the circuit court for a new trial. All concur.

WILSON v. DARROW et al.

(Supreme Court of Missouri, Division No. 1. Nov. 27, 1909.)

1. ABATEMENT AND REVIVAL (§ 74*)—APPEAL AND ERROR (§ 334*)—TIME FOR REVIVAL—PROCEEDINGS.

After the lapse of the term at which the judgment was rendered, the trial court has no power to revive the cause on the death of a party pending his appeal and authorize the new party to file a bill of exceptions.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 429-444; Dec. Dig. § 74;* Appeal and Error, Dec. Dig. § 334.*]

2. JUDGMENT (§ 486*)—PLEADINGS TO SUPPORT—COLLATERAL ATTACK.

A judgment without any statement of facts constituting the cause of action is void on collateral attack.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 486.*]

3. ABATEMENT AND REVIVAL (§ 75*)—REVIVAL OF ACTION.

A suit cannot be revived except in the mode provided by statute.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. § 446; Dec. Dig. § 75.*]

4. APPEAL AND ERROR (§ 189*)—RESERVATION OF GROUNDS OF REVIEW.

The objection that a motion to revive the cause in the name of a stranger on plaintiff's death does not charge a transfer of interest in the subject-matter may be first raised on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1206-1215; Dec. Dig. § 189.*]

5. ABATEMENT AND REVIVAL (§ 72*)—REVIVAL OF ACTION—PROCEEDINGS.

The trial court has no power, under Rev. St. 1899, §§ 756, 758 (Ann. St. 1906, pp. 739, 741), to revive a suit in the name of a stranger on the death of plaintiff, in the absence of allegation or proof of a transfer of interest in the subject-matter; and defendant's failure to show cause against the revivor within the time limited by section 758 does not prevent him from contesting its validity.

[Ed. Note.—For other cases, see Abatement and Revival, Cent. Dig. §§ 378-391; Dec. Dig. § 72.*]

6. APPEAL AND ERROR (§ 334*)—PARTIES—DEATH OF PARTY—REVIVAL.

Under Rev. St. 1899, § 858 (Ann. St. 1906, p. 806), authorizing revivor in the Supreme Court in favor of executors, administrators, heirs, or devisees on the death of appellant pending appeal, an order of the trial court reviving the cause in the name of a stranger as the transferee of appellant's interest in the subject-matter is void.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1851-1863; Dec. Dig. § 334.*]

Appeal from Circuit Court, Adair County; Nat M. Shelton, Judge.

Action by Frederick J. Wilson against Orilla F. Darrow and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This suit was instituted by Frederick J. Wilson against Orilla F. Darrow and others, to determine title to certain real estate situate in Adair county, under section 650, Rev. St. 1899 (Ann. St. 1906, p. 667). The petition was substantially in the words of

ed, setting up various defenses. A trial was had at the January term, 1907, of the Adair circuit court, which resulted in a judgment in favor of the defendants, and the plaintiff appealed by what is known as the "short method." During the same term the court duly granted plaintiff the right to file a bill of exceptions during the May term thereof, and during said May term the court extended the time for filing the bill of exceptions to during the October term thereof.

November 7, 1907, during the October term, 1907, the following was entered of record by order of the court: "Comes now the plaintiff herein by attorneys and files suggestion of the death of plaintiff, with entrance of appearance of Lillie B. Wilson, Lucile Wilson and Forest B. Wilson in this cause." Afterwards on the same day, November 7th, the following was by order of the court entered of record therein: "Comes now Lillie B. Wilson, Forest B. Wilson, and Lucile Wilson, and show to the court that the plaintiff in said cause, Frederick J. Wilson, departed this life on the 30th day of May, 1907, and that Lillie B. Wilson, Forest B. Wilson, and Lucile Wilson are his sole and only heirs at law; that said Forest B. Wilson and Lucile Wilson are minors. Now, therefore, the above Lillie B. Wilson, Forest B. Wilson, and Lucile Wilson hereby enter their appearance, and ask that a guardian ad litem be appointed by the court for said Forest B. Wilson and Lucile Wilson, and that said cause be revived and continued in the name of said Lillie B. Wilson, Forest B. Wilson, and Lucile Wilson as plaintiffs, and that the name and style of said action shall hereafter from this date be Lillie B. Wilson et al. v. Orilla F. Darrow et al." November 8, 1907, during said October term, 1907, of said court, suggestion of death of Frederick J. Wilson was filed by the Second National Bank of Jackson, Tenn., by their attorneys, Campbell & Ellison, G. C. Weatherby and A. Doneghy. Afterwards on the same day, November 8, 1907, during the said term said court caused to be entered of record therein the following: "Death of Frederick J. Wilson suggested on record, Second National Bank of Jackson, Tenn., substituted as plaintiff as the successor in interest of Frederick J. Wilson, deceased. It appearing to the court that Lillie B. Wilson, widow and executrix of Frederick J. Wilson, deceased, refuses to be substituted as plaintiff, and refuses to execute the trust in said cause, and that Forest B. Wilson and Lucile Wilson, the sole and only children of said Frederick J. Wilson, are minors, and cannot execute said trust. Cause revived in the name of said Second National Bank as plaintiff against Orilla F. Darrow and others, defendants. Summons ordered issued commanding Lillie B. Wilson, widow and executrix of Frederick J. Wilson, deceased, and Forest B. Wilson and Lucile Wilson, minor

F. Darrow, Frederick L. Darrow, Mary L. Hamilton, Ellen A. Foster, and Charles E. Darrow to appear on or before the fourth day of the next term of said court to be begun and holden on the third Monday in January, 1908, to show cause, if any, why said cause should not stand revived and be continued in the name of the Second National Bank as plaintiff."

Afterwards, on November 8, 1907, there appears on the record of said court the following: "November 8, 1907. Second National Bank, Plaintiff v. Orilla F. Darrow et al., Defendants. Now at this day is received and filed bill of exceptions, which said bill of exceptions was taken and saved on the part of the defendant in the trial of this cause, and duly signed by Hon. Nat M. Shelton, judge of this court." January 2, 1908, in vacation of said court, a summons was issued with copy of suggestions of the death of plaintiff, with notice to revive in name of Second National Bank of Jackson, Tenn., summoning Lillie B. Wilson, Forest B. Wilson, Lucile Wilson, Orilla F. Darrow, Frederick L. Darrow, Mary L. Hamilton, Ellen A. Foster, and Charles E. Darrow. February 23, 1908, alias sciri facias issued to sheriff of St. Louis for defendant Charles E. Darrow. May 18, 1908, plaintiff orders alias writ for defendant Charles E. Darrow. December 10, 1908, order of publication issued for defendant Charles E. Darrow. January 20, 1909, defendants Orilla Darrow, Fred Darrow, Mary Hamilton, Ellen Foster file motion to quash writ. February 2, 1909, Charles E. Darrow files motion to quash order of publication. Said motion (formal parts omitted) is as follows: "Comes now defendant Charles E. Darrow for the purpose of this motion, and appearing for no other purpose whatever, and moves the court to quash the order of publication herein for the following reasons: Because the same was made and published without authority of law; because no order of court was made authorizing the same; because the court had no jurisdiction to make or order the same; because the whole proceeding for revival of said cause is void and wholly without authority of law." On February 2, 1909, during January term, 1909, the motion of defendant Charles E. Darrow to quash order of publication was sustained.

Counsel for respondent has filed in this court the following motion, to wit: "The respondents move the court to strike out the bill of exceptions herein: Because the same is filed without any authority of law. And because the same was not filed by a party to the record. Because the record shows that the judgment was rendered at the January term, 1907. That at the January term, 1907, the appeal was granted and leave given appellant to file his bill of exceptions during the May term, 1907. At the May term on May 20, 1907, the court extended

court, on November 8, 1908, a bill of exceptions entitled 'Second National Bank v. Orilla F. Darrow, et al.' was filed. Because after the death of the appellant no one could appear in the cause, take any order, or file any paper until the cause was revived. Because no leave of court was ever granted to Second National Bank to file said bill of exceptions. Because after granting of the appeal, and after lapse of the term, the circuit court lost all jurisdiction of the cause, and there was no power in that court to revive the cause."

Counsel for respondents make the following suggestions or objections to reviving cause in name of Second National Bank: "This case cannot be revived in the name of the Second National Bank for the following reasons: The plaintiff, Fred. J. Wilson, died May 30, 1907, during the May term of the circuit court. Proceedings for reviving the cause could have been instituted during the term in that court, but were not. On the showing made by Second National Bank on its application to be substituted as plaintiff, Fred. J. Wilson had the legal title to the land, and when he died that title passed to his heirs, and said bank has not succeeded to that interest. It has no more title or interest now than it had when the suit was begun. The trial and judgment in the case settled it that Wilson had no title. A trial and judgment with the bank as plaintiff could only decide whether the bank had any equity. That point would be best settled if the bank would sue the Wilson heirs. The time within which any one could be substituted as plaintiff has passed."

Campbell & Ellison; A. Doneghy, and G. C. Weatherby, for appellant. H. F. Millan, for respondents.

WOODSON, J. (after stating the facts as above). 1. Counsel for respondents has filed a motion in this court to strike from the record the bill of exceptions filed in the cause by the Second National Bank. His motion is based upon the following facts, disclosed by the record, namely: That the judgment appealed from was rendered at the January term, 1907. At the same term an appeal was taken, and leave was given to appellant to file his bill of exceptions during the following May term. At the latter term the court extended the time for filing same until or during the October term of the same year. On May 30, 1907, the appellant died. At the October term, on November 8, 1908, a bill of exceptions, entitled the "Second National Bank v. Orilla F. Darrow et al.," was filed. Upon that state of the record counsel for appellant contends that, after the circuit court granted the appeal, which was at the January term, 1907, and after the lapse of the

a bill of exceptions in the cause. In our opinion that contention is well-founded, for the reason that after the lapse of the term, the circuit court has no jurisdiction whatever over the cause, except to make such orders as are provided for by statute, and the order reviving a cause is not one of them. *Crawford v. Railroad*, 171 Mo., loc. cit. 74, 75, 66 S. W. 350. There is nothing in the case cited lending countenance to the contention that the circuit court had the authority to make an order of revival after the expiration of the term at which the judgment was rendered. What was there said is directly to the contrary, and is a denial of such authority. In the discussion of this question Judge Gantt clearly stated the law as follows: "The objection by the defendant is that the order of the circuit court purporting to revive the suit in the name of Gabbert, the administrator, was void, and said court was without jurisdiction to do so, because by the allowance of the appeal that court lost jurisdiction of said cause, and had no power to permit such revivor. In the determination of this controversy we must call to our aid certain fundamental principles. Thus it is settled law in this state that during the whole of the term in which any judicial act is done, the proceedings are considered to continue in fieri, and, even after a judgment has been rendered, the record remains in the breast of the judges of the court, and is therefore subject to amendment or alteration as they may direct, but cannot be so amended after the lapse of the term further than by nunc pro tunc entries which make the record speak the exact truth of what did occur. *Aull v. Trust Co.*, 149 Mo. 1, 50 S. W. 289; *Rottmann v. Schmucker*, 94 Mo. 144, 7 S. W. 117; *Caldwell v. Lockridge*, 9 Mo. 362; *State ex rel. v. Treasurer*, 43 Mo. 228; *McCabe v. Lewis*, 76 Mo. 296. And it is equally well determined that this power of the court over its own records, and its right to amend, correct, and complete the same, is not affected by the fact that an appeal has been taken from its judgment. *Exchange Bank v. Allen*, 68 Mo. 474; *De Kalb Co. v. Hixon*, 44 Mo. 341; *Jones v. Ins. Co.*, 55 Mo. 342; *Gamble v. Daugherty*, 71 Mo. 599. While a different doctrine was announced in *Ladd v. Couzins*, 35 Mo. 513, that case was subsequently discredited in *Gamble v. Daugherty*, supra, so that it is the settled doctrine that, though an appeal transfers jurisdiction of the case, still the trial court has full jurisdiction and control of its own record, and may, notwithstanding the appeal, amend, correct, and perfect the same so that it shall show exactly what transpired in said court. *State v. Logan*, 125 Mo. 22, 23 S. W. 176." In the case at bar the term had fully expired at the time the order of revivor was made and entered of record. So

102 S. W. 978, this court held that the circuit court had no authority, even to sign a bill of exceptions, after the expiration of the term at which the judgment was rendered, except where it was expressly empowered to do so by statute. And in discussing a similar question this court in banc, in the case of *State ex rel. v. Patterson*, 207 Mo., loc. cit. 147, 105 S. W. 1053, said: "And upon that principle the circuit court has no power or jurisdiction to make an order after the expiration of the time within which the statute commands it to be done." We are therefore of the opinion that the order of the circuit court reviving the cause in the name of the Second National Bank, and authorizing it to file a bill of exceptions herein, was a nullity, and neither the order reviving the cause, nor the bill of exceptions filed by the bank, are properly before this court; and for that reason this court has no authority to consider the merits of the case presented here through those void orders.

2. There is another equally valid reason why this court cannot look into the merits of this case, and that is this: The suit was brought by Wilson, and he appealed from the judgment rendered against him, and then died. Under that state of facts, if we confine ourselves to the practice act applicable to circuit courts, then there was but one way by which the action could have been revived in that court in the name of the bank, and that was by suggesting the death of Wilson, and then in some appropriate manner charged and shown to the court that since the trial, and prior to his death, Wilson had transferred his interests in the cause to it, and then asked for an order of revivor in its name. There is no pretense made here that any such transfer was ever made by Wilson to the bank, nor did the motion (which I gather from the record was oral) for an order of revivor contain any charge of such a transfer, nor does the record disclose that any evidence was introduced tending to show such a transfer.

The only record entry bearing upon the question of revivor was made during the October term, 1907, which was on the 8th day of November. That order is as follows: "Death of Frederick J. Wilson suggested on the record. Second National Bank of Jackson, Tenn., substituted as plaintiff as the successor in interest of Frederick J. Wilson, deceased. It appearing to the court that Lillie B. Wilson, widow and executrix of Frederick J. Wilson, deceased, refuses to be substituted as plaintiff, and refuses to execute the trust in said cause, and that Forest B. Wilson and Lucile Wilson, the sole and only children of said Frederick J. Wilson, are minors and cannot execute said trust, said cause is revived in the name of said Second National Bank, as plaintiff, against Orilla F. Darrow and others, defendants. Summons ordered issued, commanding said Lillie B. Wilson, widow and

and Forest B. Wilson and Lucile Wilson, minor children of said Frederick J. Wilson, Orilla F. Darrow, Frederick Darrow, Mary L. Hamilton, Ellen A. Foster, and Charles E. Darrow to appear on or before the fourth day of the next term of said court to be begun and holden on the third Monday in January, 1908, to show cause, if any, why said cause should not stand revived and be continued in the name of the Second National Bank as plaintiff." In this connection it should be borne in mind that the widow and heirs at law of Wilson had previously suggested his death, and had asked that the cause be revived in their names, but, instead of passing upon their motion, the court took up the motion of the bank, and made the order of revivor before set forth.

As before stated, the court, without any allegation or proof whatever of a transfer of Wilson's interest in the subject-matter of the cause to the bank, "substituted the bank as plaintiff as the successor in interest of Frederick J. Wilson, deceased." The record does not show, nor do counsel for the bank contend, that the court found the fact to be that Wilson had transferred his interest in the subject-matter to the bank, but they seek to escape the effects of that omission by insisting that the order of revivor, under section 758, Rev. St. 1899 (Ann. St. 1906, p. 741), became absolute and conclusive upon defendants' failure to appear on or before the fourth day of the term of the court to which the summons was returnable, and move the court to set aside the provisional order of revivor. In other words, defendants by not so moving in the premises suffered default to go against them, and that, after the expiration of the fourth day, they could not contest the validity of the order of revivor. In our opinion that contention is unsound, for it is elementary that, before a judgment of any character, and especially one by default, will be permitted to stand, even in a collateral attack, there must be some kind of a statement filed in the court setting forth the facts constituting the cause of action, or a basis for the judgment or other relief sought, in order that the record will disclose the matters and things determined thereby. Section 756, Rev. St. 1899 (Ann. St. 1906, p. 739), provides that the court "may, on motion, order the action to be continued by or against the representative or successor of such party in interest." And section 640, Rev. St. 1899 (Ann. St. 1906, p. 660), provides that "All motions shall be accompanied by a written specification of the reasons upon which they are founded; and no reason not so specified shall be urged in support of the motion." "Revivor of actions being purely statutory in its origin, the modes provided by the Codes and statutes of the various states are exclusive, and the courts cannot grant such benefit by any other method." 18 Ency. of Plead. & Prac. p. 1128, par. 5. A failure to

loc. cit. 591, 117 S. W. 730; Davis v. Jacksonville et al., 126 Mo. 69, 28 S. W. 965; Hoffman v. McCracken, 168 Mo., loc. cit. 343, 67 S. W. 878. Suppose, for instance, defendants had appeared in court in response to the summons, what would they have found there to answer? Absolutely nothing. No motion asking for a revivor of the cause in the name of the bank, nor a statement of any kind of the fact (if fact it was) that Wilson had transferred his interests in the subject-matter of the suit to the bank.

While it is no part of the record, counsel for respondents stated in open court during argument that whatever interest, if any, the bank had in the case was acquired by it long prior to the time when Wilson instituted this suit. This side remark of counsel throws much light upon the vague and indefinite disclosures made by the record as to the interests of the bank in the cause. In fact it is the only rational explanation that could be offered for the bank's desire to become a party to the suit. But however that may be, it has nothing to do with the proper disposition of the case. It must be determined according to the record, and not according to the statements of counsel. It was, however, material for defendant to know in whose name the suit was to be revived, in that of the heirs of Wilson, or in the name of the bank, for both were asserting that right; and, as there was nothing on file in the cause informing them of the nature of the bank's claim, they were wholly unable to resist its motion (if we may so call it) for an order of revivor. A distinction might, and probably should, be drawn where the heirs or personal representatives of a deceased plaintiff suggest the death for in that case the law casts the title and interests of the deceased in and to the subject-matter of the suit upon the heirs when it concerns real estate, and upon the executor or administrator when personalty is involved, thereby leaving no issue of fact to be determined regarding the claim of ownership of the property on that side of the case; but, where a perfect stranger to all of the parties, as the bank was in this case, asserts title to the property by virtue of a contract made and entered into with the deceased, good pleading and practice require that such claim should be formally presented to the court, the evidence heard, and a formal finding and order or decree made determining that question. Otherwise the courts are liable to be imposed upon, and the rightful owners of the property are liable to be defrauded out of their rights.

The reason for requiring the bank, a new plaintiff to make formal charge and proofs of ownership in this case is the same as that which requires the original or deceased

neighbor without he first charges ownership or the right to the possession of the property claimed, except he files his petition in court setting forth the nature of his claims thereto, and notifies his neighbor to come into court and defend the same; and in addition thereto he must prove his claims by a preponderance of the evidence to the reasonable satisfaction of the court or jury; otherwise he would be taking property without due process of law. Doubtless this was the design of the Legislature in empowering the circuit courts, the triers of the facts, by section 764, Rev. St. 1899 (Ann. St. 1906, p. 743), to substitute the name of a transferee of a cause of action in lieu of the plaintiff bringing the suit, where the transfer had been made subsequent to the institution of the suit, in order that such transfer, when material, might be litigated along with the other facts of the case. That design is emphasized by the fact that the Legislature gave this court no such authority, knowing that it was not a trial court of original jurisdiction, and for that reason withheld from its consideration such matters. We are therefore of the opinion that said section 758 did not authorize the circuit court to make the order of revivor before set forth.

3. Nor is the bank relieved of the embarrassing situation in which it finds itself by anything contained in the practice act governing this court. There are but four sections of the statute bearing upon the question of revival of actions in this court, and they are sections 856-859, Rev. St. 1899 (Ann. St. 1906, pp. 805, 806) inclusive, which read as follows:

"Sec. 856. Death of Party, When Suggested. If there be several appellants or plaintiffs in error, and one or more of them die before the cause is submitted, such death shall be suggested by the surviving plaintiffs, and if one or more of several defendants die before the cause is submitted, such death shall in like manner be suggested by the surviving defendants.

"Sec. 857. Appeal or Writ shall Not Abate upon Death of Party. If there be several appellants or plaintiffs in error, and one or more of them die after the cause is submitted, or if there be several appellants or defendants in error, one or more of whom shall die after the cause is submitted, the appeal or writ of error shall not thereby abate, but in either of such cases such death shall be suggested on the record, and the cause shall proceed at the suit of the surviving appellant or plaintiff in error, or against the surviving appellee or defendant in error, as the case may be.

"Sec. 858. Heirs and Legal Representatives, When Made Parties. If all the appellants or plaintiffs in error die after the ap-

peal is taken, or writ of error is brought, and before judgment rendered thereon, the executors and administrators of the last surviving plaintiff or appellant or the heirs and devisees of the plaintiff and appellant, in cases where they would be entitled to bring writs of error, may be substituted for such plaintiffs, and the cause shall proceed at their suit.

"Sec. 859. When They shall Join in Error. If the appellees or a sole appellee, or if all the defendants or a sole defendant in a writ of error die, after the appeal taken or writ of error brought, and before judgment therein, the executors and administrators or heirs and devisees of such appellees or defendants may be compelled to become parties, and in like manner as in an original suit."

Manifestly the only one of those sections which could possibly apply to the facts of a case like this is section 858, for the reason that Frederick J. Wilson, the only appellant in the cause, died after the appeal was granted, and before a judgment had been rendered therein by this court. But that section only authorizes the suit to be revived in the names of the executors or administrators, or in the names of the heirs and devisees of the appellant, and does not authorize a substitution in the name of a stranger, who claims to have acquired the interest of the appellant in the subject-matter of the suit by contract, subsequent to the granting of the appeal. Not only that, but the grant of authority to this court to revive the cause in the names of the executors or administrators, or in the names of the heirs and devisees of the appellant, after appeal taken, and after the death of the appellant, excludes the idea that the suit may be revived in the name of any one else after the happening of those events, either in this court or in the circuit court. That was the contention of counsel for the company in the case of *Crawford v. Railroad*, supra. The writer had the honor of presiding over the circuit court which tried that cause, and concurred in the views of counsel to the extent that, literally speaking, after the appeal had been taken to this court, the circuit court had no jurisdiction to set aside the order granting the appeal and enter an order of revivor in the name of the administrator, etc., but it was of the opinion, and so held, that it was not the intention of the Legislature, by that section of the statute, to abolish the well-settled law of the state which authorized the trial court, during the term at which a judgment was rendered, to set the same aside, and to make such alterations and amendments thereto as right and justice should demand. So, acting under that well-settled law, the trial court set aside the order granting the appeal, and made an order reviving the cause in the name of the administrator, etc. On appeal to this

court the action of the trial court was affirmed. But this court went further, and properly held that the circuit court would not have had that power and authority if the term of court at which the judgment was rendered had fully lapsed prior to the time the order of revivor was made. *Crawford v. Railroad*, 171 Mo., loc. cit. 75, 66 S. W. 350, and cases cited. In the case at bar the term had fully lapsed at the time when the circuit court made the order reviving the cause in the name of the bank. According to the case before cited that court had no power or authority to make the order, and we must therefore hold the order of the circuit court reviving the cause in the name of the Second National Bank of Jackson, Tennessee to be null and void.

This view deprives this court of all authority to investigate and pass upon the merits of the case.

We are of the opinion that the judgment should be affirmed, and it is so ordered. All concur.

KOLOKAS v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 1.
July 1, 1909. Rehearing Denied
Nov. 27, 1909.)

1. APPEAL AND ERROR (§ 501*)—ABSTRACT—SUFFICIENCY.

Where the abstract of the bill of exceptions does not show any call for a motion to strike out part of the answer, and the bill does not show any exceptions to the court's ruling sustaining the motion, error assigned by defendant cannot be considered on appeal, under Laws 1903, p. 105 (Ann. St. 1906, p. 815), relating to practice in the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2301; Dec. Dig. § 501.*]

2. APPEAL AND ERROR (§ 263*)—RESERVATION OF GROUNDS OF REVIEW—FAILURE TO EXCEPT.

Where no exception was saved at the time of giving plaintiff's instructions, error therein cannot be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1516-1532; Dec. Dig. § 263.*]

3. APPEAL AND ERROR (§ 270*)—RESERVATION OF GROUNDS OF REVIEW—FAILURE TO EXCEPT.

An appellant must first not only seek and fail to get relief in the lower court, but must save an exception to the action of the court in refusing relief, before he is entitled to a review of error on appeal, and errors assigned to overruling motions in arrest and for a new trial cannot be considered if no exceptions were saved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1609, 1610, 1759, 1760, 1763; Dec. Dig. § 270.*]

4. APPEAL AND ERROR (§ 664*)—RECORD—VERITY OF ABSTRACT.

For appellate purposes the abstract of record must be assumed to import verity; and, where the abstract of the bill of exceptions shows no exception to the overruling of motions for new trial and in arrest, in the bill, which was the only place in which it could be properly preserved, it will be assumed that no exception

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

was saved, though the abstract of the record entries and of the record proper does show an exception saved to overruling the motions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2856-2859; Dec. Dig. § 664.*]

5. APPEAL AND ERROR (§ 586*)—ABSTRACT—SUFFICIENCY.

An abstract of record must not be constructed by commingling record entries and record proper with matter of mere exception in an undistinguishable mass, so that the appellate court is put to sorting out exceptions from record entries and record proper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2595-2605; Dec. Dig. § 586.*]

6. COURTS (§ 85*)—SUPREME COURT—RULES OF PRACTICE.

The rules of practice of the Supreme Court apply to all persons, cases, and representatives of clients alike, and must be construed in one case just as they have been or will be in another, irrespective of the case, the parties, or their counsel.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 85.*]

7. APPEAL AND ERROR (§ 554*)—REVIEW.

Where there is nothing for consideration on appeal but the record proper, and the petition states a good cause of action, and the judgment is in form, the judgment will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2472-2479; Dec. Dig. § 554.*]

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by Helen Kolokas against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Martin L. Clardy and Elijah Robinson, for appellant. Wm. S. Gabriel and Conkling & Rea, for respondent.

LAMM, P. J. James Kolokas, a citizen of Greece, an employé of defendant as a track laborer at Goffs in the state of Kansas, received injuries on July 24, 1904, of which he died in the ensuing September at defendant's hospital in St. Louis. Helen, his wife, also a citizen of Greece and residing there, brought suit in the Jackson circuit court for damages for his wrongful death. From a judgment in her favor for \$5,500 defendant appeals.

The petition charges that Kolokas was a track laborer for defendant under the supervision of defendant's foreman; that among other duties he helped operate a hand car on defendant's track. After pleading certain duties due from defendant to Kolokas, the petition charges a negligent breach of them, whereby Kolokas, standing upon an east-bound hand car, with his back to the east and having no knowledge of approaching danger, in rounding a curve came in sight of one of defendant's west-bound trains, and in undertaking to escape from alleged impending peril, was mortally hurt by jumping or

falling from said hand car upon the track and being struck thereby. The elements of defendant's alleged negligence will sufficiently appear in the following excerpt: "Plaintiff states that the death of said Jim Kolokas was the direct result of the carelessness and negligence of said railway company in failing to furnish him with a reasonably safe place in and upon which to work and to operate said hand car; was the direct result of its carelessness and negligence in failing to keep and maintain said tracks in a reasonably safe condition for the passage of said hand car; was the direct result of the carelessness and negligence of defendant, its foreman, and vice principal, before operating said hand car over said tracks and while so doing, in failing to use reasonable care to ascertain the presence of trains thereon, and to avoid collision with the same; and was the direct result of the carelessness and negligence of defendant, its foreman, and vice principal, when directing the operation of said hand car, in failing to give reasonably safe and careful orders and directions for such operation—all in the particulars and respects stated."

Certain Kansas statutes (Gen. St. 1901) are pleaded, viz.:

"Sec. 4871. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"Sec. 4872. That in all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section 422 of chapter 80, Laws of 1893, is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section 422 may be brought by the widow, or where there is no widow, by the next of kin of such deceased."

The petition alleges that Helen is the widow of decedent, that decedent at the time of his death was a resident of Kansas, and that no personal representative had ever been appointed. The answer admits that Kolokas was a Greek laborer in defendant's employ, and was injured in an accident on June 24, 1904, but denies responsibility for said accident. It then pleads (1) contributory negligence; (2) that plaintiff cannot recover because she as well as her husband were aliens; (3) that if any cause

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

laws of Kansas; that one of said laws provided that suits for damages on account of personal injury shall be instituted in the county where the injury occurred, or in the county where the principal office or place of business of the railroad company is located, and that defendant's principal office or place of business is not located in Jackson county, Mo., and (4) that a Kansas statute in force at the time of the accident ordains that every railroad company organized or doing business in that state shall be liable for all damages done to an employé in consequence of any negligence of its agents, or by reason of the mismanagement of the engineers or other employés, "to any person sustaining such damage, provided that notice in writing of the injury so sustained, stating the time and place thereof, shall have been given by or on behalf of the person injured to such railroad company within ninety days after the occurrence of the accident," and that no such notice was given. Plaintiff filed a motion to strike out that part of the answer pleading that decedent and plaintiff were aliens. This motion was sustained.

In due time after verdict defendant filed motions for a new trial and in arrest. These motions are preserved in the bill of exceptions, but there is no exception appearing in the abstract as saved in the bill to overruling either of them. On that behalf the record shows as follows: Under the general caption of "Appellant's Abstract of Record" appears, on page 10, among the record entries, and in that part of the abstract devoted to record proper, an abstract of an entry overruling both motions and in that connection the following: "And to the action of the court in overruling each of said motions defendant excepted." Subsequently, on page 12 of said abstract, we find the following: "The proceedings on the trial of the case, as shown by the bill of exceptions, were as follows." Immediately following that explanatory matter we find the following black-letter caption: "Bill of exceptions." Following this appropriate heading indicating the commencement of the bill of exceptions, we find an amendment to the petition, allowed over defendant's objection; an application for a continuance on account of such amendment overruled; plaintiff's evidence in chief; defendant's evidence; plaintiff's evidence in rebuttal; plaintiff's instructions; defendant's given instructions; defendant's refused instructions; defendant's modified instructions; the argument of Mr. Conkling to the jury on behalf of plaintiff, to portions of which objections were made. Following that are set forth a motion for a new trial and one in arrest. But, as said, there are no exceptions saved in the bill of exceptions to overruling either motion. Neither is the motion to strike out preserved in the bill of exceptions, nor in any call made in the bill for the motion to strike out. Neither are

plaintiff's instructions.

Learned counsel rely on the following propositions to reverse: "(1) There was no evidence tending to show negligence on the part of defendant, or any of its employés, except of decedent himself. (2) Decedent's injuries are shown to be the result of accident, for which no one was at fault. (3) Error in admitting evidence showing no administration on the estate of James Kolokas in the city of St. Louis, and in permitting one Peter Kolokas to testify that there was no administration in the state of Kansas, and in permitting in evidence a certain letter written by one Golmis to defendant's claim agent. (4) Error in striking out the allegation in the answer that plaintiff and decedent were aliens. (5) Error in overruling defendant's objections to plaintiff's instructions 1 and 2, and in refusing defendant's instruction 7."

On such record, we observe:

(a) That the abstract of the bill of exceptions does not show any call for the motion to strike out, nor does the bill show any exception saved to the ruling thereon. In such condition of the record error assigned in that behalf is not here for consideration. Laws 1903, p. 105 (Ann. St. 1903, p. 815); *Hendricks v. Calloway*, 211 Mo., loc. cit. 556, 559, 111 S. W. 60.

(b) There was no exception saved at the time to the giving of plaintiff's instructions. Hence that assignment of error is not here for consideration.

(c) Again, whether the assignments of error considered in paragraphs "a" and "b," and all other assignments, are reviewable depends on whether an exception was properly saved to overruling the motions in arrest and for a new trial. This is so because the Supreme Court is a court of last (not first) resort on error. No litigant may with safety, nisi, fasten his eye solely above, and lighten his present trial gloom with a ray of hope of success on appeal if he neglect the steps leading up. An appellant must first, not only seek and fail to get relief below, but he must save an exception to the action of the court in refusing relief, before he is entitled to a review of error here. Attending to this phase of the case, we must assume the abstract imports verity for appellate purposes. We find according to the abstract that defendant's bill preserved no exception to the ruling on either motion. The abstract of the record entries and of the record proper does show an exception saved to overruling the motions, but it must be presumed it was not saved in the only place it could be preserved properly, to wit, in the bill. This, because the abstract of the bill was bound to show such exception if one had been taken and saved. In other words, this abstract is constructed on a plan steadily condemned. It has been ruled many times that an abstract should not be con-

structed by commingling record entries and record proper with matter of mere exception in an undistinguishable mass, so that the appellate court is put to picking and choosing, to sorting out exception from record entries and record proper—guess where it is to be found and authenticated, and run a hazard of guessing wrong.

In *Reno v. Fitz Jarrel*, 163 Mo., loc. cit. 413, 63 S. W. 808, it was ruled on the point that this court "is no place for conjectures." *State v. Baty*, 166 Mo. 561, 66 S. W. 423, was a case of murder in the first degree. The commingling of record entries with the bill of exceptions, so that matter of the one class could not be differentiated from matter of the other, led this court to affirm a sentence of 10 years in the penitentiary on a conviction of murder in the first degree. In that case it was ruled: "The evidence in this case cannot be looked into by reason of the fact that the bill of exceptions has not been properly identified; nothing in the transcript to show where it begins. There is nothing in the record proper which precedes and identifies what may be supposed to be the bill." In *Clay v. Union Wholesale Publishing Co.*, 200 Mo., loc. cit. 872, 673, 98 S. W. 575, 577, Fox, J., speaking for the court, said: "If this is the bill of exceptions, then it is manifest that appellants have improperly confounded in such bill matters which pertain to the record proper with those which should only be embraced in the bill of exceptions preserving the exceptions to the action of the court during the progress of the trial."

* * * So far as this abstract discloses, there is nothing to distinguish the matters of record from those which are purely matters of exception, and can only be made a part of the record by filing a duly authenticated bill of exceptions." In *Stark v. Zehnder*, 204 Mo., loc. cit. 448 et seq., 102 S. W. 993, Valliant, J., speaking for this court, said: "Appellants have filed what they call 'Abstract in Lieu of Full Record,' in which is contained the pleadings, evidence, and several statements as of the rulings and proceedings of the court in the progress of the trial and subsequent thereto, but it is impossible to tell from this abstract whether the alleged rulings and orders of the court appear on the face of the court record proper, or are preserved only in the bill of exceptions. * * * The abstract should distinguish between what it intends to say is shown by the record proper and what it intends to say is shown by the bill of exceptions." In *Gilchrist v. Bryant*, 213 Mo., loc. cit. 443, 111 S. W. 1128, it was ruled: "Now it has always been held that an exception can be preserved for appellate use nowhere else than in a bill of exceptions. Therefore the bill of exceptions should show the exceptions. Therefore the abstract of the bill of exceptions should show that the bill of exceptions shows the exceptions."

The same propositions are asserted in one form or another in many other cases and the reason underlying them is manifest. The reports are full of interpretation and application of our rules of practice, and they should either be abrogated altogether, or obeyed as interpreted. Our decisions cannot be ignored, and prosperity result. So, as said through our Brother Graves, in *Harding v. Bedoll*, 202 Mo., loc. cit. 629, 100 S. W. 639: "These rules apply to all persons, all cases, and all representatives of clients alike, and must be construed in one case just as they have been or will be in another, irrespective of the case, the parties, or their counsel."

The premises considered, there is nothing here for consideration but the record proper. The petition states a good cause of action. The judgment is in form. It is therefore affirmed. All concur.

WILSON-REHEIS-ROLFES LUMBER CO. v. CAPRON et al.

(St. Louis Court of Appeals. Missouri. Nov. 17, 1909.)

1. MECHANICS' LIENS (§ 139*)—FORM OF CLAIM—DESCRIPTION OF MATERIALS.

The use of ordinary trade abbreviations in describing materials set out in a mechanic's lien account disclosing a demand for lumber and hardware satisfies the requirements of Rev. St. 1899, § 4207 (Ann. St. 1906, p. 2290).

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 234-236; Dec. Dig. § 139.*]

2. EVIDENCE (§ 457*)—PAROL EVIDENCE—MEANING OF ABBREVIATIONS.

The meaning of ordinary trade abbreviations as used in a mechanic's lien statement may be explained by parol.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2104, 2107, 2108; Dec. Dig. § 457.*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by the Wilson-Reheis-Rolfes Lumber Company against James D. Capron, Jr., and others. From a judgment for plaintiff, defendants appeal. Affirmed.

H. E. Sprague, for appellants. Rudolph Schulenburg, for respondent.

GOODE, J. This action was instituted to enforce a mechanic's lien against property in the city of St. Louis. Plaintiff, a lumber company in said city, sold and furnished material to defendant Ware for the erection of dwelling houses on the premises in question, in which the other defendants are interested in one way or another. A single question is presented for decision—whether the description in the lien statement of the material furnished satisfied the statute. The lien account as filed in the office of the clerk of the circuit court declared the lienor, Wilson-Reheis-Rolfes Lumber Company, with a

mechanics' liens, filed "the account below set forth for work and labor done, and lumber and millwork, hardware, and materials furnished by it under one contract with, and at the special instance and request of, W. M. Ware, upon, to and for the buildings and improvements described as follows," describing them and the lots whereon they stood, and stating the interest of the other defendants in the premises. After those matters had been set out, it was declared all the interests of the several owners of the property were subject to plaintiff's demand for a lien in the sum of \$1,070.12. An itemized account then followed in the statement, and this account, which will be more particularly described, was followed by an affidavit that it was a just and true account for work and labor done and material furnished by plaintiff company for the building and improvements previously described after all just credits had been given. The sufficiency of the lien account is challenged because abbreviations of an unintelligible character are said to have been used in designating part of the materials set out in the items of the account, instead of names of the materials. Though the lien statement containing the itemized account said the lien was filed for work and labor done, lumber, millwork, hardware, and material furnished, it contains no item for work or labor, but all the items are for materials, consisting of lumber of various kinds and hardware. Every item of hardware mentions nails, describing them as "com. nails." That description is plain enough, and is not questioned. No other items are in the account except those of lumber of various dimensions or articles manufactured out of lumber. The latter are designated as "water table," "turned cols.," "wdw. frames," "hand & foot rail," etc. We do not understand any of those items is challenged. Several other items of lumber are fully named; for instance, "lath," shingles, described as "cedar shgls," "jambs," etc. The form of the items which are questioned will be sufficiently shown by this portion of the account, following a caption wherein plaintiff is described as "dealer in lumber, shingles, lath, pickets," etc.:

Feet.	Pieces.	Size.	Length.	Description.	Price.	Amount.
4267	200	2x8	16	# 1 Y. P. Jun. 19.07	24.00	108.48
1499		1x6		Y. P. Dr. Sdg. Jul. 3.07	31.00	46.47
500	100	1x6	10	Com. Dr. Sdg. " 8 "	31.00	15.50

These descriptions are criticised on the ground that the owners of the premises or other parties interested could not ascertain from them the kinds of materials furnished, as it is nowhere described as lumber. It is argued a person would not know whether

or some other substance the name of which would have the initials "Y. P." The statute says a lien account shall be "a just and true account." Rev. St. 1899, § 4207 (Ann. St. 1906, p. 2290). Later decisions regarding what will satisfy that requirement are more liberal than the early ones, as will appear upon reading the opinion in *Mill Co. v. Allison*, 138 Mo. 50, 40 S. W. 118, 60 Am. St. Rep. 544, wherein the earlier decisions are reviewed and in some degree discredited, the court saying the account the law contemplated was such a statement of claim as fairly apprises the owner and the public of the nature and amount of the demand asserted as a lien, and discloses on its face a demand of a sort within the terms of the lien law. The itemized account in the present case is to be read in connection with the statement preceding it and the affidavit following, and in both of those parts of the lien paper it was made clear that whatever materials were furnished according to the itemized account were of a character for which a lien was given, since both the preliminary statement and the affidavit said a lien was sought for work done, lumber, millwork, hardware, and materials furnished in and for the building. But it is insisted no one can tell from the items that lumber was furnished. We take issue with counsel for defendants on this proposition, and think any one of ordinary business experience, and much more one with slight experience in buying lumber, would know the trade abbreviations. Nearly every one would know the letters "Y. P." read in connection with the number of feet in the same line (4,267) and the number of pieces (200) and the dimensions (2x8x16) meant some sort of lumber; and the same may be said in regard to such items as "Y. P. Dr. Sdg." when read in connection with the descriptive numbers and the previous statement that a lien was sought for lumber and hardware. A lien account identical in form with the one under review was sustained in *Schulenberg v. Werner*, 6 Mo. App. 292. The itemized account is not fully set out in the opinion in that case, but we have examined it in the record on file, and there is no difference. Here, as there, some of the abbreviations so clearly mean lumber that the sense is obvious; for instance "cedar shgls" and "lath." If necessary, evidence aliunde may be resorted to on a trial to explain the meaning of such trade abbreviations. They have been held in other jurisdictions sufficient descriptions of materials in a lien paper. *Wetmore v. Marsh*, 81 Iowa, 677, 47 N. W. 1021; *Great So. Hotel Co. v. Jones*, 116 Fed. 793, 54 C. C. A. 165. In the first of those cases the itemized statement was far less clear and definite than is the one at bar, and in the second case, where the lien was for brick, the descriptions in the items were in this form: "749 Jack Arch;" "385 Plain Arch;" "9100

Standard 2nds." It was said a statement of account was not insufficient because trade terms and bookkeeper's abbreviations were used, and that no one reading the items in connection with the affidavit which accompanied them could fail to see they called for different kinds of brick.

The judgment is affirmed. All concur.

WARREN v. MAYER FERTILIZER & JUNK CO.

(St. Louis Court of Appeals. Missouri. Nov. 16, 1909.)

1. CORPORATIONS (§ 439*)—TRANSFER OF PROPERTY—POSITION OF PURCHASER.

While, as a general rule, the assets of a corporation are a trust fund for the benefit of its creditors, yet a corporation may dispose of the whole or any part of its assets for value and in good faith, and the purchaser takes such assets discharged of any trust in favor of the creditors of the selling corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1774; Dec. Dig. § 439.*]

2. CORPORATIONS (§ 542*)—TRANSFER OF PROPERTY—CONSIDERATION—EVIDENCE.

Evidence held to show that a corporation transferring its assets to another corporation did so in good faith and for an adequate consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2154-2160; Dec. Dig. § 542.*]

3. CORPORATIONS (§ 547*)—TRANSFER OF PROPERTY—LIABILITY OF TRANSFEREE FOR CLAIM AGAINST TRANSFEROR.

The fact that the claim of a creditor of a corporation had not been liquidated, the case being pending in the Supreme Court, when the debtor corporation transferred its assets to another corporation, would not render the claim the less a lien on the assets in the hands of the other corporation if they were not transferred in good faith and for adequate consideration.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 547.*]

4. CORPORATIONS (§ 445*)—RIGHT TO ASSEET LEGAL CLAIM.

Where a corporation undertook in good faith, and for an adequate consideration, to transfer all its assets to another corporation, but by mistake a city lot belonging to it was omitted from the conveyance of its real property, the equitable title to the lot passed to the transferee, and, in an equitable action by the creditor of the transferor against the transferee to subject the conveyed assets to satisfaction of the debt, the creditor could not assert a right, based upon the fact that the legal title had not been conveyed.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 445.*]

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Action by Thomas Warren against the Mayer Fertilizer & Junk Company. From a judgment of dismissal, plaintiff appeals. Affirmed.

In 1895 the appellant, plaintiff below, had a transaction with a corporation, known as the "A. B. Mayer Manufacturing Company," which resulted in the commencement by him of an action against it, in the circuit

court of the city of St. Louis, on the 12th of April, 1897. At the first trial of that case, the judgment went for the defendant, being rendered October 21, 1897; but the plaintiff prosecuted an appeal to the Supreme Court, where the judgment was reversed, of date March 12, 1901 (161 Mo. 112, 61 S. W. 644). The case was again tried in the circuit court, and resulted in a judgment of date June 11, 1902, in favor of plaintiff here against the A. B. Mayer Manufacturing Company, for \$765 and costs; the costs amounting to \$157.55. At the beginning of the litigation against it, the A. B. Mayer Manufacturing Company was conducting an active business and had real and personal property, variously estimated at from \$80,000 to \$34,000. It was capitalized at \$50,000, divided into 500 shares of \$100 par, of which Fred. Mayer owned 100 shares, the estate of A. B. Mayer 200 shares, and the children of another one of the Mayer family, namely, Rosa, Henry, and Maurice, the remaining 200 shares. The officers and directors of the company were Frederick, Henry, and Maurice Mayer. After the first trial of the case in the circuit court, in which the A. B. Mayer Manufacturing Company was successful, but subsequent to the appeal of the case to the Supreme Court, and before the reversal of the judgment of the circuit court by the Supreme Court, the A. B. Mayer Manufacturing Company, under date of February 9, 1901, entered into a contract with "Henry Mayer or Maurice Mayer," the contract being evidenced by the record of the meeting of the directors of the company, held February 9th, at which all the directors were present, namely, Frederick, Henry, and Maurice Mayer, in which resolution it is set out: "That Frederick Mayer reported that the condition of the company at present was such that they could not continue in business with any expectation of earning and paying off sufficient to discharge the two larger claims of Rosa Mayer and Abram B. Mayer, appearing on the company's books as debts, although said claims really originated from the declaration of dividends which the company never had the means to pay; that, if an option were given to Henry or Maurice Mayer to sell all the assets of this company to a new corporation to be formed, such new corporation would assume all of the secured and merchandise debts of this company, except such claims of Rosa Mayer and A. B. Mayer, deceased, and except outside claims, and would pay or secure to this company the further sum of \$12,000, which could then be applied to the past debts of this company." A resolution was thereupon adopted by the board of directors "to authorize the said Henry or Maurice Mayer to negotiate a sale of all the assets of this corporation upon the terms aforesaid, and

\$12,000 in cash or good notes, and upon their furnishing an agreement of a solvent party or corporation to assume the obligations of this company hereinbefore mentioned, the president and secretary be, and they hereby are, instructed to transfer and convey to said company or corporation all the assets, brands, and good will of this company, and that said sum of \$12,000 be turned over, as received to the executors of the estate of A. B. Mayer, deceased, on account of his said claim against this company; it being considered that the said claim of Rosa Mayer against the same has become barred by limitation."

Prior to this date, February 9, 1901—that is to say, January 23, 1901—the first meeting of the stockholders of the defendant, Mayer Fertilizer & Junk Company, was held, all of the stockholders being present, to wit, Frederick Mayer, Sam. S. Pingree, and Harry Haas. Frederick Mayer was elected chairman, and Mr. Pingree secretary. It is then recited, in the minutes of the meeting, from which minutes the subsequent recitals of acts of the company are obtained, that, "negotiations for the purchase of an established business in the city of St. Louis having not yet been sufficiently completed," the meeting adjourned to reconvene February 2d. On February 2d the adjourned meeting was held, "all the stockholders being present as before," whereupon Mr. Haas offered the following resolution: "Resolved that, whereas, negotiations have been opened between our stockholders and parties having an option upon the property of the A. B. Mayer Manufacturing Company, for the purchase of its entire plant and properties upon the assumption of certain merchandise debts owing by said company and of its line of credit in the German-American Bank of this city, as well as a certain amount of cash and notes, that the following offer be made by the stockholders of this company, to wit."

The proposition is to the effect that the new company, defendant in this case, proposes to purchase from those parties all of the real estate of the company situated in St. Louis, "subject to existing company's indebtedness," also all its machinery, franchises, choses in action, "and all other personal property belonging to said A. B. Mayer Manufacturing Company, in consideration whereof this company shall assume the merchandise indebtedness of said A. B. Mayer Manufacturing Company, as contained upon its books, as well as all commercial paper upon which the same are liable, whether held in bank or by individuals, all of which indebtedness is estimated to be about \$24,000, but not including any claims in suit or in controversy, nor the claims

A. B. Mayer Manufacturing Company, and this company proposes to surrender to said parties of the A. B. Mayer Manufacturing Company the sum of \$2,958.83 in cash, and the further sum of \$9,041.17, in the negotiable promissory notes of this company, indorsed by Frederick Mayer and his two brothers, payable in semiannual installments during a period of seven years from date, with interest at the rate of 5 per cent. per annum from date, also payable semiannually, divided into 11 sets of 11 notes each, and described as follows." The resolution then enumerates the notes, and continues: "And that upon the proper transfer duly authorized of said assets, the president of this company, together with the secretary, be authorized to fully complete the terms of the aforesaid proposition." It was further resolved that the president and secretary of the company issue to each of the subscribers to the stock of the company, or their assigns, the amount of stock respectively subscribed by them upon their so turning over all of said assets, brands, and good will of said A. B. Mayer Manufacturing Company, "which shall be taken as full payment therefor. Provided said stockholders shall pay said cash or perfectly secure the payment of said promissory notes hereinbefore fully described." The meeting then adjourned until the 16th of February, 1901, and on that date, all the stockholders being present, it is recited that the president, Frederick Mayer, reported that the proposition made to the A. B. Mayer Manufacturing Company for their property, etc., had been accepted, and that the conveyances of the property were being prepared. On the same day the directors met and organized, Mr. Pingree resigning as director, and, Mr. Henry Mayer being elected to succeed him, whereupon the board proceeded to the election of officers, and Frederick Mayer was elected president and treasurer, Henry Mayer vice president, and Harry Haas secretary.

On the 10th of March, 1901, a special meeting of the directors of the defendant company was held, at which Mr. Haas presented his resignation as director, and Mr. Maurice Mayer was elected to succeed him as a director, and Mr. Henry Mayer elected to succeed him as secretary, and Maurice Mayer was elected vice president. A resolution was also adopted, to the effect that the president is authorized to execute a deed of trust upon the real estate of the company to secure the German-American Bank in St. Louis, or its assigns, the redemption of a loan or loans in the sum of not exceeding \$20,000. After all these proceedings had taken place, as before stated, and a deed, etc., had passed between the parties, the judgment of the circuit court in favor of the A.

having been successful in defeating the claim of plaintiff in the circuit court, the attorney and directors of the A. B. Mayer Manufacturing Company gave no thought to it as a possible liability. On the 25th of July, 1902, the A. B. Mayer Manufacturing Company filed in the office of the Secretary of State an affidavit of dissolution and surrendered its charter. It also appears that the deed from the A. B. Mayer Manufacturing Company to the defendant in this case, of date March 1, 1901, omitted the description of a certain parcel of real estate known as lot 7, in block 14, of Lowell, city block 3,381, of the city of St. Louis, which the company then owned, and that, at the time of the rendition of the judgment in favor of plaintiff and against the A. B. Mayer Manufacturing Company, the legal title to this lot was in the A. B. Mayer Manufacturing Company, and so remained until December 24, 1904, when the three Mayers, as the last board of directors of the A. B. Mayer Manufacturing Company, executed a conveyance of this lot to this defendant, which conveyance was duly of record; it being claimed that the omission of this lot from the conveyance of March 1, 1901, was a mere clerical error. It also appears that Henry Haas, one of the original incorporators of the defendant, had paid nothing for his stock, having subscribed for it at the request and for the accommodation of Frederick Mayer, and that he had subsequently transferred it to Maurice Mayer, who paid him nothing for it; and Mr. Haas further testified that, while he was present at the first and second meetings of the incorporators and directors, he had taken no part in the negotiations for the assets of the old concern. Mr. Pingree also testified: That while he had subscribed for 60 shares of the stock of the new company, the present defendant, he had done so at the request of Frederick Mayer, but had paid nothing for it, and had subsequently transferred it to one of the Mayers, who had paid him nothing for the transfer; that, while he attended two or three meetings of the company and acted as secretary, he had taken no part in the negotiations for the purchase of the assets of the A. B. Mayer Manufacturing Company.

It also appears that the notes which the A. B. Mayer Manufacturing Company had received as part of the consideration from the defendant, and which had been executed by the defendant and indorsed by Frederick, Henry, and Maurice Mayer, as well as a certain amount of cash, were turned over to the attorney of Mrs. A. B. Mayer and her children; that attorney having been a very active factor in procuring the adjustment of the claim of the executors and estate of A.

that something could be saved for the widow, Mrs. Mary Mayer, and her minor children, and the claim of Rosa Mayer having been eliminated as worthless. The stock held by the A. B. Mayer estate was turned over, in exchange for the notes and some cash, to Mr. Muench, who had represented the old company for many years and afterwards represented Frederick Mayer in this transaction. It further appears that Frederick Mayer was for many years the active head of the A. B. Mayer Manufacturing Company, owning, however, but 100 shares of the 500 shares of that concern, and on the death of his father, A. B. Mayer, the whole management and responsibility for the business had been thrown upon him. His unwillingness to carry on the concern under those circumstances appears to have been a very strong motive leading to the organization of the new company and its purchase of the assets and business of the old company, and it also appears that he went into the matter of taking over the business of the old company only after considerable persuasion.

Among the liabilities of the old company was one to the German-American Bank, secured by a blanket mortgage on all of the assets of the concern, being used as collateral to cover whatever the old concern from time to time owed that bank. At the time of the transfer from one company to the other, the indebtedness to the bank amounted to something like \$19,000 or \$20,000, which was the limit of the company's credit with that bank, and the bank had threatened to take steps to protect its interest if the amount of indebtedness was not reduced.

While this is a very brief summary of the facts as set out in a rather voluminous abstract, we think it sufficient to give a correct idea of the facts so far as necessary to an understanding of the issues involved in the case. Plaintiff, after the recovery of his judgment, being unable to find any property upon which to levy execution, and considering that, by reason of the dissolution of the old company, he could not run execution against the lot, which had been omitted in the deed from the old to the new company, commenced this proceeding against the defendant. The petition in the case set out the facts as plaintiff claimed them to be, and substantially as above, and prayed that an accounting be taken of the assets received by the defendant from the A. B. Mayer Manufacturing Company, their value determined, the amount due on the judgment computed to date of decree, and, in default of payment, the property so received by the respondent sold for the satisfaction of the amount which might be found to be due on the judgment

and for general relief; the petition averring that the transfer from the old to the new company was a mere merger of the business of the one into that of the other, and the transfer of the assets from one to the other made without the defendant company paying any valuable consideration therefor, and averring that the assets and property of the A. B. Mayer Manufacturing Company were, at the time they passed into the hands of the defendant company, a trust fund for the payment of all the debts and liabilities of the A. B. Mayer Manufacturing Company, and, when received and taken by defendant, were charged with such liability, and the plaintiff avers "that defendant has appropriated to its own use said assets and property of the value aforesaid, to wit, \$100,000."

The answer of the defendant admits its incorporation at the time alleged, admits the incorporation of the A. B. Mayer Manufacturing Company and its dissolution under the law, and for affirmative defense avers there is a want of proper parties defendant in the cause, inasmuch as it appears from the allegations of the petition that there could not be a final decree entered in behalf of plaintiff without joining therein as defendants "the remaining trustees and directors of the A. B. Mayer Manufacturing Company." As another affirmative defense, the answers avers: That, "at the time when the defendant corporation was organized, to wit, about the 1st of February, 1901, and at the time when plaintiff had not any claim against the A. B. Mayer Manufacturing Company, but, on the contrary, the manufacturing company had judgment against plaintiff herein," the defendant did, in good faith, and for ample and valuable consideration, acquire by purchase all the assets of A. B. Mayer Manufacturing Company; that the defendant company had acquired by purchase all the assets, real and personal, of the A. B. Mayer Manufacturing Company; that defendant had immediately rendered the consideration agreed upon and took over and received possession of all the assets, real and personal, theretofore belonging to the A. B. Mayer Manufacturing Company; but that, by an error of the scrivener, by whom the deed for the real estate was prepared, the lot in block 3,381, of the city of St. Louis, was omitted from the conveyance, although intended to be included therein, and although possession thereof was duly delivered to the defendant at the time the consideration passed and on that consideration; and that thereafter in December, 1904, when the error was first discovered, the old company made a deed correcting the omission and conveying to defendant the legal title to the lot in addition to the equitable title, which it had theretofore held thereto. The reply to this was a general denial.

The evidence developed the facts substantially as above set out. At the conclusion of the hearing, the court entered an order dis-

missing the plaintiff's bill, at the time filing a memorandum, which so clearly and fully sets out the conclusions, both on the law and the facts, arrived at by the learned trial judge, that we incorporate them herewith. It is as follows:

"The law governing a case of this character presents no special difficulty. While it is true, in a general way, that the assets of a corporation constitute a trust fund for the benefit of creditors of such corporation, it is equally true that a corporation has the power to dispose of the whole or any part of its assets for value, and in good faith, and that a purchaser takes such assets discharged of any trust in favor of the creditors of the selling corporation. The sole question in this case therefore is whether the transaction whereby the defendant acquired the assets of the A. B. Mayer Manufacturing Company was for value and in good faith, or whether, as contended by the plaintiff, the transaction amounted to the mere taking over by one corporation of the assets of another, in bad faith and without consideration, and without any provision being made for the payment of the creditors of the latter. This is a question of fact to be determined from the evidence in the case. The undisputed evidence shows that the defendant paid in money and in notes to the A. B. Mayer Manufacturing Company the sum of \$12,000, and also assumed the payment of all the commercial debts of the latter company, including an indebtedness of something like \$18,000 to \$20,000 to the German-American Bank. The amount thus paid and assumed aggregated something over \$34,000. One of the questions in this case is whether that sum was a fairly adequate price for the assets thus purchased. Fortunately for the defendant and those actively interested in its incorporation, they were dealing with adverse and opposing interests in making this purchase. The stockholders and creditors of the A. B. Mayer Manufacturing Company, represented by Mr. Arnstein, were insistent upon obtaining as large a sum as could possibly be realized for the assets of the A. B. Mayer Manufacturing Company, and it is impossible to draw any other conclusion from the evidence but that the aggregate of the sum paid and the debt assumed was as large a price as the A. B. Mayer Manufacturing Company could then have reasonably expected to obtain for its assets. It is true that the opinion evidence offered in the case by the plaintiff tends to show that the value of the assets of the A. B. Mayer Manufacturing Company far exceeded that placed upon them in the transaction whereby they were sold to the defendant. The opinion evidence offered by the defendant on the same question reduces the valuation near to that for which they were sold. Upon all the evidence offered on that question, especially in view of the difficulties which impeded the continuation

of the business of the A. B. Mayer Manufacturing Company, the court is compelled to hold that the transfer was made for an adequate and reasonable consideration. There is no fact upon which to contest the good faith of the transaction except the pending claim of the plaintiff against the A. B. Mayer Manufacturing Company for some \$700 or \$800. Suit had been commenced upon this claim long prior to the sale. A judgment had been entered in favor of the A. B. Mayer Manufacturing Company and against the plaintiff upon his claim. The case was then pending on appeal in the Supreme Court, and was undetermined. On March 1, 1901, the transaction by which the defendant acquired the assets of the A. B. Mayer Manufacturing Company was fully executed. On March 12th following, the judgment in favor of the A. B. Mayer Manufacturing Company was reversed and remanded for a new trial. This, according to the testimony of Judge Muench, was an unexpected result, and it is obvious from all the testimony in this case that the purchase by the defendant of the assets of the A. B. Mayer Manufacturing Company was not intended to hinder or delay the collection of any claim which the plaintiff might then have had against the A. B. Mayer Manufacturing Company, and that the transaction was wholly in good faith. It results therefore that the plaintiff's bill must be dismissed.

"In addition to the foregoing observations, it is plainly shown by the evidence in this case that the A. B. Mayer Manufacturing Company acquired in this transaction clear assets in money and notes, equal to the sum of \$12,000, which were subject to the claim of the plaintiff in the hands of that corporation, and were, of course, amply sufficient to pay any claim that he might establish thereafter against them. The fact that the officers and directors of the A. B. Mayer Manufacturing Company distributed those assets after thus acquiring them without making any provision for the payment of the plaintiff's claim affords no reason for holding the defendant liable therefor, but, on the contrary, conclusively shows that the debtor corporation had sufficient assets with which to pay the claim of plaintiff, and all other claims, for that matter, and it was an easy matter for the plaintiff to have pursued those assets in the hands of the stockholders of the A. B. Mayer Manufacturing Company, and to have thus secured payment of his judgment."

Geo. B. Webster, for appellant. Walther & Muench, for respondent.

REYNOLDS, P. J. (after stating the facts as above). The finding of fact and the statement of the law applicable to the case is so thoroughly in harmony with our views that we do not think it necessary to enlarge upon it. The very learned and industrious counsel for appellant relies very strongly up-

on the cases of *Bertholdt v. Holladay-Klotz Land & Lumber Co.*, 91 Mo. App. 233; *Grenell v. Detroit Gas Co.*, 112 Mich. 70, 70 N. W. 413; *Jones v. Arkansas Mech. & Ag. Co.*, 38 Ark. 17; *Arnholz v. Hartwig*, 73 Mo. 483; *State ex rel. Peirce v. Merritt*, 70 Mo. 275; and *Chattanooga, R. & C. R. Co. v. Evans*, 66 Fed. 809, 14 C. C. 116—as well as many other cases in line with these referred to. We cannot agree that the facts in this case come within the principles of those decisions. To the contrary, we think that this case falls within the doctrine laid down by the Supreme Court of the United States in *Fogg v. Blair*, 133 U. S. 534, 10 Sup. Ct. 338, 33 L. Ed. 721, and *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 385, 14 Sup. Ct. 127, 37 L. Ed. 1113, and with the Missouri case of *Hageman v. Railroad*, 202 Mo. 249, 100 S. W. 1081, and cases there cited, as well as the decisions of this court in *Barrie v. United Railways*, 125 Mo. App. 96, 102 S. W. 1078, and *Barrie v. United Railways (App.)* 119 S. W. 1020. We think that the decision of the Supreme Court in the *Hageman Case* governs and controls in the determination and decision of this case, in so far that in many respects it is closely analogous. The new company, defendant here, paid adequate, and the testimony tends to show full, consideration for the assets which it had received and took over. The purchase price went into the hands of the stockholders of the old company. If there was any fraud upon creditors, it was in the distribution of these assets among the stockholders of the old company. Neither they nor the representatives of the old company are before this court in this proceeding, and, as to whether there is any liability under the facts in the case as to them, we express no opinion whatever. So far as the defendant corporation is concerned, on all the facts in the case—and we have read this record with reasonable care—there is neither fraud in fact, fraudulent intent, or constructive fraud shown or proven which entitles the plaintiff to recover against it. We are not to be understood as holding that the fact that plaintiff's claim, then pending on appeal in the Supreme Court, was not a lien because unliquidated. On this proposition we adhere to what we have said in the *Holladay-Klotz* and *Barrie Cases*, supra. The distinction lies in the fact that in the case at bar there is no evidence whatever tending to show that the transaction here involved was carried out with any intention to defraud any creditors.

As to the proposition made by counsel for appellant in his brief that this court should at least reverse so far as concerns the lot in city block No. 3,381, it is beyond controversy that the equitable title to that lot passed to the defendant. This is a proceeding in equity, and it will not do for plaintiff, coming into a court of equity, to endeavor to assert a bare, naked legal obligation

CITY OF DE SOTO v. HUNTER.

(St. Louis Court of Appeals, Missouri. Nov. 16, 1909. Concurring Opinion Nov. 30, 1909.)

1. BREACH OF THE PEACE (§ 1*)—VIOLATION OF ORDINANCE—NATURE OF OFFENSE.

An ordinance making it an offense to "willfully disturb the peace of any person" is violated by disturbing the peace of a policeman by the use of loud, offensive, and indecent language toward him, in the presence of others, on a public street, sufficient to inspire fear or terror, and arouse the passions, or destroy repose of mind.

[Ed. Note.—For other cases, see Breach of the Peace, Cent. Dig. §§ 1-3; Dec. Dig. § 1.*]

2. BREACH OF THE PEACE (§ 10*)—VIOLATION OF ORDINANCE—QUESTIONS FOR THE JURY.

In a prosecution for violation of an ordinance, making it an offense to "willfully disturb the peace of any person," whether the peace of any person was disturbed is a question for the jury, and testimony of witnesses that accused used, in their presence, language which was loud, offensive, and indecent, but that their peace of mind was not disturbed thereby, does not warrant the court in directing a verdict for accused.

[Ed. Note.—For other cases, see Breach of the Peace, Cent. Dig. § 8; Dec. Dig. § 10.*]

3. BREACH OF THE PEACE (§ 10*)—VIOLATION OF ORDINANCE—SUFFICIENCY OF EVIDENCE.

Evidence in a prosecution for breach of the peace in violation of a municipal ordinance held sufficient to take the case to the jury.

[Ed. Note.—For other cases, see Breach of the Peace, Cent. Dig. § 8; Dec. Dig. § 10.*]

Appeal from Circuit Court, Jefferson County; Jos. J. Williams, Judge.

Carlyle Hunter was prosecuted for disturbing the peace under a city ordinance. The court directed a verdict of acquittal, and the city appeals. Reversed and remanded.

James G. Berkley, for appellant. Byrns & Bean, for respondent.

NORTONI, J. This is a prosecution for a disturbance of the peace under a city ordinance. At the conclusion of the testimony on the part of the city, the court peremptorily directed a verdict of acquittal, and the city prosecutes the appeal. The material portion of the ordinance in evidence, a violation of which is alleged against the defendant, is as follows: "Whoever shall, in this city, willfully disturb the peace of any person or persons by violent, offensive, tumultuous or obstreperous conduct or carriage, or by loud or unusual noises, or shall use toward another any indecent, profane, obscene or offensive language calculated to provoke a breach of the peace, * * * so that others are dis-

did, first, unlawfully and wrongfully and willfully disturb the peace of Robert Lanham, Eddie Eichelberger, Willie Burrus, Raymond Eichelberger, and the public generally by loud and unusual noises, by violent, tumultuous and obstreperous conduct and carriage; and second, by using to and toward others, whose names are to the affiant unknown, profane, offensive, and obscene language calculated to provoke a breach of the peace, etc. The testimony introduced on the part of the city to sustain the charges referred to is to the effect that the defendant was scuffling with some other boys on a public street and principal thoroughfare of the city of De Soto, and for some reason commenced talking loud and profane. The police officer, Robert Lanham, testified that he heard him more than a block away. Other witnesses gave testimony to the effect that they heard his profanity across the street. Some testimony goes to show that the defendant was cursing the Eichelberger boy with whom he had been scuffling, and other testimony goes to show that he was cursing some person spoken of in the testimony as an umbrella man. However, the umbrella man was not identified, nor was he a witness in the case. We gather from the testimony that he was possibly a traveling vendor or mender of these articles. The police officer, Lanham, upon hearing the profane discourse a block away, was attracted thereto, and came towards the defendant. Of the defendant's conduct and touching what he said, the police officer testified as follows: "He called me a G—d d—d s—n of a b—, and a G—d d—d b—, and was talking all kinds of names like that up there before I went up there. Q. When you got there what kind of language was he using? A. The first I heard was he was calling somebody a s—n of a b—." The police officer further testified that he heard the defendant using vile language towards the umbrella man referred to; the question and answer touching the matter being as follows: "Q. You heard him using this vile language while he was talking to this umbrella man? A. Yes, sir." The police officer was asked if the defendant's conduct and vile language disturbed his peace, and he answered that it did. While all of the evidence on the part of the city tended to prove that the defendant cursed and swore for a considerable period of time on the public street, some of it is to the effect that he was not cursing anybody particularly. One witness said: "I don't suppose he was cursing anybody particularly unless it was the Eichelberger boy. They had been scuffling." The question was directed by the court to all of the witnesses as to whether or not the de-

defendant's cursing and swearing disturbed their peace. Each witness, other than the police officer, answered in the negative, saying that his peace was not disturbed thereby. The police officer, however, said that his peace was disturbed.

From the arguments appearing in the briefs we gather that the court directed a verdict for the defendant on the theory that as all of the witnesses for the city, other than the police officer, said their peace was not disturbed by the defendant's conduct, the city failed to make out a case. The argument advanced in support of the judgment is that the police officer who testified his peace was disturbed was not within the protection of the ordinance. To quote from the defendant's brief, it is said that "the police officer was acting within the scope of his official duties, and as such an official was not a person within the meaning of the ordinance. His personality was merged into that of his office as marshal." Indeed, the case of *Salem v. Coffey*, 113 Mo. App. 675, 88 S. W. 772, 93 S. W. 281, is cited in support of the doctrine referred to. That case was decided by the Kansas City Court of Appeals, Judge Ellison dissenting, a majority of the court holding that the peace of a police officer is not protected by the statute or an ordinance as the one now in judgment. According to the reasoning of that case, it is no offense for a citizen to call a police officer "a G—d d—d s—n of a b—," and otherwise abuse and vilify him. We are not persuaded thereby, but, on the contrary, believe that a police officer is within the protection of the statute as are other citizens of the state or city. We believe loud, offensive, and indecent language and epithets directed toward a policeman in the presence of others on the public street of a city or town sufficient to inspire fear or terror and arouse the passions or destroy the equanimity and repose of the mind of the person abused will amount to a disturbance of the peace of that person, and evidence tending to prove such facts is certainly sufficient to make a prima facie case for the jury touching that question. Be this as it may, we are not persuaded that the mere fact that all of the witnesses other than the police officer said their peace was not disturbed was sufficient to authorize the court to direct a verdict for the defendant on the evidence to be found in this record. In the city of *St. Charles v. Meyer*, 58 Mo. 86, the defendant was charged with having disturbed the peace, and the Supreme Court held that it was competent to introduce evidence on the part of the defendant to show that the noises made by the charivari party of which the defendants were members were slight, and not sufficient to disturb the public peace. The court said the tendency of this evidence "was to weaken the force of the plaintiff's evidence showing the offensive character of the noises and their adaptability for a disturbance of the public repose." However, in that opinion it is said that if the

object of such testimony was "to show by way of special defense that the persons testifying were not individually disturbed by the noises complained of, such an object alone would be manifestly illegitimate."

From a careful reading of the case, we deduce the proposition that testimony to the effect that the language or conduct of the defendant actually disturbed the peace of any person or persons is not essential, as this is the real gravamen of the charge, and the question for the jury to determine on all the facts and circumstances in proof. Indeed, in *Salem v. Coffey*, 113 Mo. App. 675, 88 S. W. 772, 93 S. W. 281, the Kansas City Court of Appeals declared such testimony to be incompetent, saying that whether or not a person's peace is disturbed is the gravamen of the charge, and is therefore a question for the jury to determine. It is not necessary in this case to say that such testimony is incompetent. And the question is not decided. However, we entertain no doubt upon the proposition that it is not essential in a case where the language and conduct of the defendant is such as is shown by this record for the witnesses to testify positively that their peace was actually disturbed thereby. The facts in proof are certainly sufficient for the jury. A disturbance of the peace being the gravamen of the charge, whether the defendant's conduct was calculated to disturb and did disturb the peace of persons there assembled is for the jury to say. *Keller v. State*, 25 Tex. App. 325, 8 S. W. 275; *McCandless v. State*, 21 Tex. App. 411, 2 S. W. 811; *People v. Murray*, 54 Hun, 406, 7 N. Y. Supp. 548. One paragraph of the complaint charges the defendant with violent, tumultuous, and obnoxious conduct and carriage by using to and toward others, whose names are to the affiant unknown, profane, offensive, and obscene language calculated to provoke a breach of the peace. Now, this charge falls within the language of the ordinance, for it is made punishable thereby to use such language towards another as is calculated to provoke a breach of the peace. This charge possibly contemplates the conduct of the defendant towards the umbrella man referred to in the testimony. It appears from the record that no one knew who this umbrella man was, but that there was a man present denominated by the witnesses as an umbrella man is beyond question, if the testimony is to be believed, and it appears from the testimony of the police officer that part of the vile and offensive language spoken was directed by the defendant to this unknown person. It is obvious that the language such as detailed by the witnesses this defendant used towards this unknown umbrella man was calculated to disturb the peace of a person whether it did disturb his peace or not, and that question should certainly have been referred to the jury. It was for the jury to answer whether or not such language used toward

the police officer, were calculated to disturb the peace of a person, even though he be a police officer and accustomed to more or less unkind remarks from boisterous individuals.

The judgment will be reversed and the cause remanded.

GOODE, J., concurs.

REYNOLDS, P. J. I concur in reversal, but do not concur in holding that it is not necessary in this case to say that the testimony of witnesses, who were permitted to answer the direct question of whether their peace had been disturbed by the profanely vulgar language attributed to the defendant, and who, in answer to this, said it had not, was incompetent. I have no doubt whatever on that; and think we owe it to the trial court, and to the defendant even, to pass on it and so prevent a possible further appeal. I have no hesitancy in saying that such a question was improper in this case, and that the testimony sought to be and which was elicited by it called for conclusions by the witnesses on the very fact the jury was to find, and it was therefore incompetent.

Nor am I willing, by silence, to give any support to the idea, advanced in cases referred to in the opinion, that a policeman or constable is by his office so far removed from citizenship as not to be within "the peace of the state." I see no more reason for applying that rule to him than to a judge, as was done by the Supreme Court of the United States in the great case of *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658, 34 L. Ed. 55. A policeman is as much an officer as a judge or justice, and as much entitled to the protection of the laws of the land. Public officers are public servants, it is true, but they are none the less citizens and entitled to the same protection as is every citizen in the enjoyment of every right, one of the most important and dearest of which is the right to be within "the peace of the state," which here means the protection of its laws as against the vulgarity and profanity of public nuisances.

HAWMAN v. McLEAN et al.

(Kansas City Court of Appeals. Missouri. Nov. 15, 1909. Rehearing Denied Dec. 6, 1909.)

1. NEW TRIAL (§ 41*)—GROUNDS—ADMISSION OF IMPROPER EVIDENCE.

A trial court may very properly grant a new trial because of the admission of improper evidence, though it attempted to withdraw the evidence by an instruction.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 67-71; Dec. Dig. § 41.*]

other good cause is made by the motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3403, 3404, 3408-3430; Dec. Dig. § 854.*]

3. FRAUD (§ 59*) — DECEIT — EXCHANGE OF PROPERTY—MEASURE OF DAMAGES.

Where plaintiff claimed that she was deceived in an exchange of certain property for land in Arkansas, the measure of her damages was the difference between the actual value of the land in Arkansas at the time of the exchange, and what would have been its value if it had been as represented, and hence it was error to authorize the jury to allow the difference in the value the parties put on the land in Arkansas, at the time of the exchange, and its actual value.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62; Dec. Dig. § 59.*]

Appeal from Circuit Court, Buchanan County; C. A. Mosman, Judge.

Action by Sarah Hawman against John H. McLean and others. From an order granting defendants a new trial, plaintiff appeals. Affirmed.

James W. Boyd, K. D. Cross, and Wm. H. Sherman, for appellant. Grant S. Watkins, Chas. H. Booher, and Chas. F. Strop, for respondents.

ELLISON, J. Plaintiff's action is for fraud and deceit. She recovered judgment in the trial court. A new trial was granted, and plaintiff appealed from that order.

It appears that plaintiff owned lands in Andrew county, which she exchanged for lands owned by defendants in Arkansas, and that plaintiff then exchanged the Arkansas land for real estate in the city of St. Joseph, Mo. Plaintiff alleges: That defendants induced her to make the exchange for the Arkansas land by their false and fraudulent representations of its value, its productive qualities, and the improvements thereon—matters she did not know and could not know about, and concerning which she relied upon the representations made by defendants as being true. That the representations were made to her for the purpose of deceiving and defrauding her.

It seems that plaintiff's exchange of the Arkansas land to third parties for the St. Joseph property was unfortunate, and that the result was she realized practically nothing from it. At the trial plaintiff testified in her own behalf, over the objection of defendants, as to the poor and disastrous results of her exchange for the St. Joseph property. The court gave two instructions withdrawing such evidence from the consideration of the jury; but when it came to consider the motion for new trial the court, in its discretion, concluded that injury had been done by allowing

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

such evidence to be heard which could not be cured by withdrawing it, and therefore sustained the motion for the reason that such evidence had been heard. We think a trial court can very properly grant a new trial, in some circumstances, on the ground of having allowed improper evidence, though it does attempt to withdraw such evidence by instruction. The court, in many instances, could well conclude that material injury had been done, the influence of which could not be neutralized by an instruction; but plaintiff insists that defendants themselves first called out such improper evidence in their cross-examination of plaintiff, and that her offense, if it be one, was committed in redirect examination by way of a response, in some degree, to defendants having led the way. The record does, to some extent, bear plaintiff out; yet, on account of what follows, we need not say whether the court abused the discretion which we must allow it in the matter of granting new trials. It is a fully recognized rule that, though a reason assigned for granting a new trial be not justified by the record, if any other good cause is made by the motion, the order will be sustained on appeal. *Hewitt v. Steele*, 118 Mo. 463, 474, 24 S. W. 440; *Bank v. Wood*, 124 Mo. 72, 27 S. W. 554; *Millar v. Car Co.*, 130 Mo. 517, 31 S. W. 574.

In this case the measure of plaintiff's damage was the difference between the actual value of the Arkansas land at the time of the exchange, and what would have been its value if it had been as represented. *Bank v. Byers*, 139 Mo. 627, 659, 41 S. W. 325; *Caldwell v. Henry*, 76 Mo. 254, 257; *Hitchcock v. Baughan*, 36 Mo. App. 216, 224. But an instruction was given for plaintiff which authorized the jury to allow as damage the difference between the value which the parties put upon the Arkansas land when the exchange was made, and its actual value. This would allow the jury to take, as basis of plaintiff's damage, the value she and defendants agreed was the value; when her damage could not be more than her loss, and her loss, of course, should be measured by the value of the thing lost—that is to say, the land. Plaintiff undertakes to point out that defendants did not object to that instruction. We have examined the record and find they did. The instruction was No. 2, for plaintiff, and it was modified by the court. Plaintiff objected, and then followed defendants' objection and exception. Plaintiff states the objection and exception was taken to the instruction as originally offered. That cannot be, for as originally offered it was not given, and defendants could not have had any ground for exception. Defendants' exception was to the giving of instruction No. 2, and the only instruction No. 2 given for plaintiff was the modified one. The record leaves no

question as to defendants making the exception to the instruction given.

The order granting the new trial is affirmed. All concur.

STELTEMEIER v. BARRETT.

(St. Louis Court of Appeals. Missouri. Nov. 16, 1909.)

1. APPEAL AND ERROR (§ 969*) — DISCRETION OF TRIAL COURT—CONDUCT OF TRIAL.

The trial court has much latitude in directing the conduct of the trial, and, when the whole record shows that he endeavored to fairly conduct the trial and keep counsel within proper bounds, his discretion will not be interfered with on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3845-3848; Dec. Dig. § 969.*]

2. TRIAL (§ 29*) — CONDUCT OF TRIAL — REMARKS OF JUDGE—PROTECTING WITNESSES.

It is the trial court's duty to protect witnesses on examination, and, where counsel offered a part of the testimony of a witness on a former trial to show contradictions of his testimony at the present trial, it was not error for the trial judge to remark that counsel should have treated the witness fairly by reading the alleged contradictory statement to him, and asking him if he made it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 80-84; Dec. Dig. § 29.*]

3. EVIDENCE (§ 143*)—MATERIALITY.

In an action on a note in which defendant relied on receipts given for payments, the exclusion of a letter from defendant's counsel to plaintiff's counsel as to an inspection of the receipts was proper; the receipts being in evidence and subject to examination in court.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 424, 426-428; Dec. Dig. § 143.*]

4. TRIAL (§ 211*)—INSTRUCTIONS.

In an action by an administrator on a note, a requested instruction that, as defendant could not testify to any transaction with decedent showing payment, his failure to explain any matter connected with its payment should not be considered against him, was properly refused as prejudicing the plaintiff for exercising a lawful right; no comment having been made on his failure to testify thereto; *Rev. St. 1899, § 4652* (Ann. St. 1906, p. 2520), providing that, where an administrator is a party, the other party cannot testify in his own favor, unless the contract in issue was made with one living and competent to testify, not authorizing such instruction.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 505; Dec. Dig. § 211.*]

5. PAYMENT (§ 65*)—BURDEN OF PROOF.

Payment is an affirmative defense, the burden of proving which is always on defendant.

[Ed. Note.—For other cases, see *Payment*, Cent. Dig. § 196; Dec. Dig. § 65.*]

6. BILLS AND NOTES (§ 538*)—INSTRUCTIONS—BURDEN OF PROOF—SHIFTING BURDEN.

In an action on a note for \$1,830, executed in 1896 to a decedent, as to which defendant claimed payment and offered several receipts, defendant's second request to charge was that if the jury found that the receipts, which recited for some \$1,200 and for the money advanced to defendant in full November 8, 1897, were signed by decedent, in absence of sufficient rebutting proof, they should find that decedent had received from defendant the amounts stated

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

if they were so signed, they were a complete defense, unless overcome by proof that the payments were not in fact made. *Held*, that the requests were erroneous as attempting to shift the burden of proof upon plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 1902; Dec. Dig. § 538.*]

7. BILLS AND NOTES (§ 538*)—INSTRUCTIONS—MISLEADING INSTRUCTION.

The reference in the second request to rebutting proof, without explanation, would have tended to mislead the jury, and the instruction would have misled the jury to believe that the production of the receipts alone would cause the burden of proving payment to shift, and that part of it prohibiting a recovery upon finding the receipt by decedent of the sums stated in the receipts was so wrong in law that it would have misdirected the jury.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 538.*]

8. TRIAL (§ 244*)—INSTRUCTIONS—WEIGHT OF EVIDENCE.

In an action on a note executed to a decedent in which defendant pleaded payment and produced several receipts acknowledging payment for money advanced, a requested instruction that the production of the receipts signed by decedent was a complete defense unless overcome by proof showing that the payments were in fact not made was properly refused as unduly commenting on the effect of the receipts as evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. § 244.*]

9. BILLS AND NOTES (§ 490*)—WEIGHT OF EVIDENCE—SHIFTING BURDEN OF PROOF.

In an action on a note executed to a decedent in which defendant pleaded payment, the production by defendant of receipts for money advanced, signed by decedent, would not of itself shift the burden of proving nonpayment onto plaintiff.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1695-1697; Dec. Dig. § 499.*]

10. BILLS AND NOTES (§ 538*)—ACTIONS—INSTRUCTIONS—APPLICABILITY TO ISSUES.

In an administrator's action on a note, in which defendant pleaded payment and offered several receipts for money advanced by decedent, signed by him, requested instructions to find for defendant, without finding that the payments receipted for were made on account of the note, which was the question in controversy, were erroneous.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 538.*]

11. APPEAL AND ERROR (§§ 994, 995*)—QUESTIONS OF FACT—CREDIBILITY OF WITNESSES.

The credibility of the witnesses and weight of the evidence are matters peculiarly within the province of the trial court and jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3901-3906, 3907; Dec. Dig. §§ 994, 995.*]

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Frederick O. Steltemeier, administrator of Edward Doyle, against J. V. S. Barrett. From a judgment for plaintiff, defendant appeals. Affirmed.

Missouri, January 1st, 1896. Three years after date I promise to pay to Edward Doyle or order eighteen hundred and thirty no hundred dollars for value received with interest from date at the rate of seven per cent. per annum, until paid, and I agree to pay the same at maturity and same is due to Edward Doyle only. J. V. S. Barrett." The answer, after denying each and every allegation in the petition, sets out the note, admits the execution and delivery of it to Doyle, avers that the note was prepared on a printed blank form and the words, "date," "promise to pay," "or order," were printed as part of the blank form, and the words, "and the same is due to Edward Doyle only," were written by defendant, and avers that long prior to the maturity of the note he fully paid it to Doyle as well as paying to him, Doyle, all other notes he had ever made to him, and that Doyle at the time of the payment of the note was in possession of it, and that this is the only note bearing date January 1, 1896, that defendant ever made or delivered to Doyle. The answer further avers that defendant did not execute or deliver to Doyle the note described in the petition or any note of that date, save that set forth in his answer. This answer was sworn to by defendant. The reply is a general denial of the new matter. At the trial the plaintiff proved that he was the administrator of the estate of Doyle, and as such had duly qualified and taken possession of the assets of the estate. He also introduced evidence tending to prove that the note in suit had come into his possession as of the assets of the estate; that he had endeavored to collect it from defendant; that defendant had claimed that he had paid it. Plaintiff also introduced evidence tending to show how and when and by whom the note had been found among the effects of the decedent or had come to the hands of the parties who had turned it over to him, and also tending to show that defendant had made statements, and had done acts in connection with the note which it is claimed tended to contradict defendant's denial of indebtedness on the note, and, introducing the note in evidence, rested.

On part of defendant evidence was introduced tending to sustain his claim that he had paid the note, and that he owed decedent nothing on account of it, among the other evidence introduced by defendant being the receipts, which are set out in 115 Mo. App. 324, 91 S. W. 56, where the decision of this court is reported when the case was here on a former appeal. The receipts now particularly relied on by defendant are as follows:

"Received of J. V. S. Barrett, \$1,235.85 for

board, lodging and money advanced Oct. 8, 1900; Nov. 8, 1897. Edward Doyle."

"Received of J. V. S. Barrett the amount of money advanced to him by me in full Nov. 8, 1897. Edward Doyle."

The defendant at the trial was excluded from testifying as to transactions between himself and the decedent during the lifetime of the latter; his own testimony being confined to the narration of acts since the death of the decedent and to his transactions with the administrator and others after the death of the decedent. The witness Smidt, again testifying, the error in the admission of part of his testimony for which error, in part, the judgment was before reversed, was avoided both during this trial and by instructions. During the progress of the trial counsel for defendant offered in evidence a portion of the testimony of this witness Smidt which had been preserved in the bill of exceptions. On the court asking him what he offered it for, counsel said it was offered as contradictory of the testimony of the witness given at the present trial. Counsel for plaintiff objected to it unless all of this witness' testimony was read, whereupon the court said: "You didn't read any part of it to him, and ask him whether he made the statement or not. You asked him in a general way. You should have treated the witness fairly by reading the statement claimed he had made contradictory to his present statement. Let me see the part you want to read. The proper way and the fair way is for you to read the statement and ask him whether he made that statement or not." Counsel for defendant excepted to the remarks of the court; not, however, assigning any ground for the exception. Whereupon counsel handed the transcript of the testimony to the court with the pages marked which he proposed reading, and they were thereupon read, and the witness examined concerning what were claimed to be discrepancies between his testimony there given and what he had given in the present trial. Counsel for defendant also offered to read in evidence a letter which he had served on counsel for plaintiff, containing an offer by counsel concerning the examination of the back of some of the receipts given in evidence, there being some question as to whether paper had been pasted over the back of the original in an effort to conceal or cover up whatever was on the back. The court excluded it, to which defendant excepted. Much evidence pro and con was introduced in an effort to meet the issue as to whether the receipts in evidence covered the money evidenced by the note.

At the instance of plaintiff, the court gave three instructions, in the first of which the jury were told that the suit was on a note, the court setting the note out in the instruction as it appears in the petition. It also told the jury that the defendant denies every allegation in the petition, but, in answering

further, also admits that he executed and delivered to the decedent a promissory note in words, as follows: "\$1,830.00. St. Louis, Missouri, January 1st, 1896. Three years after date I promise to pay to Edward Doyle, or order, eighteen hundred and thirty, no hundred dollars, for value received, with interest from date at the rate of seven per cent. per annum, until paid, and I agree to pay the sum at maturity and the same is due to Edward Doyle only. J. V. S. Barrett." The instruction then proceeds: "And defendant admits that the note last referred to was the only note bearing date of January 1, 1896, that defendant ever made and delivered to the decedent." The second instruction was to the effect that it had been proved plaintiff was the person entitled to sue as administrator of the decedent, and that he was now such administrator. By the third instruction, the jury was told that if it believed from the evidence that defendant executed and delivered to decedent the note sued on, and further believed from the evidence that the note has not been paid, the jury must find for plaintiff for the value of the note, \$1,830; but, if the jury finds the note had been partly paid, it would find for plaintiff only in such an amount as the jury finds from the evidence remains unpaid, and, if the jury further finds that the interest on the note or any part thereof has not been paid, it must find for plaintiff in such further amount as it finds from the evidence is due on account of interest. Of its own motion the court instructed the jury that defendant claims the note has been paid and fully satisfied, and that the burden of establishing by a preponderance of evidence that such payment has been made is upon the defendant. In the second instruction given by the court of its own motion the jury were instructed as to the meaning of the term "burden of proof." In the third the usual instruction as to the credibility of witnesses was given, while in the fourth instruction the jury were advised that nine of their number had power to return a verdict. Exceptions were duly saved by defendant to the giving of all these instructions. At the request of defendant, the court gave three instructions. The first is to the effect that, if the jury believed from the evidence that the note offered in evidence on the trial and interest thereon was paid, they would find for the defendant. By the second instruction they were told that the note offered in evidence is not a negotiable note, and by the third they were told that any statements of the witness Smidt while testifying upon the trial of the cause as to what was told him by Edward Doyle, deceased, are to be entirely disregarded by the jury as evidence in the case in arriving at their verdict. Defendant also asked the court for three instructions substantially as follows: First, that under the law the defendant could not testify in this action to any transaction be-

tween him and the deceased relating to the note sued on or its payment unless the plaintiff had consented that he might do so, and that the failure of defendant to explain any matter connected with the note or its alleged payment is not to be considered against him in arriving at a verdict. In the second instruction, the court was asked to charge that, if the jury found from the evidence that the receipts offered in evidence as being signed by the deceased were in fact signed by him, "then, in the absence of sufficient rebutting proof, it is the duty of the jury to find that deceased received from the defendant on November 8, 1897, the sum of \$1,235.85, and also all the money which up to that time said Edward Doyle had advanced to defendant, and that plaintiff cannot recover in this action, and they are further instructed that rebutting proof sufficient to overcome those receipts must be clear and convincing, and not rest upon mere impressions." The third instruction asked, and refused, was to the effect that plaintiff claims the note sued on is wholly unpaid, and defendant claims that it was paid to the decedent "and produces in support of his contention receipts claimed to have been signed by said Edward Doyle, and the jury were further instructed that, if they find from the evidence that the signature of those receipts is that of said Edward Doyle, then those receipts are a complete defense to plaintiff's claim, unless they are overcome by proof that the payments acknowledged by those receipts were not in fact made, and the proof for that purpose must be clear and convincing and not resting on mere surmises." The court refused these instructions, and defendant duly excepted.

Further controversy arose over remarks made by counsel for plaintiff in closing the case to the jury, but no request appears to have been made to the court to correct them, nor to check counsel and no exception saved of record.

There was a verdict for plaintiff for \$3,023.78. Motion for new trial was duly filed, overruled, exception saved, and an appeal duly perfected to this court by defendant.

Kinealy & Kinealy, for appellant. John S. Leahy, for respondent.

REYNOLDS, P. J. (after stating the facts as above). The learned and able counsel for appellant present four propositions or points as their assignments of errors in the case. The first point is directed to the remarks of the court before quoted when defendant offered to read from the bill of exceptions a portion of the testimony of witness Smidt on the former trial, and which remarks are alleged by counsel to be highly improper and prejudicial. The second point made is that defendant should have been permitted to read to the jury the letter to plaintiff's counsel in regard to removing the paper from the back of the receipt. The third and fourth

points are the alleged error of the court in refusing the first, second, and third instructions asked by defendant and refused.

Taking these up in the order mentioned, we do not agree with counsel that the remarks of the court excepted to were so prejudicial to the defendant as to warrant a reversal of the judgment. While it is true that our appellate courts have gone to great lengths in enforcing the nonintervention by the trial judge in many matters at the trial, it is not to be overlooked that much latitude is to be allowed that judge. He is presiding and has under his eye the manner and demeanor of counsel, and their manner of dealing with the witnesses, and, when the record taken as a whole shows that he is endeavoring fairly and impartially to conduct the trial, and keep counsel within proper bounds, his discretion and his efforts to conduct the case in an orderly manner are not to be interfered with, and are not ground of reversal unless manifestly unfair and improper. Human nature is no different on the bench than at the bar, and we are all familiar with the fact that, in the progress of a heated and vigorously contested case, any one, whether judge or counsel, may make quick and even heated remarks and retorts, and that, unconsciously perhaps, counsel appear unfair to a witness. But, to render remarks of the court reversible error, this court must be convinced from an examination of the whole record, and consideration of all the facts surrounding the circumstance, that they were made improperly, and were of a character to prejudice the case. In the case under consideration the remarks of the court were directed to secure fair treatment of the witness. It is as much the duty of the trial judge to protect the witnesses who are before it and subject to examination of counsel as it is to see to any other incident connected with the administration of justice and which lead to the orderly conduct of trials, and great latitude must be allowed the trial judge in the exercise of this duty. We see no reversible error, in fact, no error whatever, in the remarks to which exception is taken.

Nor do we think there was error in excluding the letter addressed by counsel on one side to counsel on the other as to submitting a paper which was in controversy to an examination outside, or even inside, of court. An examination outside of court is not in the control of the court in a case of this kind, and, as the examination of that very paper could be made in the presence of the court and the paper was in evidence before the jury, and was submitted to the inspection of the jury, counsel certainly had all the advantage of any disclosure or fact which an examination might reveal.

No authority is referred to in support of the assignment of error on the refusal of the first instruction asked by defendant, which is to the effect that failure of the defendant to testify was not to be taken adversely to him,

except section 4652, Rev. St. 1899 (Ann. St. 1906, p. 2520). All there is in that section as relevant to the point is as to the qualifications and disqualifications of witnesses. Reading the section throws no light on the matter contended for, and does not meet the point made. While in criminal cases the statute (section 2638, Rev. St. 1899 [Ann. St. 1906, p. 1569]) expressly prohibits any comment whatever to be made on the failure of the defendant to testify, we know of no authority which extends this to civil cases, and, as a matter of fact, courts have frequently commented on the failure of a party to testify in civil, particularly equity, cases. That is far from holding that the jury should be instructed that the reason a party in a civil case has not testified is because the other side has not waived the statutory disability. Such an instruction would be a serious reflection upon and prejudicial to the party who has merely exercised his lawful right. Especially should no such instruction be given in a case of this kind when the right is exercised in protection of the dead. Nor does it appear in this case that any comment whatever was made on the failure of defendant to testify to acts between him and the decedent. Furthermore, it distinctly appears in the record that when defendant, testifying in his own behalf, was asked by his counsel, after being shown the note in suit, whether or not he had signed it, counsel for plaintiff objected, and the court sustained the objection. Counsel for defendant thereupon said he thought they were entitled to know the ground of the objection. Whereupon the court said that the defendant is not a competent witness for anything that transpired before the administrator was appointed; that that is the rule, but it is not an iron-clad rule. Counsel for defendant then remarked that the objection might be waived, and asked whether the objection went to the form of the question or to the fact of incompetency. Thereupon counsel for plaintiff said that he placed the objection on the ground of the incompetency of the witness. It was therefore clearly before the jury that defendant was willing to testify but was shut off under the law by the objection of plaintiff. But we do not place our ruling on this ground, but on the ground that the instructions should not have been given under the circumstances or facts.

The last proposition relied on, as to the refusal of the court to give the second and third instructions, is not tenable. Those instructions are subject to the general criticism that they endeavor to shift the burden of proof of payment from the defendant to the plaintiff. Payment is an affirmative defense, the burden of which always and under all circumstances rests on the defendant. Moreover, to have given this instruction in the language asked would have had a tendency to mislead the jury and confuse them. It is doubtful if the

ordinary jury knows what rebutting proof is. The effect of this second instruction, if given, would have been, with any ordinary jury, to have caused them to think that the mere production of receipts was in itself such strong evidence of payment of this note that the burden had shifted. This is not the law. Furthermore, in the second refused instruction, the first clause of it, after advising the jury that, in the absence of sufficient rebutting proof, "it is the duty of the jury to find that deceased received from defendant on November 8, 1897, the sum of \$1,235.85, and also all the money which up to that time Edward Doyle had advanced to defendant," concluded, "and that plaintiff cannot recover in this action." This is so wrong in law that it would inevitably have misdirected the jury, and, if given as asked, would have compelled a reversal. The third instruction refused is not only obnoxious to most of the above criticism, but is an undue comment on particular evidence in the case, in effect telling the jury that the production of the receipts is such conclusive evidence of the fact that those sums had been paid, as to require affirmative evidence on the part of plaintiff to rebut this presumption. Both these instructions omit any reference to the necessity of the jury finding and believing from the evidence that payments evidenced by the receipts were made on account of the note in suit. That was the very point in controversy.

We have not thought it necessary to set out all the rather voluminous testimony in this case more at length, deeming it sufficient to say that there are sharp contradictions and also much of it going to the nature of the transactions between plaintiff and defendant, some of it having a tendency to put a very unfavorable construction on the acts of defendant in connection with the note sued on after the death of Doyle. After an examination of the testimony and the proceedings at the trial, we are satisfied the claims of the respective parties were so presented to the jury as to leave the determination of the issue turn almost entirely upon the credibility of witnesses and on the weight of the evidence. These are matters peculiarly within the province of the trial judge and the jury; and, finding no error tending to the manifest injury of the defendant in the rulings of the court on the admission and exclusion of testimony or in the giving and refusing of instructions, the judgment of the circuit court is affirmed. All concur.

BAILEY v. BAILEY.

(Kansas City Court of Appeals. Missouri.
Nov. 15, 1909.)

1. PROPERTY (§ 9*)—EVIDENCE—OWNERSHIP OF PROPERTY—RELEVANCY.

In an action by a widow against her father-in-law to recover a filly, which she claimed

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

defendant and deceased jointly mortgaged the filly to a bank was admissible to establish defendant's ownership, in connection with other evidence that thereafter defendant alone, in deceased's presence, executed a second mortgage on the filly to secure money for decedent's use.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9.*]

2. EVIDENCE (§ 220*)—OWNERSHIP OF PROPERTY—ADMISSIONS.

Where defendant and deceased had executed a mortgage on a filly in controversy, and thereafter defendant alone, in decedent's presence, executed a second mortgage thereon for decedent's benefit, such mortgage being lost or destroyed, parol evidence thereof was admissible as an admission by deceased that defendant was the owner of the filly.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-785; Dec. Dig. § 220.*]

3. WITNESSES (§ 160*)—COMPETENCY—ADMISSIONS OF DECEDENT.

In an action by a widow against her father-in-law to recover a filly claimed to have been the property of her deceased husband, the cashier of the bank, not a party to the action, was competent to testify to the execution of a chattel mortgage on the filly to the bank by defendant alone in the presence of decedent and for his benefit.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 696, 697; Dec. Dig. § 160.*]

Appeal from Circuit Court, Benton County; C. A. Denton, Judge.

Action by Maggie Bailey against John W. Bailey. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

W. S. Jackson and Barnett & Barnett, for appellant. Henry P. Lay, for respondent.

BROADDUS, P. J. This is a suit in replevin, brought by respondent against the appellant, before a justice of the peace, to recover the possession of a two year old filly. On trial de novo in the circuit court, the verdict and judgment were for plaintiff, and defendant appealed.

The respondent is the widow of one Fred W. Bailey, deceased, son of the appellant. The widow claims that the filly in controversy belonged to her deceased husband, Fred Bailey, at the time of his death, and her claim of ownership is through him. An order of the probate court was introduced in evidence showing administration on the estate of Fred Bailey was dispensed with, and the widow was authorized to receive and collect the money and assets of the estate belonging to her deceased husband, and it is claimed that the filly in question was a part of the assets of his estate. There was evidence on part of plaintiff showing declarations on the part of defendant to the effect that he spoke of the filly as belonging to his son Fred. On the other hand, there was evidence tending to show that Fred recognized the filly as the property of his father. The defendant offered in evidence, and

the 27th day of December, 1906, appellant and his son Fred made a mortgage to the Citizens' National Bank of Fairfield jointly mortgaging the said filly with other personal property. That in March, 1907, Fred, intending to go West, wanted \$100 to go on; but, as there was no other property on which to raise money, it was agreed between them and Hudson, the cashier of the bank, that he would take a mortgage to secure a payment of \$100 on the property already mortgaged, leaving out a span of black horses, with the agreement that the Baileys should sell the span, and with the proceeds pay off the first mortgage. And that Hudson was offered as a witness to prove the agreement, and that it was carried out, and that the first mortgage was paid off. As the second mortgage was said to be lost or destroyed, defendant offered to prove by witness Hudson that the mortgage was executed by defendant alone, and that Fred was present at the time, and knew what occurred. A third mortgage executed by defendant on the filly, purporting to be a renewal of the second, was also offered.

The court committed error in rejecting the evidence of the first and second mortgages and the evidence of the witness Hudson. The first, it is true, does not go far to show who was the owner of the filly, Fred or defendant; but it became important in its connection with the second. If Fred was present when defendant alone executed the second mortgage on the filly and assented thereto, it was evidence of the most persuasive character that the filly was not his property, but that of the defendant. It would stand like any other act or declaration of defendant claiming ownership in the property, with the assent and concurrence of Fred; and Hudson was a competent witness to prove what Fred said or did at the time. The fact that the latter is dead did not prevent Hudson's competency as a witness under the statute. The bank of which he was cashier was not a party to the suit or the cause of action. *Southern Commercial Bank v. Slattery*, 168 Mo. 620, 66 S. W. 1066. The statute has often been construed by the appellate courts of this state, and the decisions have not always been in line; yet we do not believe any court has ever held that one who was neither a party to the suit nor contract or cause in action was incompetent to testify as a witness. At common law the witness was competent.

The third, or renewal, mortgage, was properly excluded, as it amounted to a mere declaration by defendant of ownership of the property.

For the error noted, the cause is reversed and remanded. All concur.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

1. INTOXICATING LIQUORS (§ 69*)—LICENSE—DISCRETION AS TO GRANT.

Rev. St. 1899, § 2903 (Ann. St. 1906, p. 1717), providing that, where a petition for a liquor license is signed by two-thirds of the taxpayers in the block, and its requirements are complied with, the county court shall grant such license, is mandatory.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 70, 73; Dec. Dig. § 69.*]

2. INTOXICATING LIQUORS (§ 33*)—LOCAL OPTION ELECTION—ORDER—COLLATERAL ATTACK—MANDAMUS.

The findings by the county court, in passing on the question whether a local option election petitioned for shall be ordered, that one-tenth of the qualified voters in the county signed the petition, as required by Rev. St. 1899, § 3027 (Ann. St. 1906, p. 1733), and that a city in the county has less than 2,500 inhabitants which entitles its voters under such section to participate in the election, cannot be attacked on mandamus to compel the issuance of a liquor license pursuant to section 2993 (page 1717).

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 33.*]

On Petition for Rehearing.**3. EVIDENCE (§ 12*)—JUDICIAL NOTICE—CENSUS OF CITY.**

Courts do not take judicial notice of the number of inhabitants of a city because of a mere colorable proceeding by city officers for the purpose of defeating the adoption of the local option law therein, without substantial compliance with Rev. St. 1899, §§ 3028, 3300 (Ann. St. 1906, pp. 1735, 3147), providing for taking the census of cities.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 17; Dec. Dig. § 12.*]

4. CENSUS (§ 9*)—MUNICIPAL "CENSUS."

A "census" being "an official enumeration of the inhabitants with details of sex, age, family," etc. (6 Cyc. 725), the census of a city as provided by Rev. St. 1899, §§ 3028, 3300 (Ann. St. 1906, pp. 1735, 3147), means an official enumeration of the inhabitants and a public record thereof.

[Ed. Note.—For other cases, see *Census*, Dec. Dig. § 9.*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1026.]

5. INTOXICATING LIQUORS (§ 33*)—ELECTION—ORDER—COLLATERAL ATTACK.

A finding of fact by the county court, in passing on the question whether a local option election petitioned for shall be ordered, that "the pretended census" of a city was "fraudulent and void, and not based on any list, count, or enumeration of the inhabitants," is conclusive on an appellate court, on a collateral attack by mandamus to compel the issuance of a license to sell intoxicating liquors.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 33.*]

Appeal from Circuit Court, Lawrence County; F. O. Johnson, Judge.

Action in the name of the State, on the relation of Ed. Ryan, for mandamus to T. C. Wooten and others, as Justices, and B. F. Woodford, as Clerk, of the Lawrence County Court. From a judgment for defendants, relator appeals. Affirmed.

application for a dramshop license, said dramshop to be kept on lot 1 in block 28 of the city of Pierce City, in Lawrence county, and in every respect complied with the statutory requirements as a dramshop keeper. His application was refused, on the ground that the county court had made an order for the submission of the question of the adoption of local option under article 3, c. 22, of the Revised Statutes of 1899 (Ann. St. 1906, pp. 1733-1740), whereupon the relator filed his petition for mandamus in the circuit court of Lawrence county, praying that said court direct the county court to issue him a license as a dramshop keeper, or show cause for such refusal. An alternative writ of mandamus was issued. In due time the respondents T. C. Wooten, John J. Holt, and James Doyle, justices of the county court of Lawrence county, filed their return to the alternative writ, in which they admitted that the said Ed. Ryan, relator, at the time of filing his petition for a license as a dramshop keeper, possessed all the statutory requirements, and that his petition was in conformity with the requirements of the dramshop law, but that his petition had been denied on the ground that proceedings were pending for a vote under the local option law. The return further stated that, on the 6th day of January, 1909, a petition in due form, signed by one-tenth of the qualified voters of said county who resided outside the corporate limits of the city of Aurora, had been presented to the county court, asking said court to order a special election to be held in Lawrence county to determine whether spirituous and intoxicating liquors, including wine and beer, should be sold outside the corporate limits of the city of Aurora. The return further stated that on the 9th day of January, 1909, after an examination, the county court granted the prayer of the petitioners, ordered a special election to be held for the purpose of determining whether intoxicants should be sold in Lawrence county, and fixed the date of the election and form of tickets, in compliance with article 3, c. 22, Rev. St. 1899. It further appeared from the return that notice of such election was duly published in the papers designated in the order; that the election was held in pursuance to said order; that in due time the votes were canvassed, a majority of the votes cast being against the sale of intoxicating liquors, and the result of the election was duly certified. There is no contention in this case that the notice of the local option election was not in conformity with the statute, nor is there any objection made by the relator to any of the proceedings of the county court,

*For other cases see same topic and section NUMBER in Dec. & Ann. Digs. 1907 to date, & Reporter Index.

the petition for a special election was filed, and thereafter, that it then had a population of more than 2,500 inhabitants, and that the voters in said city were, under the orders of the county court, entitled to vote at such local option election. It further appears from the return of the respondents to the alternative writ that, at the time the petition for said local option election was pending, and its sufficiency was under consideration by the county court, the question arose before the county court as to whether Pierce City had a population of more than 2,500 inhabitants; that as to such question a hearing was had, and the court heard testimony offered by both sides as to the population of Pierce City. Among other evidence considered was a census of Pierce City, purporting to have been officially taken under order of its board of aldermen, for the year 1904, and another for the year 1907, each tending to show a population of more than 2,500 inhabitants. The county court, after hearing all the testimony, upon consideration of the question, found that the city of Aurora was the only town or city within said Lawrence county having a population of more than 2,500 inhabitants, that Pierce City, a city within said county, had a population of less than 2,500 inhabitants, and that the pretended censuses of the said city for 1904 and 1907 were each false, fraudulent, and void, and that the pretended returns and results of each of said censuses were not based upon a list, count, or enumeration of the inhabitants of the said city of Pierce City, whereupon the county court proceeded to order a special election under the local option law as hereinbefore stated.

The relator filed a motion for a peremptory writ and for judgment on the return. This motion was by the circuit court overruled, the alternative writ was quashed, and judgment entered that relator's bill be dismissed. In due time, the relator filed his motion for a new trial, in which he set up that the county court had no authority to declare that the said city of Pierce City did not have 2,500 inhabitants at the time the order was made for holding the local option election. This motion was overruled, and he has perfected his appeal to this court.

W. Cloud and Thos. Carlin, for appellant.
Archie L. Hilpert, Charles L. Henson, and
W. B. Skinner, for respondents.

NIXON, P. J. (after stating the facts as above). The statute concerning dramshops (section 2993, Rev. St. 1899 [Ann. St. 1906, p. 1717]) provides that, when the petition for a dramshop license is signed by two-thirds of the assessed taxpaying citizens in the block, and its requirements are complied with, the county court shall grant such license. This statute is mandatory when the petitioner complies with the requirements.

107 S. W. 1064; State ex rel. v. Meyers, 80 Mo. 601; Bean v. County Court, 33 Mo. App. 635; State ex rel. v. McCannon, 111 Mo. App. 626, 86 S. W. 510; Harlan v. State, 136 Ala. 150, 33 South. 858. In this case it is conceded that all the requirements of the statute were complied with by the relator, and the sole question remaining for our decision is as to the validity of the local option election; the only ground upon which said election is assailed being that Pierce City was, at the time the petition for the election was filed, a city in Lawrence county with a population of more than 2,500 inhabitants, and that under the orders made by the county court the voters residing in such city were authorized to vote on the question of the sale of intoxicating liquors. Section 3027 of the Revised Statutes of 1890 (Ann. St. 1906, p. 1733) contains the following language: "Provided, that at an election ordered under the provisions of this section, no one shall be entitled to vote who is a resident of any incorporated town having a population of twenty-five hundred inhabitants or more."

This proceeding by mandamus was an indirect attempt to contest the validity of the local option election. The adjudication of the validity or invalidity of such an election is a collateral question to the direct relief sought, namely, the issuance to relator of a dramshop license. The relator's right to such license depends upon the adjudication of the collateral question as to whether the city of Pierce City, at the time the petition for the election was presented, had a population of 2,500 inhabitants or more. The county court, at the time the petition was presented to them asking for a special election, heard the evidence on both sides, and found "that the city of Aurora was the only town or city within said county having a population of 2,500 inhabitants or more, and that the city of Pierce City was a city within said county having a population of less than 2,500 inhabitants." We cannot, in the present indirect attack on that finding, review the evidence upon which the judgment of the county court was founded, and set aside their finding because not supported by sufficient evidence. It is a settled rule that mandamus cannot be made the instrument for giving a court jurisdiction of litigation on collateral matters. State ex rel. v. Martin, 55 Fla. 538, 46 South., loc. cit. 426; Underwood v. Commissioners, 67 Conn. 411, 35 Atl. 274; Kennon v. Blackburn, 127 Ky. 39, 104 S. W. 908, 31 Ky. Law Rep. 1246; Hammond v. Darlington, 109 Mo. App., loc. cit. 345, 84 S. W. 446; 2 Spelling on Injunctions and Other Extra. Rem. (2d Ed.) §§ 1386-1440; High's Extra. Leg. Rem. (3d Ed.) § 189. The finding of the county court that one-tenth of the qualified voters signed the petition, and that Pierce City was a city with a pop-

ulation of less than 2,500 inhabitants, is res adjudicata, and such finding cannot be attacked in the present collateral proceeding. *State v. Rinke* (Mo. App.) 121 S. W. 159; *State v. Searcy*, 39 Mo. App. 393; *State v. Dugan*, 110 Mo. 138, 19 S. W. 195; *State v. McCord*, 207 Mo. 519, 106 S. W. 27, 123 Am. St. Rep. 410. "Whether the vote was legally taken or not is entirely collateral." *People v. Hamilton*, 27 Misc. Rep. 363, 58 N. Y. Supp. 959. The total vote in Lawrence county at the local option election was 2,686 votes against the sale, and 1,005 votes for the sale, of intoxicating liquors, a majority against the sale of 1,681 votes. This decision against the sale of intoxicating liquors "should be upheld by every reasonable intendment." *People v. Hamilton*, supra.

From the foregoing examination of this case, it clearly appears that the law has given us its mandate to uphold and maintain, and not invalidate the expressed will of the electors of Lawrence county at the local option election.

The order of the trial court overruling relator's motion for judgment and quashing the alternative writ and dismissing his bill is hereby affirmed. All concur.

On Petition for Rehearing.

In this case, appellant has filed a petition for rehearing, and has argued the same with great ardor and insistence.

Upon reconsideration, we are unable to shut our eyes to the fact that one of the enumerators who took the census in question in the city of Pierce City was prosecuted for a misdemeanor under section 6300 of the Revised Statutes of 1899 (Ann. St. 1906, p. 3147), for willfully falsifying the returns of such census; that he pleaded guilty to the criminal charge, and at the present term of this court the judgment of conviction was affirmed. Aside from any question of fraud in the taking of this so-called census, the argument of appellant's counsel proceeds upon false premises in that he assumes in this case that the county court of Lawrence county and all other courts were required to take judicial notice of the taking of the census in question and the entry of the result on the records of the city. The paramount question is, Was there a census taken such as is contemplated by the statutes under section 3028 (page 1735) and section 6300? A mere colorable proceeding on the part of the board of aldermen without any substantial compliance with the law, as to the taking of such census, for the purpose of defeating the adoption of the local option law in the city of Pierce City, would not import any notice of the number of the inhabitants of the city of Pierce City.

A question arose for consideration before the county court of Lawrence county, at the time the petition for the local option election

was filed, whether any census, in the legal acceptance of that term, had in fact been taken in the city of Pierce City; that is, whether any enumeration was made that could be called a "census" within the meaning of sections 3028 and 6300 of the Revised Statutes of 1899. The "census," as provided for by these sections of the statutes, can only mean an official enumeration of the inhabitants and a public record thereof. "A census is an official enumeration of the inhabitants with details of sex, age, family," etc. 6 Cyc. 725. A census of the city of Pierce City would be an official enrollment of the inhabitants of said city. Such an enrollment or registration of the people when taken would become a public document, to be preserved in the archives of the city, where it might be subject to the inspection of all those who were interested. "A census is not merely a sum total, but an official list containing the names of all the inhabitants." *City of Huntington v. Cast*, 149 Ind. 250, 48 N. E. 1025. At the time the petition for the local option election was presented to the county court of Lawrence county they were required to determine as to whether there had been any census taken of the inhabitants of the city of Pierce City, such as in contemplation of law would constitute a census. The result of their investigation is stated in the following finding and order: "The court, after hearing all the evidence offered, finds that the pretended censuses of the city of Pierce City were false, fraudulent, and void, and not based upon any list, count, or enumeration of the inhabitants of the city of Pierce City." Such finding by the county court that there had been no legal census taken is conclusive on an appellate court on a collateral attack.

The petition for rehearing is accordingly denied. All concur.

STATE ex rel. KELLEY v. WOOTEN et al. (Springfield Court of Appeals. Missouri. Nov. 3, 1909. On Petition for Rehearing, Dec. 6, 1909.)

1. CERTIORARI (§ 64*)—NATURE AND PURPOSE. On certiorari, only such matters as appear on the face of the record which go to the jurisdiction can be reviewed.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. §§ 174, 175, 183, 184; Dec. Dig. § 64.*]

2. CERTIORARI (§ 78*)—MATTERS REVIEWABLE. There being no provision for preserving the evidence taken before the county court and making the same a part of the record, such evidence cannot be reviewed on certiorari.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 146; Dec. Dig. § 58.*]

3. CERTIORARI (§ 29*)—NATURE AND PURPOSE. Where a tribunal had jurisdiction, certiorari does not lie to correct mere errors in the exercise of such jurisdiction.

[Ed. Note.—For other cases, see *Certiorari*, Cent. Dig. § 42; Dec. Dig. § 29.*]

review the proceedings of T. C. Wooten and others, as Justices, and B. F. Woodford, as Clerk, of the Lawrence County Court. There was a judgment dismissing the petition and denying a new trial, from which relator appeals. Affirmed.

This litigation is rooted in a local option election held in Lawrence county on February 13, 1909, at which a majority of the votes were cast against the sale of spirituous and intoxicating liquors. The relator, in his petition for a writ of certiorari, alleged that at the time of the vote on local option, the city of Pierce City was a municipal corporation of more than 2,500 inhabitants, and duly incorporated as a city of the fourth class, that relator was mayor, and a taxpayer, of said city, and that prior to such vote said city had two licensed saloons, from which it was deriving a revenue of \$2,000 per year, and that by reason of said vote, said city was prevented from exercising its charter powers to license and regulate the sale of intoxicating liquors within its limits, and was deprived of the \$2,000 license tax. The relator prayed that the circuit court, by its writ of certiorari, should require the respondents, who are the justices of the county court of Lawrence county, to certify to the circuit court a complete copy of their acts and proceedings in relation to the election, "including all documents considered by them in the determination of the population of Pierce City." The trial court issued the writ of certiorari in the usual form, containing no reference to the production of the documents referred to in relator's petition. The respondents, however, in their return, make ample amends by furnishing a voluminous supply of documentary evidence relating principally to the census of the city of Pierce City—one taken in 1904, and another in 1907—showing, or tending to show, a population of 2,500 inhabitants or more. Further, it appears by respondents' return that, at the time the petition was presented to the county court asking for a local option election, a controversy arose, and two sides appeared before the county court and offered evidence as to the population of Pierce City; one side claiming that two censuses had been taken of the inhabitants of the city of Pierce City, and the other side challenging such censuses on the ground that they were not an official enumeration or list of such inhabitants, but simply a sum total reported by the enumerators, and were a fraudulent pretext devised and designed to defeat the adoption of local option in the city of Pierce City.

The county court, after hearing the evidence offered, made an order of which the following is a part: "And the court, after hearing testimony offered and being fully ad-

more, and that the city of Pierce City is a city within said county having, at the time of said petition a population of less than 2,500 inhabitants, and that the pretended census of said city of 1904 and another of 1907 are each false, fraudulent, and void, and the pretended returns and results of each of said censuses were not based upon any list, count, or enumeration of said city of Pierce City." It is conceded by relator that the petition, notice, canvass of votes, and all the subsequent proceedings of the county court conformed to the requirements of the statutes governing local option elections, except its finding of the number of inhabitants of the city of Pierce City. In the trial court the relator filed a motion for judgment on the respondents' return, and asking that the proceedings of the county court be quashed, which motion was by the trial court overruled, and judgment entered that relator's petition be dismissed. A motion for a new trial was duly filed and overruled, and the case is here for hearing on appeal.

W. Cloud and Thos. Carlin, for appellant.
Archie L. Hilpert, Charles L. Henson, and W. B. Skinner, for respondents.

NIXON, P. J. (after stating the facts as above). It was unquestionably the purpose of the relator, in suing out the writ of certiorari in this case, to have the documentary evidence, offered before the county court at the time the petition for a local option election was presented, brought up in the respondents' return and reviewed by the trial court, so as to thereby secure a retrial of the question whether or not Pierce City, at the time of the filing of such petition, was a municipal corporation of more than 2,500 inhabitants. This belief that the writ of certiorari can be used to accomplish any such purpose is a total misapprehension of the functions of such writ. The writ of certiorari only brings up the record, and only such matters as appear on the face thereof which go to the jurisdiction of the tribunal to which the writ is directed can be reviewed by such writ. *Ward v. Board of Equalization*, 135 Mo. 309, 36 S. W. 648; *State ex rel. v. Madison County Court*, 136 Mo., loc. cit. 326, 37 S. W. 1126. The county court is of statutory origin, having neither common-law nor equitable jurisdiction. No provision has been made for preserving evidence taken before it and making it a part of the record. Therefore the evidence adduced before such court on the hearing of habeas corpus (or writ of certiorari), even if reviewable, is no part of the record proper, nor could it be made so in the absence of statutory enactment providing for so doing by bill of exceptions or otherwise; hence such evidence is not the subject of review

here. There is nothing for us to pass upon save the record proper. *State ex rel. v. Madison County Court*, 136 Mo., loc. cit. 327, 37 S. W. 1126; *State ex rel. v. Walbridge*, 62 Mo. App. 162; *Hannibal and St. J. R. R. Co. v. State Board*, 64 Mo. 308; *State ex rel. v. Bland*, 168 Mo., loc. cit. 7, 67 S. W. 580; *State v. Common Council*, 53 Minn. 238, 55 N. W. 118, 39 Am. St. Rep. 595; *Baizer v. Lasch*, 28 Wis. 271.

The record proper in this case, which we can only consider, consists of the petition presented to the county court for a special election and the orders of record made concerning such election, the notice of the local option election with proof of the publication of the same, and the abstract and certificate of the canvass of the votes cast showing the results of the election. At common law, and in those states which have not departed materially therefrom (of which Missouri is one), the accepted doctrine is that, where a tribunal has jurisdiction, a writ of certiorari does not lie to correct mere errors in the exercise of rightful jurisdiction. 4 *Ency. of Pl. & Prac.* 98; *State ex rel. v. Smith*, 101 Mo. 174, 14 S. W. 108; *Railroad v. State Board*, 64 Mo. 294; *State ex rel. v. Edwards*, 104 Mo. 125, 16 S. W. 117; *State ex rel. v. Shelton*, 154 Mo. 670, 55 S. W. 1008, 50 L. R. A. 798; *State ex rel. v. Moniteau County Court*, 45 Mo. App. 387. To cite more cases in support of this principle is "wasteful and ridiculous excess."

As the law has given us no commission, under the showing made in this case, to set aside the order of the county court of Lawrence county calling a special election to vote upon the question of local option in said county, for the reasons herein stated the judgment of the circuit court quashing the writ of certiorari and dismissing the petition of the relator is hereby affirmed. All concur.

On Petition for Rehearing.

For reasons stated in the opinion denying the petition for rehearing in the case of *State of Missouri ex rel. Ed. Ryan, Appellant, v. T. C. Wooten et al., Respondents*, 122 S. W. 1101, the petition for a rehearing in this case is denied. All concur.

UNITED BREEDERS' CO. v. WRIGHT.

(Kansas City Court of Appeals. Missouri.
Nov. 15, 1909.)

1. CONTRACTS (§ 94*)—NEGLIGENCE—EFFECT.

A competent business man, laboring under no disability, is bound by a contract signed by him without reading it, on the representation that the adverse party was in a hurry to catch a train.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 420-430; Dec. Dig. § 94.*]

2. JUSTICES OF THE PEACE (§ 98*)—PLEADING—FILING WRITTEN INSTRUMENT—JURISDICTION.

In a suit in justice's court on account for goods sold and delivered, the failure of plaintiff to file the written contract for the purchase of the goods, does not affect the jurisdiction of the court.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 335; Dec. Dig. § 98.*]

Appeal from Circuit Court, Andrew County; A. D. Burnes, Judge.

Action by the United Breeders' Company against C. R. Wright. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

J. B. Majors, L. W. Booher, and Hine & Cross, for appellant. J. A. Sanders, S. Fee, and P. C. Breit, for respondent.

JOHNSON, J. This case was before us on a former appeal (134 Mo. App. 717, 115 S. W. 470), and was reversed and remanded. A second trial resulted in a verdict and judgment for defendant, and the cause is here again on the appeal of plaintiff. We refer to our former opinion for a statement of the facts and our views on the law of the case.

When we remanded the cause for another trial, we thought perhaps facts not brought out by defendant might exist, which, if adduced, would give a different cast to the case; but we find the evidence in the present record to be substantially the same as that before considered. In our opinion we spoke of defendant's admission that he had been careless in signing the contract. In the last trial, apparently thinking he had "put his foot in it" by that admission, defendant denied admitting he had been careless, and said he had only confessed to being negligent. He then declared he had not been negligent, "because I didn't have a chance to be negligent." Of course, no differentiating effect should be accorded such quibbling. The law will characterize his conduct, regardless of his own opinion about it. He was inexcusably careless. Being a competent business man, laboring under no disability, he had no business signing a contract without reading it, merely because the man who asked him to sign it was in a hurry to catch a train. We declare as a matter of law that his own fault was the sole cause of the predicament in which he finds himself, and since he admits that the goods were received by him, and it is conceded he has paid but \$60 on the account, there was no issue of fact to go to the jury, and the learned trial judge should have directed a verdict for the remainder due on the contract price of the goods.

This being a suit on account for goods sold and delivered, there is no merit in the point that the justice of the peace acquired no

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jurisdiction of the action because of the failure of plaintiff to file the written contract.

The judgment is reversed, and the cause remanded. All concur.

ATTERBURY et al. v. WEST et al.

(Kansas City Court of Appeals. Missouri. Nov. 13, 1909.)

1. MUNICIPAL CORPORATIONS (§ 697*)—BAND STAND IN STREET AS "CONTINUING NUISANCE"—RELIEF BY INJUNCTION.

A band stand in the street is a "continuing nuisance," where, so long as it remains and is used for the purpose of its construction, it will interfere with merchants in their business, and hence injunction will lie against it after its completion.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1503; Dec. Dig. § 697.*]

For other definitions, see Words and Phrases, vol. 2, pp. 1509, 1510.]

2. NUISANCE (§ 72*)—PUBLIC NUISANCES—INJUNCTION BY INDIVIDUALS.

The law is that injunction by individuals will not lie to prevent a nuisance, where the injury complained of is common to the public at large; but it does not apply when the injury to plaintiffs is special, and they have suffered, and will suffer, damage over and above the injury to the community at large.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-179; Dec. Dig. § 72.*]

Appeal from Circuit Court, Chariton County; John P. Butler, Judge.

Action by H. C. Atterbury and others against W. D. West and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

H. J. West and Jones & Conkling, for appellants. Benecke & Benecke and Lozier, Morris & Atwood, for respondents.

BROADDUS, P. J. This is an action by certain property owners to restrain the alleged unlawful obstruction of a public street in the incorporated town of Mendon, Mo., and for a judgment for its removal. Plaintiffs are joint owners of four lots at the intersection of Main and Third streets in said town, upon which there is a building occupied by them as an implement, vehicle, and harness store, and also for general merchandise purposes. This building fronts on Main street, which is one of the principal thoroughfares of the town, and about 76 feet in width between the sidewalks. Plaintiffs' evidence tended to show: That the entire space was used by the public; that it was especially needed by plaintiffs as a means of free access by their patrons to their place of business; that the crowds of people who would be attracted to hear the music of the band would obstruct free communication, of persons who might desire to

buy, with plaintiffs; that defendants Engleman, Hubbard, Stewart, and Lowe constituted the board of aldermen of the town; that defendant West was the mayor; that defendant Backus was the leader of a brass band; that said defendants as mayor and board of aldermen authorized the erection of and participated with defendant Backus in constructing, and causing to be constructed, upon said street in front of plaintiffs' place of business, a wooden structure about 13 feet square and 13 feet high, to be used as a stand for a brass band; that the erection of the structure was an obstruction to the street and interfered with free access to plaintiffs' place of business by their patrons; and that they will suffer in consequence of the erection and use of said structure, injury over and above that shared by the general public. In addition, it appeared that plaintiffs were the owners of the fee to the center of said street, subject to the public use, and that the structure was situated on that part of which they were such owners. It appeared from the evidence that the structure had been completed before the trial, wherefore plaintiffs asked and were granted permission to amend their petition to conform to the evidence and to include a prayer for an abatement of the nuisance. The amendment was made as proposed. The court found for the plaintiffs, and decreed that the said mayor and aldermen remove the obstruction within 30 days, and the defendant Backus was enjoined from using it for musical practice or entertainments as located. The defendants appealed.

In the first place, defendants complain that the amendment was unauthorized for the reason that the original petition did not state a cause of action. Without going into particulars, we are of the opinion that the petition did state a good cause of action, and that there was no abuse of discretion by the court in allowing the amendment.

The principal question, however, raised by the appellants, is that, as the structure had been completed before the commencement of the action, injunction will not lie. It is held that: "Injunction lies only for a threatened wrong for which no adequate legal remedy is afforded, and a court of equity will not issue an injunction to prevent the performance of an act already consummated." *Carlin v. Wolff*, 154 Mo. 530, 51 S. W. 679, 55 S. W. 441. And we find this general statement in *Verdin v. City of St. Louis*, 131 Mo., loc. cit. 117, 33 S. W. 502, that: "The appropriate function of a writ of injunction is to afford preventive relief only, * * * and it is only to be used for the prevention of future injury actually threatened." The law is similarly stated by many legal authorities; but we will confine our consideration of the question to what

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

has been said by our own court. The case of *Carlin v. Wolff*, supra, was commented on by this court in *Downing v. Corcoran*, 112 Mo. App. 645, 87 S. W. 114. The opinion reads: "It is suggested that the acts complained of are now, and were at the beginning of the proceeding, accomplished facts, and equity will not undertake to restrain the doing of things already done. The case of *Carlin v. Wolff*, 154 Mo. 534, 51 S. W. 679, 55 S. W. 441, is cited to sustain the suggestion. * * * That rule of law was stated in that case to the single and isolated act of obstructing an alley." It was consequently held not to apply to instances of a series of continuous wrongs. In *State v. Franklin*, 133 Mo. App. 486, 113 S. W. 652, the proceeding was to compel defendant to remove an obstruction from the street which consisted of a stable and fences. It was held that the state, through its law officer, the prosecuting attorney, may maintain proceedings in equity to abate the nuisance. And the Supreme Court has declared the law to be that it is settled beyond all dispute that the equitable relief of preventing and abating a nuisance may be sought on one proceeding in a court of equity. *Baker v. McDaniel*, 178 Mo., loc. cit. 468, 77 S. W. 531. *Sherwood, J.*, who delivered the opinion in *Carlin v. Wolff*, supra, said, in *Paddock v. Somes*, 102 Mo., loc. cit. 240, 14 S. W. 749, 10 L. R. A. 234, that: "The question of nuisance having been established at law, and, where this has been done, the court will grant an injunction as a matter of course, where, as here, such nuisance is of a continuous or constantly recurring character." Since the decision in that case, the courts are holding that it is not necessary to first establish the fact of the existence of the nuisance by a court of law before equity will interpose to prevent and abate it, but that the equity power of the court extends and embraces every feature of the case, as is said in *Baker v. McDaniel*, supra.

There is no conflict in the decisions of the state when properly analyzed. The acts complained of constitute a continuing nuisance by reason of the fact that, so long as it remained and was used for the purpose of its construction, it would operate to interfere with the plaintiffs in their business as merchants.

Much of appellants' brief and argument is predicated upon the theory that an unjunction will not lie, where the injury complained of is common to the public at large. Such is the law; but, as we have seen already, it has no application, because the injury to plaintiffs is special, and they have, and will, suffer damage over and above the injury the community at large will suffer. *Baker v. McDaniel*, supra.

Affirmed.

FRUIN et al. v. MEREDITH et al.

(St. Louis Court of Appeals. Missouri. Nov. 16, 1909.)

1. MUNICIPAL CORPORATIONS (§ 564*)—SPECIAL TAX BILLS—ACTIONS—LIMITATIONS—"PAID."

St. Louis City Charter, art. 6, § 25, as amended in 1901 (Ann. St. 1906, p. 4863), providing that tax bills for public improvements shall be divided into not less than three nor more than 7 equal parts, payable in annual installments, the first payable 30 days after notice, provided that, where bills are not paid in installments, the lien thereof shall terminate within two years after their date, gives the right to pay special assessments in installments, and, where tax bills are so payable, an action is not barred in two years, though the holder of the bills elects to adjudge all the installments due on default in payment of the first installment, the word "paid" in the proviso meaning "payable," so that the proviso will read that, where bills are not payable in installments, the lien shall terminate within two years after their date.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1273; Dec. Dig. § 564.*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5156, 5157.]

2. STATUTES (§§ 181, 206*)—CONSTRUCTION—MEANING OF WORDS.

A statute must be so construed as to give every part of it effect, and to carry out the manifest intent of the Legislature, so as to avoid an absurd result.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 259, 263, 283; Dec. Dig. §§ 181, 206.*]

3. MUNICIPAL CORPORATIONS (§ 456*)—SPECIAL TAX BILLS—VALIDITY.

Where lots fronting on a street and extending back to a parallel street were by the use of the owner made into one lot for purposes of assessment for an improvement of the street, St. Louis City Charter requires the lots to be assessed as one lot, and the line for assessment must be drawn midway between the street and the parallel street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1085; Dec. Dig. § 456.*]

4. APPEAL AND ERROR (§ 1010*)—MUNICIPAL CORPORATIONS (§ 558*)—SPECIAL TAX BILLS—ACTIONS—FINDINGS OF TRIAL COURT.

An action on a special tax bill is an action at law, and the conclusion of the trial court on the facts is conclusive, where it is supported by substantial testimony.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010; * *Municipal Corporations*, Cent. Dig. § 1265; Dec. Dig. § 558.*]

5. MUNICIPAL CORPORATIONS (§ 568*)—SPECIAL TAX BILLS—ACTIONS—EVIDENCE.

In an action on special tax bills on distinct lots, defended on the ground that the use by the owner had made the lots one lot for purposes of assessment, evidence held to support a finding that the lots remained distinct lots for assessment, and that the special tax bills were valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1282; Dec. Dig. § 568.*]

6. APPEAL AND ERROR (§ 1071*)—HARMLESS ERROR—TRIAL BY COURT—DECLARATIONS—INSTRUCTIONS—REFUSAL.

Where the court trying a cause without a jury had a correct conception of the law as applicable to the facts, and correctly applied it, the mere failure to give specific declarations, the principle covered by which is embodied in declarations given, is not ground for reversal; but, to warrant a reversal for such failure, it must appear that the principle covered by the declarations had either not been given in other declarations, or had been incorrectly declared.

[Ed. Note. For other cases, see Appeal and Error, Cent. Dig. § 4234; Dec. Dig. § 1071.*]

7. MUNICIPAL CORPORATIONS (§ 567*)—SPECIAL TAX BILLS—ACTIONS—DEFENSES.

The defense, in an action on special tax bills issued against distinct lots, that one tax bill should have been issued against all the lots, on the ground that they were one for purposes of assessment, is available under the general denial.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1281; Dec. Dig. § 567.*]

8. MUNICIPAL CORPORATIONS (§ 485*)—SPECIAL TAX BILLS—VALIDITY.

The courts should not invalidate special tax bills on doubtful grounds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1140; Dec. Dig. § 485.*]

9. MUNICIPAL CORPORATIONS (§ 485*)—SPECIAL TAX BILLS—CONCLUSIVENESS.

The questions whether a street improvement was made in accordance with the contract and at a reasonable price, and was an improvement enhancing the value of the property assessed, are not open to inquiry, in an action on special tax bills.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1144; Dec. Dig. § 485.*]

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

Action by Jeremiah Fruin and others against C. A. Meredith and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

The facts in the case are set forth so fully by counsel for the appellants that opposing counsel have filed no counter statement, and it is so satisfactory to the court that we adopt practically all of it, so far as it goes, as set out by counsel. It is as follows:

"This is an action, in the usual form, for the enforcement of four special tax bills for the improvement of Warne avenue, against a parcel of ground in city block No. 3,545, of the city of St. Louis, lying between Warne, Florissant, and Mary avenues, as shown upon the plat filed with the abstract. Four bills were issued against this property on the theory that it comprised four distinct lots, known as Nos. 1, 2, 3, and 4, fronting on Warne avenue. The petition is in four counts, one for each tax bill. The petition alleges, and the evidence shows that the tax bills were issued on the 5th day of January, 1906, and were, on the same day, registered in the office of the board of public improvements and in the comptroller's office,

and certified and delivered to plaintiffs, and that on the 12th day of January, 1906, the defendant C. A. Meredith acknowledged in writing the service of notice of the bills and demand for payment of the same. Each of the bills had attached to it seven installment coupons, in accordance with the charter and the ordinance authorizing the improvement, the first installment being due on February 12, 1906, 30 days after the notice had been given of the issuance of the bills, and the remaining installments at yearly intervals thereafter, until all had been paid. Default was made in the payment of the first installment, and each count of the plaintiff's petition contains the following language: 'Plaintiffs have elected, and do elect, to treat all of said installments and the interest thereon as due February 12, 1906, the date when defendant defaulted in the payment of the first installment of said special tax bill as provided by the charter of the city of St. Louis.' The petition was filed January 11, 1908.

"Three distinct defenses were raised by the answer: (1) That the lien of the special tax bills sued upon had expired by limitation, under the terms of section 25 of article 6 of the amended charter of the city of St. Louis. (2) That the tax bills were erroneously issued, in that lots 1, 2, 3, and 4 were treated and taxed as separate and distinct lots; whereas, they had, by use, become one lot within the meaning of the charter. (3) That the taxing district had been improperly defined, in that the total depth of lots 1, 2, 3, and 4 had been included in the taxing district, although the improvements upon the consolidated lot were built to front, and said lot was treated by the defendants as fronting, on Florissant avenue, in consequence whereof the line bounding the taxing district should have been drawn midway between Warne and Mary avenues.

"The theories of the answer were later embodied in three declarations of law, asked on behalf of the defendants, one of which the trial court gave, and two of which it refused to give. The declaration given by the court is as follows: '(3) The court declares the law to be that if the court sitting as a jury should find from the evidence that the four lots respectively described in the four counts of plaintiff's petition are adjacent, that the owners of said property have, in the use thereof, disregarded the lines of said platted lots and have treated the said four lots as one lot, then the portion of the cost of improving Warne avenue, properly assessable against said land of defendants, should have been assessed against said four platted lots as one lot, and the tax bills herein sued upon being assessed against said platted lots, separately, are invalid, and plaintiffs cannot recover thereon.'

"The two declarations refused by the court are as follows: '(4) The court declares the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

law to be that if the court, sitting as a jury, should find from the evidence that the land described in the four tax bills herein sued upon consists of four lots, as shown by a recorded plat, that said lots as platted fronted on Warne avenue, the street improved, and extended to Mary avenue, the next parallel or converging street; and if the court sitting as a jury should further find that the defendants, owners of the said land, before the improvement of Warne avenue and the issuance of the special tax bills herein sued upon, had by their use of the said lots disregarded the lines of said lots as platted and had used and treated said four lots, or any two or more of them, or fractions thereof, as one lot, and had used the portion of said land so used as one lot as fronting upon Florissant avenue, instead of fronting on said Warne avenue, then the line of the taxing district for the assessment of three-fourths of the cost of improving Warne avenue should, under the provisions of the charter of the city of St. Louis, have been placed midway between said Warne avenue and Mary avenue, the next parallel or converging street on the west of said Warne avenue, in the portion of said platted lots so used as one lot fronting on Florissant avenue, and the court therefore finds that as the said district line was, as to said portion of said land, placed at the east line of said Mary avenue, instead of midway between said Mary avenue and Warne avenue, the said taxing district was not established according to the provisions of the charter of the city of St. Louis, and the tax bills herein sued upon are illegal and void, and the judgment must be for the defendants. (5) The court declares the law to be that if the court, sitting as a jury, should find from the evidence that the tax bills herein sued upon were issued and delivered to plaintiffs on January 5, 1908, and that no installment of any said special tax bills has been paid, and that suit to enforce the collection of said special tax bills was not commenced until the 11th day of January, 1908, then the said special tax bills are barred by limitation.'

"The evidence showed that the property in controversy was bought by defendant Meredith as vacant property, from the Franklin Bank, on October 29, 1897, and that in 1903 he erected on lots 1, 2, and 3 a two-story brick building containing stores and flats; that three of the stores, occupied, respectively, as a millinery shop, a shoe store and a grocery, fronted on Florissant avenue, and only one store, occupied as a butcher shop, fronted on Warne avenue; that the first three stores were numbered on Florissant avenue; and that the flats above the shoe store and grocery were reached from Florissant avenue, that above the millinery shop from Mary, and that above the butcher shop from Warne avenue. There was also testimony that the Florissant avenue side of the building was constructed of better brick than

the Mary and Warne avenue sides; that it had an ornamental coping which did not extend around the other sides; that the entire construction indicated that the Florissant avenue side was the front. The evidence further showed that the parts of lots 1, 2, and 3, not built upon, together with lot 4, were used as a common yard by various of the tenants for the storage of wagons, and by all the tenants as a playground for their children, for hanging out the wash, and for other purposes; that all the tenants used a common ashpit, situated on the rear of the premises; and that the butcher and the grocer jointly used a stable built on lots 3 and 4."

We will add to the foregoing statement of counsel that an inspection of the plat in evidence shows that the space occupied on Florissant avenue by the buildings is 62.62 feet, while the space covered by the buildings on Warne avenue is 73.18 feet. The total front of the four lots on Warne avenue is 110.48 feet; on Florissant, 62.62 feet. There are no buildings on Warne avenue on that part of lot 4, 25 feet, or on 12.30 feet of lot 3. Whatever improvements are on lot 4 consist of a frame stable, which covers 27.45 feet of lot 4, and about 12 feet of lot 3, and these are on Mary avenue. The ashpit in the rear of lot 3 is on Mary avenue. The building on the corner of Mary and Florissant avenues, occupied as a millinery store, is 63.35 feet on Mary avenue by 22.35 on Florissant. It should also be noted that, in addition to offering the special tax bills and of the service of notice of the issue of them and demand for payment, a plat showing the lot lines and improvements was in evidence, which was prepared by a draftsman employed in the special tax department of the city of St. Louis, who testified that the lot lines were taken from the official plat book. He also described the character and location of the buildings which he had marked on the plat. There was a stipulation of facts, by which, among other things, it was stipulated: That the plat introduced in evidence is a true and correct plat of lots 1, 2, 3, and 4, in city block 3,545, covering the premises in controversy, and that it correctly shows the boundaries and dimensions of said lots and the location of the improvements thereon; that lots 1, 2, 3, and 4 were conveyed by the Franklin Bank to one Meredith, in 1897, and in the deed of conveyance the lots were described as fronting on Warne avenue; that in 1902 the brick buildings on lots 1, 2, and 3 were erected, and the stable on lots 3 and 4 was erected in 1907; that in 1902 Meredith and wife executed a deed of trust to the Franklin Bank, trustee, in which deed of trust the lots were described as fronting on Warne avenue; that in 1907 the lots were conveyed by Meredith and wife to the defendant Fountain Real Estate & Investment Company, the lots being described in that conveyance as

improvements, that the tax bills now in suit had been issued to them; that on January 12, 1906, notice of the issuance of the tax bills had been delivered to the defendant Meredith, the record owner of the property on that date; and that no part of the tax bills had been paid. The eighth clause of the stipulation was to the effect that, prior to and since the improvement of Warne avenue, for which the tax bills were issued, taxes for state, school, and city purposes have been levied and assessed against lots 1, 2, 3, and 4, in city block 3,545, as fronting on Warne avenue, and that the taxes so levied and assessed had been paid by the defendant Meredith. Defendants' counsel objected to this paragraph on the ground that the facts stated were immaterial. The court overruled the objection, and plaintiffs accepted. The files were introduced to show commencement of suit January 11, 1908. The tax bills themselves were in evidence, and defendants introduced testimony tending to prove the use of the lots as one lot, and going fully into the character and location of the buildings; all this evidence being directed to prove that the use of the property was as one lot, although it also appears that the several buildings are occupied by various and different tenants.

At the instance of plaintiffs, the court gave two declarations of law. The first was to the effect that if the tax bills sued on were issued and delivered to plaintiffs on January 5, 1906, and notices of their issue served on defendant Meredith, the record owner of the property in suit, on January 12, 1906, and suit to enforce collection of the special tax bills was commenced on January 11, 1908, then the court declares the law to be that the tax bills are not barred by limitation. The second declaration of law is to the effect that the court declares the law to be that if, sitting as a jury, it finds from the evidence that the property in suit was platted into lots fronting on Warne avenue and extending to Mary avenue, and that the special tax bills were issued against the lots as platted, and that the lots were assessed for general taxes as fronting on Warne avenue, before and after the improvement of that avenue by plaintiffs, and that the taxes so assessed were paid by defendant Meredith, and that after the issuance of the tax bills sued on Meredith conveyed the property to the Fountain Real Estate & Investment Company, and in the deed of conveyance described the lots as fronting on Warne avenue, and if the court further finds from the evidence that, before the improvement of Warne avenue by plaintiffs, a building had been erected on parts of lots 1, 2, and 3, consisting of stores and flats, and that part of the building fronts on Florissant and the remainder on Warne avenue, and that the frame shed or stable on lot 4 was

and by the tenant of the butcher shop on Warne avenue, and that the remainder of lots 1, 2, 3, and 4 was used in common by tenants in said building, then the court declares the law to be that the frontage of lots 1, 2, 3, and 4 has not been changed by user from Warne avenue to Florissant avenue, and the special tax bills sued on were properly issued. Exception was saved to the giving of these declarations by the defendants, and, as before noted in this statement, the court gave the third declaration of law asked by defendants, but refused the fourth and fifth. These have been heretofore set out. The first and second declarations of law asked do not appear in the record; but no point is made on their refusal.

There was a finding for plaintiffs and judgment in their favor for the full amount of the bills sued on, with interest, and they were severally adjudged to be liens against the four lots described. Motion for rehearing was filed, overruled, exception saved, and the case brought to this court on appeal by the defendants.

Walther & Muench and David Goldsmith, for appellants. Geo. D. Harris, for respondents.

REYNOLDS, P. J. (after stating the facts as above). While counsel for appellants saved exception to the giving of the declarations of law on behalf of plaintiffs and to the refusal to give two of the three which defendants asked, in presenting the case to us, they make but three points: First, that suit had not been brought on the tax bills within two years after date of the bills; the bills being dated January 5, 1906, the suit having been brought January 11, 1908, and no installments having been ever paid. That the lien had expired under the provisions of section 25, art. 6, of the Charter of St. Louis (Ann. St. 1906, p. 4863). Second, that the purchase of the lots by the defendant Meredith, and the erection of improvements thereon and subsequent use thereof, in total disregard of platted lot lines, made the four lots but one lot, for the purposes of this assessment, and therefore but one tax bill should have been issued against the property, instead of separate bills for each of the original lots. And, third, that the undisputed evidence shows that the improvements erected upon the consolidated lots made up of lots 1, 2, 3, and 4, fronted on Florissant avenue, and it was therefore improper, in defining the taxing district for the improvement of Warne avenue, to include the whole of the lot to Mary avenue. That the line should have been drawn through the property midway between Warne and Mary avenues, so as to include only one-half of the property.

Taking up the propositions involved in the

order named, we cannot agree with the contention of the learned and experienced counsel for appellants that the suit is barred on these tax bills by the special limitation in the charter of the city of St. Louis, as amended in 1901. Counsel for appellants cite no authority for this contention, except section 25, art. 6, of the Charter of St. Louis, as amended in 1901. This section 25, art. 6, provides that the special tax bills authorized by the charter, "for the construction or reconstruction of streets, avenues, highways, boulevards or district or joint district sewers, shall be divided into not less than three, nor more than seven, equal parts, as may be provided by the ordinance authorizing such improvements, payable and collectible in installments as follows: The first installment shall become due and payable thirty days after notice of the issuance thereof, without interest; the second installment shall become due and payable one year after such notice; the third installment, two years; the fourth installment, three years; the fifth installment, four years; the sixth installment, five years; and the seventh installment, six years after such notice; provided, however, that the owner or any person having an interest in the property charged with a tax bill may pay the same in full at any time within thirty days after notice as aforesaid, without interest, and such owner or person having an interest may pay such tax bills in full at any time by paying interest thereon as follows: If paid at or before maturity and more than thirty days after notice, as aforesaid, at the rate of six per cent. per annum from date of notice to date of payment; if paid after maturity at the rate of six per cent. per annum from date of notice to date of maturity, and at the rate of eight per cent. per annum from date of maturity to date of payment; all interest shall be payable annually from date of notice of the issuance of tax bills. If any installment of any such special tax bills, or any interest on any installment, be not paid when due, then, at the option of the holder thereof, all remaining installments shall become due and collectible, together with interest thereon as aforesaid. Suits may be brought to enforce the payment of such special tax bills, or any installment or installments thereof, with any interest due on any installment, in the manner herein provided for the bringing of such suits on other special tax bills." Following this is the provision for the limitation of the lien of special tax bills, in which are the following provisions: "Whenever any special tax bill issued heretofore, or hereafter to be issued, to a contractor or contractors, shall be paid, it shall be entered satisfied on the register in the comptroller's office, and the lien of any bills so issued that is not entered satisfied within two years after its maturity, unless proceedings in law shall have been commenced to collect the same within that time, and shall still be pending shall be destroyed and

of no effect against the land charged therewith; provided, however, that where bills are not paid in installments, the lien thereof shall terminate within two years after their date, unless such proceedings shall have been commenced within that time and be still pending."

The real contention over this limitation clause turns upon the meaning of the word "paid" in the proviso. To repeat that proviso as written, it is: "That where bills are not paid in installments, the lien thereof shall terminate within two years after their date, unless such proceedings shall have been commenced within that time and be still pending." The date of these bills was January 12, 1906, notice of issue served January 12, 1906, and this action instituted January 11, 1908. Construing the sections together, and having reference to the charter before it was amended, we agree with counsel for respondents that this word "paid," as here used, should be read "payable," so that that proviso would read: "That where bills are not payable in installments, the lien shall terminate within two years after their date." We can give the clause no practical or sensible interpretation, unless it is so read. This section 25 of the charter, as it now stands, distinctly gives the right of payment of these assessments by installments, which "shall be divided into not less than three, nor more than seven, equal parts," the first installment becoming due and payable 30 days after the notice of issue thereof, the second installment becoming due and payable one year after notice, and the subsequent installments becoming due and payable at intervals of one year thereafter, so that the seventh installment is due and payable six years after notice of issue, and, if the bill is divided into seven payments, the last installment would be due and payable about six years after the notice of the tax bills. Therefore, if this proviso is to be read literally, right of action on them would have terminated or their lien would have fallen before they were payable. That cannot be. We may suppose this case: That the debtor owner of the property against whom the tax bill is issued, having the right to pay in seven installments, has paid the first within the 30 days after notice, the second one year after notice, the third two years after notice, the fourth three years after notice, and makes default in the payment of the fifth installment. Thereupon, under the law, the sixth and seventh become due and payable, but the unfortunate holder of the tax bills has then lost his lien and cannot enforce payment of it, because more than two years have elapsed after their date. That applies when the bill has been divided into seven installments, which is the maximum number allowed. Mark that the charter provision is mandatory: "Shall be divided into not less than three, nor more than seven, equal parts." Suppose they are divided into three installments, the minimum. The owner pays the

last hour of the last day of the second year has elapsed, and cannot be sued until the beginning of the third year. If sued then, as more than the two years have elapsed, suit is barred, and the lien of that installment of the tax bill lost. Any such construction leads to an absurdity, which most certainly is not to be tolerated any more in the construction of charter provisions and ordinances than in statutory law. Surely no such result was contemplated in the use, in this proviso, of this word "paid." Following the well-settled rule of construction that laws are to be so construed as to give every part of them effect, and to carry out the manifest intention of the framers and makers of them, and so as to avoid an absurd result, we can arrive at no conclusion other than that this particular word "paid," construing it in connection with the whole paragraph, is to be read and construed as if the word "payable" had been used. That construction being applied to the case at bar, the claim made as to this action, being barred, falls, and there was no error in the action of the trial court in refusing to declare the law as asked by the defendants on this branch of the case.

In support of their second proposition, that the user of the lots by the owners made them but one lot for the purposes of this assessment, and that but one tax bill should have been issued against the property, instead of separate bills for each of the original lots, the learned and experienced counsel for defendants cite the charter of the City of St. Louis (article 6, § 14 [Ann. St. 1906, p. 4854]), and these cases: *State ex rel. Skrainka v. St. Louis*, 211 Mo. 591, loc. cit. 607, 111 S. W. 89; *Paving Co. v. Peck*, 186 Mo. 506, loc. cit. 516, 85 S. W. 387; *Wolfert v. City of St. Louis*, 115 Mo. 139, loc. cit. 144, 21 S. W. 912; *Kemper v. King*, 11 Mo. App. 116; *Hill-O'Meara Co. v. Sessinghaus*, 106 Mo. App. 163, 80 S. W. 747; *Heman Construction Co. v. Loevy*, 64 Mo. App. 430. This is the real point in issue; that is, whether the user of the lots made them one lot. If so, the charter not only requires that they be assessed as one lot, but that the line for assessment should have been drawn midway between Warne and Mary avenues, and not at Mary avenue; in brief, only one-half and not all, of their area should have been included for purposes of assessment for the improvement of Warne avenue.

The third proposition advanced by counsel for appellants, that the undisputed evidence in the case shows that the improvements erected upon the consolidated lots, made up of the four lots, had a frontage on Florissant avenue and not on Warne avenue, and that it was therefore improper in defining the taxing district for the improvement on Warne avenue to include the whole of the lot to Mary avenue, but that a line should be

timately connected with the above proposition that we will discuss them together. As specifically in support of this, the case of *Collier Est. v. Western Pav. & Supply Co.*, 180 Mo. 362, 79 S. W. 947, is cited. An examination of this, as well as of the other cases above cited, fails to convince us that the action of the lower court in giving and refusing the declarations of law covering this branch of the case, and in finding contrary to the contention of counsel for appellants, was erroneous. With the plat, and with the testimony of the witnesses before it on the question of user, it was a question of fact for the trial court to determine whether the user had changed the lots from four lots, as platted, into one lot. In the instructions given, both for the plaintiffs and the defendants, the trial judge distinctly recognized as law that user could effect such a change; that they must be treated as one for the purposes of the issue of special tax bills, when they are in fact used as one lot. This is an action at law. It was so treated by the court and the parties. Hence the conclusion of the court on the facts, if that conclusion is supported by substantial testimony, is conclusive upon this court. The principles of law announced in the *Collier* and *Skrainka* Cases were, in our opinion, followed in this case; the court, in the case at bar, finding, on the facts, that the lots were to be assessed as four lots, and that the evidence of user had not altered the situation. In the *Collier* Case, on the facts there in evidence, a different conclusion was reached. So that we think that, in disposing of this case, the trial court was in entire harmony with the law as handed down in this and in the other cases cited.

Complaint is made of the refusal to give the declaration of law asked by defendants and marked in the foregoing statement (4). If this case had been tried before a jury, it is possible that defendants would have been entitled to have had that given as an instruction. The parties have a right to have the jury fully instructed on their theory of the law; but this was a trial before the court without a jury, and when it appears, as it does in this case, that the trial judge has a correct conception of the law as applicable to the case on trial, and has correctly applied it, mere failure to give specific declarations, the principle covered by which is embodied in declarations given, is not ground for reversal. It must appear, to warrant reversal for failure to give a declaration of law asked, that the principle covered by the declaration had either not been given in other declarations, or had been incorrectly declared; that the refusal of the declaration shows that the trial judge misconceived the law. That was not the case here. The trial judge recognized through

the trial, and by the declarations he did give, the principle covered by this fourth refused instruction.

It is suggested by counsel for respondents, in his very fair argument, that the defense that one tax bill should have been issued, instead of four, was not raised in the answer of appellants, and cannot be considered on appeal. While citing several authorities claimed to be in support of this proposition, counsel very frankly cites us to *Cushing v. Powell*, 130 Mo. App. 576, loc. cit. 579, 109 S. W. 1054, 1055. An examination of that case shows that in an exceedingly well-considered opinion by Judge Ellison, of the Kansas City Court of Appeals, that learned jurist holds that a defense of the character here referred to is admissible under the general issue. Referring to pleading in connection with these special tax bill cases, Judge Ellison says: "In this case it was necessary for plaintiff to prove that he had a valid lien subject to enforcement against defendant's property. It took, of course, several proper steps or legal proceedings to finally take the form of a tax bill as a valid lien on the defendant's property. The omission of these would prevent the proceeding ripening into a valid tax bill and lien—would show that the lien and bill never had arisen or been brought into existence. Therefore a general denial should let in such evidence." We think that an application of the rule here so clearly set out answers the suggestion of counsel for respondent. This is a minor consideration, however.

We have not undertaken to go into a lengthy discussion or analysis of the cases cited, or into the matter of special tax bills. The law in this state in relation to these matters of street improvements and of the assessment of property for payment thereof may be said to be fairly well settled. It certainly is so far as concerns the main question in this case. Even if we had the power to disturb the finding of the trial court on the question of the weight of evidence, we would not be disposed to do so in a case of this character, having in mind the great importance to the people of the city of St. Louis, and, for that matter, the people of the various cities of the state, in which public improvements are being made, of not only not overturning or disturbing tax bills, on doubtful or debatable grounds, but of holding fast to the law declared. Not only should there be stability of decision in this class of cases, but the bills for public works, issued by public servants, should carry with them at least some presumption that the officers charged with the duty of issuing them have correctly discharged that duty. The contractor does not make out these bills. They are made out by officers of the public. On the ability of the contractors to collect on these bills, when so made, depends, not

only the making of improvements themselves, but the cost of the improvements to the property owners, as also the general public. If these tax bills are to be overthrown for slight cause, and on doubtful evidence, or on strained and technical construction of the law itself, the consequences are almost disastrous. They thereby become so discredited and so much under suspicion that responsible parties will be loth to enter upon contracts for public work. Few contractors can carry on great public works entirely with their own funds, and they must borrow. The banks and financial institutions will be loth to loan or to make advances to contractors on account of anticipated payment which must be made out of these tax bills, and the uncertainty connected with the payment of the bills will not only hinder public improvements, but largely enhance the price of these improvements themselves.

If therefore this was a doubtful case on the evidence, and on that the learned trial judge has concluded us, and inasmuch as there is no pretense that this improvement was not made on Warne avenue, and no pretense that it was not made in accordance with contract, and at fair and reasonable prices, and as it was an improvement that undoubtedly went to the enhancement of the value of the property of these defendants, none of which matters, however, are open to inquiry in this case, for it stands on the tax bills alone, we would decline to disturb the finding of the lower court, and it is affirmed. All concur.

WILLIAMSON v. WABASH R. CO.

(Kansas City Court of Appeals. Missouri.
Nov. 15, 1909. Rehearing Denied
Dec. 6, 1909.)

1. EVIDENCE (§ 586*)—POSITIVE AND NEGATIVE TESTIMONY—RELATIVE VALUE.

Probative force is accorded to negative testimony, where the opportunity of the witnesses to receive knowledge of the fact is approximately equal to that of witnesses who give positive testimony concerning it, but where, because of an impaired sense or of an admitted lack of attention, the opportunity of the witness who did not see or hear is not equal to that of a witness who did, the testimony of the former is devoid of evidentiary strength.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2432-2435; Dec. Dig. § 586.*]

2. MASTER AND SERVANT (§ 236*)—INJURY OF SECTION HAND—NEGLIGENCE.

Where plaintiff, a section hand, was upon the track trying to remove a hand car knowing that a regular train was approaching which would assert a right of way over him and his hand car, and there was nothing to keep him on the track but his own heedlessness or preoccupation, and he had not the slightest excuse for remaining there until the train knocked him off, he was negligent as a matter of law.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 739; Dec. Dig. § 236.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

3. MASTER AND SERVANT (§ 248*)—INJURY TO SECTION HAND—KNOWLEDGE OF PERIL—HUMANITARIAN DOCTRINE.

When an engineer sees a section hand at work on the track, there is nothing to suggest to the engineer that he is oblivious to his danger, and will not step off in time to avoid being struck, but, where there is that in the appearance of the section hand which indicates the existence of real peril, the engineer should exert himself to avoid injuring the man, and in such a case the humanitarian doctrine is applicable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 801-804; Dec. Dig. § 248.*]

4. MASTER AND SERVANT (§ 289*)—INJURY TO SECTION HAND—KNOWLEDGE OF PERIL—HUMANITARIAN DOCTRINE.

Defendant's engineer while 600 feet away discovered that plaintiff, a section man, had his feet against one of the rails, and his body extended almost horizontally across the track, endeavoring to lift a hand car from the track with his shoulder. Plaintiff's position was extremely awkward, and it would require some time and effort to extract himself. A collision with the hand car could not be avoided, but there was ample time to whistle the danger signal, and, had plaintiff heeded it, he could have escaped. *Held* that, notwithstanding plaintiff's negligence, he was entitled to go to the jury on the issue of last clear chance negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1132; Dec. Dig. § 289.*]

5. TRIAL (§ 191*)—INSTRUCTIONS.

Where the court in charging the jury assumed that plaintiff, a section hand, injured from being struck by a train, had no knowledge of the near approach of the train and of his peril, these being controverted facts and both material, the instruction was erroneous, it being a question for the jury whether he was oblivious to his peril, and, if he knew of his peril, the jury might find that he wantonly exposed himself, thereby losing the protection of the humanitarian doctrine.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 430; Dec. Dig. § 191.*]

Appeal from Circuit Court, Randolph County; A. H. Waller, Judge.

Action by William Williamson against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

J. L. Minnis and Robertson & Robertson, for appellant. M. J. Lilly, for respondent.

JOHNSON, J. This suit is for damages for personal injuries alleged to have been caused by the negligence of defendant. Verdict and judgment were for plaintiff in the sum of \$3,500, and the cause is here on the appeal of defendant.

The injury occurred about 5 o'clock p. m. April 13, 1908, at a point on defendant's railroad about 1½ miles south of Cairo. Plaintiff was a section hand in the service of defendant on the section between Cairo and Moberly. The gang had been working about 1,000 feet north of the place of the injury. A south-bound regular freight train, some time overdue, was observed by the foreman to arrive at Cairo, whereupon he ordered some of the men to go for the hand car which was on

a dump some distance north. When the men returned with the hand car, the foreman ordered plaintiff and another hand to load the tools on the car, and take it south to another dump. According to the testimony of plaintiff, the foreman said: "You take this hand car down there, and put the tools on it, and set it off the track, but put all the tools on it first and set it off. No. 70 (the freight train) is up there. I think you have plenty of time." In obedience to this order, plaintiff and his fellow workman, after the car was loaded, ran it down to the place indicated, and proceeded to remove it to the dump which was on the west side of the track. They lifted and pushed the forward end of the car around to the dump, and then plaintiff went around to the rear end to push the car westward until it would clear the track. To do this he was compelled to take a position between the rails. In pushing the car westward the rear wheels became stuck or obstructed in some way, retarding the clearing of the track. Plaintiff testified: "I was trying to get the car off the track, and I had my head down kinda, and was trying to lift the car up, and it got caught some way. I don't know how. I had my head down looking under the car trying to raise it up. I was trying to raise the car up to get it off the track, * * * and the first thing I knew I didn't know nothing." At this time the locomotive collided with the hand car, and plaintiff was struck and severely injured. In their argument on the demurrer to the evidence counsel for defendant earnestly contend that plaintiff was guilty of negligence in law which directly caused or at least contributed to his injury; and, further, they argue that the facts and circumstances in their aspect most favorable to plaintiff disclose no cause of action under the "humanitarian doctrine."

Facts and circumstances in evidence which are pertinent to the questions argued thus may be stated: Plaintiff says, in substance, that he did not see the train at any time, did not know it was so near at hand when he was striving to push the hand car off the track, and did not hear any warning of its approach. He does admit the foreman told him the train was coming, and on cross-examination testified: "Q. You were working as fast as you could? A. Supposed to be. Q. What were you taking that car off for? A. For No. 70. Q. No. 70 that was coming? A. Yes, sir." The dump to which plaintiff was trying to move the hand car was quite near the whistling post for a road crossing some distance south. All the witnesses introduced by plaintiff, except plaintiff himself and one other, state the whistle sounded the road crossing signal when the locomotive was about 600 feet north of the dump. Plaintiff and this witness say they did not hear the whistle, but plaintiff attempts to exonerate

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

himself from the imputation of neglecting his own safety by the claim that he had become engrossed in his work, and the other witness admitted on cross-examination that he is "pretty hard of hearing," and "was absorbed in his work." The country through which the train was running is an open prairie, and the train was going up a slight grade in approaching the hand car. At the point where the engine whistled for the crossing there is a slight curve in the track. The engineer introduced as a witness testified: "As I approached the curve, I could see right straight across, and could see the whistling board, and could see the hand car setting on the dump and the whistling board in the middle, setting in the middle, and that put me of the opinion that it was in the clear. As I approached a little closer, I saw that it was not in the clear, and I went around the curve a little bit further and saw this hand car, about 600 feet from the whistling board, and the very minute I saw the man on the track, and he was laying down with his left shoulder against the hand car and his feet up against the opposite rail, trying to push the hand car over, and, as soon as I seen him, I shut off the steam, and put on the emergency, and give the whistle, two longs and two shorts. He was laying with his left shoulder against that hand car, and looking me straight in the eye. Q. When you saw him in that position, you did what, Mr. Moeller? A. Shut off the steam, throwed the brake and emergency, and give the whistle. Q. Two longs and two shorts, I believe you said? A. Yes, sir. Q. How far were you from the men when you gave the whistle? A. 500 or 600 feet. Q. How far was you when you got through giving the whistle? A. I judge I would be 400 or 500 feet. I suppose I must have run about that. Q. The car was cross-ways the track, and he was down with his feet against the opposite rail? A. With his shoulder against the hand car. Q. He was shoving, and he had his face turned toward the engine? A. Yes, sir; looking me in the eye. Q. Did you stop as quick as you could? A. Yes, sir. Q. Well. A. When I found out that he was not going to get off the track, I stuck my head out of the window and waved at him and hollered at him as loud as I could, and then he raised to his feet, and, instead of going this way (indicating), he backed up, and I went underneath the car with the pilot and struck him. * * * Q. When he was on the ground as you have testified that he was, with his feet against the rail and his shoulder against the hand car, you were only 60 feet from him, 60 feet away? A. Just about; yes. Q. How long had he been in that position? A. He was trying to push the hand car. Q. Was that the position in which you first discovered him? A. Yes, sir. Q. After you discovered his peril, instead of continuing to sound the whistle, you stuck your head out of the cab and hollered at him. A. I hollered and whistled for him." Other witness-

es for plaintiff who were paying close attention deny that any warning was given by the whistle after the crossing signal.

We shall assume, as conclusively proved by evidence introduced by plaintiff, that the crossing signal was given when the locomotive was not more than 600 feet from the hand car, and was in plain view. The statements of plaintiff and his witness of defective hearing are valueless, and cannot be suffered to raise an issue of fact. We accord probative force to negative testimony where the opportunity of the witnesses to receive knowledge of the fact is approximately equal to that of witnesses who give positive testimony concerning it. *Butler v. Railway*, 117 Mo. App. 354, 93 S. W. 877. But where, because of an impaired sense or of an admitted lack of attention, it is apparent that the opportunity of the witness who did not see or hear is unequal to that of the witness who did see or hear, the testimony of the former should be rejected as wholly devoid of evidentiary strength. The rule thus is stated in 2 *Moore on Facts*, § 1188: "If a credible witness with apparently adequate opportunity for observation testifies to the occurrence of a fact, no conflict arises by the testimony of other witnesses that they were cognizant of the occurrence, where the latter witnesses' opportunities for observation are not stated, or where it affirmatively appears that their situation was such or their attention was so engrossed with other matters that they probably would not have observed the fact if it had occurred, or where their opportunities were not co-extensive with those of the witnesses who testify positively to the fact." But we shall treat as an issue of fact the statement of the engineer that he sounded the whistle when the engine was about 60 feet from the hand car, since that statement is contradicted by the testimony of witnesses who were giving attention and whose opportunity to know the real fact was equal to that of the engineer. Therefore, for the purposes of the demurrer to the evidence, we shall assume that the crossing signal was given, and that the whistle was not sounded again before the collision. That the peril of plaintiff was created by his own negligence is a conclusion not open to serious doubt. As a section hand it was his duty to be on the lookout for trains, and to keep out of their way, and he "had no right to become so engrossed in his work as to become heedless of his danger and as not to take proper precautions to observe the approach of trains." *Sissel v. Railroad*, 214 Mo., loc. cit. 523, 113 S. W. 1107; *Clancy v. Transit Co.*, 192 Mo., loc. cit. 657, 91 S. W. 522. The prime object of the operators of a railroad is—or at least should be—the service of the public. The business is highly complex, and calls for a strict adherence to system and discipline. Trains in the service of the public must be run on schedule, and not be impeded by track

ing, and that the accident was caused by the negligence of the engineer over him and his hand car. There was nothing to keep him on the track but his own heedlessness or preoccupation, and he had not the slightest excuse for remaining there until the train knocked him off. His peril was the result of his own negligence.

But counsel for plaintiff have not made the mistake of basing their cause of action on negligence that might be made innocuous by contributory negligence. They argue that their client acted in a proper manner, but in the petition, evidence, and instructions they plant plaintiff's case squarely on the humanitarian doctrine; and the principal question for our decision is whether or not they have made out a case under the principle and rules of that doctrine. Were it not for the testimony of the engineer, we would declare that plaintiff had no case. As was said by the Supreme Court in *Evans v. Railroad*, 178 Mo., loc. cit. 517, 77 S. W. 518, quoted approvingly in *Sissel v. Railroad*, supra: "It will not do to apply this rule in all its strictness to sectionmen whose business it is to work upon and keep in repair railroad tracks, for they are supposed to look after their own personal safety, and to know of the time at which trains pass, to look for them and see them, and to move out of the way. It is of common knowledge that these men often voluntarily wait until trains get dangerously close to them, and then step out of danger and let them pass by, and to require trains to stop upon all such occasions when sectionmen are discovered at work on the track would not only be imposing upon railroads unjust burdens, but would greatly interfere with traffic and travel." When an engineer sees a section hand at work on the track and has good reason to believe the man is aware of the approach of the train, there is in the bare fact that the man remains on the track until the very last instant nothing to suggest to the engineer that he is oblivious to his danger, and will not step off in time to avoid being struck; but, whenever there is that in the appearance of the section hand that would indicate the existence of real peril, the engineer should exert himself to avoid injuring the man. In such situation the facts that the man is a section hand, and, in the exercise of his duty, should get out of the way, sink into insignificance, and give way to the all controlling fact that a human being is in peril, and the engineer has the means at hand for saving him. The engineer says that, when plaintiff was 600 feet away, he discovered that plaintiff had his feet planted against the east rail and his body extended

looking towards the train, but, be this as it may, plaintiff was in an extremely awkward position, one from which it would require some time and effort to extricate himself. He was not in the situation of a person who has but a step or two to take to reach safety, and we think it was for the jury to say whether or not there was an appearance of peril to a reasonably careful and humane man in the position of the engineer. If there was, the engineer should have made reasonable use of the means at his command to save this foolish person. It appears that he could not avoid a collision with the hand car, but it also appears that he had ample opportunity to whistle the danger signal. Had he done so, the inference is reasonable that plaintiff would have heeded the warning and escaped. We conclude that, despite his own negligence, plaintiff was entitled to go to the jury on the issue of last chance negligence.

But the judgment must be reversed and the cause remanded on account of prejudicial error in the first instruction given at the request of plaintiff. In that instruction the court assumes as proved the fact that plaintiff had no knowledge of the near approach of the train and of his peril. These were controverted facts and both were material. If, as the engineer says, plaintiff was looking at the approaching train and had time to escape, it is, at least, a question of fact for the jury whether he was oblivious to his peril; and, if he had knowledge of the real extent of his peril, his act in remaining therein would entitle the jury to find that he wantonly exposed himself to a danger of which he had full knowledge and from which he could have escaped. The beneficial principle of the humanitarian doctrine is for the protection of the negligent and careless, and not of the wanton. To illustrate, suppose a man were to throw himself in front of a train with the intention of committing suicide, would not conclusive proof of that fact end all question of responsibility, regardless of whether or not the engineer might have stopped the train? And in this case it may be asked—and there could be but one answer to the question—what would have been the use of signaling a danger to plaintiff of the existence of which he already had full knowledge? The facts assumed by the court were of the very marrow of the case, and should have been included among the facts in issue.

For this error, the judgment is reversed and the cause remanded. All concur.

1. DIVORCE (§ 298*)—CUSTODY OF CHILDREN—PARAMOUNT CONSIDERATION.

In awarding the custody of children in divorce proceedings, the wishes of the parents should only receive a subordinate consideration; the paramount consideration being the welfare of the child.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 781; Dec. Dig. § 298.*]

2. HUSBAND AND WIFE (§ 278*)—CONTRACT OF SEPARATION—ENFORCEABILITY.

A contract between husband and wife, by which they agree to live apart and which disposes of the custody of the children, will not be enforced.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1046-1053; Dec. Dig. § 278.* Contracts, Cent. Dig. §§ 515, 517.]

3. DIVORCE (§ 312*)—APPEAL—CROSS-PETITION—ALLEGATIONS—PRESUMPTIONS.

Where the husband's cross-petition in a suit for divorce alleged many acts of misconduct on the part of the wife, but did not specifically charge adultery, it will be presumed, on the wife's appeal from a modification of the decree as to custody of the children, that the decree given the husband did not include a finding that the wife was an adulteress.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 312.*]

4. WORDS AND PHRASES—FITNESS OF PARENT—"DEPRAVED."

A person is depraved when he is generally bad, is wicked in mind and heart, loves evil rather than good, and, though a single act of adultery may be considered strong evidence of depravity, it is not conclusive.

5. DIVORCE (§ 298*)—CUSTODY OF CHILDREN—DEPRIVITY OF PARENT.

Plaintiff, a divorced woman, spent the two nights previous to her marriage with her present husband in a hotel with him; they having registered as husband and wife. Since her marriage she had been leading a good life. Held, that her relation with her present husband should be regarded as a single transgression, and not such a manifestation of a depraved disposition, as to render her unfit to retain the custody of an 11 year old daughter of the former marriage.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 784; Dec. Dig. § 298.*]

Appeal from Circuit Court, Carroll County; John P. Butler, Judge.

Laura Knepper, now Laura Knepper Huckleberry, against Frank Knepper. From a judgment modifying a decree of divorce, plaintiff appeals. Reversed.

James F. Graham and Jones & Conkling, for appellant. Lozler, Morris & Atwood, for respondent.

JOHNSON, J. The issue before us is raised by the divorced parents of Allie Knepper, a female minor, now 11 years old. The appeal is prosecuted by the mother from a judgment modifying the decree of divorce in which the custody of the child was awarded the mother. After their marriage, the parties lived together as husband and wife until Feb-

ruary and a girl, established her home at Bosworth. Before the separation, the parties lived on a farm south of Bosworth. They sold the farm to J. C. Huckleberry, and also disposed of their personal property preparatory to the separation. On the 15th of February, 1907, they entered into a written contract by the terms of which they agreed to live apart, and settled all questions relating to the division of their property. That contract contained the agreement that the mother should have the custody of the children for two years, after which she should retain the little girl, and the boy should go to the father. Plaintiff then instituted the present suit. In the petition she alleged certain indignities committed against her by defendant, and prayed for a divorce, and for the custody of the children, but did not pray for alimony. Defendant filed an answer and cross-petition, in which he alleged acts of misconduct on the part of plaintiff, chiefly acts which, if true, inculpated plaintiff with Huckleberry. When the cause came to trial in September, 1907, plaintiff dismissed her petition, the court heard the evidence introduced by defendant, and decreed "that the defendant, Frank Knepper, be divorced from the bonds of matrimony contracted with the plaintiff, Laura Knepper, and be forever freed from the obligations of said marriage. It is further ordered that plaintiff, Laura Knepper, have the care and custody of Allie Knepper, minor child born of said marriage, and that defendant have the care and custody of Warren Knepper, minor child born of said marriage, and that each party pay one-half the costs." On March 18, 1908, defendant filed a petition for review, in which he prays that he be given the custody of the daughter on the ground of the moral turpitude of the mother, and alleges that, since the decree of divorce was rendered, plaintiff has been guilty of immoral conduct with Huckleberry. A trial of the issues presented by this petition and plaintiff's reply resulted in a judgment awarding the custody of the child to defendant "on condition that the latter obtain a suitable home for said child and shall pay the necessary expenses for its maintenance; it further appearing that said Frank Knepper has secured a home for said child at the home of Richard Morris, and that said Richard Morris and wife are suitable persons to have the care and custody of said child." It is provided that the children shall be permitted to visit plaintiff once every month, and that plaintiff may visit them on suitable occasions.

The evidence adduced by defendant tends to establish the following facts: Defendant and Huckleberry were neighboring farmers. Huckleberry became a frequent visitor at defendant's home, and an intimacy sprang up between him and Mrs. Knepper. Defendant's

he outwardly preserved a friendly attitude toward the man he now claims defiled his home. Most of the visits of Huckleberry were either on the express or implied invitation of defendant. The excuse offered for such complaisance is that defendant was so cowed by his wife that he acquiesced in her plans for the companionship of Huckleberry even when his mind had become charged with suspicion that his wife's affections were being alienated from him. After the separation, Huckleberry frequently called on Mrs. Knepper at her home in Bosworth. Neighbors saw his horse or team hitched in front of the house, and the tongue of gossip wagged furiously. In the following January, Huckleberry and Mrs. Knepper left Bosworth to be married in Kentucky. They went to Carrollton by different trains, and boarded a train at Carrollton for St. Louis, where they arrived at 11 o'clock at night. They went to a hotel, and Huckleberry registered them as husband and wife. They went to the room assigned them, where, according to the testimony of plaintiff, Huckleberry remained for an hour "talking business" with her, and then went to another hotel. The next night they spent at a hotel in Louisville, and again Huckleberry registered them as man and wife. Plaintiff says she permitted her companion to remain in the room that night because she was ill, and, besides, she "knew how to take care of herself." The next day they were married, and, after visiting relatives in Kentucky, they returned to Bosworth, and went to live on the farm Huckleberry had purchased from defendant. Defendant introduced a great number of witnesses, who testified that plaintiff's reputation for chastity in Bosworth and vicinity is bad, but without exception each admitted that this reputation is based solely on plaintiff's conduct with her present husband. The evidence is overwhelming that, with the exception of this conduct, plaintiff always has behaved with propriety, and that since her marriage with Huckleberry she has been faithful to her husband and child. She and the little girl are full of affection for each other. The mother has supported the child in a manner befitting their station, has sent her to school and to Sunday school, has given her instruction in music, and, in general, has surrounded her with the comforts and blessings of a mother's love. Further, it appears beyond dispute that Huckleberry is a hard-working, sober farmer, who, but for the offense of courting another man's wife, has lived an uneventful and blameless life. He is in fairly good circumstances, and appears to be able and willing to provide a good home for the child. On the other hand, defendant, though able to support his children, has no home, and must, perforce, intrust them to the care of others.

This child is the ward of the court, and her welfare is the paramount consideration.

sires and feelings of the warring natural parents, and will do for the child that which will best serve to promote her true welfare. If we thought the mother so depraved that the moral nature of the child would be contaminated by unwholesome environment, we would not hesitate to tear the child from her for its own good. The feelings of the parents should be considered in such cases, but only as a subordinate consideration. What will best serve the little girl whose destiny will be so greatly affected by our decision? The father certainly is far from being an attractive personage. He stood by with his eyes open and watched another man win the heart of his wife without offering even a word of protest, and now pleads his own weakness as an excuse for such unmanly conduct. He believed his wife unfaithful when he entered into the contract of separation, and yet in the face of that belief agreed that she might keep the little girl. He even sold his homestead to his despoiler. Evidently he thought more of his property interests than he did of the welfare of his child. It is true this contract could not bind the courts, but it does bring into strong relief the character of the man who asks us to disregard his attempt to contract away his child, and to give him its custody, though he believed as much against the character of his wife when he made that contract as he knows now. Moreover, he has no home, does not propose to establish one, and will do no better than to pay the board of the child in some one else's home—a poor prospect, indeed, for a girl of tender years who most of all needs the moral and physical nourishment of a mother's love. We find ourselves unable to avoid the conclusion that defendant is not actuated so much by parental solicitude for the well-being of the child as he is by a motive of revenge against his former wife. That motive obtrudes throughout the record, and we shall have to find the mother's conduct so bad as to denote depravity—I. e., an inherent deficiency of moral sense and rectitude—before we shall give our consent to the affirmance of a judgment that would give a tender girl into the keeping of such a father.

The cross-petition for a divorce alleges many acts of misconduct on the part of plaintiff with Huckleberry, but it does not specifically charge her with adultery, and we shall assume from this omission that the decree given defendant does not necessarily include the finding that plaintiff was an adulteress. Turning to the evidence in the record before us, we find ample proof of the fact that, before the separation, plaintiff was guilty of the grave offense against the marital relation of receiving and reciprocating the attentions of a man other than her husband, but we do not believe she went to the length of committing adultery. When her affections became alienated from her hus-

ing marriage with Huckleberry, who was in a position to marry her. Such conduct cannot be reprobated too strongly. The law exacts fidelity to the marital relation, and, though we believe defendant stupidly contributed to the demolition of his home, we find plaintiff was guilty of a flagrant outrage against the most sacred of human institutions. Further, we find that, while on her way to be married to Huckleberry, she was guilty of immoral conduct at the hotels where they stopped in St. Louis and Louisville. Her attempted exculpatory excuses will not go. "Finding persons in such a situation as presumes guilt generally, courts must presume it in all cases attended with those circumstances." *Jennings v. Jennings*, 85 Mo. App. 290. We have stated everything of consequence that reflects on the moral character of plaintiff. An attempt was made to show an improper relation between her and a married man at Bosworth, but the attempt fell flat. Stress also was laid on the fact that she associated with a woman of questionable character in Bosworth, but it turned out that she merely employed the woman to work for her while she was ill. The woman was engaged in domestic service, and had been employed by and received in the homes of respectable people, including some of the accusing witnesses. There is nothing in that incident to cast reproach on plaintiff. We find in her an entire absence of immoral conduct and propensity except in the matter of her relation with her present husband. Before the beginning of that relation, she lived the life of a good woman, and since her marriage has held herself beyond reproach.

Counsel for defendant invoke the general rule applicable to an adulterous mother in cases of this character. It has been said that: "A woman who has been guilty of adultery is unfit to have the care and education of children, and more especially of female children." 2 Bishop on Marriage, Divorce and Separation, § 1198. But in the same paragraph the author says: "A single act of adultery not repeated and not likely to be, whether by father or mother, has been deemed not necessarily to deprive forever the delinquent of the custody." In the case of *In re Steele*, 107 Mo. App. 567, 81 S. W. 1182, much relied on by defendant, we said: "The relator has been shown to be guilty of adultery, and, though she is the mother, yet her abhorrent conduct of itself affords the strongest reasons for refusing her application for the custody, society, and association of the child." But the facts in that case differ in material respects from those before us, and indicated to us that the mother was morally depraved. A single transgression of the moral law does not necessarily betoken depravity. A person is depraved when he is gen-

erally depraved, it is not conclusive. We are disposed to regard the relation of plaintiff with her present husband prior to their marriage as a single transgression, and not as the manifestation of a disposition to evil. We believe she is a good woman at heart, and a good mother, and that her transgression was due not to wantonness, but to a passion weakly resisted, and suffered to grow and ripen by the fatuous conduct of defendant. Now that she is married, and is leading a good life, we think her mother love which appears to be strong will assert itself and that the child will not be surrounded by a morally impure atmosphere. We shall leave the child for the present with her, believing that the benign results of a mother's care and love will be greater than any evil influence likely to be born of the mother's past offense. But we place plaintiff on probation, and, should she backslide again, it will be at the cost of losing her child.

In answer to the argument that the social ostracism of plaintiff will include the child, we find that this exclusion from respectable social intercourse is not so extensive as counsel describe it. Many good citizens of Bosworth appeared as witnesses for plaintiff and defended her. Further, it appears that the vulture gossip has picked the bones of this scandal clean, and it is reasonable to presume it will turn to other carrion—of which, unhappily, a sufficient supply is never wanting. We perceive no reason for thinking the child will be deprived of healthful companionship.

The judgment is reversed. All concur.

PALMER v. REEVES & CO.

(Kansas City Court of Appeals. Missouri.
Nov. 15, 1909. Rehearing Denied
Dec. 6, 1909.)

1. SALES (§ 441*)—BREACH OF WARRANTY—EVIDENCE.

In an action for a breach of warranty in the sale of certain farm machinery, evidence held to require a finding that the machine failed to answer the purpose intended.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1277-1283; Dec. Dig. § 441.*]

2. SALES (§ 285*) — FARM MACHINERY — BREACH OF WARRANTY — REGISTERED NOTICE.

A provision in a contract for the sale of farm machinery, requiring notice of a failure of the machine to comply with the warranty by registered letter, was waived, where defendant received a nonregistered letter of complaint and acted thereon by sending one of its agents to rectify the defects.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 810; Dec. Dig. § 285.*]

3. SALES (§ 287*) — FARM MACHINERY — BREACH OF WARRANTY—RETURN—WAIVER.

Where defendant notified plaintiff that it would not rescind a contract for the sale of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

to return the machine to defendant's agent is not satisfactory.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 816; Dec. Dig. § 287.*]

4. SALES (§ 62*)—FARM MACHINERY—RETURN.

Where defendant sold plaintiff a clover huller, feeder, and stacker, all constituting parts of a machine needed for the complete accomplishment of the objects intended, the contract was not divisible in the sense that defendant could refuse to accept a return of the feeder and stacker because the huller did not work satisfactorily, under a contract providing for a return of the machine in case it did not do good work after a satisfactory trial.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 171-179; Dec. Dig. § 62.*]

Appeal from Circuit Court, Boone County; A. H. Walker, Judge.

Action by John Palmer against Reeves & Co. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

C. B. Sebastian and W. M. Williams, for appellant. Charles J. Walker, for respondent.

BROADDUS, P. J. This is an action for a breach of warranty by the defendant upon the sale of a certain machine, consisting of a clover huller, feeder, and stacker. The contract was entered into on September 9, 1905, and the machine was delivered on September 11th, two days thereafter. The contract provided for a payment of \$300 cash on delivery, and \$250 to be paid on the 1st day of November, evidenced by a note of plaintiff and secured by chattel mortgage on the property. The contract contained the following warranty: "The machinery ordered is to be well made, of good material, and, with proper care and management, to do as good work as any other machine of the same size and manufactured for a like purpose." The plaintiff paid the \$300 and gave his note for the \$250, as specified in the contract, and executed a mortgage on the machine to secure the payment of the note. After the recitation of the warranty, the writing further reads: "But if inside of six days from the day of its first use, the said machinery fails to fill its warranty, written notice shall be given Reeves & Co. by registered letter, and also written notice to the local agent from whom the same was purchased, stating wherein it fails to fill the warranty, and if it be of such a nature that remedy cannot be suggested by letter, a reasonable time shall be allowed to remedy the defects, if any there be, and an opportunity offered for a trial thereafter, the purchaser rendering necessary and friendly assistance. Defects or failures in one part shall not condemn any other part of attached machine, and if, after a fair opportunity to remedy a defect, the part or parts containing such cannot be

nish another machine, or part, in place of the machine or part so returned, or credit the settlement of the same. If Reeves & Co. shall furnish another machine or part in place of the one returned, the terms of this warranty shall be held to be fulfilled and the company shall be subject to no further liability under this order. It is hereby expressly agreed that all claims for damages against Reeves & Co. by reason of nonperformance of machinery are hereby waived. It is mutually agreed that the failure of the purchaser to give said written notice of defects, as above provided, within six days from the day of its first use, or to return the said machinery or part to the place where it was received within six days from the day of its first use, shall be conclusive evidence of the fulfillment of the warranty and the full satisfaction to the purchaser, who agrees to make no claim thereafter against Reeves & Co., or to make any defense to the notes given therefor on account of any breach of the warranty. It is also expressly agreed that if, at any time after the expiration of the six days from the date of its first use, Reeves & Co., should furnish to the purchaser any improvements or attachments for said machinery, or replace any old parts with new, or should the purchaser notify Reeves & Co. in any wise whatever, of any imperfection in said machinery, and if upon receipt of such notice Reeves & Co., or any agent or employé, should act thereon and remedy, or attempt to remedy, such imperfections, the so doing of all such acts will not extend the liability of Reeves & Co., under this warranty beyond the six days from the day of the first use." There are other iron-clad provisions in the writing which it is not necessary to notice.

The machine was first put in use on the 22d day of September. One of defendant's agents was present to start it, but it failed to do good work. He claimed that the clover was too wet, and that he would have to wait until it should get dry, and promised to come back later. He returned on the 26th, and failed again to make the machine do good work. It was then moved to another farm, where it was started, to work again by defendant's agent on the 27th of September; but it failed again to do proper work. On the 28th, the next day, plaintiff endeavored to run the machine without the aid of defendant's agent; but it still failed to act so as to do good work. Whereupon, on the same day, he called up the defendant's agent then in Columbia, and told him the machine would not do good work. On the same day he wrote a letter addressed to the company at its home office stating that the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

machine would not do good work, specifying wherein it failed. This letter was not registered. On September 30th defendant answered acknowledging receipt of his letter, and informed plaintiff that the matter would be referred to the Kansas City office, where it would receive prompt attention. On the 29th of September the defendant's agent came back, and, after testing the machine, said he had done all he could, and that it was doing as well as it could under the conditions. On the next day, the 30th of September, plaintiff again wrote to defendant stating that he had given the clover huller a fair trial, that he had tried to use it for five days, that its agent had failed to make it work successfully, again stating the defect, and asked what he should do with it, as he wished to return it, demanding that defendant return the \$300 he had paid. On the 2d day of October defendant acknowledged the receipt of this letter, stating that the matter would be referred to the Kansas City office, and further: "We don't know whether or not the terms of warranty on the machine has expired, but would state that we are not very particular about a thing of that sort, desiring always to look after our customers in proper shape." On the 3d of October the agent of defendant at Kansas City wrote to plaintiff that the huller, if handled properly, would do the work as guaranteed, and that: "We have your order in which the guaranty is fully set forth, and we have your settlement, and unless we learn something to the contrary as to the working of the huller from what we now know, the guaranty has been absolutely fulfilled, and you have no complaint. * * * Your note for \$250 will be due November 1st, and we expect the same will be met promptly when due." The plaintiff did nothing more in the way of returning the machine. When the note became due, the mortgage was foreclosed, and at the sale defendant became the purchaser. The finding and judgment were for the defendant, and plaintiff appealed. There were no declarations of law asked or given by the court, and no finding of facts. The case is therefore here upon the whole record.

There can be little or no dispute but that the machine failed to answer the purpose intended. The evidence is all one way. It is true the defendant's agent claimed that the clover was too wet for the machine to operate successfully; but it was tried upon different material, at different times and places, with the same result. The language of the warranty is not limited in its application to any particular condition of the clover to be hulled as to dryness or dampness. If such was the intention, defendant should have specified in that particular. From the very nature of things, it may be safely inferred that the condition of clover after it is harvested is subject to change of temperature and the condition of the atmosphere. If the atmo-

sphere be warm and damp, the clover would be affected thereby, and to some extent would be damp. On the contrary, if the weather is fair and the atmosphere dry, the clover would necessarily be drier. At the time plaintiff first attempted to use the machine under the supervision of defendant's agent, it is claimed, as we have seen, that the clover was wet, and at all the subsequent trials it is claimed that the same condition existed. It is to be concluded from these facts that the huller would only perform good work while the clover was in a certain condition as to being dry. Just how dry it does not appear. The contract does not say. It seems to us that a machine that would not work well under ordinary conditions as to dampness or dryness of the material would, in this climate, be very uncertain and unsatisfactory, and would be of little, or at least uncertain, value; but, as the contract does not include any such specification, the matter need not be further noticed.

The plaintiff's failure to give notice to the local agent, and to the corporation by registered letter, was waived by the defendant, who actually received the letter and acted upon the notice therein contained by sending one of its agents for the purpose of rectifying the defect. "Every purpose of a registered letter was accomplished by the letter received, as defendant acted upon it." *Buchanan v. Minneapolis Threshing Mach. Co.* (N. D.) 116 N. W. 335; *Hein v. Milderbrandt*, 134 Wis. 582, 115 N. W. 121; *Harrison v. Russell*, 12 Idaho, 624, 87 Pac. 784.

After defendant notified plaintiff, in effect, that it would not rescind the contract, and that it would hold him to its terms, he was not bound to return the machine to the agent at Columbia. It amounted to a waiver of a return of the machine. *Walls v. Gates*, 4 Mo. App. 1; *Osborne v. Mullikin*, 88 Mo. App. 350. The rule is succinctly stated in *Padden v. Marsh*, 34 Iowa, 522, that: "Where, by the terms of a warranty under which a reaping machine was sold, it was stipulated that, in case it failed to work as warranted, it was to be returned by the purchaser to a particular place, it was held that a notification by the seller to the buyer that he would not receive the machine back excused the buyer from making an effort to return it." But it is insisted that plaintiff should at least have returned the defective part of the machine and give defendant the option either to refund its value or substitute machinery that would fill the warranty. It is held, on a similar contract: "That in case of a breach of warranty the buyer should immediately return the defective machinery, and the seller should have the option either to furnish another machine, or return the purchase money, the buyer was bound to elect within a reasonable time whether he would return the machinery and claim cancellation of the purchase-money notes or the delivery of proper machinery in lieu of that

found deficient, and his failure to do so waived the breach." Gaar, Scott & Co. v. Hodges (Ky.) 90 S. W. 580. And so is it held in Heagney v. J. I. Case Threshing Machine Co., 4 Neb. (Unof.) 745, 96 N. W. 175. These cases are not in conflict with those last cited, because there was no waiver in either of the provisions of the contract for a return of the machine, and the conclusions only amount to declarations that the purchaser must comply with the stipulations contained in the guaranties, a conclusion which is not to be denied.

It was argued that as the contract was divisible, defendant was under no obligation to take back any part of the machine that fulfilled the contract; that is to say, if there were no defects in the stacker and feeder, the plaintiff was bound by the contract to keep them. It is true these were divisible parts of the machine, which, had either proved defective, the defendant upon notice had the right to remedy, yet respondent has left out of consideration that these divisible parts went to constitute the whole, and that without the huller they were of no value whatever to plaintiff. What use could he have had for a feeder without the huller to receive the feed, or what material could he have had to stack until the clover passed through the huller, are matters which the agreement has left out of consideration.

We believe the finding and judgment is not sustained by the evidence and the law, for which reason the cause is reversed and remanded. All concur.

SNICKLES v. CITY OF ST. JOSEPH.

(Kansas City Court of Appeals. Missouri.
Nov. 15, 1909.)

1. APPEAL AND ERROR (§§ 979, 1015*) — AWARDED NEW TRIAL—REVIEW.

On appeal from a judgment awarding a new trial on the ground that the verdict for defendant is against the weight of the evidence, the court will not interfere with the discretion of the trial judge, unless the petition fails to state a cause of action, or plaintiff's proof is insufficient to raise an issue for the jury, and the court will not weigh the evidence except to determine whether that most favorable to the cause of action asserted is substantial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3871; Dec. Dig. §§ 979, 1015.*]

2. MUNICIPAL CORPORATIONS (§ 812*) — DEFECTIVE STREETS—NOTICE OF INJURY—SUFFICIENCY.

Rev. St. 1899, § 5724 (Ann. St. 1906, p. 2909), requiring the giving of notice of the time, place, character, and circumstances of an injury on a defective street, must be construed reasonably, and, though one will not be permitted to thwart the intent of the statute by indefiniteness when the true facts may be clearly stated, a notice which gave the officers information which cannot mislead, but which will enable them to locate the defect, is sufficient,

though it fails to state the exact place where the injury was received.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1702; Dec. Dig. § 812.*]

3. MUNICIPAL CORPORATIONS (§ 812*) — DEFECTIVE STREETS—NOTICE OF INJURY—SUFFICIENCY.

A notice of injury to a pedestrian on a defective sidewalk, which stated that the injury occurred while the pedestrian was walking on the sidewalk on the north side of the street in a block between designated streets, that the sidewalk was out of repair because the stringers had become rotten and the earth underneath them had been washed away, causing the sidewalk to tilt from the horizontal, sufficiently informed the city of the place of the injury within Rev. St. 1899, § 5724 (Ann. St. 1906, p. 2909), where the evidence shows that the west half of the block of the sidewalk was defective as described.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1702; Dec. Dig. § 812.*]

4. MUNICIPAL CORPORATIONS (§ 800*) — DEFECTIVE SIDEWALKS—NEGLIGENCE—LIABILITY.

The negligence of a city in maintaining a sidewalk which had sagged down by the washing away of the earth and the rotting of the stringers, so as to cause it to slope sharply, was the proximate cause of the injury to a pedestrian slipping thereon while the walk was wet and slippery.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1666-1671; Dec. Dig. § 800.*]

5. MUNICIPAL CORPORATIONS (§ 821*) — DEFECTIVE SIDEWALKS—INJURIES TO PEDESTRIANS—CONTRIBUTORY NEGLIGENCE.

A city maintaining a sidewalk on only one side of an unpaved street impliedly invites one living on property abutting the sidewalk to use it, and the issue of his contributory negligence is for the jury, unless the court can declare as a matter of law that the sidewalk was so glaringly dangerous that a reasonably prudent person would have refused to encounter the danger.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1754-1756; Dec. Dig. § 821.*]

Appeal from Circuit Court, Buchanan County; Henry M. Ramey, Judge.

Action by Anna M. Snickles against the City of St. Joseph. Verdict for defendant, and, from a judgment awarding a new trial, defendant appeals. Affirmed.

W. B. Norris and O. E. Shultz, for appellant. P. J. Carolus, for respondent.

JOHNSON, J. This is an action to recover damages for personal injuries sustained by plaintiff from falling on a board sidewalk in St. Joseph, a city of the second class. Plaintiff alleges that her injuries were caused by the negligence of defendant. The verdict of the jury was for the defendant, but the trial court sustained plaintiff's motion for a new trial on the ground that the verdict was against the weight of the evidence. Defendant appealed from the judgment awarding a new trial.

we find either that the petition fails to state a cause of action, or that the proof adduced by the plaintiff is insufficient to raise an issue to go to the triers of fact. We do not weigh the evidence, except for the purpose of determining whether that most favorable to the cause of action asserted is substantial. Defendant recognizes this rule, but contends that plaintiff has failed to make out a case for the jury, and argues, first, that the notice of the injury given defendant was fatally defective for the reason that it failed to state the place of the injury with sufficient definiteness; second, that the evidence most favorable to plaintiff fails to accuse defendant of negligence; and, third, that it does show that the injury was the direct result of plaintiff's own negligence. Should we find that any of these contentions is well taken, a proper case would be presented for our interference with the action of the trial court in granting a new trial.

The evidence of plaintiff discloses the following state of facts: The injury occurred early in the morning of August 28, 1907, on Hammond street, between Lookout street and Swift avenue, all public streets of the city. Hammond street runs east and west, the other named streets north and south. Hammond street was not paved, but some grading had been done on it by the city. A board sidewalk was maintained on the north side of the street. A deep gully separated the sidewalk from the roadway, and there was no sidewalk on the south side of the street. The plane of the sidewalk was about four feet above that of the street. West from Lookout street to Swift avenue, Hammond street ran down a steep hill. The gully had extended under the stringers underneath the south side of the board walk, and the stringers had rotted. From these two causes, the south side of the walk had sagged down to an extent to cause the walk to slope sharply to the south. Plaintiff, who was 56 years old, lived on the north side of Hammond street, just west of Lookout street. She left her house to go to work, and started westward on the sidewalk described. It had rained during the night, and the walk was wet and slippery. She realized that the way was dangerous, owing to its slope in two directions and its slippery condition, and states that she walked along the edge of the property line with the greatest care. At a point between the middle of the block and Swift avenue, her feet slipped toward the south, and she fell heavily to the sidewalk, breaking her arm. It appears that the defect in the sidewalk of which plaintiff complains had existed long enough for the city to have known of it, and to have repaired it had reasonable care been observed.

The negligence alleged in the petition is as follows: "That on the 28th day of August, 1907, and for a long time prior thereto, Hammond street, between Lookout streets on the

and that on said date there was a wooden sidewalk constructed upon and along the north side of Hammond street between the points named, consisting of two stringers running lengthwise, and having cross-planks nailed thereto which were about four feet long, that at a point on said sidewalk about 110 feet east of Swift avenue said walk had become old and crooked, and uneven and out of repair, and the cross-boards had become partly rotten, and the stringers underneath said walk had become weak and bent, rotten and decayed, and the braces underneath said stringers had become removed, and the dirt underneath (of) said stringers and braces had been permitted to wash away, causing the south side of said walk to drop and tilt from a horizontal, and to be sunken, and uneven and rough, and that, on account of such defects, said walk was caused to slope toward the south, leaving the south line of said walk about six inches below the line of its original plane of construction, making it dangerous for persons to walk thereon, and especially so in inclement or wet weather. That the city of St. Joseph, at said date, and for a long time prior thereto, carelessly and negligently maintained said walk in the condition aforesaid, and carelessly and negligently permitted the same to be and remain in the aforesaid defective condition upon said street as a public sidewalk and thoroughfare; that the dangers aforesaid were greatly increased whenever rains would fall upon said walk, making it slippery and difficult to stand on, or walk upon, and that all of the foregoing facts were well known to the defendant, or could have been so known to it by the exercise of ordinary care."

The notice given the city by plaintiff states with reference to the place: That the injury occurred while plaintiff was "walking along and upon the board and wooden sidewalk on the north side of Hammond street, and between Lookout street on the east and Swift avenue on the west and being in the west half of said block. That said sidewalk was carelessly and negligently constructed upon a steep incline or hillside sloping toward the west, and was so sloping and slanting that it was dangerous for persons to walk thereon, and especially so when the same became wet or damp from dew or rain. That on said day said walk was wet or damp from dew or rain, and had become old and curved, uneven, and out of repair, and the stringers underneath said walk had become rotten, decayed, or broken, and the dirt underneath said stringers and walk had been permitted to wash away and become removed by rains, and by the natural elements, causing said walk to be sunken, uneven, and rough, and causing the same to slope from the north to the south, as well as from the east to the west, and the surface of said walk was materially changed by reason of all of which it was unsafe and

of August, 1907. I was by and on account of sloping, slanting, and defective condition aforesaid of said walk caused to slip, to fall." We think the description of the place of the injury sufficient. The prime object of the statute (section 5724, Rev. St. 1899 [Ann. St. 1906, p. 2906]), requiring the giving of notice in cases of this character, is to protect the city against fraudulent or stale demands. The city must be informed of the time, place, and circumstances of the injury in order that from the facts stated in the notice its officers may accurately investigate the merits of the claim. If the notice were so vague and indefinite in any of the particulars made essential by the statute as to be misleading, we would not hesitate in declaring it bad. A claimant will not be permitted to thwart the intent of the statute by untruthfulness or indefiniteness when the true facts may be clearly stated. But the statute should be construed reasonably. Its design is to defeat unjust demands, not to lay pitfalls in the way of honest claimants. The city may use it as a shield, not as a sword; and, where it appears, as it does here, that the officers of the city with the information given in the notice could not be misled, but might go to the place and put a finger on the negligent defect that plaintiff declared caused her injury, it would be a harsh and unjust rule that would deprive plaintiff of her cause of action because she failed to state the exact spot on which her injury was received. The evidence shows that in the west half of the block (a distance of perhaps 150 feet) the sidewalk sagged to the south because of the gully underneath and the decayed condition of the stringers. The notice informed the city that plaintiff's fall was caused by that defective condition. How could the city be misled or hampered in the investigation into the merits of the case by not being informed of the spot where plaintiff fell? Its officers could see the defective state of the sidewalk as stated in the notice. They would know that the cause of action would be bottomed on the negligence of maintaining the walk in such condition, and they would be in no possible danger of preparing a defense to one state of facts, and of being confronted at the trial with another.

We have examined the cases cited by defendant (*Butts v. Town of Stowe*, 53 Vt. 600; *Dalton v. City of Salem*, 139 Mass. 91, 28 N. E. 576; *Cronin v. City of Boston*, 135 Mass. 110), and find them to differ in essential facts from the case in hand, but, if they did not, we would not permit them to control our decision, since a rule more harsh on the claimant than that we have declared would impress us as being too unjust for adoption in-

court. *Reno v. City*, 169 Mo. 642, 80 S. W. 123; *Lyons v. City*, 112 Mo. App. 681, 87 S. W. 588; *Canter v. City*, 126 Mo. App. 629, 105 S. W. 1.

We do not agree with defendant in its contention that the evidence does not show that the injury was the direct result of defendant's negligence. Certainly it was negligence for the city to suffer the sidewalk to remain for so long a time in the condition described. It may be true that plaintiff would not have fallen but for the wet condition of the walk which rendered it slippery, and that she would not have fallen had the walk been laid on a grade less steep, but it is a reasonable inference that she would have passed over the way in safety but for the pronounced slope to the south caused by the defective condition of the walk. The negligence of defendant, therefore, is presented by plaintiff's evidence as the direct and proximate cause of the injury, and it was an issue of fact to be sent to the jury.

Nor do we sanction the argument that we should declare as a matter of law that negligence of the plaintiff contributed to the production of the injury. The issue of contributory negligence was one of fact for the jury to solve. This is not a case like that considered by the Supreme Court in *Cohn v. City*, 108 Mo. 387, 18 S. W. 973, where the plaintiff deliberately or negligently chose the most dangerous of two or more convenient ways. By implication, defendant invited plaintiff to use the sidewalk in front of her home, and, under the circumstances before us, we think it is for the jury to say whether or not she was justified in using it. She knew the way was more dangerous than it would have been had it been kept in reasonable repair, but we cannot declare in law that it was so glaringly and imminently dangerous that a reasonably prudent person in the situation of plaintiff would have refused to encounter the danger. There was no other convenient way for her to take. To go into the street, she would have had to cross a deep gully, and in so doing would have encountered a risk perhaps as great as that she faced, and, because of the rain of the preceding night, it is fair to believe that the unpaved street was muddy and slippery, and consequently neither a desirable nor an entirely safe way for a woman to travel. Clearly the case should go to the jury on the issues of defendant's negligence and plaintiff's contributory negligence, and no occasion is presented for interference with the discretion exercised by the trial court in granting a new trial.

The judgment is affirmed. All concur.

PRATT v. MISSOURI PAC. RY. CO.

(Kansas City Court of Appeals. Missouri. Nov. 15, 1909. Rehearing Denied Dec. 6, 1909.)

1. NEGLIGENCE (§ 121*)—EVIDENCE—PRESUMPTIONS.

Where an accident proceeds from an act of such a character that when due care is taken in its performance no injury ordinarily ensues from it in similar cases, it will be presumed to be "negligent."

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-228; Dec. Dig. § 121.*]

For other definitions, see Words and Phrases, vol. 5, pp. 4743-4763; vol. 8, pp. 7729-7731.]

2. MASTER AND SERVANT (§ 139*)—DEATH OF SERVANT—PROXIMATE CAUSE.

A switchman, engaged as a brakeman on a loaded coal car that was being switched to a side track, was killed by the car colliding with a car on the main track. The accident occurred on a stormy night. The brakeman in charge of the other car left it on the track without a light and without notifying a fellow workman charged with the duty of signaling the engineer. The fellow workman could have prevented by proper care the coal car from being sent forward, or could have given decedent a lantern signal to stop the car before the accident. *Held*, that the proximate cause of the accident was the negligence of the brakeman in leaving his car without light and without notifying the fellow workman thereof, and the negligence of the fellow workman failing to take steps to prevent the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 275-296; Dec. Dig. § 139.*]

3. MASTER AND SERVANT (§ 203*)—ASSUMPTION OF RISK.

A servant does not assume risks created by the negligence of his master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 538; Dec. Dig. § 203.*]

4. MASTER AND SERVANT (§ 289*)—INJURIES TO SERVANTS—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

Whether a switchman killed, while engaged as a brakeman on a loaded coal car in a collision with another car, was guilty of contributory negligence, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.*]

5. MASTER AND SERVANT (§ 180*)—INJURY TO SERVANT—FELLOW SERVANTS—LIABILITY—"RUNNING, CONDUCTING, OR MANAGING ANY LOCOMOTIVE, CAR, OR TRAIN OF CARS."

Rev. St. 1890, § 2864, as amended by Laws 1905, p. 135 (Ann. St. 1906, p. 1637), making a railroad liable for the death of an employé occasioned by the negligence of another employé, while "running, conducting, or managing any locomotive, car, or train of cars," etc., covers the operation of cars at terminal yards, and the death of an employé of a railroad engaged as a brakeman on a loaded coal car while being shunted from a main switch track in a terminal yard to a side track, caused by the negligence of fellow servants in the moving of cars and the giving of signals, resulted from the negligence of an employé within the statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 359-368; Dec. Dig. § 180.*]

6. MASTER AND SERVANT (§ 179*)—FELLOW-SERVANT STATUTE—CONSTRUCTION.

The fellow-servant statute is remedial in its nature, and the court must give to it such an interpretation as will best realize the purposes of the Legislature to afford employes, working in dangerous positions and exposed to unusual hazards, protection.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 179.*]

7. DEATH (§ 31*)—ACTION FOR DEATH—PARTY ENTITLED TO SUE.

Under Rev. St. 1890, § 2864, as amended by Laws 1905, p. 135 (Ann. St. 1906, p. 1637), authorizing a recovery by the administrator of decedent leaving no husband, wife, or minor child, the administrator may sue for the negligent death of one of mature age, unmarried, and childless.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35-46; Dec. Dig. § 31.*]

8. EVIDENCE (§ 174*)—MEMORANDA—ADMISSIBILITY.

A record book kept by a railroad, showing the names of employes in a railroad yard, compiled from time slips made in the yard by an employé required to keep the time of the employes in the yard, is inadmissible, where the time slips were admitted in evidence.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 174.*]

9. APPEAL AND ERROR (§ 882*)—INVITED ERROR—RIGHT TO COMPLAIN.

While a defendant, who is driven by adverse rulings of the court to contest a false issue, is not precluded, on preserving his exceptions, from availing himself in the appellate court of the error, yet a defendant who voluntarily accepts a false issue tendered by his adversary may not complain after he is defeated on such issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

10. APPEAL AND ERROR (§ 882*)—INVITED ERROR—RIGHT TO COMPLAIN.

Where, in an action for negligent death, brought under Rev. St. 1890, § 2864, as amended by Laws 1905, p. 135 (Ann. St. 1906, p. 1637), plaintiff without objection proved the earning capacity of decedent and the dependency of his mother on him for support, and defendant on cross-examination attempted to show that decedent was not industrious, but idled away much of his time, defendant could not complain that plaintiff was permitted to show the pecuniary value of the life of decedent to those dependent on him.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.*]

11. TRIAL (§ 105*)—EVIDENCE—FAILURE TO OBJECT—INSTRUCTIONS.

The court must in its instructions declare the correct rule relating to the remedy, though evidence received without objection should have been excluded on objections, and, where the court gives an incorrect rule, prejudicial error results.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 260-266; Dec. Dig. § 105.*]

12. DEATH (§ 78*)—ACTION FOR NEGLIGENCE—DEATH—EVIDENCE.

Under Rev. St. 1890, § 2864, as amended by Laws 1905, c. 135 (Ann. St. 1906, p. 1637), making a railroad liable for the death of an employé by the negligence of a co-employé, and declaring that the railroad shall pay as a penalty a sum not less than \$2,000, nor more than \$10,000, the remedy must be imposed by the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the jury.
[Ed. Note.—For other cases, see Death, Cent. Dig. § 97; Dec. Dig. § 78.*]

Appeal from Circuit Court, Jackson County.

Action by Elizabeth Pratt, administratrix of Albert H. Pratt, deceased, against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Elijah Robinson and Harris Robinson, for appellant. Noyes & Heath and G. L. Walls, for respondent.

JOHNSON, J. This suit is prosecuted by the administratrix of the estate of Albert H. Pratt, deceased, to recover damages for the death of the decedent, which the petition alleges was caused by the negligence of defendant. The answer admits that Pratt was killed at the time and place alleged, but denies the other allegations of the petition, and contains pleas of assumed risk and contributory negligence. Verdict and judgment were for plaintiff in the sum of \$4,500. Defendant appealed.

The injuries from which the unfortunate man died, in a few hours, were received about 8:30 o'clock p. m. March 5, 1906, in the terminal yards of defendant at Kansas City. Pratt was a switchman in the service of defendant, and was engaged at the time as brakeman on a loaded coal car that was being shunted from a main switch track to a side track. The yard where the switching was being done was what is called a gravity or "hump" yard. The tracks consisted of a main lead running east and west and 25 or more switch tracks diverging at intervals therefrom. Some of these switch tracks ran in a southwesterly, and others in a northwesterly, direction from the lead track. In approaching this yard from the east, as it was necessary to do in distributing a string of cars, the ground had been elevated in order that the end car, when detached from the train, would run by gravity to the place where it was to stop on a switch track. Switchmen were stationed in the yard to throw the necessary switches, and there is evidence to the effect that it was the duty of the engineer not to detach and send a car forward except on signal from the switchman, and that the signal should not be given except when the car had a clear track ahead. A brakeman was stationed on each car sent forward for the purpose of controlling the progress of the car to the place where it should stop. It was sleeting at the time of the injury, the night was very dark, and the rails were slippery. Some cars had been "kicked" forward, and the last one, an empty furniture car, for some reason, had

fire in the yard, probably to warm himself. At any rate, the car was standing without any light on it when the next car was sent forward some five or ten minutes later. We are dealing now with controverted facts, and are stating the evidence most favorable to the cause of action. Pratt was the brakeman on the car last mentioned, which, as we have said, was a loaded coal car. He was at the brake, and, with the aid of a brake stick, was attending to his duty of controlling the progress of the car, which was running from four to five miles per hour. On account of the darkness and the sleet striking his face, he could see but a short distance. Evidently he did not see the furniture car, or know of its presence on the lead track, until it was too late to avoid a collision. It was the purpose to run his car on the lead track to a switch beyond the place where the furniture car was stalled. As the car ran along, a switchman uttered a warning cry, and Pratt was observed to be setting the brake. The coal car crashed into the furniture car with much violence, Pratt was thrown to the track, and the wheels of the coal car ran over him. There is evidence that the engineer, before shunting the coal car, received a go ahead signal from a switchman in the yard, and that Pratt tested his brake before the car was started and found it in good working order, and, further, it appears that neither the engineer nor Pratt received any signal to the effect that the main lead was fouled.

Acts of defendant alleged to be negligent, and of the commission of which we find substantial evidence, thus may be summarized: First. The furniture car was stopped on the main lead in a position to endanger the safety of the brakeman on the following car by the negligent manner in which the brakeman set the brakes. (There is evidence that the brakes of the furniture car were set very hard.) Second. Whether or not the fouling of the main lead was attributable to negligence, the car was negligently left standing without a light on it to give warning of the obstruction. Third. The switchman whose duty it was to signal the engineer knew, or by the exercise of ordinary care should have known, that the lead was fouled in time to have prevented the coal car from being "kicked" down the incline, but negligently failed to warn the engineer not to send the car forward.

In the argument of defendant on the proposition that the demurrer to the evidence should have been sustained, the point is urged that the evidence does not accuse defendant of any negligence that was the proximate cause of the injury, and that the in-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

jury should be considered as an unfortunate result of a mere accident. We regard this position as untenable. "The rule is that, when an accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, it will be presumed to be negligent." *Shuler v. Railway*, 87 Mo. App. 618. It is a fair inference, from all the facts and circumstances in evidence, that the furniture car did not stop on the main lead on account of insufficient impetus to carry it to its proper destination, but because of the act of the brakeman in setting the brake too hard; and though it may be said with reason that his act could have been the result of a mere mistake in judgment induced mainly by unfavorable weather conditions, and not of negligence, we think it would be difficult to exculpate him from the charge of negligence, in deserting the car without leaving a light on it and without calling the attention of the switchman, whose duty it was to signal the engineer, to the fact that he had left an obstruction on the track. That negligence should be considered as a proximate cause of the injury, regardless of whether or not the switchman had actual notice of the obstruction in time to give a saving warning, for if the brakeman had remained on his car, or at least had left his lantern there, he might, and doubtless would, have saved the life of his fellow workman. Because of the darkness and storm, he left a concealed pitfall. He could not do this and act with the degree of care and humanity to be expected of the ordinarily careful and humane person in his situation; and, further, if the switchman knew of the obstruction in time, by the exercise of reasonable care, to prevent the coal car from being sent forward, or to give Pratt a lantern signal to stop when the car might have been stopped before it reached the obstruction (it is reasonable to infer from the evidence that both, or at least the last mentioned, of these signals, could have been given), his failure thus to signal was negligence directly productive of the injury. We think it is clear that the evidence tends to inculcate both the furniture car brakeman and the signaling switchman, and to point to their negligence as proximate causes.

There is no room in this case for the application of the doctrine of assumed risk. The natural and inherent dangers of Pratt's calling were very great, and he assumed risk of injury from them as a part of his contract of employment; but he did not assume risks created by the negligence of his master, nor, as we shall show, did he assume risks created by the negligence of his fellow servants.

Nor can we agree with defendant that Pratt was guilty in law of contributory negligence. The signal given the engineer, and the fact that the engineer "kicked" his car forward, assured him that the way was clear. It was his duty not to rely blindly on such as-

surance, but to make reasonable use of his senses to protect his safety; but, considering all the facts of his situation—the deep darkness, the blinding storm, and the attention he naturally would give to regulating the speed of the car—we say it was for the jury to pass on the issue of whether or not he could or should have seen the car in time to avoid the collision. In answer to the argument that he might have dropped off the car or climbed back on it for safety, we say it would be a harsh and unjust rule that would accuse a man of negligence in law on account of his actions under stress of a sudden, imminent, and fearsome danger. The man stood at his post, and we shall not say he failed in the performance of his highest duty. That was a question for the jury.

Since the injury, according to the evidence of plaintiff, was caused by the negligence of fellow servants of Pratt, it goes without saying that such negligence would afford no cause of action against the defendant at common law, and we must turn to the statute to ascertain whether the Legislature has provided a remedy in cases of this character. The action is based on section 2864, Rev. St. 1899, as amended in 1905 (*Laws* 1905, p. 136). That section provides that: "Whenever any person including an employé * * * shall die from any injury resulting or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employé, whilst running, conducting or managing any locomotive, car or train of cars, or any street, electric or terminal or train of cars * * * the corporation * * * shall forfeit and pay as a penalty," etc. Defendant makes the point that the death of Pratt "was not caused by any negligence, unskillfulness, or criminal intent of any officer, agent, servant or employé, whilst running or conducting any locomotive, car or train of cars." We think the cause of action asserted falls squarely within the purview of the statute. It is conceded Pratt was an employé of defendant engaged in its service at the time of the injury, and we have shown that his death was caused by the negligence of co-employés. That this negligence was in the performance of the duty of moving a car and a train of cars is a proposition about which there can be no reasonable difference of opinion. It is immaterial that the train was being operated in a terminal yard, instead of on the highway. It was a train of cars in operation, nevertheless. The language of the statute expressed a clear legislative intent to cover the operation of cars and trains at terminals, as well as of trains on the road. The principal rule of construction to be applied to this statute is the same that governs the construction of the section commonly called the "fellow-servant statute" (section 2873, Rev. St. 1899 [*Ann. St.* 1906, p. 1655]). "Laws of this kind are of a remedial nature, and such an interpretation is and

ought to be given to them as will best realize the purpose of the Legislature to afford employes of railroad companies, who work in dangerous positions and are exposed to the unusual hazards incident to a service in which their personal safety is jeopardized by the carelessness of numerous other employes over whom they have no control, and whose habits of work, in respect to being careful or careless, they have but slight chance to observe, redress for injuries sustained by the default of such other employes, unrestricted by the common-law doctrine in regard to injuries caused by the acts of fellow servants. Hence attention is paid rather to the humane spirit of the law than to its exact words." *Rice v. Railway*, 92 Mo. App., loc. cit. 38; *Stubbs v. Railway*, 85 Mo. App. 192; *Shuler v. Railway*, supra; *Huston v. Railroad*, 129 Mo. App. 576, 107 S. W. 1045; *Briscoe v. Railroad*, 130 Mo. App. 513, 109 S. W. 93; *Callahan v. Railway*, 170 Mo., loc. cit. 495, 71 S. W. 208, 60 L. R. A. 249, 94 Am. St. Rep. 746. We approve what was said in the foregoing quotation, and, though we find the action before us is within the strict letter of the statute, we take this occasion to declare that full efficacy must be given to the humane spirit and intent of the law.

Of the legal capacity of the administratrix to sue there can be no question. Pratt was a man of mature age, unmarried, and childless. The administratrix was his mother and dependent on him for support. The statute (section 2864), as amended in 1905 (*Laws 1905*, p. 135 [*Ann. St. 1906*, p. 1637]), provides: "If there be no husband, wife, minor child or minor children, natural born or adopted, * * * then in such case suit may be instituted and recovery had by the administrator or executor of the deceased," etc. The demurrer to the evidence was properly overruled.

Point is made that the court erred in excluding from the evidence a book kept by defendant which showed the names of the employes who were working at the scene of the accident. The purpose of the offer was to prove that one of plaintiff's important witnesses, who testified that he was at work in yard at the time of the injury, had given false testimony. The time slips or tickets made in the yard by the employe whose duty it was to keep the time of the employes were offered by defendant and admitted in evidence. The record book was a mere compilation of these slips. The following excerpt from the opinion of Judge Lamm, in *Sharp v. Railway*, 213 Mo. 517, 111 S. W. 1154, disposes of this point adversely to the contention of defendant: "The primary evidence obviously was the testimony of the inspector himself and his tally book made contemporaneously with his inspection. The record offered was a mere after-compilation of these tally books, in the nature of a ledger kept for the convenience of defendant. Note the fol-

lowing: There is even no testimony that the copying was correctly done. There is no excuse offered for the absence of the original memoranda, viz., the tally book and its contents, or for the absence of the evidence of the inspector who made both the inspection and the tally book. In this condition of things, it would be dangerously loose practice to permit the introduction of such secondary evidence. We are cited to no well-considered case holding such book admissible, on such proof. We take it, its admission would be a novelty in the law, and, if we were to allow its exclusion as error, we would open the door to grave abuses by such a precedent."

But one of the objections of the defendant to the instructions given at the request of plaintiff is of sufficient merit to call for special notice. That is addressed to the following instruction: "The court instructs the jury that, if you find for plaintiff, you will assess her damages at a sum not less than \$2,000 and not exceeding \$10,000, all in the discretion of the jury, and in arriving at the amount the jury may take into consideration the age, physical condition, and earning capacity of deceased at the time of his death." The statute provides that the offending corporation "shall forfeit and pay as a penalty * * * the sum of not less than two thousand dollars and not exceeding ten thousand dollars, in the discretion of the jury." Defendant argues: "The language of this statute shows clearly and conclusively that it is a penal statute, and that the question of compensation does not enter into the amount of damages which the plaintiff is entitled to recover. That being true, the said instruction No. 12, telling the jury that they should take into consideration the age, earning capacity, etc., of the deceased, was clearly erroneous." Plaintiff, without objection from defendant, was permitted to examine a witness on matters relating to the earning capacity of the decedent and the dependency of his mother on him for support, and on cross-examination defendant went into this subject and endeavored to show that Pratt was not industrious, but idled away much of his time. A defendant who is driven by adverse rulings of the court to contest a false issue is not precluded, where he has duly preserved his exceptions, from availing himself, in the appellate courts, of the error forced upon him; but a defendant who voluntarily accepts a false issue tendered by his adversary has no right to complain after he is beaten on ground of his own choosing. Neither party will be suffered to try the case on one theory in the trial court and on another in the appellate court. Defendant therefore is in no position to complain that plaintiff was permitted to show the pecuniary value of the life of the decedent to those dependent upon him.

But defendant did object and except to the instruction under consideration, and we must

assume that the point was made that the remedy was penal, and must be awarded as a penalty, and not as compensation for actual damages inflicted. Whether or not the evidence we have noted was improper and should have been excluded had defendant objected to its reception, it became the duty of the court to declare in the instruction the correct rule relating to the remedy, and, should we find that an incorrect rule was given, we would hold that prejudicial error had been committed against the defendant. The rule now prevailing in this state is that such portions of the statute "as confer a remedy are to be liberally construed in advancement of the remedy, and such portions of it as impose a penalty are to be strictly construed, in order that the penalty shall be sustained and the statute shall be operative and in full force, to the end that the mischief which it seeks to prevent and punish shall be abated or minimized." *Casey v. Transit Co.*, 116 Mo. App., loc. cit. 249, 91 S. W. 424; s. c. 205 Mo. 721, 103 S. W. 1146. The remedy must be imposed by the jury as a penalty, not as compensatory damages; but the statute in its present form does not fix the exact amount of the penalty, but leaves a wide range for the jury to exercise discretion. Between the limits of \$2,000 and \$10,000 the jury is given room for the expression of its convictions concerning the amount of the penalty that should be imposed. The very fact that the Legislature invested the jury with the right of exercising a discretion makes pertinent all of the facts and circumstances of the case that are necessary to be known in order that the discretion may be wisely, and not foolishly or capriciously, exercised. Not only is it essential that the jury should know the nature of the culpable act which gave rise to the cause of action, but also should they know the kind of man who met his death by the negligence of the defendant. The age and earning capacity of the decedent were proper subjects of investigation, and it was not error to instruct the jury to take such facts into consideration. The instruction does not tell the jury to award plaintiff compensatory damages. It directs them to assess the damages at a sum not less than \$2,000 and not exceeding \$10,000, "all in the discretion of the jury." While it does not use the word "penalty," it does fix arbitrary bounds to the verdict without reference to the question of whether actual compensation for the damages incurred would lie within those bounds. In doing this, the instruction sufficiently expressed the idea that the assessment of damages was to be treated by the jury as the imposition of a penalty. If defendant desired a more specific instruction, it should have asked it.

We find no substantial error in the record, and, accordingly, the judgment is affirmed. All concur.

CARRELL v. McDONNELL.

(Kansas City Court of Appeals. Missouri. Nov. 15, 1900. Rehearing Denied Dec. 6, 1900.)

1. WORK AND LABOR (§ 7*)—COMPENSATION—RIGHT TO RECOVER.

A married daughter, living with her husband apart from her father was requested by the latter to come home and work. Thereafter she broke up her home and went to her father's home and rendered services for several years. Before any services were rendered he promised her that he would do what was right, and after the rendition of a part, he said he would pay her for everything. *Held*, that she was entitled to recover the value of the services, as the father's request raised an implied contract to pay therefor.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 12, 13, 17; Dec. Dig. § 7.*]

2. PLEADING (§ 398*)—VARIANCE.

Where the petition, in an action for services, alleged that they began on September 1st, an instruction that the jury might allow compensation for services from March 1st preceding, in accordance with the evidence, was not erroneous, where it did not mislead or surprise defendant.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 1338; Dec. Dig. § 398.*]

Appeal from Circuit Court, Andrew County; Alonzo D. Burns, Judge.

Action by Maggie J. Carrell against Michael J. McDonnell. From a judgment for plaintiff, defendant appeals. Affirmed.

J. C. Growney, for appellant. L. C. Cook, for respondent.

BROADBUSH, P. J. This is a suit to recover for the value of plaintiff's services rendered by plaintiff on an alleged contract had with defendant. The plaintiff is the daughter of defendant, and was married prior to the 1st day of March, 1899, and was living with her husband and child separate and apart from defendant. Plaintiff's evidence went to prove that she left her own home, and at the request of defendant and took up her abode with him. The request mentioned was in the form of a letter, the contents of which were to the effect that defendant would like for plaintiff to come home; that her sister was there, but she would not stay, and if plaintiff would come home, he would fix things up right for her, and to come home and stay; that her mother was not able to do anything. Plaintiff in a short time thereafter sold her household goods, broke up her home, and went to Maryville. The defendant met her at the depot, and took her to his farm. After she got to the farm, the parties talked the matter over, and defendant said to her: "If you will stay with us from now on, I will do right by you. I will give you plenty. If your will stay with us, I will do right by you. Help me with the chores, and help me with the work." She worked for defendant from that time, doing the household work and also that of a farm hand. She

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

the quit for a time, on the ground that her health had broken down. She left defendant's farm, and with her husband and child established themselves in a home in Maryville. She there followed the business of a dressmaker, in which she earned from \$1 to \$1.50 a day. On October 1, 1903, defendant went to her home and solicited her to go back to the farm, and upon her hesitation to consent to do so, he said to her; "Well, you will get pay for everything you've done for me. They won't stay with me. Won't you come back for your mother's sake, for God's sake?" Plaintiff again broke up her home, and with her child went back to the farm and resumed her former labors. She remained, performing such services as has been described until February 1, 1906, a period of 4 years and 4 months, which with that she had formerly performed aggregated 92 months of service. Disagreements arose then between herself and sister, who had returned to the farm, and whose husband had died in the meantime, and she left the farm again. That plaintiff rendered important service is well attested by her neighbors, who were witnesses in her behalf, and there was evidence going to prove the value of her services. As the case was tried before a jury, we deem it unnecessary to set out defendant's testimony, as their verdict settled the questions of fact in issue. The jury returned a verdict for plaintiff in the sum of \$1,515, upon which judgment was rendered, and defendant appealed.

The court instructed the jury, in substance, that if plaintiff rendered services for defendant at his request, she was entitled to recover for the reasonable value of such services. It is contended that the instruction is radically wrong. The theory of appellant is that plaintiff was the daughter of defendant, and that the law presumes, in the absence of an understanding that defendant was to pay and the other was to receive pay for her services, that such were rendered gratuitously. *Louder v. Hart*, 52 Mo. App. 377; *Finnell v. Gooch*, 59 Mo. App. 209; *Castle v. Edwards*, 63 Mo. App. 564. There is no disputing the rule which defendant has invoked, but it does not govern under the facts in this case. There are authorities of the most direct bearing holding that plaintiff is entitled to recover under the facts. The plaintiff was not a member of defendant's family; and, as the services were rendered at defendant's request, there was an implied contract that she would receive compensation therefor. We have a case in this state much in point. It is there said: "Where in an action by decedent's daughter for services plaintiff's evidence showed that she came home at her father's request, and began work with the understanding that

services from the fact that she began work up to the death of her father." *Shannon v. Carter*, 99 Mo. App. 134, 72 S. W. 495. "Where the evidence raises the presumption that the services were rendered and received with the expectation that the parent would compensate the child for the same, there is sufficient evidence to send the issue to the jury." *Finnell v. Gooch*, supra. It is held in cases like this "that the relation of the parties did not make them members of the same family, and therefore takes the case out of the rule that services rendered another by a child or a member of his family are presumed to be gratuitous." *Lillard v. Wilson*, 178 Mo. 145, 77 S. W. 74.

The defendant argues, however, that under the instruction the jury were authorized to find for respondent without first finding that the services were performed under and by virtue of a contract either expressed or implied. This is a misapprehension, because the instruction requires that there must have been a request to plaintiff to perform the services before she was entitled to recover; and, as such a request raises an implied contract to pay for them, the instruction is not subject to criticism. And this rule is particularly applicable to the facts of this case, as plaintiff was not a member of defendant's family, and there existed no presumption that such services were to be performed gratuitously.

We pass over the objection made to instruction numbered 2 given for plaintiff, as we do not think there is any kind of error contained therein.

Instructions numbered 3, 4, and 5 we are fully persuaded are properly worded, and contain correct directions to the jury in arriving at a verdict; and there was no error in telling the jury they might allow plaintiff compensation for her services from March 1, 1899; the petition alleging that such services began September 1, 1899, because it was a mere variance, and was not misleading and worked no surprise to defendant.

Finding no error, the cause is affirmed. All concur.

WENNINGER v. MITCHELL et al.

(Kansas City Court of Appeals. Missouri.
Nov. 15, 1909. Rehearing Denied
Dec. 6, 1909.)

1. CONTRACTS (§§ 111, 139*)—LEGALITY—MARRIAGE BROKERAGE CONTRACT.

A contract to aid a woman in securing a husband is invalid, although when the contract was made the woman was endeavoring to marry the man that she subsequently married, and the services that she contracted for were in connection with her efforts to secure such man as her husband; and, although the contract is ex-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter indexes

cuted, the woman will not be deemed in pari delicto with the other parties to the contract, and will be allowed to recover the consideration paid.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 515-520, 684-700; Dec. Dig. §§ 111, 139.*]

2. CONTRACTS (§ 53*)—FRAUD—"UNCONSCIONABLE."

An "unconscionable" contract is one such as no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 231, 232, 505; Dec. Dig. § 53.*]

For other definitions, see Words and Phrases, vol. 8, pp. 7153, 7154.]

Appeal from Circuit Court, Schuyler County; Nat M. Shelton, Judge.

Action by Dora Wenninger against D. B. Mitchell and others. Case was referred to a referee, who made findings for plaintiff, but on exceptions to the report the court entered judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions to overrule objections to the referee's report, and enter judgment thereon for plaintiff.

Thos. L. Buford and Fogle & Fogle, for appellant. Wm. Saxbury and Higbee & Mills, for respondents.

ELLISON, J. Plaintiff instituted this action by filing a bill in equity praying for dissolution of a partnership with defendants, and for an accounting. The case was referred to a referee, who took the evidence brought forward by the parties and made his findings for the plaintiff. Exceptions were taken to his report, which the court sustained, and entered a judgment for the defendants.

It appears that plaintiff was a widow and that her name was Skinner; that her husband died in 1905, and that afterwards, in the latter part of the summer or early fall of 1906, she returned to Queen City, Schuyler county, Mo. (the seat of this controversy), where she had formerly lived, and went to board with defendants, who are husband and wife. Defendant D. B. Mitchell was engaged in the livery stable business in that town, and shortly after plaintiff came to his house he sold her a half interest in the business and livery stock for \$500 in cash. It seems that plaintiff desired to get married again, and was so anxious in that regard that she advertised for a husband in the newspapers through a matrimonial agency. In this way one Wenninger, of Lincoln, Neb., learned of her, and he, too, wanting to get married, entered into a correspondence with plaintiff, which quickly resulted in an engagement and shortly thereafter their marriage. In thus getting a husband plaintiff wittingly or unwittingly laid the foundation for the defense to this action. Defendants admit that plaintiff purchased a one-half interest in the livery

stable for \$500 and became a partner in the business. But they claim that she said to Mrs. Mitchell, before she purchased the interest in the livery stable, that she would pay well if we "would assist her in getting a man"; that after she purchased of them the interest in the stable, "she said if we would help her get this man, she would give us her interest in the barn for our service." Defendants say they carried out their part of the agreement, and that plaintiff's interest in the barn became theirs. We will examine the record to see what substance of law or fact there may be in this claim.

In the first place we find the work claimed to have been performed by defendants for plaintiff to be of such trifling nature as not to deserve serious consideration. It consisted principally in writing two letters. The time covered by this "service" was between the middle of September and the 24th of October, for the first letter was written two or three weeks after plaintiff arrived at their house, which was the latter part of August, and the last one must have been prior to October 24th, as that was the day of the marriage. Thus some time within the space of four or five weeks, Mrs. Mitchell wrote two letters at plaintiff's dictation. The record does not disclose how long a time this took, but the simple matter of writing two letters could not have taken long. Suffice it to say we cannot bring ourselves to believe the task was worth one-half of a livery stable, for which plaintiff had just paid defendants \$500.

But defendants will say that the foregoing was not all the service they performed "in getting a man" for plaintiff. Their further claim came about in this way: It seems that Wenninger, recognizing the custom in such affairs, endeavored to seek plaintiff by going to her and having the wedding at her home. But counsel say the "Fates" interfered, and as he was on his way to the train in Lincoln, he met with an accident on a street car, the nature of which is not disclosed. However, he immediately instituted an action for damages against the street railway, and wrote to plaintiff the reason for his failure to appear at her home. It was then arranged by plaintiff that she would go to Lincoln, and the ceremony could be performed notwithstanding the misfortune. Plaintiff invited defendants to the wedding, and Mrs. Mitchell straightway accepted, or at least immediately expressed a desire to go, but Mr. Mitchell gave evidence of some hesitation. He said he was "short of money." At any rate, when he was informed of a matter to be presently mentioned, he too accepted, and all three started for the wedding. It is for thus attending the wedding that the additional service is made up. It is so out of the ordinary for one to charge for an acceptance of an invitation to a wedding that we find dir-

that Mrs. Mitchell had never traveled much, and when we reflect on the pleasure it ordinarily must be to be favored with an invitation to a trip from a country village to a distant city to attend a wedding, and, as they said, partake of a "wedding feast," we are again loath to allow any charge in a proceeding in equity. But this is not all to be said on this head, in plaintiff's behalf and defendants' condemnation. Plaintiff paid the expenses of Mrs. Mitchell, and gave Mr. Mitchell a new bedstead. When he learned that plaintiff was to pay his wife's expenses for the trip and to give him her new bedstead, his objection softened, and the hesitation noted above faded away. These considerations make it a matter of some wonder how this branch of the defense, so extraordinary in its nature, could have been set up. Yet, notwithstanding the foregoing considerations, it must be conceded that the record discloses some evidence of an agreement on plaintiff's part, though she testified that there was not. For the reasons following it will not be necessary for us to say whether she did, in fact, promise to pay for what was not much more than imaginary service.

The defense is based on an unconscionable claim. In *Ball v. Reyburn*, 136 Mo. App. 546, 118 S. W. 524, we approvingly cited this definition of an unconscionable contract from *Chesterfield v. Jansen*, 2 Ves. Sr. 155: It is a bargain "such as no man in his senses, and not under a delusion, would make on the one hand, and as no honest and fair man would accept on the other." In passing on the utter disproportion between the service said to have been rendered and the compensation claimed we will add to what we said at the outset that we must keep in mind the situation of the parties and the possibility, or perhaps the better word would be the impossibility, of defendants rendering any real service. The man they were to aid plaintiff in marrying was not an acquaintance of theirs over whom they had influence; he was a total stranger to them, whom they had never seen or heard of, and who had never seen or heard of them. There is no pretense of any service, nor was there opportunity for any, save the mere writing of two letters, a common civility rarely made a matter for compensation. If plaintiff could have called upon any one running a typewriter, the service could, and doubtless would, have been performed for not more than 10 cents each.

But if we should have concluded that the evidence favored the defendants, it would have been, for another reason, of no benefit to them. It would but show a contract which the law would not aid in enforcing. The contract would be nothing less than that known as "marriage brokerage," which is condemned where the English common law is enforced. The contract, according to the

They were to procure, or aid in procuring, a husband for the plaintiff. It was subject to all the vicious tendencies such contracts have been shown to possess, and is wholly void. 2 *Parsons on Contracts*, 73; *Lawson on Contracts*, § 321; 3 *Addison on Contracts*, § 1349; *Jangraw v. Perkins*, 76 Vt. 127, 56 Atl. 532, 104 Am. St. Rep. 917; *Duval v. Wellman*, 124 N. Y. 156, 26 N. E. 343. The fact that plaintiff was engaged in seeking to marry Wenninger when defendants were called in and employed to aid her in the already conceived purpose does not change the nature or character of the contract, nor relieve it of any of the obnoxious features of an ordinary marriage brokerage agreement. Thus in *Jangraw v. Perkins*, supra, the contract was to hasten an intended marriage. It read: "I owe you five hundred dollars and I deed you this land to secure the debt; but if Rivett shall marry your daughter at once and be for six years her faithful husband, the debt shall be satisfied; otherwise, I must pay you five hundred dollars to be held by you in trust for her." It was condemned as illegal. In *Crawford v. Russell*, 62 Barb. (N. Y.) 92, the contract was "that plaintiff should do all she could to aid a marriage between Jeremiah and Christina by her influence and services," for which service and influence Christina promised, if she became the wife of Jeremiah, she would pay plaintiff \$2,000 in cash, and to purchase for her a piano, and also a gold watch for plaintiff's daughter, and pay the expense of the daughter's education. The contract was condemned as illegal. In that case it is shown that the civil law allowed and encouraged marriage brokers and matchmakers for the reason that it was thought to facilitate matrimony. But the common law looked more to bad tendency and the evil consequences flowing from marriages thus brought about. And Judge Story said: "The surprise is not that the doctrine should have been established in a refined, enlightened, and Christian country, but that its propriety should ever have been a matter of debate." In *Boynton v. Hubbard*, 7 Mass. 112, such contracts were pronounced void, "not because they are fraudulent upon either party, but because they are a fraud upon third persons, and because they are a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, * * * and they are relieved against for the sake of the public." The idea conveyed by these cases is that to uphold contracts of this nature would make marriage a matter of traffic, and would stimulate marriage procurement in such degree as to be demoralizing in its tendency and unhappy in its results. They are therefore condemned on the ground of public policy.

But it may be said that plaintiff is in part

delicto and therefore cannot take advantage of the illegality, since the law will not aid one who has joined in acts which the law forbids. There are, however, cases where, notwithstanding the plaintiff may profit by the relief asked, the public good requires that it be granted; especially is that true when the party seeking relief is the lesser wrongdoer. The question was recently elaborately discussed by Judge Valliant in *Hobbs v. Boatrigh't*, 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709. The judge said that: "The doctrine that courts will not aid a plaintiff who is in pari delicto with the defendant is not a rule of universal application. It is based on the principle that to give the plaintiff relief in such case would contravene public morals and impair the good of society. Therefore the rule should not be applied in a case in which to withhold the relief would, to a greater extent, offend public morals. To promote the good of the public is the highest aim of the courts in the application of this doctrine. Under the head of exceptions to the rule in 9 Cyc. p. 550, it is said: 'Although the parties are in pari delicto, yet the court may interfere and grant relief at the suit of one of them where public policy requires its intervention, even though the result may be that a benefit will be derived by a plaintiff, who is in equal guilt with the defendant. But here the guilt of the parties is not considered as equal to the higher right of the public, and the guilty party to whom the relief is granted is simply the instrument by which the public is served.' A question of what is public policy in a given case is as broad as a question of what is fraud in a given case, and is addressed to the good common sense of the court." To the same effect, see *Funding Co. v. Haskett*, 125 Mo. App. 516-539, 102 S. W. 1050. The question was presented to the Court of Appeals in *New York* in a case of the kind before us. *Duval v. Wellman*, 124 N. Y. 156.¹ The contract was between a woman seeking a husband and the proprietor of a matrimonial journal called the "New York Cupid," and it read as follows: "June 2, 1887. Due Mrs. Gulon, from Mr. Wellman, fifty dollars (\$50.00) Aug. 15th, if at that time she is willing to give up all acquaintance with gentlemen who were introduced in any manner by H. B. Wellman. If Mrs. Gulon marry the gentleman whom we introduce her to, an additional fifty dollars (\$50.00) is due Mr. Wellman from Mrs. Gulon. [Signed] H. B. Wellman. E. Gulon." The court ruled that the money paid on the contract could be recovered back, on the ground that the woman was not the equal in guilt with the marriage promoter. And that where the contract was not *malum in se*, the law would afford relief to the more innocent party, and that two parties might "concur" in an illegal act without being deemed in all respects in *pari delicto*.

We, therefore, feel not restrained by the rule in *pari delicto* and, in consequence, do not consider that it in any wise stands in the way of plaintiff's right to claim her partnership share of the livery stable property.

The judgment is reversed, and the cause remanded, with direction to overrule objections to the referee's report and enter judgment thereon as therein indicated. All concur.

PINELAND MFG. CO. v. GUARDIAN TRUST CO.

(Kansas City Court of Appeals. Missouri.
Nov. 15, 1909.)

1. COVENANTS (§ 94*)—COVENANT OF SEISIN—BREACH—NECESSITY OF EVICTION.

The rule that a grantor is not liable upon a covenant of fee-simple title until eviction, or something equivalent thereto, under a paramount title, applies in case of a failure of title, where no adverse title has been asserted, and generally where it is sought to avoid the payment of purchase money or the payment back of purchase money already paid, but does not apply in case of a covenant of an indefeasible estate in fee simple, where in fact the covenantor has no legal title whatever; there being a breach of the covenant warranting nominal damages the instant it was made, in which case the covenantee may sue when he has suffered substantial damages, though there has been no eviction.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 109; Dec. Dig. § 94.*]

2. VENDOR AND PURCHASER (§ 129*)—PERFORMANCE OF CONTRACT—SUFFICIENCY OF TITLE.

Under a contract calling for a general warranty deed, a purchaser could not be compelled to accept a conveyance, where the legal title is outstanding in a third person.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 238; Dec. Dig. § 129.*]

3. COVENANTS (§ 132*)—WARRANTY OF FEE-SIMPLE TITLE—BREACH—DAMAGES—EXPENSE OF PERFECTING TITLE.

Where a vendor covenanted to convey a fee-simple title, the legal title being in a third person, the purchaser could call upon the vendor to obtain a fee-simple title, and, upon its default, could institute proceedings to protect and perfect the title, and the necessary expense incurred therein would be substantial damage, for which recovery could be had of the vendor under its covenant.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 260-262; Dec. Dig. § 132.*]

4. COVENANTS (§ 132*)—WARRANTY OF FEE-SIMPLE TITLE—BREACH—DAMAGES—ATTORNEY'S FEES.

For breach of such a covenant, attorney's fees and necessary reasonable expenses and proper court costs are allowable; attorney's fees being allowed only where notice of the action has been given to the covenantor.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 261, 262; Dec. Dig. § 132.*]

5. LIMITATION OF ACTIONS (§ 180*)—PLEADING—DEMURRER RAISING DEFENSE.

A defendant may take advantage of limitations by demurrer, when the bar appears on the face of the petition.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 670, 671; Dec. Dig. § 180.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

¹ 26 N. E. 243.

vey a fee-simple title from the time substantial damage accrues, and where the date of the covenant was more than 10 years prior to the beginning of the action thereon, but there had been no eviction or equivalent act, and substantial damage only occurred upon expenditures in an action by the purchaser to perfect the title against a third person holding the legal title, within the 10-year period, the subsequent action on the covenant was not barred by 10 years' limitation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 255, 256; Dec. Dig. § 47; * Covenants, Cent. Dig. § 178.]

Appeal from Circuit Court, Jackson County; Jas. E. Goodrich, Judge.

Action by the Pineland Manufacturing Company against the Guardian Trust Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Haff & Michaels and Daniel C. Ketchum, for appellant. Geo. H. English, Jr., and Edward C. Wright, for respondent.

ELLISON, J. This action is based on a covenant of seisin contained in a general warranty deed for lands lying in the state of Louisiana. The judgment in the trial court was for the defendant. The defendant demurred to plaintiff's petition on the ground that it did not state a cause of action. The trial court sustained that view, and plaintiff thereupon appealed.

Stripped of detail, the petition states that plaintiff bought a large tract of land of defendant situated in the state of Louisiana, and received from defendant a general warranty deed containing covenants for an indefeasible estate in fee simple and for further assurance. It is then alleged that, at the time of defendant's deed to plaintiff, one Searing held the legal title to the land by regular conveyance from the state of Louisiana, the then owner. It is then alleged: That Searing laid claim to the land and demanded of plaintiff that he be paid \$10 per acre therefor; that plaintiff did not know of Searing's title or claim until after it had made a contract of sale to third parties, when it was discovered that defendant did not have the title and had not conveyed any to plaintiff. It is further alleged: That upon discovering that nature of the title, and in order to put such title in condition that plaintiff could make sale of the land, plaintiff demanded of Searing that he make a deed thereof to plaintiff, which he declined to do unless it was bought of him as already stated, and that Searing threatened that unless it was bought of him he would sell to other parties. That, in order to prevent Searing conveying the land to innocent third parties, plaintiff, through its attorneys, began the preparation of an action for a decree

and prosecute such suit, or otherwise obtain the title from Searing, and that, if defendant did not do so, plaintiff would prosecute the action and hold defendant for all costs, fees, and expenses connected therewith, and that defendant refused to do so. That thereafter plaintiff did file its action against Searing in a court of competent jurisdiction in Louisiana praying that its title be declared to be null and void, and that the legal title be vested in plaintiff. That it was set up in the petition in such action that Searing purchased the lands from the state of Louisiana for the defendant and acting as agent for defendant, though he took the title in his own name. That Searing, the next day after plaintiff instituted such action against him, carried out his threat, and actually conveyed the land to a third party, though, on account of the lis pendens, the sale was of no avail. It was then averred that afterwards Searing filed an answer to such action denying that he purchased the lands as agent for defendant, but that he held the title as of his own right. It was then averred that the court aforesaid heard the action in due course and entered a decree divesting Searing of his title and vesting it in plaintiff. The expense of the litigation, consisting of costs and attorney's fees, are then set up, and judgment asked for the aggregate amount.

The defendant supports its attack upon the sufficiency of the petition by the claim that it is not liable under its warranty deed until there has been an eviction, or something equivalent thereto, under a paramount title. This claim is the general law in this state. *Collier v. Gamble*, 10 Mo. 473; *Cockrell v. Proctor*, 65 Mo. 46; *Pence v. Gabbert*, 63 Mo. App. 302; *Leet v. Gratz*, 92 Mo. App. 422; *Id.*, 124 Mo. App. 394, 101 S. W. 696. But that law is generally stated as to claims where a party seeks to recover damages arising from a failure of title when none adverse thereto looking to taking the land from him has been asserted; and the damages are generally, though not always, where it is sought to avoid, in whole or in part, the payment of purchase money, or the recovery back of purchase money already paid. But this is not a case of such character, nor does the reason applicable to that class of cases apply to this. Here defendant attempts to convey land to plaintiff by deed, in which it covenants that it is seised of an indefeasible estate in fee simple, when in fact it had no legal title whatever; the legal title was outstanding in Searing. There was therefore a breach of the covenant the instant it was made, and nominal damages could have been recovered, though substantial damages could not be had until such character of damage

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

accrued. It is true substantial damage, as, for instance, for failure of title, would not accrue until an eviction or its equivalent; but that does not meet the question in this case, either in technical law or bare justice. Here the plaintiff demands and obtains a covenant for an indefeasible fee-simple legal title and does not get such title. Plaintiff does not get such a title as will permit it to sell. It gets a title which could be defeated in toto by Searing selling to a third party without notice. It does not get a marketable title. It does not get a title which it could have been compelled to accept under a contract of sale calling for a general warranty deed. *Mitchner v. Holmes*, 117 Mo. 185, 205, 22 S. W. 1070; *Mastin v. Grimes*, 88 Mo. 478; *Green v. Ditsch*, 143 Mo. 1, 12, 44 S. W. 799. In that condition of case, when the defect is covered by the covenant, we cannot see any good reason why the covenantee could not resort to an action on the covenant when he suffers damage.

Plaintiff has a right to the title which defendant covenanted it had conveyed to it, and, having that right, it was within its privilege to call upon defendant to obtain it, or, in default, to obtain it itself. It therefore did no more than assert its plain right when it began and carried through proceedings in the proper court in Louisiana to protect and perfect its title. By that proceeding it got what defendant covenanted it should have, and in prosecuting that proceeding it incurred necessary expense, which it paid, and thereby substantial damage accrued. Not the damage, it is true, which ordinarily accrues on breaches of covenants, but the oddity or rarity of the claim cannot affect its justice or alter the law supporting it. Where a grantee has not been evicted, and he gets the land in fact, he must pay for it; but here, as already intimated, by the covenant which plaintiff obtained from defendant, it was to receive more than the land; it was to have also a title to the land, and it did not get it, and when it was put to expense in curing defendant's obligation substantial damage accrued. In such character of case, eviction is not necessary to maintain the action. *Dickson v. Desire*, 23 Mo. 151, 167, 66 Am. Dec. 661. While that was said in that case in respect to the assertion of a paramount title, yet it is applicable to the facts here. An action for substantial damages may be maintained on such covenant when such damages occur.

It is a part of defendant's insistence that an invalid claim does not constitute an incumbrance within the meaning of the covenants in a deed, and that a covenantor is not bound to protect a grantee against unlawful claims, citing *Luther v. Brown*, 66 Mo. App. 227, *Smith v. Parsons*, 33 W. Va. 644, 11 S.

E. 68, and other authority. What we have written above applies to this phase of the defense. This was not an invalid or unlawful claim in the sense of that rule of law. It was a real claim of the legal title to the property. The legal title was not in this defendant when it covenanted that it was. As already stated, plaintiff had a right to demand the legal title, and, defendant refusing to procure such title, it was plaintiff's privilege to institute proceedings to acquire that title and to hold defendant, after notice, for the necessary expense.

Coming to the measure of damages claimed in the petition, it may be stated to be the rule in this state that attorney's fees and necessary reasonable expenses, as well as proper court costs, may be allowed. *Hazlett v. Woodruff*, 150 Mo. 534, 51 S. W. 1048. But, if attorney's fees are claimed, notice of the action must have been given. *Long v. Wheeler*, 84 Mo. App. 101; *Quick v. Walker*, 125 Mo. App. 257, 102 S. W. 33. For, as stated in *Long v. Wheeler*, supra, the covenant "is not, in terms, that the covenantor will pay all expenses of defense of a paramount title, but that he will himself defend against it. He should therefore be given an opportunity to defend by notice of the action. Furthermore, * * * it may be that the breach of covenant is of such nature that the covenantor would willingly adjust it without litigation."

Defendant claims that the face of the petition shows the action to be barred by the 10-year period of the statute of limitations. The claim is based on the idea that the covenant was broken as soon as made, and that, if there was no title, the substantial damage occurred at the date of the deed, and the right of action accrued then, which was more than 10 years prior to filing the petition. The defendant may properly take advantage of the statute of limitations by demurrer whenever the face of the petition shows the bar to be complete. *Burrus v. Cook*, 215 Mo. 496, 114 S. W. 1065. But we do not think the petition shows a bar. The date of the covenant alleged in the petition was more than 10 years prior to filing the petition; but the substantial damage which is alleged, and for which the action is brought, occurred long within the period. The statute of limitations only begins to run from the time substantial damage occurs. *Chambers v. Smith*, 23 Mo. 174. If defendant had been without right or title of any kind, the entire superior right being in another, and an eviction, or, something equivalent, had occurred, then the substantial injury would have occurred when the deed was made; but that was not this case.

The result of these views is to reverse the judgment and remand the cause. All concur.

1. DAMAGES (§ 109*)—MEASURE OF DAMAGES—TEMPORARY INJURY TO LAND.

Where the destruction of the thing includes but the temporary injury to the land, and the thing may be replaced in a comparatively brief period, the true measure of damages is the cost of replacing it and the rental value of the land until it is replaced.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 273-278; Dec. Dig. § 109.*]

2. DAMAGES (§ 110*)—MEASURE OF DAMAGES—PERMANENT INJURY TO LAND.

Where the destruction of the thing inflicts more than a temporary injury to the land, or the replacement would be impossible or tedious and uncertain both in cost and result, the measure of damages is the damage inflicted on the market value of the land.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 273-278; Dec. Dig. § 110.*]

3. DAMAGES (§ 112*)—MEASURE OF DAMAGES—MATURED CROPS—TREATED AS PERSONAL PROPERTY.

Where a matured crop is destroyed, the crop is treated as personal property, and the measure of damages is the market value of the crop standing on the ground.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

4. DAMAGES (§ 217*)—DESTRUCTION OF CROP—INSTRUCTION AS TO MEASURE OF DAMAGES.

In an action against a railroad company for the destruction of a crop of alfalfa from water being thrown back upon the land because of the insufficiency of a culvert put in by the company over a natural water course, where it was shown that three other crops could have been grown upon the land during the season, an instruction that the jury should assess plaintiffs' damages at the fair value of the alfalfa on the ground at the time of the loss was erroneous, as it permitted the jury to include in their assessment the value of three future crops, which was an element too contingent and speculative to afford a basis for the assessment of the damages sustained.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 556-559; Dec. Dig. § 217.*]

5. DAMAGES (§ 112*)—GROWING CROPS—MEASURE.

Where water destroyed the first and matured crop of the season of alfalfa, root and branch, the measure of damages was the value of the crop, and the cost of reseeded, and the rental value of the land, and not the value of the crop destroyed, plus three other possible crops that might have been grown the same season.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 281-283; Dec. Dig. § 112.*]

Appeal from Circuit Court, Platte County; A. D. Burnes, Judge.

Action by John G. Adam and another against the Chicago, Burlington & Quincy Railway Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

O. M. Spencer, H. B. Pyle, and Guy B. Park, for appellant. John W. Coots, for respondents.

Plaintiffs allege the culvert was insufficient, and that in 1908 five acres of alfalfa planted by plaintiffs in the preceding year were totally destroyed by the waters thrown back on plaintiffs' land by the obstruction. Several defenses were interposed in the answer. A trial to a jury resulted in a verdict and judgment for plaintiffs in the sum of \$200, and the cause is here on the appeal of defendant.

The errors assigned by defendant relate solely to the issue of the measure of damages. It appears that a matured crop was destroyed, and, further, that the deposits left on the land prevented any renewal of the crop. The evidence of plaintiffs is to the effect that the market value of the matured crop, which was the first of the season, was \$10 per acre, and that three other crops would have been produced that season. A witness testified that a field of alfalfa was of the value of "\$10 an acre for each cutting and \$10 for the stubble." Evidently this estimate was adopted by the jury. In the instructions given at the request of plaintiffs, the jury were told that, if they found for plaintiffs, to assess the damage "at the fair value of said alfalfa on the ground at the time of such loss or damage." Defendant argues that since plaintiffs failed to prove either the cost of reseeded and the rental value of the land while a new crop of alfalfa was being grown, or the difference in the market value of the land caused by the destruction of the reproductive power of the roots, there was no evidence on which to base a verdict. It is the theory of defendant that the proper rule was the difference in the market value of the land before and after the injury. In this conclusion defendant finds support in the opinion of the Supreme Court of Nebraska in *Thompson v. Railway*, 121 N. W. 447, where it is said: "There is a difference in condition between an ordinary annual crop and a permanent crop, such as alfalfa, which justifies and requires a different rule in the measurement of damages, and we are of the opinion that a fair criterion of the damages suffered by the destruction of a good stand of alfalfa would be the difference between the value of the land with such crop standing and growing upon it and the same without such crop." This view of the law, doubtless, was induced by consideration of the facts that alfalfa is perennial and its roots grow very deep and become closely interwoven. We do not think the opinion of the Nebraska court is in harmony with the fundamental rules recognized in this state in such cases. These rules thus may be stated: Where the destruction of

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ure of damages is the cost of replacing it and the rental value of the land until it is replaced; but where the destruction of the thing inflicts more than a temporary injury to the land, or the replacement would be impossible or tedious and uncertain both in cost and result, the criterion is the damage inflicted on the market value of the land. And in cases where a matured crop is destroyed the crop is treated as personal property, and the measure of damages is its market value standing on the ground.

Illustrative of these rules are the following instances: The value of an annual crop, such as corn, wheat, or oats, destroyed before maturity, is measured by the cost of re-seeding and the rental value of the land. *Standley v. Railway*, 121 Mo. App. 537, 97 S. W. 244; *Jones v. Cooley Lake Club*, 122 Mo. App. 113, 98 S. W. 82. A hedge was treated as a part of the inheritance, and the rule applied was the difference in the market value of the land before and after its destruction. *Gates v. Railway*, 44 Mo. App. 488. Fruit trees were held to belong to the inheritance, but the matured fruit on them to be personalty. *Doty v. Railroad*, 136 Mo. App. 254, 116 S. W. 1126. A crop of timothy hay was treated as personalty, but damages for the grass roots, which also were destroyed, were held to be measured by the cost of reseeded and the rental value of the land. *Mattis v. Railway*, 119 S. W. 998. In this case it is said that a different rule would be applied where prairie grass roots were destroyed, because of the impossibility of replacing wild grass. In such case the injury to the inheritance would be the test. There has been a vast deal of law written in this state on the subjects we are discussing, and the decisions are not altogether harmonious. It is not necessary nor useful to refer to or even cite the numerous cases. We are satisfied with our opinions in the *Mattis* and *Doty* Cases, and think the rules applied in them control the determination of the question under consideration.

We perceive no essential difference between a timothy or clover field and one of alfalfa. All of these crops are perennial, and, if totally destroyed, may be replaced without permanent injury to the soil. Their replacement is a matter of a comparatively short period and may be accomplished with reasonable definiteness and certainty as to cost and result. We conclude that the proper rule, in the case at bar, for measuring the damage caused by the destruction of the roots, was the cost of reseeded and the rental value of the land, and that the rule applicable to the matured crop was its market value standing on the ground. The instruction to the jury was erroneous, because it

did not refer to the crops grown in the future are an element too contingent and speculative to afford a basis for the assessment of damages in such cases. *Standley v. Railroad*, supra.

The judgment is reversed, and the cause remanded. All concur.

FUSSELMAN v. WABASH R. CO.

(Kansas City Court of Appeals. Missouri. Nov. 15, 1909.)

1. NEW TRIAL (§ 117*)—PROCEEDINGS TO PROCURE—TIME FOR MOTION—CONSTRUCTION OF STATUTE.

While an amendment to a pleading or motion is an abandonment of the original, the statute requiring motions for a new trial to be filed within four days is mandatory, and an amended motion cannot be filed after that time.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 238; Dec. Dig. § 117.*]

2. NEGLIGENCE (§ 59*)—PROXIMATE CAUSE.

Where negligence is admitted or otherwise proved, and the injuries are immediate and flow directly from the negligent act, the guilty person will not be excused because the particular circumstances are unusual and could not ordinarily have been foreseen.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 72; Dec. Dig. § 59.*]

3. CARRIERS (§ 280*)—CARRIAGE OF PASSENGERS—INJURIES TO STOCKMAN—NEGLIGENCE.

Plaintiff, a shipper of stock, was required by his contract to look after it, including the fastening of the car door, for which he was furnished with a key. While the car was on a side track en route, he went to look after his stock, but, instead of returning to the caboose, where he was supposed to stay, remained in the car all night. A collision occurred during the night which injured him. Held, that the carrier's employes had the right to assume that he would not quarter himself in the car, and the company owed him no duty except not to injure him purposely.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1105; Dec. Dig. § 280.*]

4. CARRIERS (§ 282*)—OPERATION OF TRAIN—DUTY TO OBSERVE CARE—PERSONS ENTITLED TO COMPLAIN.

The general duty of a carrier to run its train with care does not become a duty to a particular person until he is in a position to have the right to complain.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1107; Dec. Dig. § 282.*]

5. CARRIERS (§ 331*)—CARRIAGE OF PASSENGERS—INJURY TO STOCKMAN—CONTRIBUTORY NEGLIGENCE.

Plaintiff having voluntarily placed himself in a place of danger, as the result showed, he was negligent, though he may not have anticipated danger.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1374, 1381; Dec. Dig. § 331.*]

6. TRIAL (§ 296*)—INSTRUCTIONS—ERRORS CURED BY OTHER INSTRUCTIONS.

In an action for injury to a horse in transit, a charge, assuming that the horse was injured by the carrier carelessly and negligently running a car against the car containing the horse, was not ground for reversal, where, tak-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes 122 S.W.—72

en in connection with another instruction, which properly directed the jury on the question of negligence, the jury could not have been misled, especially where the purpose of the objectionable charge was only to direct attention to the question of damages, and not to liability.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 709; Dec. Dig. § 296; * Carriers, Cent. Dig. § 1406.]

Appeal from Circuit Court, Adair County; Nat. M. Shelton, Judge.

Action by Henry Fusselman against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, unless remittitur be made.

J. L. Minnis and Higbee & Mills, for appellant. Weatherby & Frank and Campbell & Ellison, for respondent.

BROADDUS, P. J. This is a suit for damages for injuries plaintiff claims he sustained to his person, and for injury to certain personal property by reason of the alleged negligence of defendant. In January, 1907, plaintiff shipped some household goods, farming utensils, baled hay, and two horses and one mule over defendant's railroad from Kansas City to Kirksville. The property was all shipped in one car; the horses and mule being separated from the other property by a temporary partition. The contract made it the duty of plaintiff to look after and care for the stock, and to look after the fastening of the door to the car, and for this purpose he was furnished with a key to the door. The plaintiff traveled in the caboose of the train, which when it reached Moberly en route, about 6 o'clock p. m., the car containing his property was switched onto a side track. Plaintiff testified: That after the car was switched he asked some one of defendant's employes when his car would leave, and was informed that it would soon leave; that afterwards he went into the car to see about his animals and gave them some feed; that he remained in the car all night, sitting upon some of his goods; that during the night, but at what time he could not state, the defendant's employes in switching caused some other car to strike his car with such force and violence that one of his horses was thrown through the partition and over a bedstead, demolishing the bedstead and injuring the horse, besides doing other damage; that he was also thrown down and rendered unconscious; that after he arrived at Kirksville he called the attention of the station agent to the injured condition of the horse; that afterwards he filed a claim against the company for damages to the horse, but at that time made no claim for injury to his own person; and that he was unable to ascertain the extent of the injury to his horse until several months thereafter, when it became certain that it was permanent. Plaintiff recovered damages for injury to his horse in the sum of \$50, and \$1,000 for

injuries to his person. The defendant in due time filed a motion for a new trial and in arrest of judgment, but, after the expiration of four days, filed an amended motion, and later filed a second amended motion, neither of which amendments are set forth in the abstract; but the original motion is.

Respondent contends that the filing of the first amended motion was an abandonment of the original motion, and the filing of the second amended motion was an abandonment of the first amended motion. The rule in such instances is that the filing of an amendment to a pleading or motion amounts to an abandonment of the original. *Kortzendorfer v. Kansas City*, 52 Mo. 206; *Roberts v. Company*, 26 Mo. App., loc. cit. 98; *Walker v. Railroad*, 193 Mo., loc. cit. 472, 92 S. W. 83. In a recent decision of this court, however, it is held that the statute requiring motions for a new trial to be filed within four days is mandatory, and that no motion for a new trial nor an amendment thereto can be properly filed after the expiration of said time, and, where a motion is filed within the proper time, an amendment filed after that time is a nullity, and as such has no effect upon the original motion. *Brinton v. Thomas*, 119 S. W. 1016. Under the authority of this case, and others, it is plain that, as the original motion is contained in the abstract, the whole case is before this court as made by the bill of exceptions and record proper. *Mirrieless v. Wabash Ry. Co.*, 163 Mo. 470, 63 S. W. 718; *State v. Brooks*, 92 Mo. 542, 5 S. W. 257, 330; *Bank v. Bennett*, 138 Mo. 494, 40 S. W. 97.

Appellant claims that there is no evidence, so far as the issue relates to the injuries respondent asserts that he received to his person, that defendant's employes had any knowledge that he was in the box car at the time, and that his injuries were the result of his own negligence. On the contrary, respondent insists that, as it was made his duty "to attend to and care for his stock, therefore he had the right to go into the car at any time, and that defendant had no right to assume that he would not be there at any particular time. The fact that plaintiff had horses * * * in the car made it the defendant's duty to exercise reasonable care to avoid injury. The defendant therefore owed to plaintiff a duty, regardless of whether plaintiff was in or out of the car, and that duty was to handle the particular car with care so as to avoid unnecessary injury, and whenever defendant breached that duty, and injury resulted from such breach, plaintiff was entitled to recover therefor." It is said: "The negligence being established, defendant is liable for all the consequences directly resulting therefrom, though the particular injury might not have been anticipated. In case the negligence is

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

admitted or otherwise proved, and the injurious consequences are immediate and flow directly from the negligent act, the person guilty of the act will not be excused for the reason that the particular consequences are unusual and could not ordinarily have been foreseen." *Graney v. Ry. Co.*, 140 Mo., loc. cit. 98, 41 S. W. 246, 38 L. R. A. 633. And a similar enunciation of the principle is found in *Lawrence v. Company*, 119 Mo. App., loc. cit. 327, 93 S. W. 897. The case of *Bolton v. Mo. Pac. Ry. Co.*, 172 Mo. 92, 72 S. W. 530, relied on by respondent, has no application.

There can be no question but what defendant's act in producing the collision was the immediate cause of respondent's injuries, and that it should answer in damages, unless, under the circumstances, the appellant owed respondent no duty to look after his safety while in the car, or that he was guilty as a matter of law of contributory negligence. After respondent went into the car and looked after his stock and fed them, which only occupied a few moments of time, he had no further duty to perform, and his remaining therein afterwards until next morning was purely voluntary. The appellant's agents did not, and were not required to, know that he would remain there during the entire night. No reasonable person would have anticipated that he would have done so. His place was in the caboose, not in the car. Under the circumstances, the company owed no duty whatever to plaintiff, except not to injure him purposely. Furthermore, we are of the opinion that appellant's employes had the right to assume that he would not quarter himself in the car for the night. It is held, in *Barker v. Railroad Co.*, 98 Mo., loc. cit. 54, 11 S. W. 254, that "the general duty of a railroad to run its train with care becomes a particular duty to no one until he is in a position to have the right to complain." This rule was quoted and approved in *Frye v. Railway Co.*, 200 Mo., loc. cit. 407, 98 S. W. 566, 8 L. R. A. (N. S.) 1069. Numerous cases might be marshaled to sustain this proposition; but we conclude that it is too well settled to be seriously denied. The plaintiff, furthermore, was guilty of such contributory negligence as precludes his right to recover. Voluntarily placing himself in the car, and there remaining until the collision occurred, was a voluntary, unusual, and unnecessary act, which he was not required to do under his contract. He thus voluntarily placed himself in a place of danger, as the result showed. It is true he may not have anticipated danger. In that respect he stands in no better position than appellant, who could not have reasonably anticipated that he would be in the car. Both stand in pari passu, without preference. It was a question of law under the evidence, and appellant's demurrer to the respondent's claim

for his personal injuries should have been sustained.

The appellant contends that the court committed error in instruction numbered 2, given for plaintiff, wherein it was assumed that plaintiff's horse was injured by defendant carelessly and negligently running a car against the car containing said horse. Taken in connection with instruction numbered 1, which properly directed the jury on the question of negligence, the jury could not be misled. Besides, the purpose of the instruction was only to direct the attention of the jury as to the question of damages, and not to that of its liability.

That appellant was liable for the injury to the horse there can be no question.

The cause is reversed and remanded, unless respondent will within 10 days enter a remittitur for \$1,000, in which case the judgment will stand affirmed. All concur.

SHARTLE v. MODERN BROTHERHOOD OF AMERICA.

(Kansas City Court of Appeals. Missouri. Nov. 15, 1909. Rehearing Denied Dec. 6, 1909.)

1. INSURANCE (§ 694*)—MUTUAL BENEFIT INSURANCE—BENEFITS—NECESSITY OF INITIATION—FRATERNAL INSURANCE COMPANIES.

The by-laws of a fraternal benefit society provided that, upon receipt of the benefit certificate, the applicant should be initiated by the subordinate lodge, unless initiation was refused, when the certificate should be returned to the supreme lodge, and that no liability for benefits upon death should attach until all the acts, laws, and rituals prescribed had been complied with, and that no officer could waive any provision of the by-laws. *Rev. St. 1899, § 1408 (Ann. St. 1906, p. 1111)*, requires such associations to have a lodge system and a ritual. Held, that initiation of the certificate holder was essential to recovery upon the certificate, and no recovery could be had where the applicant died after issue and delivery of the certificate to him and payment of the first assessment, but before initiation.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1834; Dec. Dig. § 694.*]

2. INSURANCE (§ 724*)—MUTUAL BENEFIT INSURANCE—ESTOPPEL TO DENY LIABILITY.

A fraternal benefit association may be estopped to deny liability, notwithstanding non-compliance by a member with the by-laws as to the requisites of liability, if its supreme officers led deceased to believe that it had assumed liability without such compliance, or by such conduct of its subordinate officials continued so long that it must have necessarily become known to the supreme officials.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1866; Dec. Dig. § 724.*]

3. INSURANCE (§ 817*)—MUTUAL BENEFIT INSURANCE—EFFECT OF BY-LAWS—KNOWLEDGE OF CERTIFICATE HOLDER.

It must be assumed, in an action on a fraternal benefit association certificate, that the certificate holder knew the provisions of the by-laws of the association.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1999-2002; Dec. Dig. § 817.*]

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

subordinate lodge of defendant fraternal benefit association for membership, and the application was approved on the 23d and sent by the supreme lodge to the subordinate lodge and delivered to decedent on December 5th, when the benefit assessment for December was collected, which payment the by-laws provided should be returned if he was refused initiation. Decedent died on December 13th without having been initiated. *Held*, that defendant was not estopped to deny liability on the certificate by reason of any conduct leading decedent to believe that he need not comply with the by-laws, which required an initiation before becoming a member and entitled to benefits; there having been no time before his death for such a course of conduct.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1866; Dec. Dig. § 724.*]

5. INSURANCE (§ 724*)—MUTUAL BENEFIT INSURANCE—ESTOPPEL—ACKNOWLEDGMENT.

A member of a fraternal benefit society could not be misled by the nonenforcement of the by-laws as to matters essential to constitute membership so as to estop the society from denying liability on the certificate for noncompliance with such by-laws, where he did not know of their nonenforcement.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1866; Dec. Dig. § 724.*]

Appeal from Circuit Court, Jackson County; Walter A. Powell, Judge.

Action by Ella M. Shartle against the Modern Brotherhood of America. From a judgment for plaintiff, defendant appeals. Reversed.

Conkling, Rea & Sparrow, for appellant. Metcalf, Brady & Sherman, for respondent.

ELLISON, J. Plaintiff is the beneficiary in a benefit certificate for \$1,000 issued by defendant to her husband in his lifetime. He died, and defendant refused to pay, and plaintiff thereupon instituted this action. The defendant is a fraternal benefit society organized under the statutes of Iowa, and is also doing business in this state under authority of our laws. On the 20th of November, 1906, the deceased, then being a resident of Independence, Mo., made application to the subordinate lodge of defendant for that city for membership and for the benefit certificate in controversy. The application was approved on the 23d of November, 1906, and on the next day the benefit certificate was issued and sent by defendant's "Supreme Secretary" from the home office in Iowa to the secretary of the subordinate lodge at Independence. A few days thereafter, on the 5th of December, 1906, that secretary delivered the certificate to the deceased, and collected from him the benefit assessment for the month of December. A few days after this, viz., on the 13th of December, 1906, deceased died without having been initiated or accepted as a member of the Independence lodge and without having taken any of the ritualistic work prescribed by the

sions:

"Sec. A. * * * Upon receipt of the benefit certificate the president shall notify the candidate and he shall be initiated by the subordinate lodge at a regular or special meeting. At any time before the initiation of an applicant, the lodge may, by a majority vote, refuse to initiate, in which case, the benefit certificate with a certified statement of the action of the subordinate lodge, shall be immediately forwarded to the Supreme Secretary."

"Sec. D. The initiation fee shall be deposited by the secretary with the treasurer, and in case the applicant is rejected, said fee shall be returned to him by order of the lodge. But if the applicant fails to report for medical examination within thirty days after his election, or fails to report for initiation within sixty days after his benefit certificate is issued, he shall forfeit the membership fee, and if he desires to become a member, must again make application, when his fees shall be credited on second application. * * *"

"Sec. G. The liability of this fraternity for the payment of benefits upon the death or injury of a member shall not begin until all the acts, qualification and requirements prescribed in the above division, and in all the laws, rules, regulations and ritual of the fraternity shall have been fully complied with by him, and until all acts therein prescribed for the lodge shall have been fully complied with by it, and until his application shall have been approved by the lodge and head physician, and a benefit certificate issued as provided in section C of this division, and delivered to the applicant while in good health, and no officer of this fraternity is authorized or permitted to waive any of the provisions of this division, or these laws, or any other of the laws of this fraternity which shall relate to the contract of insurance between the members and the fraternity."

It thus appears that there was delivered to deceased, and he accepted, a benefit certificate before he became initiated as a member of the defendant's subordinate lodge for Independence, and before he took upon himself any ritualistic work. The by-laws above quoted provide that, when the benefit certificate is received, the applicant therefor shall be initiated by the subordinate lodge. If initiation is refused, the certificate is to be returned to the Supreme Secretary at the home office. It will be seen that the by-laws further provide that no liability shall attach "until all the acts, qualification and requirements prescribed, * * * and all the laws, rules, regulations and ritual shall have been complied with." Such laws also provide that no officer is authorized to waive any provisions thereof. The deceased died without having complied with any of these

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

prerequisites entitling him to a benefit certificate. The terms of section 1408 of the Statutes of 1899 (Ann. St. 1906, p. 1111) require (as the by-laws of defendant required) that these associations have a lodge system and a ritualistic form of work. The St. Louis Court of Appeals has said that: "By requiring a lodge system, the statute evidently intended that no person could become a member of these orders until he was initiated as a member of one of its lodges." The by-laws of these associations expressly so provide. *Hiatt v. Fraternal Home*, 99 Mo. App. 105, 72 S. W. 463. And this is said to be, not an idle form, but is necessary under the charter of the society. *Loyd v. Modern Woodmen*, 113 Mo. App. 19, 87 S. W. 530.

The question now under consideration has been before the courts in other states, and it is held that initiation into the lodge and compliance with essential terms of the by-laws of the association are necessary prerequisites to a valid and binding beneficiary certificate. *Matkin v. Supreme Lodge*, 82 Tex. 301, 18 S. W. 306, 27 Am. St. Rep. 886; *Driscoll v. Modern Brotherhood*, 77 Neb. 282, 109 N. W. 158; *Loudon v. Modern Brotherhood*, 107 Minn. 12, 119 N. W. 425. See, also, *Taylor v. Grand Lodge*, 75 Hun, 612, 29 N. Y. Supp. 773. It cannot be denied, for the record conclusively shows, that deceased was never initiated into the society; nor were any of the essential matters done by him, required by the by-laws, which entitled him to a benefit certificate or obligated the society to pay the certificate after his death. But it is insisted that defendant is estopped to deny liability by having waived these provisions of its by-laws, and that the obligation arose from that fact. There is no doubt that an association of this character can become liable by waiver and estoppel, notwithstanding the prerequisites to liability, as required by the laws of the association, have not been complied with. *McMahon v. Macabees*, 151 Mo. 522, 52 S. W. 384; *Supreme Fraternal Circle v. Crawford*, 32 Tex. Civ. App. 603, 75 S. W. 844; *Benefit Ass'n v. Blue*, 120 Ill. 121, 11 N. E. 331, 60 Am. Rep. 558; *McCorkle v. Texas Benevolent Ass'n*, 71 Tex. 149, 8 S. W. 516. These authorities are taken from plaintiff's brief; but in each of them it appears to be necessary that the society has acted towards deceased in such way as to lead him to believe the laws would not be enforced, and that an obligation would attach notwithstanding there had not been any compliance with those laws. So it may be said that if the association, through its supreme officers, by a course of dealing with the deceased, leads him to believe that it has assumed an obligation to pay the certificate without compliance with its laws, then it will not be permitted to deny liability; and though this course of dealing has been had with inferior officers—officers of the subordinate lodge—without authority to bind the society, yet if it has been

carried on in such way, or for such length of time, as necessarily to have been known to the supreme officers of the general society, it will become binding.

What are the facts in this case as applied to this rule of law? Assuming, as we must, that deceased was acquainted with defendant's by-laws, as we have quoted them, what evidence is there to show that he was lulled into security, or deceived by the defendant, or that he was led to believe the defendant would not require him to comply with the laws, even to becoming a member of the society? We are not cited to any testimony of that character in the record. The time between his first movement toward obtaining a benefit certificate and his death was quite short, 23 days. As already stated, he made application for membership on the 20th of November, which was sent to the home office and approved, and on the 24th of November the beneficiary certificate was issued and sent to the local secretary of the subordinate lodge and on the 5th of December deceased paid 90 cents as initiation fee, to be returned to him if he was rejected. In a week and a day thereafter he died, before any opportunity was presented for deception or course of conduct leading him, as a reasonable man, to believe that he need not comply with any of the requisites necessary to make him a member of the society. He paid the fee; but that he knew to be an advance payment, which was to be returned if he was rejected. So the most that can be said in behalf of plaintiff is that deceased had taken the first of many steps necessary to make a contract with defendant, and died before any was, in fact, made, and before many of the vital requisites to that contract had been performed.

Plaintiff introduced evidence in her behalf which tended to show that the by-laws as to initiation of members into the society, of ritualistic work, etc., were not observed by the Independence and other lodges. It may be (we have no means of knowing) that defendant, by its course of conduct with others, became estopped as to them; but that has no bearing on this case, governed, as it must be, by its own facts. If there had been time for a course of conduct with the deceased in the matters now relied upon, and defendant had denied that it had done anything to mislead deceased, it may be that proof of what it customarily did with others would have had some tendency to prove what it did with deceased; but no such situation is presented by the record. The upshot of plaintiff's position is, and must be, under the facts, that, since defendant in the past had allowed others a noncompliance with its laws, it would, in the future, allow plaintiff the same thing; but, aside from the foregoing considerations, it was not made to appear that the deceased knew of the course of carelessness and non-enforcement of by-laws as to the essential requisites to the contract. Unless he knew that was the customary practice, he was, of

brief will disclose that they are all based on a course of conduct which misled the assured. That fact appears in all the cases, notably that from our Supreme Court. *McMahon v. Maccabees*, supra. We recently had a case in this court (*Burke v. Grand Lodge*, 136 Mo. App. 480, 118 S. W. 493), in which we held, in an opinion by Judge Johnson, that the society was estopped to deny liability for the certificate; but there the assured had been a member of the lodge for eight years, and the defense was suspension for being behind with dues at the time of his death; but facts are set out in the opinion showing that he had frequently been behind and no forfeiture taken. It was true that it appeared some member of the lodge "would get up and stand good" for delinquent members, and for the assured in the different instances when he was delinquent. The practice of granting these indulgences to the assured and other members, the opinion states, was very common and was known to all; and so, when it came to taking a forfeiture for nonpayment against the assured when he was dying, we refused to allow it. But this is no such case as that, and cannot in any way be likened to any of the authorities upon which plaintiff has placed reliance.

This is merely a case in which it is stated what might have occurred, if deceased had lived any considerable length of time, should be assumed by us as having actually occurred. The judgment is reversed. All concur.

MARKT v. CHICAGO, B. & Q. RY. CO.
(Kansas City Court of Appeals. Missouri.
Nov. 15, 1909. Rehearing Denied
Dec. 6, 1909.)

1. TRIAL (§ 140*)—QUESTION FOR JURY—CREDIBILITY OF WITNESS.

It is a question for the jury whether the testimony of a party is to be believed.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.*]

2. RAILROADS (§ 484*)—FIRES—EVIDENCE.

Evidence, in an action to recover for the burning of plaintiff's mill by sparks from defendant's locomotive passing about 50 feet from the building, held sufficient to submit the case to the jury under the rule that, where the evidence shows no more than a probability that the source of a fire was a railroad engine, it is sufficient to submit to the jury, although the evidence as to the origin of the fire was entirely circumstantial.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.*]

Appeal from Circuit Court, Holt County; William C. Ellison, Judge.

Action by Arthur O. Markt against the Chicago, Burlington & Quincy Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

BROADDUS, P. J. This is a suit to recover damages for loss sustained by plaintiff by the burning of his mill and electric plant, alleged to have been set on fire by sparks from one of defendant's locomotive engines. The plaintiff obtained judgment, from which defendant appealed.

As the appellant has taken his appeal upon the sole ground that the respondent was not entitled to recover under the proof, it is necessary to examine all the material evidence in the case for a proper determination of that question. There is no question that the fire occurred about 9 o'clock a. m. June 27, 1907, and that the property mentioned was entirely destroyed by fire. The building was located in the town of Maitland, Mo., 50 feet and 4 inches from the line of appellant's railroad track. The depot is situated on the west side of the track, which, after leaving the depot, curves to the southwest and is about 1,500 feet from where plaintiff's building was located, which was also situated on the west side of the track. The building was a two-story and basement structure covered with metal. In the basement were the engines, boilers and machinery. In the first story were the mill machinery, feedroom, and office, and in the second story was the machine for cleaning meal and grain and other material.

No one saw how the fire started, so it is a matter to be inferred from the evidence, if the appellant is to be held liable. As the respondent was the only person in and about the building just previous to its discovery, the case depends largely upon his evidence. He stated: That the line of the railroad extended in a semicircle from the depot, and then in a southwesterly direction past his building, which faced the railroad to the southwest; that there were four doors and three windows on the south side facing the track; that there was an opening in the window of the upper story on the south side about ten by eight inches, where a pane of glass had been broken a few weeks previously; that the weather was dry; that there was chaff scattered on the upper floor near this opening, and dust and cobwebs in the room, also some sacks and lumber; that he went to the building on the morning of the fire about 15 minutes after 5 o'clock; that he went in and got some feed, and then went through and milked his cow on the other side of the railroad track, and then came back and through the building again and then to his breakfast; that one Frank Ross had been in charge of the machinery until midnight the night before, after which no one was in charge; that he returned to the building about 7 o'clock, and remained there

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

until about 9:15 o'clock; that he, during this time, went through the building, first to the boiler room to see the condition of the fire, and found that it was banked and in good condition, and he did not disturb it; that he examined the condition of the furnace, and everything was all right and the fire well banked; that he then went upstairs, opened the doors, and swept the first floor; that he then figured up some coal accounts and did a little bookwork and writing; that he saw a train pass while he was in the electric plant office; that when it passed he heard cinders rattle on the southeast window; that it sounded like the rattling of hail; that he remained there until a drayman drove up with a package and delivered it to him; that he then went out to a storage room northwest of the building, where he had his workshop, at which time it was about 15 minutes after the train had passed; that in a few minutes he started to the barn of his residence, just across the street; that as he was crossing Mr. and Mrs. Southwell, who were driving in a buggy, came along, and as they passed Mr. Southwell halloed at him, and said there must be something wrong; that he then looked back at the plant and saw a little smoke coming out from under the eaves; that from his position he could only see the northwest side of the building; that he ran back quickly and tried to get into the office, but, as he could not get the door open quickly, he went around to the engine room and broke in; that then he attempted to get upstairs on the second floor; that then he found that the whole southeast part of the building was on fire from bottom to top; that he then tied the whistle down so as to give alarm; that when he came from tying down the whistle the fire was all in the southeast part of the room, and the first place the flames broke through was through the broken window; and that the time from the passage of the train until his attention was called to the fire was about 15 minutes. It was shown that the window in question was 35 feet above the level of the railroad track, and that the day was mostly clear, and that a brisk wind was blowing from the southeast. There was testimony to the effect that the track declined as it approached plaintiff's building, that the engine pulling the train, after it left the depot, was throwing cinder sparks as high as the telegraph poles; but no one testified that it was throwing sparks when near respondent's building, save and except the statement of respondent that they rattled on the window panes of his office. There was evidence offered on the part of defendant, the tendency of which was to show that, within a very few minutes after the train passed, the building was burning rapidly, and before it could have been started by a spark from defendant's engine.

The argument of appellant is that there is no evidence going to show that a spark emitted from the engine going downhill

could or did throw sparks a distance of 50 feet, and upward 35 feet from a level of the said bed, so as to enter the broken pane of glass in the second story of the building. In estimating the height, we must make allowance for about 10 feet, the distance from the level of the track and the top of the smokestack. As we have seen, the engine, when it left the depot, was throwing sparks as high as the tops of the telegraph poles, and that, when it came near respondent's mills, it was throwing them so as to reach the window in the first story of the building 50 feet away. If respondent is to be believed, which was a question for the jury, sparks were carried that distance and height, unless we are to conclude that it was an impossibility.

Appellant's position is based mostly on two decisions, one by the St. Louis Court of Appeals, and the other by the Supreme Court. In the first mentioned the court said: "In this case we face not only a lack of direct evidence to show sparks from the engine, that was heard to go by after midnight, set fire to decedent's house, but a lack of direct evidence to show sparks escaped from it. The precise question for decision therefore is: Is it so generally known to persons of average intelligence that a locomotive drawing a heavy load on an ascending grade throws sparks, or cinders, 50 feet away, and hot enough to ignite the roof of a house if they happen to fall on one?" etc. The court answers the question in the negative. *Gibbs v. Railroad*, 104 Mo. App. 276, 78 S. W. 835. In the second case it is said: "No evidence was introduced to prove the possibility of the fire being ignited by sparks thrown off by defendant's engine at the distance, whatever that may have been, it was seen to throw them; and some proof of the kind was required." *Campbell v. Railroad*, 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530. In the latter case, however, the court said: "The facts that live sparks were thrown from engines, and did ignite grass, and other combustible materials, would tend to prove the probability that the fire was communicated from an engine." The evidence was held sufficient to authorize a verdict for plaintiff. In the later case of *Manning v. Railroad*, 119 S. W. 464, the St. Louis Court of Appeals (which was similar in principle) reiterated what was said in *Gibbs v. Railroad*, *supra*, that there was a lack of proof that defendant's engine communicated the fire. There is a marked difference in the facts in the two cases in the St. Louis Court of Appeals, and the one under consideration, and a much stronger case was made out in this than in that of *Campbell v. Railroad*, *supra*, where the plaintiff was permitted to recover.

Here the evidence shows that the engine in question did throw sparks to a great height, and was throwing them at the time it passed plaintiff's building. There was a brisk wind

but there is no direct proof that any were carried so high as the broken pane of glass in the second story thereof. That sparks may have been thrown to such an elevation may be implied from the circumstances. It is true that, under ordinary conditions, without the interference of the wind, sparks emitted from any engine, however prone to throw sparks, would not throw them to any great distance, because their course would be mostly in a direct line upward, and they would descend by the force of gravitation in the same manner; but we do not think there can be any doubt but what sparks thrown off from a burning building or emitted from a locomotive engine during a strong wind may be carried to a much greater distance than 50 feet and much higher than 25 feet. As a matter of course, the height and distance to which they could be carried would depend greatly upon the force with which the sparks were emitted and the force of the wind, and it is safe to say that such is known to all persons of average intelligence. The probability is that the fire could have been communicated in no other way than from sparks emitted from defendant's engine, unless it was set by plaintiff himself. According to his statements, he had just previous to its discovery examined the building, and there was no evidence of fire anywhere, except in the furnace, which had been banked. The mill and the electric machinery were not in operation, and had not been since midnight. But it is not for the court to say that plaintiff committed perjury, as the jury was the sole judge of his credibility, and, as they evidently believed he told the truth, that was an end to the matter. It is probable that a live spark was carried by the force of the wind to the upper story, and that it entered through the opening and fell upon the cliaff or other combustible material and ignited the fire that consumed the building. The evidence in the most positive character tends to prove that the fire could have originated in no other manner. The process of reasoning, by excluding every other means by which the fire could have been started, tends to support the theory that it was by means of sparks thrown out by defendant's engine.

This case seems to fall within the rule that, where the evidence shows no more than a probability that the source of a fire was a railroad engine, it is sufficient to submit to the jury. *Lead Co. v. Railway Co.*, 123 Mo. App. 394, 101 S. W. 636; *Tapley v. Railway Co.*, 129 Mo. App. 88, 107 S. W. 470; *Matthews v. Railroad*, 142 Mo. 645, 44 S. W. 802; *Campbell v. Railroad*, supra.

For the reasons given, the cause is affirmed. All concur.

15, 1900. Rehearing Denied Dec. 6, 1900.)

1. APPEAL AND ERROR (§ 1011*)—REVIEW—FINDINGS BY COURT.

A finding by the court, based on a preponderance of evidence, will not be disturbed.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.*]

2. HOMESTEAD (§ 164*)—ABANDONMENT—ENTRY ON PUBLIC LAND.

An entry on government land does not constitute an abandonment of the entryman's homestead, in the absence of some overt act, such as actually moving from the homestead with no intention of returning.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 327; Dec. Dig. § 164.*]

3. HOMESTEAD (§ 128*)—SALE—TRANSFER.

As the owner of a homestead has a right to sell the same, the purchaser takes the property free from the lien of judgments on demands originating after the acquisition of the homestead.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 228; Dec. Dig. § 128.*]

4. HOMESTEAD (§ 77*)—PROPERTY CONSTITUTING—PROCEEDS OF HOMESTEAD.

The proceeds from a voluntary sale of a homestead are not subject to garnishment.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 109; Dec. Dig. § 77.*]

5. HOMESTEAD (§ 84*)—PROPERTY CONSTITUTING—HUSBAND AND WIFE AS TENANTS IN COMMON.

A homestead right may attach to land held by husband and wife as tenants in common.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 121; Dec. Dig. § 84.*]

6. APPEAL AND ERROR (§ 854*)—REVIEW—THEORY OF TRIAL IN LOWER COURT.

In the absence of declarations of law given or asked on a trial by the court, it is immaterial, on a review of a judgment correct on the merits, on what theory the action was tried.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3408; Dec. Dig. § 854.*]

7. APPEAL AND ERROR (§ 1010*)—REVIEW—FINDINGS OF FACT.

Findings of fact by the court, supported by some evidence, are conclusive on review.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3979; Dec. Dig. § 1010.*]

Appeal from Circuit Court, De Kalb County; Alonzo D. Burns, Judge.

Garnishment proceedings by Susie Beauchamp Graham, as assignee, of separate judgments in favor of John T. Kimberlin, George Shrenk, and Elijah Groom, against Henry C. Gordon, defendant, Grant U. Brown, garnishee, and George Teegarden, interpleader. The three actions were submitted together, and from findings in favor of the interpleader, the assignee appeals. Affirmed.

Kendall B. Randolph and Wm. M. Fitch, for appellant. Hewitt & Hewitt, for respondent.

BROADBUSH, P. J. By the written agreement of parties the three cases, were submitted to the court sitting as a jury. The agree-

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

ment further provided that a verdict should be rendered disposing of the issues in each case separately. All are proceedings in garnishment under executions issued under three different judgments. The first, in favor of John T. Kimberlin against H. C. Gordon, was rendered by the circuit court of De Kalb county, February 9, 1906, on a note dated February 16, 1904. The second is in favor of George Shrenk against said Gordon on a note dated January 8, 1905, and transcript of which was filed in the circuit clerk's office January 20, 1906. The third was in favor of Elijah Groom against H. C. Gordon, rendered May 15, 1906, on a note dated March 22, 1902. Each of said judgments have been assigned to Susie B. Graham upon which the executions were issued to her use, and Grant U. Brown, who had in his hands certain money alleged to be the property of the defendant H. C. Gordon, was summoned as garnishee. The answer of the garnishee disclosed that George Teegarden claimed the fund, whereupon he was made a party. He made answer, claiming said money. The plaintiffs replied, denying such ownership, and the issue thus made was tried by the court. The finding in each case was in favor of the interpleader. The plaintiffs appealed.

H. C. Gordon, the judgment debtor, was married to Florence, his present wife, in October, 1899. She was a widow, and at the time of the last marriage had about \$1,000 she had realized from a policy on the life of her deceased husband. She also claimed to be the owner of a dwelling in Clarksdale, but the title to which was in her late husband, and she was also the mother of three children. On December 8, 1899, she and her then husband, the defendant, traded with Dallas C. White for 80 acres of land in De Kalb county, which was incumbered by a trust deed for \$1,600, for the benefit of the Prudential Life Insurance Company. She claims that in payment for the land she put in the said dwelling, at the valuation of \$600, \$500 in money, and the defendant put in a stock of goods at \$800, which were incumbered by a mortgage for that amount. It was shown that on the 11th day of December, 1899, defendant transferred the debt from the stock of goods by giving a lien on the land, whereby the lien on the goods was released. The deed from Dallas and wife was made to defendant and his wife. They moved onto this land, and occupied it until they sold it to one Dyers in January, 1902. On the 4th day of March, 1901, Florence and the defendant, for the expressed consideration of \$3,500, conveyed the land to Asa Martin subject to the incumbrance to the said insurance company and the \$900 trust deed aforesaid. On the same day the said Brooks reconveyed the land to defendant and his wife, Florence, also for the expressed consideration of \$3,500, and also subject to the foregoing incumbrances. The deed contained the following recitations: "Subject to a trust deed to the

Prudential Life Insurance Co., for \$1,600; also subject to a trust deed given to W. B. Brooks for \$900, and also the said Florence to have extra over and above, H. C. Gordon, eleven hundred dollars."

In January, 1902, H. C. Gordon and wife, Florence, sold this 80 acres to F. N. and Albert Dyer for \$3,400, subject to two deeds of trust, the one for \$1,600 and one for \$900. Mrs. Gordon placed \$1,000 of the money in the Bank of Clarksdale, where it remained until the purchase of the 66½ acres in question, which was purchased at a partition sale July 2, 1902, at the price and sum of \$2,706, which \$1,000 was paid on the purchase, and \$1,700 was furnished by the Bank of Clarksdale, until a loan could be negotiated from the Hoagland Loan & Investment Company. Said loan was secured by a trust deed on the land. The deed to the 66½ acres was taken in the names of H. C. Gordon and Florence Gordon, his wife. They moved onto this land, and continued to occupy it until they sold it to the interpleader, George Teegarden, subject to the two trust deeds then upon it, \$1,700 and \$425, respectively. Shortly after the execution of the \$1,700 trust deed to the Hoagland Loan & Investment Company, H. C. Gordon borrowed for his own use \$425 from A. J. Dean, and secured said loan by a second mortgage on this same tract, and when the \$425 loan came due, he borrowed the same amount from Mr. L. L. Chappelle, and took up that loan and secured Mr. Chappelle by a like mortgage. On the 20th day of May, 1907, H. C. Gordon and wife, Florence, sold and conveyed to the interpleader, George Teegarden, the land in question, for the expressed consideration of \$3,630, and executed a warranty deed therefor, containing the following recitation: "Subject to one trust deed executed by the grantors to Benjamin R. Vineyard, in trust for the Hoagland Loan & Investment Co., for seventeen hundred dollars, date Oct. 31, 1902." "Also subject to trust deed executed by the grantors herein to Grant U. Brown in trust for Lorenzo L. Chappelle to secure \$425." The purchase price of this land, over and above the amount of the two incumbrances recited and referred to in their deed to Teegarden, something like \$1,400, was paid to H. C. Gordon by Teegarden at the Bank of Clarksdale, and by Gordon delivered to his wife, Florence. Immediately after the payment of the money by Teegarden to Gordon, R. A. Hewitt, who was holding the deed in escrow, was directed by Gordon and Teegarden to file same for record, which was done, and the deed delivered to Teegarden. The \$425 due L. L. Chappelle having become due, default in the payment having been made, the land was advertised under the trust deed, and sold on the 28th day of October, 1907, at which said sale George Teegarden, and the attorney representing Mrs. Graham, the execution creditor of H. C. Gordon, were the only bidders, and the land was knocked down

amount of his bid. Whereupon Teegarden (the interpleader) paid the amount of his bid, and after the debt, interest, and costs of the sale were paid, there remained in the trustee's hands \$1,844.

The appellants challenge the correctness of the statement that Mrs. Gordon put into the land purchased from Dallas White the sum of \$1,100. The purchase price of the land was \$3,200. There was an incumbrance on it for \$1,600. Gordon put in his stock of goods for \$800, and Mrs. Gordon claims she put in \$500 cash and house in Clarksdale at \$600, whole amount thus said to be paid \$3,500, or \$300 more than the purchase price. Appellant claims from these figures that she could have only put into the land the \$500 in cash. Therefore she did not have \$1,100 to invest in the 66½ acres the proceeds of which are in controversy. And, furthermore, the testimony goes to show that the house in Clarksdale was the property of her former husband, and that the administrator sold it for the purpose of paying his debts, and the records show the latter fact. But it further appears that Mrs. Gordon claimed to be the owner of the house. It was not shown that the money received by the administrator was applied to the payment of debts. If it had been so applied, it was within the power and it was the duty of appellants to have so shown. The report of sale recites that the purchaser at said sale was Dallas White. The statement of respondent is that, in order to vest the title to the house in White as a part of the consideration for the land, the order of sale to pay debts was resorted to. Under the evidence it was a question of fact for the court. Appellants contend that it is not reasonable to infer that the administrator would indulge in such an unwarranted proceeding. And in the absence of evidence the inference would be that he did not. But evidence of the most positive kind shows that he did. And it is just as positive as that which goes to show that Gordon put in his \$800 stock of goods as a part of the consideration. There is the discrepancy of \$300 remaining over paid for the land. The evidence does not disclose of what it consisted. The court found from the statement of witnesses that it was not to be attributed to Mrs. Gordon's share of the payments. We conclude that the finding was based upon the preponderance of the most credible evidence, and as such is binding on this court.

The evidence shows that the interpleader was to pay for the 66.5 acres of land \$3,960. Of this sum he paid \$1,480 to Florence, the wife, and the two incumbrances on the land which he paid amounted to \$2,125, making a total of \$3,605 paid, which left in the hands of the garnishee \$355, which appellant claims

80 acres he put in as payment \$800 worth of goods, which were mortgaged for that amount. This mortgage he discharged by placing a deed of trust on the land for a similar amount, which he never paid. This the evidence seems to bear out. But, as the court found that defendant had an interest in the land, and, admitting such to have been the fact, the interpleader contends that the surplus in his hands of \$355, which represents that interest, was not subject to the garnishment, as it was the proceeds derived from the sale of defendant's homestead. The 80-acre tract was occupied by defendant and wife as a homestead until they sold it in January, 1902. The proceeds of this sale was the only money that went into the purchase of the 66.5 acres in July, 1902. Upon this land defendant and wife made their home until it was sold to the interpleader. However, just shortly before such sale, defendant made an entry on government land in the state of Colorado. Appellant insists that by so doing the defendant abandoned his homestead right to the land in controversy. But we think not. It is true his conduct was such as to indicate that such was his intention. It cannot be said that because of such intention that there was any actual abandonment. That could only have occurred by some overt act, such as actually moving away from it without any intention to return. He did not give up his possession until he sold to interpleader. *Smith v. Bunn*, 75 Mo. 559; *Duffey v. Willis*, 99 Mo. 132, 12 S. W. 520. There can be no question that a homesteader may sell his homestead, and that the purchaser steps into his shoes and takes the property free from the lien of all judgments on demands originating after the acquisition of the homestead, or homestead purchased with the proceeds of the former. The surplus was a part of the proceeds of defendant's homestead, and as such was not subject to garnishment.

Plaintiff contends that, as the estate in the land held by defendant or his wife was not an estate by entirety, it cannot be considered as a homestead. As there was not the usual granting clause in the deed to defendant and wife, under the authority of certain decisions, it is true they cannot be considered tenants by entirety. *Wilson v. Frost*, 186 Mo. 311, 85 S. W. 375, 105 Am. St. Rep. 619; *Harrison v. McReynolds*, 183 Mo. 533, 82 S. W. 120. But the recitation in the deed constituted them tenants in common. *Id.* A homestead in the husband may attach to an estate in land held by husband and wife, where they both own an interest in the same. *Hart v. Leete*, 104 Mo. 315, 15 S. W. 976. Appellant insists that interpleader should not be heard on this phase of the question, because he makes the claim for the

first time in this court. However that may be, the record shows that there was no declaration of law given or asked, and we cannot know upon what theory interpleader submitted his case, or upon what theory the court decided it. We hold, as the trial court did in effect, that the surplus proceeds of the sale of the equity of redemption of defendant and his wife were not subject to garnishment under the judgments, and it is of no consequence to us upon what theory the cause was tried and judgment rendered. Even should it have been misconceived, we must uphold it if it is the progeny of good law.

A controversy arose also over some personal property, part of which was claimed by the wife and a part by her son. It is insisted that the evidence did not justify the finding. But, as there was some evidence to it, we will not disturb it.

It is ordered that each of said cases be affirmed. All concur.

PIERCE v. PIERCE et al.

(Kansas City Court of Appeals. Missouri. Nov. 1, 1900. Rehearing Denied Dec. 6, 1900.)

1. JUDGMENT (§§ 707, 719*)—CONCLUSIVENESS—PARTIES BOUND.

A former judgment, when offered as evidence in a subsequent action between the same parties or their privies, is conclusive on every question within the issues in the former suit; but strangers to a judgment are not bound by it.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1230, 1250; Dec. Dig. §§ 707, 719.*]

2. EXECUTORS AND ADMINISTRATORS (§ 237*)—CLAIMS—DECREE.

A judgment of the probate court allowing a claim against the estate of a deceased widow is res judicata to the extent of the establishment of the debt in proceedings to charge the debt against the estate of the deceased husband, leaving a will giving his wife the use of his estate for life, with gift over after her death on the payment of her debts.

[Ed. Note.—For other cases, see Executors and Administrators, Dec. Dig. § 237.*]

3. WILLS (§ 872*)—CREDITORS OF DEVISEE—CLAIMS—ENFORCEMENT—PARTIES.

In a suit to charge the estate of a deceased husband, leaving a will whereby he gave his wife the use of his estate for life, with gift over after her death, on the payment of her debts, for a debt of the wife, the executors and devisees are proper parties, as the devisees are entitled to the remainder, and the executors are, by the will, authorized to convey the property.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 872.*]

4. WILLS (§ 872*)—CREDITORS OF DEVISEE—CLAIMS—ENFORCEMENT—REMEDY.

A proceeding to establish a charge against the estate of a deceased husband, leaving a will whereby he gave to his wife the use of his estate for life, with gift over after her death and the payment of her debts, for a debt of the wife is by bill in equity.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 872.*]

5. WILLS (§ 872*)—CLAIMS AGAINST DEVISEE—ENFORCEMENT—LIMITATIONS.

The two-year statute of limitations (Rev. St. 1899, § 185 [Ann. St. 1906, p. 399]) is inapplicable, in a proceeding to establish a charge against the estate of a deceased husband leaving a will giving to his wife the use of his property for life, with gift over after her death on the payment of her debts, for a debt of the wife.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 872.*]

Appeal from Circuit Court, Macon County; Nat M. Shelton, Judge.

Action by Della Pierce against James K. Pierce and others. From a judgment for defendants, plaintiff appeals. Reversed and rendered.

R. S. Matthews & Son, H. A. White, and R. W. Barrow, for appellant. B. R. Dysart and A. A. Gilstrap, for respondents.

BROADBUSH, P. J. This is a suit in equity to charge the estate of John C. Pierce with a debt contracted by his wife subsequent to his death. John C. Pierce died testate on the 4th day of March, 1900. By the terms of his will his wife was to have the use of all his estate, with rents and profits during her life, and the remainder he disposed of in the following language: "After the death of my said wife, and the payment of her lawful debts and funeral expenses, it is my will that all the rest and remainder of my property both real and personal, be sold and reduced to money, for the purpose of distribution among my children and descendants as hereinafter provided, and my executors hereinafter named are hereby fully authorized and empowered to sell and convey the same, and execute bills of sale and deeds of conveyance necessary and appropriate to convey and vest the title to said property and real estate in the purchaser." The deceased owned little or no personal property at his death. He owned, however, certain real estate which the plaintiff by these proceedings seeks to charge with the indebtedness of the widow, Paulina. Paulina, the widow, died in September, 1904, more than four years after the death of her husband. She died leaving no estate. An administrator, however, was appointed by the probate court, and the plaintiff presented a claim for allowance against her estate for services to the deceased rendered after the death of her husband, which the court allowed, amounting to the sum of \$1,100. It is this judgment that plaintiff seeks to charge against the said real estate of the deceased testator. The executors and the devisees are all made parties. The judgment of the court was for the defendants, and the plaintiff appealed.

We assume from the argument of the respective parties that the court tried the case upon the theory that the judgment of the probate court in plaintiff's favor against the administrator of the estate of said Paulina

it. 2 Black on Judgments, § 600. There need not, however, in all cases be an identity of the subject-matter, identity of the cause of action, and identity of persons and parties to the suit, for it is a fundamental rule that a former judgment, when offered as evidence in a second action between the same parties or their privies, is conclusive upon every question involved within the issues in such former suit. *Id.* § 609. The judgment of the probate court was a judgment establishing an indebtedness against the estate of Paulina, and as such is *res adjudicata* in so far as it goes to establish such indebtedness. By the provisions of the will the estate of the deceased was charged with such indebtedness, which was made a prior lien. This is not a proceeding to charge defendants personally, or their estate, with the debts of the wife, but to charge the estate itself. It is therefore in the nature of a proceeding in rem. The defendants were necessary parties to the suit by reason of the fact that they were entitled to the remainder. And it may be said that they stand in the relation of privies to that extent. It is held that the proper proceeding in a case like this is by bill in equity. *Presbyterian Church v. McElhinney*, 61 Mo. 540.

The defendants insist that the claim is barred by the two years statute of limitations (Rev. St. 1899, § 185 [Ann. St. 1906, p. 399]), as more than that period of time had expired since administration was had upon the estate of the testator. But we cannot conceive how the statute has any application, as the debt was not his own, but one that his will provided should be a charge against his estate, if contracted by his wife during her life, however long or short it might be.

Under the evidence offered, plaintiff made out her case. It is therefore ordered that the case be reversed, and judgment entered for the amount of the judgment. All concur.

MARCUM v. MISSOURI, K. & T. RY. CO.
(Kansas City Court of Appeals. Missouri.
Nov. 15, 1909.)

1. CARRIERS (§ 352*)—PASSENGERS—EJECTION—AUTHORITY OF BRAKEMAN.

A brakeman on a freight train has not per se authority to eject a trespasser therefrom.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1412; Dec. Dig. § 352.*]

2. CARRIERS (§ 352*)—PASSENGERS—EJECTION—AUTHORITY OF BRAKEMAN—CUSTOM.

Evidence that a carrier's freight brakemen did customarily put persons off trains who were not entitled to be transported thereon, with the knowledge of defendant's officers, was sufficient, if believed, to establish a freight brake-

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1412; Dec. Dig. § 352.*]

3. APPEAL AND ERROR (§ 1068*)—EXEMPLARY DAMAGES—PREJUDICE.

Defendant was not prejudiced by an instruction authorizing exemplary damages, where none were allowed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. § 1068.*]

4. CARRIERS (§ 382*)—EJECTION OF TRESPASSER—EXEMPLARY DAMAGES.

Where a freight brakeman ordered plaintiff to get off a freight train which plaintiff had boarded under the impression that it carried passengers, and, when plaintiff started down the ladder of a car to get off when the train slowed up, the brakeman commenced throwing coal at him, striking him on the head and arm, and after plaintiff had jumped off the brakeman again threw a lump of coal, which struck plaintiff on the ankle and injured him, the court did not err in authorizing exemplary damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1489; Dec. Dig. § 382.*]

5. CARRIERS (§ 352*)—EJECTION OF PASSENGER OR TRESPASSER—ACTS OF BRAKEMAN.

In an action for ejection of a trespasser on a freight train, plaintiff having left the train in obedience to a brakeman's demand, the jury were entitled to consider evidence that plaintiff was injured by a lump of coal thrown by the brakeman after plaintiff alighted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1413; Dec. Dig. § 352.*]

Appeal from Circuit Court, Cooper County; Wm. H. Martin, Judge.

Action by Cole Marcum against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. P. B. Jackson, for appellant. W. V. Draffen and Jeffries & Corum, for respondent.

ELLISON, J. This action is for personal injury, in which plaintiff obtained judgment in the trial court. The defendant, claiming that plaintiff had not made out a case, demurred to the evidence in his behalf and did not introduce any in defense. Plaintiff desired to go from Franklin Junction to Booneville, and, being informed that one of defendant's freight trains carried passengers, boarded it as it was moving out. He was near the front end, and, fearing the speed would be too great, when the rear reached him he boarded it from the front end by climbing up on the car, intending to walk back over the train to the caboose. He was discovered by one of defendant's brakemen and told that the train did not carry passengers and ordered to get off. Plaintiff stated he thought it a local freight which carried passengers. They disputed for a time; plaintiff saying he would get off if the brakeman would slow up the train so he could do so. The brakeman swore at him, declared he

should get off, and went back to the engine, got a "clinker hook," and came to him, again demanding that he get off, and plaintiff again asked that the train be slowed up. Then the brakeman signaled to the engineer to slow up, and, when the train had begun to go slower, plaintiff "started down the ladder of the car, so when he got slowed up enough for me I could drop off." Then the brakeman commenced throwing coal at him, striking him on the head and arm. He found he would have to drop off to prevent being hit again, and did so by jumping and running with the train. Then the brakeman again threw a lump of coal, striking him on the ankle and injuring him. It is not necessary to go further into the manner of plaintiff's injury, since the case turns on the question of the brakeman's authority to act for defendant in putting him off the train.

It has been determined in this state that merely showing that one was a brakeman on a train did not show he had authority to put persons off who were claimed not to be rightfully on; that the duty of a brakeman, merely, did not include the charge of passengers or trespassers; and that, in order to hold the company for the act of the brakeman, it was necessary to show authority given to the brakeman in addition to his ordinary duty of attending on the train itself. *Farber v. Railway Co.*, 116 Mo. 81, 22 S. W. 631, 20 L. R. A. 350; *Krueger v. Railway Co.*, 84 Mo. App. 358; *Krueger v. Railway Co.*, 94 Mo. App. 458, 68 S. W. 220; *Curtis v. Railway Co.*, 99 Mo. App. 502, 73 S. W. 1103. In this case matter was brought out in direct and cross examination of witnesses as to the rules of the defendant concerning the duties of brakemen. We will assume that such rules showed that brakemen were prohibited from interfering with passengers or trespassers except under direction of the conductor; but there was evidence which tended to show that defendant's brakemen did customarily put persons off who were not entitled to be transported on freight trains, and that this was done with the knowledge of defendant's officers. This was proper evidence, and, when believed, it will establish the brakeman's authority, notwithstanding rules to the contrary. *Charlton v. Railway Co.*, 200 Mo. 413, 442, 98 S. W. 529; *Farber v. Railway Co.*, 139 Mo., loc. cit. 278, 40 S. W. 932; *Farber v. Railway Co.*, 116 Mo., loc. cit. 94, 22 S. W. 631, 20 L. R. A. 350; *Krueger v. Railway Co.*, 94 Mo. App. 458, 463, 68 S. W. 220.

Complaint is made of an instruction authorizing the jury to allow exemplary damages; but the jury gave no heed to it, as none were allowed. It was not error, under the evidence, to give it.

So complaint is made of the refusal of defendant's instruction directing the jury not to consider the act of the brakeman in

throwing the coal and striking plaintiff after he had reached the ground from the car. The instruction was properly refused. *O'Brien v. Transit Co.*, 185 Mo. 263, 84 S. W. 939, 105 Am. St. Rep. 592.

Defendant has submitted a full argument on the case made by plaintiff, and, after consideration of all the points made therein, we feel that we would not be justified in interfering with this judgment, and it is, accordingly, affirmed. All concur.

WILSON v. KIEFFER.

(Kansas City Court of Appeals. Missouri. Nov. 15, 1909. Rehearing Denied Dec. 6, 1909.)

PRINCIPAL AND SURETY (§ 194*)—CO-SURETIES—CONTRIBUTION.

Plaintiff signed, as surety, a note to defendant, who afterwards sold it to a bank. When it became due, it was taken up, and another given to the bank in lieu thereof by all three parties, and it was thereafter renewed in the same way. Held, that plaintiff and defendant thereby became co-sureties for the maker, and plaintiff was entitled to contribution on paying the judgment rendered on the last note.

[Ed. Note.—For other cases, see *Principal and Surety*, Cent. Dig. §§ 606-623; Dec. Dig. § 194.*]

Appeal from Circuit Court, Benton County; Chas. A. Denton, Judge.

Action by Rebecca C. Wilson against G. S. Kieffer. From a judgment for defendant, plaintiff appeals. Reversed.

Bruce Barnett, for appellant. Henry P. Lay, for respondent.

ELLISON, J. This is an action for contribution on account of an alleged payment of the full amount of a judgment rendered on a promissory note, upon which plaintiff and defendant were sureties. The judgment in the trial court was for the defendant.

It seems that one Louis W. Wilson was indebted to defendant for a stock of goods sold to him by defendant, and that afterwards such indebtedness was put in the form of a note payable to defendant, due at a future date, and that this plaintiff signed such note, with Louis W. Wilson as his surety; that afterwards this defendant sold and indorsed the note to a bank, and became liable to the bank by such indorsement. When it became due, it was taken up, and one given to the bank in lieu thereof by all three, Louis Wilson, this plaintiff, and defendant. There were several renewals in the same way until the one on which the judgment was rendered, which plaintiff paid. From this it seems clear that plaintiff and defendant were co-sureties for Louis Wilson. In the first place plaintiff was alone surety for him. Then when that note was not paid to the bank to which it had been sold and indorsed by defendant, it was taken up by Louis Wilson executing a new note to the

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

note last mentioned, the parties bore the same relation to it. We regard the evidence as establishing a payment of the judgment by plaintiff. She, therefore, paid a judgment on an obligation in which defendant was jointly bound with her as surety. Plaintiff should therefore have recovered in the trial court.

The judgment will therefore be reversed, and the cause remanded, with directions to enter judgment for the plaintiff for the amount paid by her, with interest. All concur.

SUBLETTE et al. v. BREWINGTON et al.
(Kansas City Court of Appeals. Missouri. Nov. 1, 1909. Rehearing Denied Dec. 6, 1909.)

1. BILLS AND NOTES (§ 209*)—NEGOTIATION—DELIVERY.

Where a note is negotiable under the law merchant and Laws 1905, p. 243, § 1 (Ann. St. 1906, § 463-1), and is payable to order, it will not pass by mere delivery, section 30 of the act of 1905 providing that a negotiable instrument, if payable to order, is negotiated by the indorsement of the holder completed by delivery, which indorsement, under section 31, must be written on the instrument itself or upon a paper attached thereto, and the transferees thereof, so far as their liability is determined by the law governing the transfer of negotiable instruments payable to order, would be holders with notice of whatever equities the makers might have.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 423-427, 497-501; Dec. Dig. § 209.*]

2. PRINCIPAL AND AGENT (§ 109*)—ACTS OF AGENT—LIABILITY OF PRINCIPAL.

Plaintiffs made a person their agent to negotiate a loan upon the credit of their note payable to the agent's order, which would necessarily become the property of whoever advanced the money thereon. The agent's authority was complete, and he turned over the note unindorsed as collateral security for a loan to himself. Held that, as between plaintiffs and the agent, the law merchant did not apply, but plaintiffs' rights depended upon the rules governing the relation of principal and agent, and the acts of the agent, being within the scope, or apparent scope, of his authority, were binding upon plaintiffs.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 318-322; Dec. Dig. § 109.*]

3. PRINCIPAL AND AGENT (§ 109*)—ACTS OF AGENT—LIABILITY OF PRINCIPAL.

The agent, in the exercise of his authority as such, having dealt with strangers to their prejudice, plaintiffs could not plead want of consideration as a basis of recovery against the transferees.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 318-322; Dec. Dig. § 109.*]

Appeal from Circuit Court, Adair County;
Nat M. Shelton, Judge.

Action by D. W. Sublette and another
against George R. Brewington and another.

A. Donaghy, for appellants. H. F. Milham,
for respondents.

BROADDUS, P. J. This is a suit to restrain defendants from disposing of a certain promissory note, and asking for its cancellation. On January 8, 1906, the plaintiffs applied to E. L. Hilbert to procure for them a loan of \$1,000, for the period of one year. For the purpose of obtaining the loan, they executed and delivered their promissory note for said sum of \$1,000, due in one year, payable to the order of said Hilbert. Hilbert, with one of the plaintiffs, applied to several persons to get them to advance the money on the note, but failed to get such advance. The plaintiffs then went home. Afterwards communication by telephone was had between the plaintiffs and Hilbert as to whether the latter had succeeded in securing the loan. The matter was left in this condition until in April, when plaintiffs, according to their statements, saw Hilbert for the purpose of taking up the note, when he informed them that he had destroyed it. Thereafter, on the 2d of October, 1906, several months before the maturity of the note, Hilbert borrowed from defendants \$814, and executed his note to them for that amount and turned over to them the note in suit, without indorsement, as collateral security. The defendants took the note in good faith in the belief that Hilbert was its owner. The judgment of the court was for the defendants, and plaintiffs appealed.

The note in question was a negotiable instrument as defined in section 1, Act 1905, p. 243 (Ann. St. 1906, § 463-1), entitled "Negotiable Instruments," and is such under the law merchant, and, being payable to order, it did not pass by the mere act of delivery. Section 30, Acts 1905, pp. 247, 248, is as follows: "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery." Section 31: "The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement." If the case is to be determined by the law governing the transfer of negotiable instruments payable to order, the defendants are holders with notice of whatever equities plaintiff may have had. The defendants' defense is based upon the ground that, as Hilbert was the agent of plaintiffs, the law merchant does not control, but the question is one of agency.

*For other cases see same topic and section NUMBER in Dec. & Am. Digs. 1907 to date, & Reporter Indexes

With this view we coincide. That Hilbert was the agent of plaintiffs to negotiate a loan by means of the note is undeniable. His duty was to obtain a loan upon the credit of plaintiffs' note, which as a matter of course would necessarily become the property of whoever could be induced to advance the money on the security offered. His authority was complete. In effect he was empowered to dispose of the paper as freely as if it had been his own. The face of the paper, in fact, was a notice to strangers that it was his property; and it was not issued in due course of business.

There is no question better settled than that the acts of the agent (within the scope or apparent scope of his authority) are binding upon the principal. We cannot escape the conclusion that the case falls within the rule governing the relation of agent and principal, and that the law merchant does not apply. Furthermore, we are of the opinion that the plaintiffs have no equity as against defendants, and that the transfer to defendants was for a sufficient valuable consideration. It does not lie in the mouth of a party to plead want of consideration where his agent in the exercise of his authority as such deals with a stranger to his prejudice.

We believe the judgment of the court was for the right party, and it is therefore affirmed. All concur.

MEMORANDUM DECISIONS.

TYLER et al. v. TYLER et al. (Court of Appeals of Kentucky. Dec. 3, 1909.) Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division. "Not to be officially reported." Suit between Isaac Tyler and others and Owen Tyler and others. From the judgment, the former parties appeal. Affirmed. E. L. McDonald, for appellants. Trabue, Doolan & Cox, for appellees.

HOBSON, J. Considering all the provisions of the will in question, and the facts shown by the record, we are of opinion that the chancellor did not err in the conclusion he reached. Judgment affirmed.

HANEY v. STATE. (Court of Criminal Appeals of Texas. Nov. 24, 1909.) Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge. Rube Haney was convicted

of burglary, and he appeals. Affirmed. F. J. McCord, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the crime of burglary; his punishment being assessed at two years' confinement in the penitentiary. There are no bills of exceptions incorporated in the record. The motion for new trial alleges the insufficiency of the evidence to support the conviction, that the court erred in forcing the defendant into trial without the witness Rickles, and that, therefore, he did not have a fair trial. So far as the record is concerned, there is no application for continuance, and no bill of exceptions reserved to the ruling of the court. We have examined the evidence carefully, and are of opinion that it is sufficient, and deem it unnecessary to recapitulate or state the evidence. The jury were fully justified in reaching the conclusion that appellant was guilty as charged. The judgment is affirmed.

BROOKS, J., absent.

HARRIS v. STATE. (Court of Criminal Appeals of Texas. Oct. 27, 1909.) Appeal from Kaufman County Court; Thos. R. Bond, Judge. Jim Harris was convicted of violating the local option law, and he appeals. Affirmed. See, also, *infra*. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail. There is no statement of facts nor bill of exceptions contained in the record. No error appearing, the judgment is affirmed.

HARRIS v. STATE. (Court of Criminal Appeals of Texas. Oct. 27, 1909.) Appeal from Kaufman County Court; Thos. R. Bond, Judge. Jim Harris was convicted of violating the local option law, and he appeals. Affirmed. See, also, *supra*. F. J. McCord, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail.

There is neither a statement of the facts nor a bill of exceptions in the record. There is no error apparent in the record, and the judgment is in all things affirmed.

LEWIS v. STATE. (Court of Criminal Appeals of Texas. Nov. 3, 1909.) Appeal from Hill County Court; Horton B. Porter, Judge. Love Lewis was convicted of violating the local option law, and he appeals. Affirmed. F. J. McCord, Asst. Atty. Gen., for the State.

RAMSEY, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' imprisonment in the county jail. As the record comes to us, there is neither bill of exceptions nor statement of facts. The indictment is valid. In this state of the record, it follows, of necessity, there is no question which we can review, and the judgment of conviction is affirmed.

ABANDONMENT.

Of homestead, see Homestead, §§ 164, 181.
Of prescriptive rights, see Adverse Possession, § 53.

ABATEMENT.

Of nuisance, see Nuisance, § 84.
Of price of land, see Vendor and Purchaser, § 176.

ABATEMENT AND REVIVAL.

Judgment as bar to another action, see Judgment, § 570.
Right of action by or against personal representative, see Executors and Administrators, § 431.
Substitution of parties, see Parties, § 40.

II. ANOTHER ACTION PENDING.

§ 13. That a plaintiff in an action brought in Texas for a personal injury inflicted in a sister state instituted an action in the sister state on the same cause of action *held* not to abate the former action.—*Morgan's L. & T. R. & S. S. Co. v. Street* (Tex. Civ. App.) 270.

V. DEATH OF PARTY AND REVIVAL OF ACTION.**(B) Continuance or Revival of Action.**

Review of order of revival as dependent on finality of determination, see Appeal and Error, § 70.

§ 72. The trial court has no power, under Rev. St. 1890, §§ 756, 758 (Ann. St. 1906, pp. 739, 741), to revive a suit in the name of a stranger on the death of plaintiff, in the absence of allegation or proof of a transfer of interest in the subject-matter.—*Wilson v. Darrow* (Mo.) 1077.

§ 74. After the term at which the judgment was rendered, the trial court has no power to revive the cause on the death of a party pending his appeal.—*Wilson v. Darrow* (Mo.) 1077.

§ 75. A suit cannot be revived except in the mode provided by statute.—*Wilson v. Darrow* (Mo.) 1077.

ABDUCTION.

See Seduction.

II. PROSECUTION AND PUNISHMENT.

§ 12. Evidence *held* to authorize a conviction, under Rev. St. 1890, § 1842 (Ann. St. 1906, p. 1273), of abduction for purpose of prostitution or concubinage.—*State v. Fleetwood* (Mo.) 696.

ABSTRACTS.

Of record on appeal or writ of error, see Appeal and Error, §§ 580, 586.

ABUTTING OWNERS.

Assessments for expenses of public improvements, see Municipal Corporations, §§ 414-485.

Compensation for taking of or injury to lands or easements for public use, see Eminent Domain, §§ 93-136.
Rights as to drains in highways, see Highways, § 120.
Rights in streets in cities, see Municipal Corporations, § 697.

ACCEPTANCE.

Of goods sold in general, see Sales, §§ 150-182.
Of offer or proposal, see Contracts, § 22.

ACCESSION.

Annexation of personal to real property, see Fixtures; Improvements.

ACCIDENT.

Cause of death, see Death, §§ 7-32.
Cause of personal injuries, see Negligence, § 3.

ACCIDENT INSURANCE.

See Insurance, § 450.

ACCOMPLICES.

Testimony, see Criminal Law, § 508.

ACCORD AND SATISFACTION.

See Compromise and Settlement; Payment; Release.

§ 11. The retention of a check which was shown by a letter and voucher which accompanied it to be in full payment of the account sued on, without any explanation, *held* a payment in full of the account.—*Goodloe v. Empson Packing Co.* (Mo. App.) 771.

ACCOUNT.

See Account, Action on.

Statement of account by mortgagee as condition precedent to recovery of mortgaged chattels, see Chattel Mortgages, § 172.

Accounting by particular classes of persons. See Executors and Administrators, §§ 513, 516.
Assignee for benefit of creditors, see Assignments for Benefit of Creditors, § 390.
City bond recorder, see Municipal Corporations, § 162.

Trustee, see Trusts, § 315.

ACCOUNT, ACTION ON.

§ 12. In an action on a sworn account, defendant's sworn plea, by admitting the correctness of the items of the account, made a *prima facie* case for plaintiff, though the plea also alleged that defendant was entitled to certain credits from the amount claimed as due, and the burden was upon defendant to establish such credits by other proof.—*Blackwell Durham Tobacco Co. v. Jacobs* (Tex. Civ. App.) 66.

ACCRUAL.

Of right of action, see Limitation of Actions, §§ 44-55.

ed by acid escaping from loaded car, see Railroads, § 443.

ACKNOWLEDGMENT.

Of indebtedness barred by limitation, see Limitation of Actions, § 143.
Operation and effect of admissions as evidence, see Evidence, §§ 220-258.
Operation and effect of admissions as ground of estoppel, see Estoppel, §§ 63-95.

I. NATURE AND NECESSITY.

Defectively acknowledged deed as color of title, see Adverse Possession, § 82.

§ 6. Under Act April 23, 1907 (Laws 1907, p. 308, c. 165), amending Sayles' Ann. Civ. St. 1897, art. 2312, a deed or certified copy thereof which has been recorded for 10 years is admissible in evidence whether duly acknowledged or not.—*Bledsoe v. Haney* (Tex. Civ. App.) 455.

II. TAKING AND CERTIFICATE.

§ 47. Any defect in the acknowledgment of a deed, acknowledged before a judge of the Supreme Court of Louisiana a number of years before the enactment of Act April 27, 1874 (Laws 1874, p. 152, c. 105), because the statute of the republic of Texas then in force required foreign acknowledgments to be taken before consular agents, etc., held cured by the act of 1874; such official being authorized to take acknowledgments by act of 1871 (Laws 1871, p. 17, c. 76), in force when the former statute was enacted.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 47. Act April 27, 1874 (Laws 1874, p. 152, c. 105), curing defectively acknowledged deeds, held to only affect rules of evidence, and not to give greater effect to a deed than it had under the laws existing when it was executed.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

III. OPERATION AND EFFECT.

§ 54. The words "acknowledged in the manner provided by the laws in force at the time of its registration," in Sayles' Ann. Civ. St. 1897, art. 2312, relating to the introduction in evidence of recorded documents, defined.—*Bledsoe v. Haney* (Tex. Civ. App.) 455.

§ 55. In view of Ky. St. § 3760 (Russell's St. § 4862), held that a certificate to a grantor's signature and acknowledgment is conclusive in a suit by a party claiming under the deed, where the certificate was not attacked for mistake or fraud.—*Everman v. Everman* (Ky.) 135.

ACTION.

Abatement, see Abatement and Revival.
Accrual, see Limitation of Actions, §§ 44-55.
Bar by former adjudication, see Judgment, § 570.
Commencement within period of limitation, see Limitation of Actions, § 127.
Jurisdiction of courts, see Courts.
Laches, see Equity, § 87.
Limitation by statute, see Limitation of Actions.
Malicious actions, see Malicious Prosecution.
Pendency of action, see Abatement and Revival, § 13; *Lis Pendens*.

Actions between parties in particular relations.
See Master and Servant, §§ 70-83, 262-293.
Co-sureties, see Principal and Surety, § 194.
Co-tenants, see Partition, §§ 16, 63.

Corporations, §§ 490; Executors and Administrators, § 431; Guardian and Ward, § 126; Husband and Wife, §§ 223, 238; Infants, § 105; Landlord and Tenant, § 180; Master and Servant, § 330; Municipal Corporations, §§ 812-821; Principal and Agent, § 184; Receivers, §§ 174, 183.

Corporate officers, see Corporations, § 349.
Taxpayers, see Schools and School Districts, § 111.
Trustees, see Trusts, § 372.

Particular causes or grounds of action.

See Bills and Notes, §§ 443-538; Death, §§ 7-78; Fraud, §§ 56-60; Insurance, §§ 668, 817, 819; Libel and Slander, §§ 114-124; Malicious Prosecution, §§ 56-72; Money Received; Negligence, §§ 121-140; Nuisance, §§ 50, 72; Taxation, § 593; Torts; Trespass; Trover and Conversion, §§ 16-54; Work and Labor.

Breach of contract, see Contracts, §§ 334-350; Sales, §§ 370-384, 406-420.

Breach of covenant, see Covenants, §§ 116-135.
Breach of warranty, see Sales, §§ 435-442.

Compensation of broker, see Brokers, §§ 85-88.

Delay in transportation of goods, see Carriers, §§ 104, 105.

Delay in transportation of live stock, see Carriers, § 228.

Diversion of water course, see Waters and Water Courses, § 87.

Ejection of passenger, see Carriers, § 382.

Failure to deliver shipment, see Carriers, § 94.

Flowage, see Waters and Water Courses, § 178.

Injuries caused by operation of street railroad, see Street Railroads, § 117.

Injuries from fires set by operation of railroad, see Railroads, §§ 484-485.

Injuries to animals on or near railroad tracks, see Railroads, §§ 443-446.

Injuries to passenger, see Carriers, §§ 314-321.

Injuries to persons at railroad crossings, see Railroads, §§ 350, 351.

Injuries to persons on city streets, see Municipal Corporations, §§ 812-821.

Injuries to persons on or near railroad tracks, see Railroads, § 397-401.

Injuries to servant, see Master and Servant, §§ 262-296.

Loss of or injury to shipment, see Carriers, §§ 134-136.

Negligent transmission of telegram, see Telegraphs and Telephones, §§ 66-73.

Price of goods, see Sales, §§ 340-364.

Price of land, see Vendor and Purchaser, §§ 308-318.

Recovery of interest, see Interest, § 66.

Recovery of land sold by vendor, see Vendor and Purchaser, § 290.

Recovery of price paid for goods, see Sales, § 397.

Recovery of price paid for land, see Vendor and Purchaser, § 334.

Recovery of tax paid, see Taxation, §§ 527, 528.

Services, see Master and Servant, § 80; Work and Labor.

Special tax bill for municipal improvement, see Municipal Corporations, § 558.

Unpaid taxes, see Taxation, § 593.

Wages, see Master and Servant, § 80.

Wrongful eviction of tenant, see Landlord and Tenant, § 180.

Particular forms of action.

See Account, Action on; Ejectment; Replevin; Trespass, §§ 20-67; Trespass to Try Title; Trover and Conversion.

Topics, divisions, & section (§) NUMBERS in this Index, & Dec. & Amer. Digs. & Reporter Indexes agree.

Particular forms of special relief.

See Divorce; Injunction; Interpleader; Partition, §§ 16, 63; Quietening Title; Specific Performance.

Admeasurement or assignment of dower, see Dower, §§ 79, 101.

Alimony, see Divorce, §§ 239-286; Husband and Wife, § 278.

Cancellation of written instrument, see Cancellation of Instruments.

Confirmation of tax title, see Taxation, § 805.

Determination of adverse claims to real property, see Quietening Title.

Enforcement of vendor's lien, see Vendor and Purchaser, §§ 281-289.

Enforcement or foreclosure of lien, see Mechanics' Liens, § 304.

Establishment and enforcement of trust, see Trusts, § 372.

Establishment of boundaries, see Boundaries, §§ 33-54.

Establishment of will, see Wills, §§ 260-400.

Foreclosure of mortgage, see Mortgages, § 559.

Reformation of written instrument, see Reformation of Instruments.

Removal of cloud on title, see Quietening Title.

Separate maintenance of wife, see Husband and Wife, § 278.

Setting aside fraudulent conveyance, see Fraudulent Conveyances, §§ 282, 299.

Setting aside will, see Wills, §§ 260-400.

Trial of tax title, see Taxation, § 805.

Particular proceedings in actions.

See Appearance; Costs; Damages; Depositions; Dismissal and Nonsuit; Evidence; Execution; Judgment; Judicial Sales; Jury; Limitation of Actions; Parties; Pleading; Process; Reference; Removal of Causes; Stipulations; Trial; Venue.

Notice of action, see Process, § 96.

Revival, see Abatement and Revival, §§ 72-75.

Verdict, see Trial, § 330.

Particular remedies in or incident to actions.

See Attachment; Garnishment; Injunction; Receivers.

Notice of pendency of action, see Lis Pendens.

Set-off, see Set-Off and Counterclaim.

Proceedings in exercise of special or limited jurisdictions.

Criminal prosecutions, see Criminal Law.

Suits in equity, see Equity.

Suits in justices' courts, see Justices of the Peace, §§ 92-133.

Review of proceedings.

See Appeal and Error; Certiorari; Exceptions, Bill of; Justices of the Peace, §§ 162-191; New Trial.

II. NATURE AND FORM.

Of affiliation proceedings, see Bastards, § 19.

ACTION ON THE CASE.

See Trespass, §§ 20-67.

ACT OF GOD.

Liability of carrier for damage from, see Carriers, § 119.

ADEQUATE REMEDY AT LAW.

Effect on right to injunctive relief, see Injunction, § 16.

Effect on right to mandamus, see Mandamus, § 3.

ADJOINING LANDOWNERS.

See Boundaries.

ADJUDICATION.

Of courts in general, see Courts, §§ 89-116.
Operation and effect of former adjudication, see Judgment, §§ 570, 707-743.

ADMEASUREMENT.

Of dower, see Dower, §§ 79, 101.

ADMINISTRATION.

Of estate of decedent, see Executors and Administrators.

Of estate of ward, see Guardian and Ward, § 34.

Of property by receiver, see Receivers, § 139.

ADMISSIONS.

As evidence in civil actions, see Evidence, §§ 220-258.

ADVERSE CLAIM.

To real property, see Quietening Title.

ADVERSE POSSESSION.

See Limitation of Actions.

Between tenants in common, see Tenancy in Common, § 15.

Prescriptive right to easement, see Easements, §§ 5, 8, 10.

Review in action to recover lands held adversely as dependent on finality of determination, see Appeal and Error, § 80.

I. NATURE AND REQUISITES.

(A) Acquisition of Rights by Prescription in General.

§ 13. One held to have acquired title by adverse possession.—Hardy v. Samuels (Ark.) 654.

§ 13. "Requisites of possession to vest title" defined.—Jones v. Weaver (Tex. Civ. App.) 619.

(B) Actual Possession.

§ 16. Any visible or notorious acts clearly showing an intention to claim by adverse possession held sufficient.—McComb v. Saxe (Ark.) 987.

§ 16. Evidence held to establish title by adverse possession.—Nall v. Conover (Mo.) 1039.

§ 20. If improvements, such as building houses, opening fields, etc., made by defendant's grantor on land, claimed by defendant by the adverse possession of such grantor, were located on the land claimed, it was immaterial on what particular part of the land they were located.—Merriman v. Blalack (Tex. Civ. App.) 403.

(C) Visible and Notorious Possession.

§ 30. Defendant's possession of land held sufficiently notorious to give title by adverse possession.—McComb v. Saxe (Ark.) 987.

§ 30. If one entered upon land under a duly recorded deed, and held open and notorious possession thereof, it was immaterial to his right to claim by adverse possession whether any one actually knew of his claim and possession.—Merriman v. Blalack (Tex. Civ. App.) 403.

§ 31. One who entered upon land under a duly recorded deed thereto, and held it adversely to the world, need not otherwise repudiate the title of others claiming the land, or notify them of his claim of title, in order to set limitations running.—Merriman v. Blalack (Tex. Civ. App.) 403.

§ 31. The possession of a small part of a 160-acre tract held not sufficient to ripen into title to the 160 acres by adverse possession.—Jones v. Weaver (Tex. Civ. App.) 619.

§ 41. An adverse claim made shortly before the beginning of the action in which the adverse claim was set up was not available to give title by adverse possession.—*Kidd v. Bell* (Ky.) 232.

§ 41. Where persons did not hold possession of land under title, or color of title, from the sovereignty of the soil, their chain of title not extending to the original grantee, they could not claim under three years' limitation.—*Barrera v. Guerra* (Tex. Civ. App.) 902.

§ 44. That the fence by which an adverse claimant inclosed land was occasionally broken by spring floods did not break the continuity of his possession.—*McComb v. Saxe* (Ark.) 987.

§ 44. Even if a tenant agreed to hold possession of a league of land for one claiming title thereto, there was no title by limitations, through such tenant, where the evidence did not show continued possession of the tenant or of persons claiming under him, acknowledging the title of the claimant and exercising the right of possession of the entire league.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 50. Where a landlord is in adverse possession through a tenant, his possession is not destroyed by the tenant's attornment to a stranger.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

§ 53. Where plaintiffs had possession through tenants, a hiatus between the tenants' abandonment without notice to plaintiffs and defendants' entry held not to establish plaintiffs' abandonment of their possessory rights.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

(F) Hostile Character of Possession.

§ 65. One entering and holding land under the belief that it is vacant public land, with the intention of acquiring title from the state, is not holding adversely to the true owner.—*Jones v. Weaver* (Tex. Civ. App.) 619.

§ 71. The three-year statute of limitation does not protect one not deraining title from the state.—*Haring v. Shelton* (Tex.) 13.

§ 71. Defendants held not to have color of title from a sovereignty of the soil essential to a claim of adverse possession under the three-year statute of limitations.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

§ 71. A deed held not a mere quitclaim or option to purchase as to three-fourths of the league of land conveyed thereby, but a deed of the whole league, sufficient to support a claim under the 5-year limitations, or sufficient, as a memorandum of title, to support a claim under the 10-year limitations.—*Merriman v. Blalack* (Tex. Civ. App.) 403.

§ 82. The five-year statute of limitation does not protect one claiming under a deed from an individual where he does not show the date of the recording of the deed.—*Haring v. Shelton* (Tex.) 13.

§ 82. Where the record of a married woman's deed conveying her separate property showed that an essential part of the certificate of acknowledgment was omitted, the deed was not "duly recorded" so as to support a plea of title by limitations.—*Merriman v. Blalack* (Tex. Civ. App.) 403.

§ 82. Where title was complete in defendant's remote grantor at the latter's death, it was immaterial to defendant's right to claim title by adverse possession that deeds of subsequent grantors were not recorded a sufficient length of time before the commencement of the action to base a claim by limitations thereon.—*Merriman v. Blalack* (Tex. Civ. App.) 403.

and making improvements thereon, held to show prima facie that such possession and use were based upon the deed, and a claim of title to the entire tract thereunder.—*Merriman v. Blalack* (Tex. Civ. App.) 403.

(G) Payment of Taxes.

§ 86. Where persons in possession of land have paid no taxes thereon, they have obtained no title by five years' limitation.—*Barrera v. Guerra* (Tex. Civ. App.) 902.

§ 95. It is presumed, in trespass to try title to land claimed by adverse possession, that one residing on land under a deed thereto, and who is admitted to have paid the taxes, paid them for himself, and not for another.—*Merriman v. Blalack* (Tex. Civ. App.) 403.

II. OPERATION AND EFFECT.

(A) Extent of Possession.

§ 96. In order to establish title by limitations to a league of land by the possession of tenants, there must be possession by the tenants or those claiming under them of the entire league in the name of the claimant.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 96. Where the boundaries of a lot were clearly marked, possession of plaintiff, through his tenants, of a part of the lot, perfected title by limitation to the well-defined limits of the whole lot.—*Washam v. Harrison* (Tex. Civ. App.) 52.

§ 100. Where defendant thought that a tract which he fenced and on which he erected a barn was a part of land he had purchased, and did not then know it was a part of land now claimed adversely by him, his possession would not extend beyond the fenced part, and was not available to sustain an adverse claim to other land.—*Kidd v. Bell* (Ky.) 232.

§ 100. Certain acts by a grantee, improving land upon which he entered under a deed, held sufficient to support title by limitations to the entire tract, whether the deed is considered as a duly registered deed under the 5-year limitations, or as a written memorandum of title under the 10-year limitations.—*Merriman v. Blalack* (Tex. Civ. App.) 403.

§ 100. Adverse possession of land extends to the entire tract claimed, unless a part thereof is in the actual possession of another during some of the period of limitation.—*Thacker v. Wilson* (Tex. Civ. App.) 938.

(B) Title or Right Acquired.

§ 104. In trespass to try title, where defendants claimed that another by long silence as to his title to the land in controversy had abandoned claim thereto, and relied on that fact to raise a presumption of a transfer of his right to one under whom defendants claimed, testimony of such other's children as to declarations by him as to his ownership of the land was admissible to show that he had not abandoned his claim thereto.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 111. Defendant held not entitled to claim by adverse possession in partition proceedings a two-acre tract which he had fenced where he did not describe such tract, in view of Civ. Code Prac. § 125.—*Kidd v. Bell* (Ky.) 232.

§ 115. Whether title to land by adverse possession is established is a question for the jury, where the evidence is conflicting as to the length and continuity of occupation, and the use and

cultivation of the land.—Thacker v. Wilson (Tex. Civ. App.) 938.

ADVERTISEMENT.

Of resale of goods after default of conditional vendee, see Sales, § 479.
Of sale of goods retaken by conditional seller on default of buyer, see Sales, § 479.
Publication of process, see Process, § 96.

AFFIDAVITS.

See Depositions.
Verification of claim against estate of decedent, see Executors and Administrators, § 227.

Particular proceedings or purposes.

See Attachment, § 122.
Appeal from probate court, see Courts, § 202.
Appeal or writ of error, see Criminal Law, § 1074.
Newly discovered evidence as ground for new trial, see Criminal Law, § 858.
Verification of pleading, see Pleading, §§ 291-301.

§ 14. An affidavit must be made and verified as required by the laws of Kentucky, though executed in another state.—Crane & Breed Mfg. Co. v. Staggs's Adm'r (Ky.) 225.

AFFILIATION.

See Bastards, §§ 19, 65.

AFFIRMANCE.

Of judgment on appeal, see Appeal and Error, §§ 1126, 1140.

AGENCY.

See Principal and Agent.

AGREED CASE.

See Stipulations, § 14.

AGREEMENT.

See Contracts.

AIDER BY VERDICT.

In civil actions, see Pleading, § 433.

ALIBI.

Instructions on, see Criminal Law, § 775.

ALIENATION.

Suspension of power of alienation of property, see Perpetuities.

ALIMONY.

See Divorce, §§ 239-286; Husband and Wife, § 278.

ALLOWANCE.

To surviving wife, husband, or children of decedent, see Executors and Administrators, § 190.

ALTERATION.

Of geographical or political divisions, see Schools and School Districts, §§ 30-41.

ALTERATION OF INSTRUMENTS.

See Reformation of Instruments.

AMENDMENT.

Of pleadings affecting limitations, see Limitation of Actions, § 127.

In particular remedies or special jurisdictions.
See Mandamus, § 146.

Of particular acts, instruments, or proceedings.
See Judgment, § 299; Statutes, § 138.

Affidavit on attachment, see Attachment, § 122.

Motion for new trial, see New Trial, § 117.

Order approving sale of property belonging to estate of decedent, see Executors and Administrators, § 375.

Pleading, see Pleading, §§ 248, 252.

Proceedings of county board, see Counties, § 53.

Record on appeal or writ of error, see Appeal and Error, § 659.

ANIMALS.

Carriage of live stock, see Carriers, §§ 228, 229.

Injuries from operation of railroads, see Railroads, §§ 411-446.

Stabling and hiring of horses, see Livery Stable Keepers.

§ 44. A judgment for damages to the owner of an animal maliciously killed or wounded, under Kirby's Dig. §§ 1892, 1893, held not payable into the county treasury, and hence was not payable to the sheriff in county warrants.—Baker v. Nanny (Ark.) 109.

§ 50. Under Sayles' Ann. Civ. St. 1897, art. 4980, a stock-law election held invalid because the subdivision in which the election was to be held was not described by metes and bounds.—Ex parte Gullede (Tex. Cr. App.) 21.

§ 51. The penalty prescribed by the stock law of May 23, 1901 (Acts 1901, p. 303), for its violation, is not applicable to stock merely running at large.—Rowe v. State (Ark.) 626.

§ 57. Stock law of May 23, 1901 (Acts 1901, p. 303), held not to create an indictable offense for its violation.—Rowe v. State (Ark.) 626.

ANNULMENT.

Of will, see Wills, §§ 260-400.

ANSWER.

In pleading, see Pleading, § 93.

APPEAL AND ERROR.

See Certiorari; Exceptions, Bill of; New Trial. Appellate jurisdiction of particular courts, see Courts, §§ 207-246.

Costs, see Costs, §§ 238, 241.

In particular civil actions.

See Divorce, § 177.

Review in special proceedings.

See Interpleader, § 34; Mandamus, § 187.

Accounting by executor or administrator, see Executors and Administrators, §§ 513, 516.

Condemnation proceedings, see Eminent Domain, § 262.

For appointment of administrator with will annexed, see Executors and Administrators, § 21.

Probate proceedings, see Wills, § 400.

Review of criminal prosecutions.

See Criminal Law, §§ 1024-1182; Homicide, §§ 339, 341.

Review of proceedings of justices of the peace.
See Justices of the Peace, §§ 162-191.

parties will not be determined, where it was admitted that the acts sought to be prevented had been accomplished.—*Mabry v. Kettering* (Ark.) 115.

§ 21. Consent of the parties cannot give the Supreme Court jurisdiction of the action, if it does not in fact have jurisdiction.—*Schwychart v. Barrett* (Mo.) 1049.

III. DECISIONS REVIEWABLE.

(D) Finality of Determination.

§ 69. An order refusing a writ of mandamus *held* interlocutory, and not appealable, in absence of statute.—*Simmers v. Anderson* (Tex. Civ. App.) 910.

§ 70. An order of revival under Kirby's Dig. §§ 6312, 6313, 6315, can be reviewed only on appeal from final judgment.—*Blum v. Pulaski County* (Ark.) 109.

§ 78. Rev. St. 1895, art. 1383, *held* not to authorize an appeal from an order of the county court setting aside a default judgment.—*Hope v. Long* (Tex. Civ. App.) 40.

§ 79. A judgment in a suit to sell land necessarily for a decedent's debts *held* a final appealable judgment as to a cross-petitioner, though his name was not mentioned therein.—*Little v. Cardwell* (Ky.) 799.

§ 80. An order, in proceedings by the true owner to recover possession of land and the rents thereof, brought against the occupant holding in good faith under a void judicial sale, *held* not appealable.—*McDonald v. Rankin* (Ark.) 88.

IV. RIGHT OF REVIEW.

(B) Estoppel, Waiver, or Agreements Affecting Right.

§ 154. Where the receiver of a bank in bankruptcy had appealed from a judgment against him for the value of certain notes, his claim on the notes against the estate of the president of the bank *held* not a recognition of the conclusiveness of the judgment so as to effect an abandonment of the appeal.—*Morris v. Butler* (Mo. App.) 377.

V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

(A) Issues and Questions in Lower Court.

§ 171. Where the action was necessarily based upon an adverse claim by defendants, plaintiffs *held* estopped from contending, on appeal, that the purchase of the land by defendant at foreclosure sale *prima facie* enured to plaintiffs' benefit as tenants in common with defendants, because the agreed statement of facts did not expressly negative such tenancy by asserting an adverse holding.—*Rutter v. Carothers* (Mo.) 1056.

§ 171. Where an action against a carrier was for negligent delay in transporting freight, the common-law liability of the carrier for delivery in a damaged state will not be considered on appeal.—*A. C. L. Haase & Sons' Fish Co. v. Merchants' Despatch Transp. Co.* (Mo. App.) 362.

§ 175. Where evidence merely raises an issue, and is not conclusive of it, a party relying on it, who fails to have it passed upon by the trial court, or at least to request that it be passed upon, waives the issue.—*Bell County v. Felts* (Tex. Civ. App.) 269.

not change a transfer of decedent's interest in the subject-matter may be first raised on appeal.—*Wilson v. Darrow* (Mo.) 1077.

§ 216. A party cannot complain that an instruction given is not sufficiently specific, unless he has requested one more specific.—*Kirchman v. Tuffli Bros. Pig Iron & Coke Co.* (Ark.) 239.

§ 216. Defendants *held* not entitled to claim for the first time on appeal that the submission of an issue concerning the reconveyance of certain land to the patentee was erroneous.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

§ 219. Appellants cannot complain that findings do not cover all the issues of fact when no other findings were requested.—*Capps v. City of Longview* (Tex. Civ. App.) 427.

§ 219. Failure to find specified facts and propositions of law cannot be reviewed, where no request for such findings was made.—*Gainesville Water Co. v. City of Gainesville* (Tex. Civ. App.) 959.

§ 238. A defect in the verdict cannot be considered on appeal, where the defect was not presented at the trial by motion in arrest.—*Southern Missouri & A. R. Co. v. Wyatt* (Mo.) 683.

(C) Exceptions.

§ 263. Where no exception was saved at the time of giving plaintiff's instructions, error therein cannot be considered on appeal.—*Kolokas v. Missouri Pac. Ry. Co.* (Mo.) 1082.

§ 265. Failure to find specified facts and propositions of law cannot be reviewed, where no exception was taken to such failure.—*Gainesville Water Co. v. City of Gainesville* (Tex. Civ. App.) 959.

§ 270. Errors assigned to overruling motions in arrest and for a new trial cannot be considered on appeal, where no exception was saved to the ruling.—*Kolokas v. Missouri Pac. Ry. Co.* (Mo.) 1082.

(D) Motions for New Trial.

§ 281. An appeal from an order discharging an attachment upon denying plaintiff's motion to amend a defective affidavit *held* an appeal from an order denying an amendment, so that its denial cannot be reviewed in absence of a motion for new trial or for rehearing.—*Marshall v. Brown* (Mo. App.) 790.

§ 288. Where remarks of the judge made during the trial in the nature of comments on the evidence and mild criticisms of counsel were not assigned as grounds for new trial so that the court could correct itself, they will not be reviewed.—*Gardner v. Metropolitan St. Ry. Co.* (Mo.) 1068.

§ 289. Where a court's rulings excluding various offers of testimony were not assigned as grounds for new trial, so that the court could correct itself, they will not be reviewed.—*Gardner v. Metropolitan St. Ry. Co.* (Mo.) 1068.

§ 301. A question not assigned in the motion for a new trial or in the regular assignments of error *held* not reviewable.—*Halter v. Leonard* (Mo.) 706.

§ 301. A point not saved in the motion for a new trial *held* not reviewable on appeal.—*Martin v. Bennett* (Mo. App.) 779.

§ 302. A motion for a new trial, on the ground that the verdict was contrary to the evidence, raised the question whether the verdict was sustained by sufficient evidence.—*Naylor v. McNair* (Ark.) 662.

§ 302. A ground of motion for new trial *held* so general that the trial court's action cannot be reviewed.—*American Credit-Indemnity Co. of New York v. National Clothing Co. (Ky.)* 840.

VI. PARTIES.

§ 334. After the term at which the judgment was rendered, the trial court has no power to revive the cause on the death of a party pending his appeal, and authorize the new party to file a bill of exception.—*Wilson v. Darrow (Mo.)* 1077.

§ 334. Rev. St. 1899, § 858 (Ann. St. 1906, p. 806), does not authorize revivor in the Supreme Court in the name of a stranger, who has acquired interest of a deceased appellant.—*Wilson v. Darrow (Mo.)* 1077.

VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

(A) Time of Taking Proceedings.

§ 338. Act May 5, 1909, fixing the time for suing out writs of error, does not apply to writs to review judgments rendered prior to its enactment.—*State v. St. Louis & S. F. R. Co. (Ark.)* 627.

(B) Petition or Prayer, Allowance, and Certificate or Affidavit.

On appeal from probate court, see Courts, § 202.

(C) Payment of Fees or Costs, and Bonds or Other Securities.

§ 387. Under Sayles' Ann. Civ. St. 1897, art. 1387, the appellate court *held* to acquire no jurisdiction where an appeal bond was not filed within 20 days after the adjournment of the term.—*Simpson v. Baker (Tex. Civ. App.)* 959.

§ 387. Sayles' Ann. Civ. St. 1897, art. 1387, *held* to fix the time within which a nonresident appellant must file the appeal bond.—*Simpson v. Baker (Tex. Civ. App.)* 959.

(D) Writ of Error, Citation, or Notice.

§ 407. Under Rev. St. 1895, arts. 1394, 1398, where a citation in error merely directed the officer to summon defendant, service thereof on defendant's attorney is insufficient.—*Pratt v. Interstate Savings & Trust Co. (Tex. Civ. App.)* 281.

VIII. EFFECT OF TRANSFER OF CAUSE OR PROCEEDINGS THEREFOR.

In justice's court, see Justices of the Peace, § 162.

X. RECORD AND PROCEEDINGS NOT IN RECORD.

(A) Matters to be Shown by Record.

§ 497. Where the appeal record fails to show that a special charge complained of was given, the instruction will not be considered.—*St. Louis, R. & M. Ry. Co. v. Yznaga (Tex. Civ. App.)* 267.

§ 500. An assignment of error complaining of the refusal to give certain instructions will be overruled, where the record does not show that appellant requested the instructions indicated in the assignment.—*Montgomery v. Amisler (Tex. Civ. App.)* 307.

§ 501. Where the abstract of the bill of exceptions does not show any call for a motion to strike out part of the answer, and the bill shows no exceptions to the court's ruling sustaining the motion, error assigned by defendant cannot be considered on appeal, under Laws 1903, p. 105 (Ann. St. 1906, p. 815), relating

to practice in the Supreme Court.—*Kolokas v. Missouri Pac. Ry. Co. (Mo.)* 1082.

§ 511. A bill of exceptions *held* not in the record, where the record proper did not show that it was filed in proper time, which appeared only from the bill itself.—*Southern Missouri & A. R. Co. v. Wyatt (Mo.)* 688.

(B) Scope and Contents of Record.

§ 523. Depositions of witnesses read at the trial *held* a part of the record on appeal.—*Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co. (Ky.)* 852.

§ 523. The court on appeal *held* entitled to consider depositions as a part of the record, though they should not be embodied in the transcript made by the official stenographer under Ky. St. § 4639 (Russell's St. § 3110).—*Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co. (Ky.)* 852.

§ 539. Counsel cannot by agreement obviate the requirements of the rules of the Supreme Court as to the contents of the record on appeal.—*Hays v. Foos (Mo.)* 1088.

(C) Necessity of Bill of Exceptions, Cause, or Statement of Facts.

§ 547. An assignment of error in the denial of a motion for judgment on the findings cannot be considered, where the record on appeal contains neither bill of exceptions nor order of court showing that the motion was made and overruled.—*Stephenville Oil Mill v. McNeill (Tex. Civ. App.)* 911.

§ 549. Necessity for bill of exceptions preserving objections to remarks of counsel, stated.—*Mowry v. Norman (Mo.)* 724.

§ 549. Where the statement of facts prepared by the trial judge shows the proceedings on the trial, etc., and is filed within the time allowed for filing bills of exceptions, *held*, that exceptions to the introduction of evidence so presented will be considered.—*Missouri, K. & T. Ry. Co. of Texas v. Couch (Tex. Civ. App.)* 67.

§ 554. A judgment cannot be affirmed if the abstract shows error in the record proper.—*Southern Missouri & A. R. Co. v. Wyatt (Mo.)* 688.

§ 554. Where there is nothing for consideration on appeal but the record proper, and the petition states a good cause of action, and the judgment is in form, the judgment will be affirmed.—*Kolokas v. Missouri Pac. Ry. Co. (Mo.)* 1082.

(E) Abstracts of Record.

§ 580. A finding of the chancellor on conflicting evidence will not be disturbed on appeal, especially where the testimony on which it is based is not abstracted.—*Davis & Rhea v. Spann (Ark.)* 495.

§ 586. An appeal *held* to present nothing for review except the record proper because of defects in the abstract of the bill of exceptions.—*Hays v. Foos (Mo.)* 1038.

§ 586. An abstract of record must not be constructed by commingling record entries and record proper with matter of mere exception in an undistinguishable mass, so that the appellate court is put to sorting out exceptions from record entries and record proper.—*Kolokas v. Missouri Pac. Ry. Co. (Mo.)* 1082.

(I) Defects, Objections, Amendment, and Correction.

§ 635. An appeal will not be dismissed because the abstract fails to show the filing of a bill of exceptions.—*Claver v. Woodmen of the World (Mo. App.)* 334.

§ 635. The failure of the abstract to show the taking of an appeal justifies a dismissal.—*Claver v. Woodmen of the World* (Mo. App.) 334.

§ 635. A default judgment entered on a cross-plea against codefendants would not be sustained on writ of error, in the absence of a showing in the record of an appearance of the codefendants, or of service on them aside from recitals in the judgment.—*Mayhew & Co. v. Harrell* (Tex. Civ. App.) 957.

§ 659. Certiorari will not be granted to amplify the record in support of an issue raised for the first time on an application for rehearing.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

(J) Conclusiveness and Effect, Impeaching and Contradicting.

§ 663. A certificate to a statement of facts held conclusive.—*Thouren v. Skirvin* (Tex. Civ. App.) 55.

§ 664. Where the abstract of the bill of exceptions shows no exception to the overruling of motions for a new trial and in arrest, it will be assumed that no exception was saved, though the abstract of the record entries and of the record proper shows such an exception.—*Kolokas v. Missouri Pac. Ry. Co.* (Mo.) 1062.

(K) Questions Presented for Review.

§ 672. Rev. St. 1895, art. 1014, construed as to the meaning of error "apparent" on the face of the record.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 697. A bill of exceptions is sufficient if it appears inferentially that all the evidence is brought up.—*Walker v. Noll* (Ark.) 488.

§ 697. Bill of exceptions held to sufficiently show that it contained all the testimony.—*Walker v. Noll* (Ark.) 488.

(L) Matters Not Apparent of Record.

§ 713. Matters of record proper have no place in the bill of exceptions.—*Southern Missouri & A. R. Co. v. Wyatt* (Mo.) 638.

XI. ASSIGNMENT OF ERRORS.

§ 719. A question not assigned in the motion for a new trial or in the regular assignments of error held not reviewable.—*Halter v. Leonard* (Mo.) 706.

§ 719. Errors not apparent on the face of the record, and not assigned in the trial court for presentation to the Court of Civil Appeals, as required, cannot be considered by the Supreme Court.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 719. Matters held not to constitute fundamental error, which can be considered in the absence of assignments of error.—*Hamilton v. Kegley* (Tex. Civ. App.) 304.

§ 719. The overruling of demurrers will not be considered on appeal in absence of assignments of error not predicated thereon.—*John M. Bonner Memorial Home v. Collin County Nat. Bank* (Tex. Civ. App.) 430.

§ 724. An assignment of error in rendering judgment for appellees against appellants, under which various propositions were submitted complaining of the admission of evidence, etc., is too general to require consideration on appeal.—*Stephenville Oil Mill v. McNeill* (Tex. Civ. App.) 911.

§ 728. An assignment of error in admitting any and all evidence offered by plaintiff over objection is too general and indefinite to be considered on appeal.—*W. T. Adams Mach. Co. v. Castleberry* (Ark.) 908.

§ 728. An assignment of error held insufficient under Court of Civil Appeals Rules 25

and 26 (67 S. W. xv).—*Estes v. Estes* (Tex. Civ. App.) 304.

§ 730. Certain assignments of error held insufficient as too general and indefinite.—*Estes v. Estes* (Tex. Civ. App.) 304.

§ 731. An assignment of error held too general to require consideration on appeal.—*Stacy v. Delery* (Tex. Civ. App.) 300.

§ 731. An assignment of error held too general and indefinite under Court of Civil Appeals Rules 22-28 (67 S. W. xv).—*Estes v. Estes* (Tex. Civ. App.) 304.

§ 739. An assignment of error held not entitled to consideration because embracing two or more distinct and inconsistent propositions of law.—*J. T. Stark Grain Co. v. Harry Bros. Co.* (Tex. Civ. App.) 947.

§ 742. An assignment of error held insufficient.—*Washam v. Harrison* (Tex. Civ. App.) 52.

§ 742. In an action to set aside a deed for fraud, an assignment of error held not to raise the issue of plaintiff's ratification.—*Koppe v. Koppe* (Tex. Civ. App.) 68.

§ 742. Assignments of error followed by insufficient statements or by no statement need not be considered.—*Estes v. Estes* (Tex. Civ. App.) 304.

§ 742. Assignments complaining of several separate charges embracing propositions of law as one proposition are insufficient.—*Estes v. Estes* (Tex. Civ. App.) 304.

§ 742. Where propositions under assignments of error are not germane to the assignments, or are general and indefinite, failing to specify with certainty the particular error complained of, they are insufficient under Court of Civil Appeals Rules 30-32 (67 S. W. xvi), prescribing the form of such propositions.—*Estes v. Estes* (Tex. Civ. App.) 304.

§ 742. Alleged error in the refusal of an instruction will not be considered, where its contents are not shown and it is not copied or referred to in the statement following the assignment.—*Montgomery v. Amsler* (Tex. Civ. App.) 307.

§ 742. Assignments of error not followed by a proposition or statement from the record, as required by Rules 29-36 (67 S. W. xv, xvi), will not be considered.—*Capps v. City of Longview* (Tex. Civ. App.) 427.

§ 742. Assignments of error with their propositions, not followed by any statements sufficient to explain and support the propositions, as required by rule 31 for the Court of Civil Appeals (67 S. W. xvi), are not entitled to consideration.—*Beaumont Traction Co. v. Happ* (Tex. Civ. App.) 610.

§ 742. An assignment of error, in overruling appellants' motion on the findings of fact by the jury and court for a judgment pursuant to such findings, cannot be considered on appeal, where it was not followed by a statement from the record showing the ruling complained of, or what the findings were on which judgment was asked.—*Stephenville Oil Mill v. McNeill* (Tex. Civ. App.) 911.

XII. BRIEFS.

§ 755. Though justice was not done below, the Court of Civil Appeals cannot review errors, in absence of a proper brief presenting them; they not being fundamental.—*Stephenville Oil Mill v. McNeill* (Tex. Civ. App.) 911.

§ 759. An assignment of error stated in the brief held not a copy of the assignment below, as required by court rule, so that it could not be considered on appeal.—*Stephenville Oil Mill v. McNeill* (Tex. Civ. App.) 911.

§ 773. Where appellant fails to file briefs, and there is no fundamental error, the judgment will be affirmed.—Beck v. Hancock (Tex. Civ. App.) 419.

XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.

In election contest, see Elections, § 305.

§ 787. Where neither appellant nor any of the appellees filed a brief, the appeal will be dismissed.—Suderman-Dolson Co. v. Carson (Tex. Civ. App.) 401.

XV. HEARING AND REHEARING.

§ 832. A new issue cannot be introduced on a motion for rehearing.—Saxton v. Corbett (Tex. Civ. App.) 75.

XVI. REVIEW.

(A) Scope and Extent in General.

§ 842. An instruction in the nature of a direction to the jury to find for the plaintiff raises a question of law.—Shelton v. Cooksey (Mo. App.) 331.

§ 843. Whether a foreign acknowledgment of a deed was defective need not be determined on appeal, where any defect in the acknowledgment was cured by a subsequent statute.—Houston Oil Co. of Texas v. Kimball (Tex.) 533.

§ 843. An academic question will not be considered on appeal.—International & G. N. R. Co. v. Wynne (Tex. Civ. App.) 50.

§ 843. Where the contract in suit cannot be enforced because defendant's agent had no authority to make it, whether it should be deemed an option or not need not be determined.—McKay v. McKinnon (Tex. Civ. App.) 440.

§ 843. Upon deciding, in an action against an executor for services rendered testator, that plaintiff's claim need not, under the statute, be presented to the executor and rejected before suing thereon, the appellate court need not decide whether the claim presented and rejected should have been excluded as evidence on the ground of variance between it and the account declared on.—Wells v. Hobbs (Tex. Civ. App.) 451.

§ 852. Whether evidence sustains a finding that defendant waived performance by plaintiff of a condition precedent *held* not to be considered on appeal where plaintiff pleaded performance, not a waiver thereof.—Dolinski v. First Nat. Bank (Tex. Civ. App.) 276.

§ 854. The order granting a new trial will be sustained, if any good cause is made by the motion.—Hawman v. McLean (Mo. App.) 1094.

§ 854. In the absence of declarations of law given or asked on a trial by the court, it is immaterial, on review of a judgment correct on the merits, on what theory the action was tried.—Kimberlin v. Gordon (Mo. App.) 1144.

§ 854. To affirm a judgment, the Court of Civil Appeals is not bound by the reasons given by the trial court.—Bell County v. Felts (Tex. Civ. App.) 269.

§ 854. Where the court correctly found in favor of the successful party on either one of two grounds, the judgment will be sustained.—Gulf, C. & S. F. Ry. Co. v. Fowler (Tex. Civ. App.) 593.

§ 856. Court of Civil Appeals *held* not limited in affirming judgment to grounds stated by trial court.—Bell County v. Felts (Tex. Civ. App.) 269.

(C) Parties Entitled to Allege Error.

§ 878. In trespass to try title, in which defendant brought in his vendor as a party, de-

fendant, on the vendor's appeal, *held* not entitled to question the correctness of the judgment for plaintiff against him, but could, on cross-assignments of error, combat the vendor's appeal against him.—Schwartz v. Jones (Tex. Civ. App.) 956.

§ 882. Defendant, in a will contest, *held* estopped from objecting to an instruction as to the capacity of testator to make a will given at the instance of plaintiffs.—Mowry v. Norman (Mo.) 724.

§ 882. A party cannot complain of an instruction which is the same as one asked by him.—Rippeteo v. Missouri, K. & T. Ry. Co. (Mo. App.) 314.

§ 882. A defendant voluntarily accepting a false issue tendered by his adversary *held* not entitled to complain after he is defeated on such issue.—Pratt v. Missouri Pac. Ry. Co. (Mo. App.) 1125.

§ 882. In an action for negligent death, brought under Rev. St. 1899, § 2364, as amended by Laws 1905, p. 135 (Ann. St. 1906, p. 1637) defendant *held* not entitled to complain that plaintiff was permitted to show the pecuniary value of the life of decedent.—Pratt v. Missouri Pac. Ry. Co. (Mo. App.) 1125.

§ 882. Where plaintiff's requested charges placed the submission of the case upon the same basis upon which it was submitted by the court, plaintiff cannot on writ of error complain of the court's placing the decision of the case upon those issues.—Kettler Brass Mfg. Co. v. O'Neil (Tex. Civ. App.) 900.

(D) Amendments, Additional Proofs, and Trial of Cause Anew.

Appeal from justice's court, see Justices of the Peace, § 174.

(E) Presumptions.

§ 903. Though all presumptions are to be indulged in favor of the action of the trial court, the court on appeal cannot indulge in presumptions in the face of the record.—Goodloe v. Empson Packing Co. (Mo. App.) 771.

§ 907. In the absence of a statement of facts, a finding of the trial court that the report of the jury of view appointed to lay out a road was accepted will be presumed to be correct, though the fact is not shown by the record of the commissioners' court.—Cator v. Hays (Tex. Civ. App.) 953.

§ 909. In an action against a carrier for negligent delay in shipping cattle, it cannot be assumed on appeal, in the absence of evidence on the point, that he sold for the highest market price on the day of sale.—Dawson v. Quincy, O. & K. C. R. Co. (Mo. App.) 335.

§ 928. In the absence of an abstract of the evidence, the court on appeal must presume that the instructions given were based on the evidence.—Smith v. Scott (Ark.) 501.

§ 928. The presumption is that the trial court fully and correctly instructed on the issue involved, in absence of a contrary showing.—McAbee v. Wiley (Ark.) 623.

§ 930. In the absence of an abstract setting forth the evidence, the court on appeal must assume that there was evidence sufficient to uphold the verdict rendered on correct instructions.—Smith v. Scott (Ark.) 501.

§ 931. While, in a trial before a jury, the subsequent admission of evidence theretofore ruled out would have done away with the exception taken, in a trial before the court without a jury it must be assumed, on appeal, that the court determined the case on the theory announced in ruling out the testimony.—Griswold v. Haas (Mo. App.) 781.

§ 931. Where the lower court in a nonjury trial makes its written conclusions of fact, in accordance with certain testimony, in the absence of a showing that such facts were not considered by it in the final determination of the case, an appeal must be disposed of upon the theory that they were so considered.—*Missouri, K. & T. Ry. Co. of Texas v. Vandiver* (Tex. Civ. App.) 955.

§ 934. Where appellant does not abstract the testimony necessary to show that the judgment is erroneous, the Supreme Court will presume that the judgment is correct.—*Davis & Rhea v. Spann* (Ark.) 495.

§ 934. In the absence of a showing to the contrary, the court on appeal must presume that the judgment justified by the petition was proper.—*Dersch v. Miller* (Ky.) 177.

§ 935. Where a record on appeal does not contain the testimony upon which the trial court overruled a motion to vacate the judgment, made upon the ground that the case was tried on appeal from justice's court without notice that an appeal had been perfected and in absence of defendants, it cannot be said by the Supreme Court, that there was error in overruling the motion.—*Smith Bros. v. Flanders* (Tex. Civ. App.) 80.

§ 936. Under Rev. St. 1895, arts. 1436, 1438, *held*, that where the court ignores article 1436 in awarding costs, and does not state reasons on the record, it will be presumed on appeal that good reasons did not exist.—*St. Louis Southwestern Ry. Co. of Texas v. King* (Tex. Civ. App.) 925.

(F) Discretion of Lower Court.

§ 959. In a case wherein the court allowed an amended petition to be filed on the day of trial, *held*, that in matters of this kind the trial court had a large discretion not to be interfered with in the absence of a clear showing of prejudice, which was not apparent.—*John Diebold & Sons v. Wollborn* (Ky.) 212.

§ 959. Granting leave to amend during the trial is largely in the court's discretion, and its ruling will not be disturbed, unless the discretion is abused.—*American Copying Co. v. Muleski* (Mo. App.) 384.

§ 964. The action of the court in directing that an original cause of action and a cause of action presented by cross-petition shall be heard together *held* not to be disturbed unless in the exercise of a sound discretion separate trials should have been ordered.—*Offutt & Blackburn v. Doyle* (Ky.) 156.

§ 969. The trial court has much latitude in directing the conduct of the trial, and, when the whole record shows that he endeavored to fairly conduct the trial and keep counsel within proper bounds, his discretion will not be interfered with on appeal.—*Steltemeier v. Barrett* (Mo. App.) 1095.

§ 979. The court, on appeal from a judgment awarding a new trial on the ground of the insufficiency of the evidence, will not interfere with the discretion of the trial judge unless the petition fails to state a cause of action, or plaintiff's proof is insufficient to raise an issue for the jury.—*Snickles v. City of St. Joseph* (Mo. App.) 1122.

(G) Questions of Fact, Verdicts, and Findings.

§ 987. In proceedings for assignment of dower, *held* that, upon the record, the evidence should be reviewed by the Supreme Court.—*Johnson v. Johnson* (Ark.) 656.

§ 987. The court on appeal, must examine the evidence and ascertain whether it is sufficient to justify the findings made and the con-

clusions of law based thereon.—*Parker v. Cook* (Tex. Civ. App.) 419.

§ 987. Where the evidence is conflicting, the Court of Civil Appeals will find the facts in support of the verdict.—*Beaumont Traction Co. v. Happ* (Tex. Civ. App.) 610.

§ 994. The weight to be given to testimony of witnesses is a matter for the exclusive determination of the jury in the trial court.—*Reis v. Epperson* (Mo. App.) 353.

§ 994. The credibility of the witnesses is a matter peculiarly within the province of the trial court and jury.—*Steltemeier v. Barrett* (Mo. App.) 1095.

§ 995. The weight of the evidence is a matter peculiarly within the province of the trial court and jury.—*Steltemeier v. Barrett* (Mo. App.) 1095.

§ 1001. The Supreme Court cannot disturb a verdict which has legal evidence to support it.—*Qualls v. State* (Ark.) 498.

§ 1002. A verdict on conflicting evidence will not be disturbed.—*Broadway Coal Mining Co. v. Davis* (Ky.) 228; *Louisville & N. R. Co. v. Smith* (Ky.) 806; *Heinz v. United Rys. Co. of St. Louis* (Mo. App.) 346.

§ 1002. If there is any evidence in the record on appeal which, fairly construed, would support the verdict, it will not be set aside because it contained other testimony tending to support a contrary conclusion.—*Buchanan v. Rollings* (Tex. Civ. App.) 962.

§ 1003. Evidence *held* not to authorize the court on appeal setting aside the verdict as against the weight of evidence.—*American Credit-Indemnity Co. of New York v. National Clothing Co.* (Ky.) 840.

§ 1008. A finding of the trial court in an action at law must be treated as the verdict of a properly instructed jury.—*Wright v. Schultz* (Ky.) 138.

§ 1009. A finding of the chancellor on conflicting evidence will not be disturbed.—*Ozark & C. C. Ry. Co. v. Ferguson* (Ark.) 624.

§ 1009. The finding of a chancellor *held* not conclusive on appeal.—*Carr v. Fair* (Ark.) 659.

§ 1009. Where a chancery case reaches the Supreme Court, it must be decided on the competent evidence.—*Latham v. First Nat. Bank* (Ark.) 992.

§ 1009. A chancellor's finding of fact on conflicting evidence is conclusive on appeal.—*Everman v. Everman* (Ky.) 135.

§ 1010. The conclusion of the trial court on the facts, in an action on a special tax bill, is conclusive, where it is supported by substantial testimony.—*Fruin v. Meredith* (Mo. App.) 1107.

§ 1010. Findings of fact by the court supported by some evidence are conclusive on review.—*Kimberlin v. Gordon* (Mo. App.) 1144.

§ 1011. A finding by the court, based on a preponderance of evidence, will not be disturbed.—*Kimberlin v. Gordon* (Mo. App.) 1144.

§ 1012. While the Supreme Court can weigh the evidence in equity cases, where the evidence is mostly oral, it will defer largely to the judgment of the trial court upon questions of the weight and credibility of the testimony, and its findings will not be disturbed in absence of a showing of abuse of discretion.—*Ancell v. Southern Illinois & M. Bridge Co.* (Mo.) 709.

§ 1015. Where evidence was conflicting, the grant of a new trial on the ground that the verdict was against the weight of evidence will not be set aside.—*Bartlett v. Helmbacher Forge & Rolling Mills Co.* (Mo. App.) 351.

§ 1015. The court on appeal from a judgment awarding a new trial on the ground of the

insufficiency of the evidence will not weigh the evidence except to determine whether that most favorable to the cause of action asserted is substantial.—*Snickles v. City of St. Joseph (Mo. App.)* 1122.

(H) Harmless Error.

§ 1027. Where in libel, judgment for defendant establishing the truth as a defense, as authorized by Gen. Laws 1901, p. 30, c. 26, was the only correct judgment that could have been rendered, errors committed by the trial court were not reversible.—*Wheless v. W. Y. Davis & Son (Tex. Civ. App.)* 929.

§ 1033. A plaintiff in foreclosure who appeals from a judgment in his favor may not complain, where the deed and notes on which he sues are void for usury.—*Ward v. Blythe (Ark.)* 508.

§ 1033. An instruction, in a servant's injury action, held not as prejudicial to defendant as to plaintiff.—*Broadway Coal Mining Co. v. Davis (Ky.)* 228.

§ 1033. In trespass to try title, held, that defendant could not object to exclusion of certain evidence.—*Ingalls v. Orange Lumber Co. (Tex. Civ. App.)* 53.

§ 1039. Where a party gets the full benefit of a defense pleaded by him, he cannot complain, on appeal, that the answer, pleading the defense, was not permitted to be filed.—*Keeney v. Waters (Ky.)* 837.

§ 1040. Where plaintiff was not entitled under any phase of the evidence to recover more than the amount awarded him, error in overruling an exception to a certain plea was harmless.—*Montgomery v. Amsler (Tex. Civ. App.)* 307.

§ 1048. The erroneous admission of an alleged ante mortem statement by decedent held prejudicial.—*Murphy v. St. Louis, I. M. & S. R. Co. (Ark.)* 636.

§ 1048. In an action for death of a switchman, erroneous admission of contradictory statements by plaintiff's witness held prejudicial.—*Murphy v. St. Louis, I. M. & S. R. Co. (Ark.)* 636.

§ 1048. The impeachment of a witness whose deposition has been excluded is harmless.—*Lindsay v. Bates (Mo.)* 682.

§ 1050. In an action to replevin property mortgaged to secure a note given by defendants for a store account, in which the defense was payment, error in admitting irrelevant testimony that, when witness went to plaintiff's store to settle an account, the bookkeeper said that the witness still owed another account, but afterwards admitted that it had been settled, held prejudicial.—*McCown v. Wilson (Ark.)* 478.

§ 1050. In an action for personal injuries, the error in admitting testimony of physicians as to the necessity of a change of scenery to divert the mind of the person injured held not prejudicial.—*International & G. N. R. Co. v. Sandlin (Tex. Civ. App.)* 60.

§ 1050. The admission of evidence held harmless error.—*Ellwood v. Stallcup (Tex. Civ. App.)* 906.

§ 1050. In an employee's action for the difference between his original salary and the amount which the employer claimed was his salary after it had been reduced by a general reduction of wages, where plaintiff claimed that he had received no notice of such reduction, error in admitting testimony not within the issues that defendant would have lost money, if wages had not been reduced because not within the issues, held harmful to plaintiff.—*Fennington v. Thompson Bros. Lumber Co. (Tex. Civ. App.)* 923.

§ 1051. Where the competent evidence authorized the trial court to direct a verdict as was done, the error in the admission and exclusion of other evidence was not prejudicial.—*Bailey v. O'Neal (Ark.)* 503.

§ 1051. Error in admitting evidence on the question of damages was harmless where the undisputed evidence fully sustained the verdict as to the damages awarded.—*Kirby Lumber Co. v. C. B. Cummings & Co. (Tex. Civ. App.)* 273.

§ 1051. Admission of evidence on an admitted fact held harmless.—*Goldman v. Hadley (Tex. Civ. App.)* 282.

§ 1051. In an action by a land broker for commissions, error in the admission of certain evidence showing notice to plaintiff of defects in defendant's title held harmless; such notice appearing from other evidence.—*Montgomery v. Amsler (Tex. Civ. App.)* 307.

§ 1051. In trespass to try title, admission of immaterial and irrelevant testimony held not to have prejudiced plaintiff, especially where the judgment for defendant was supported by proper evidence.—*Merriman v. Blalack (Tex. Civ. App.)* 403.

§ 1051. Evidence of a surveyor that the south line of a survey was pointed out to him by two persons was not objectionable because there was no evidence that such persons knew where the line was on the ground.—*Myers v. Moody (Tex. Civ. App.)* 920.

§ 1051. In action for breach of contract admission of a certain evidence, if error, held harmless.—*J. T. Stark Grain Co. v. Harry Bros. Co. (Tex. Civ. App.)* 947.

§ 1052. The error in taking interrogatories propounded to a party, and not answered by him, as confessed, is cured where the party is permitted to testify as to the matters inquired about.—*Clevenger v. Blount (Tex.)* 529.

§ 1052. Where facts sufficient to support a judgment for defendant were conclusively shown in a trial by the court by proper evidence, so that no other judgment could have been rendered, any error in the admission of evidence was not reversible.—*Merriman v. Blalack (Tex. Civ. App.)* 403.

§ 1052. Where, under a contract as properly construed, plaintiff was not entitled to recover, error in the admission of testimony affecting such construction was harmless.—*Smith v. Fears (Tex. Civ. App.)* 433.

§ 1052. The error, if any, in the exclusion of evidence, is harmless, where the witness was afterward permitted to testify to substantially the same facts.—*Williamson v. Chicago, R. I. & G. Ry. Co. (Tex. Civ. App.)* 897.

§ 1052. An objection to the admission of evidence is unavailing, where another witness is permitted to give the same testimony without objection.—*Myers v. Moody (Tex. Civ. App.)* 920.

§ 1052. Error, if any, in admitting testimony objected to, held harmless where the witness was allowed to make substantially the same statement without objection.—*J. T. Stark Grain Co. v. Harry Bros. Co. (Tex. Civ. App.)* 947.

§ 1053. Where evidence erroneously admitted related to issues which were not submitted to the jury, the error was harmless.—*Stephenville Oil Mill v. McNeill (Tex. Civ. App.)* 911.

§ 1054. Where the question in issue was conclusively established by evidence not objected to, error in admitting evidence thereon held not reversible especially where the trial was by the court.—*Merriman v. Blalack (Tex. Civ. App.)* 403.

§ 1054. Erroneous admission of evidence is not ground for reversal, where the trial was be-

fore the court, and there was sufficient legal evidence to support the judgment.—Gainesville Water Co. v. City of Gainesville (Tex. Civ. App.) 959.

§ 1056. In an action by plaintiff to recover for injuries in a railroad wreck, the exclusion of the depositions of two physicians who assisted the principal physician in the examination, and treatment of plaintiff while in a hospital, *held* not sustainable on the ground that the evidence was immaterial.—Epstein v. Pennsylvania R. Co. (Mo. App.) 366.

§ 1060. Error, if any, in comment by defendant's counsel, *held* not prejudicial, where the jury could not have rendered any other verdict than one for defendant.—Kettler Brass Mfg. Co. v. O'Neil (Tex. Civ. App.) 900.

§ 1064. The objection to an instruction on punitive damages that the words "or may not" should have been inserted after the words "then you may" in the clause allowing an award of such damages is too technical for consideration.—Louisville & N. R. Co. v. Smith (Ky.) 806.

§ 1064. In trespass to try title, a charge, if erroneous, *held* harmless.—Ingalls v. Orange Lumber Co. (Tex. Civ. App.) 53.

§ 1064. In an action to set aside a deed for fraud, an erroneous charge *held* prejudicial.—Koppe v. Koppe (Tex. Civ. App.) 68.

§ 1066. In a coal miner's action for injuries by a car breaking loose and running over him, error in an instruction in authorizing recovery if the accident was caused by the negligence of a fellow servant in chocking the car under the foreman's direction, irrespective of whether he was present, *held* not to have prejudiced defendant, in view of the evidence and issues.—Broadway Coal Mining Co. v. Davis (Ky.) 228.

§ 1068. Defendant was not prejudiced by an instruction authorizing exemplary damages, where none were allowed.—Marcum v. Missouri, K. & T. Ry. Co. (Mo. App.) 1148.

§ 1068. In trespass for cutting timber, the refusal to charge that plaintiff was estopped *held* not prejudicial in view of the verdict.—Clevenger v. Blount (Tex.) 529.

§ 1068. Where the court assumed that defendant's title was sufficient to sustain the three year limitations and charged the statute, and the jury found that they had not held possession for three years, defendants *held* not injured by failure to charge the five and ten year limitations.—Houston Oil Co. of Texas v. Kimball (Tex.) 533.

§ 1068. Any error in the submission of the case to the jury was harmless to plaintiff, where he recovered all he was entitled to under the undisputed evidence.—Montgomery v. Amsler (Tex. Civ. App.) 307.

§ 1071. The mere failure of the court trying a case without a jury to give specific declarations, the principle covered by which is embodied in declarations given, *held* not ground for reversal.—Fruin v. Meredith (Mo. App.) 1107.

§ 1071. Where title by limitations was complete in defendant's remote grantor, at the latter's death, it was immaterial, upon defendant's title by limitations, that a deed by a subsequent grantor was so defectively acknowledged on its face that it would not support title by limitations, and hence a finding that it was properly acknowledged was harmless.—Merriam v. Blalack (Tex. Civ. App.) 403.

(J) Decisions of Intermediate Courts.

§ 1082. An objection that the account, required by Rev. St. 1899, § 3852 (Ann. St. 1906, p. 2135), was insufficient to give the court jurisdiction, *held* to come too late on appeal. It

should have been taken previous to or during the trial.—Wegner v. Gray (Mo. App.) 755.

§ 1082. Objections to the instructions not made in the application for a writ of error to review the judgment of the Court of Civil Appeals affirming the judgment will not be considered.—Clevenger v. Blount (Tex.) 529.

(K) Subsequent Appeals.

In criminal prosecutions, see Criminal Law, § 1190.

§ 1099. In view of the expression of the court's opinion on appeal as to the conclusiveness of the evidence in favor of a defendant's adverse possession of land in litigation, and the fact that no evidence on a subsequent trial below authorizes a departure therefrom, *held*, that judgment should be for defendant, regardless of how disputed boundary lines should be run.—Martin v. Spurlock (Ky.) 125.

XVII. DETERMINATION AND DISPOSITION OF CAUSE.

(B) Affirmance.

§ 1126. To entitle appellee to an affirmance for failure of appellant to prepare the cause for submission, he must prepare the case for submission in accordance with Court Rule 42 (67 S. W. xvii).—Suderman-Dolson Co. v. Carson (Tex. Civ. App.) 401.

§ 1140. An excessive verdict rendered after trial without error will be corrected by the court ordering a proper remittitur.—Texas & N. O. R. Co. v. Marshall (Tex. Civ. App.) 946.

(C) Modification.

§ 1151. Where the court erroneously confined the jury to one element of damages and plaintiff did not complain thereof, the verdict excessive under the instructions will be reduced by the amount of the excess.—Freeman v. St. Louis & S. F. R. Co. (Mo. App.) 1.

(D) Reversal.

§ 1169. Where the verdict is general, and there were two theories presented on which the case was tried, an erroneous instruction on one theory will require a reversal of the case.—St. Louis, B. & M. Ry. Co. v. Yznaga (Tex. Civ. App.) 267.

§ 1171. A judgment for defendant *held* not to be reversed on appeal because plaintiff was entitled to nominal damages.—Stone v. Adams Express Co. (Ky.) 200.

§ 1171. Error in rendering judgment *held* infinitesimal, and not to authorize a reversal.—Rector v. Rector (Ky.) 518.

§ 1171. A judgment will not be reversed where the only error was the award of a trivial amount of costs.—City of Columbus v. Bank of Columbus (Ky.) 835.

§ 1175. Where the evidence on appeal, which consisted of the pleadings and admissions therein, shows that plaintiff was entitled to a larger judgment than that rendered, the Court of Civil Appeals will reverse and render such judgment as the trial court should have rendered.—Blackwell Durham Tobacco Co. v. Jacobs (Tex. Civ. App.) 68.

§ 1176. Where a decree of the trial court involving title to land is reversed, the Supreme Court must remand the case to the trial court, with directions to enter a decree in accordance with the order and opinion of the Supreme Court.—McDonald v. Rankin (Ark.) 88.

(F) Mandate and Proceedings in Lower Court.

§ 1195. Where, in a proceeding to condemn a crossing over a railroad right of way, the Court of Appeals determined that on a retrial only

one instruction as to the measure of damages should be given, such determination constituted the law of the case.—*Louisville & N. R. Co. v. City of Louisville* (Ky.) 849.

§ 1195. An instruction at a trial which was held on appeal to be error was properly refused on a subsequent trial of the case.—*Mowry v. Norman* (Mo.) 724.

§ 1201. The court on appeal vacating an injunction restraining a judgment creditor of plaintiff's grantor from selling under execution realty held by plaintiff will permit plaintiff after remand to amend the petition and make a case within Rev. St. 1895, art. 2989, amended by Gen. Laws 1909, p. 354, c. 34, § 1, passed subsequent to the issuance of the injunction.—*Latham Co., Bankers, v. Shelton* (Tex. Civ. App.) 941.

XVIII. LIABILITIES ON BONDS AND UNDERTAKINGS.

§ 1232. A judgment affirmed on appeal held to be within the covenant of sureties on an appeal bond.—*Cook v. Spence* (Mo. App.) 340.

APPEARANCE.

§ 19. The appearance of the parties held to give the court jurisdiction over the person by consent.—*Cook v. Spence* (Mo. App.) 340.

APPLIANCES.

Liability of employer for defects, see Master and Servant, §§ 101-129.

APPLICATION.

For continuance, see Criminal Law, §§ 603, 614. For new trial, see New Trial, § 117.

Of instructions to case, see Criminal Law, § 814.

Of payment, see Payment, § 38.

APPOINTMENT.

Of executor or administrator, see Executors and Administrators, § 21.

Of justice of the peace, see Justices of the Peace, § 10.

APPRAISAL.

Of estate of decedent, see Executors and Administrators, §§ 39-51.

ARBITRATION AND AWARD.

See Reference.

ARGUMENT OF COUNSEL.

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In civil actions, see Trial, §§ 122-133.

In criminal prosecutions, see Criminal Law, §§ 715-730.

Objections for purpose of review, see Criminal Law, § 1037.

ARREST.

See Bail.

Illegal arrest, see False Imprisonment.

Validity of law providing for arrest without warrant of disorderly person on train as authorizing unreasonable search or seizure, see Searches and Seizures, § 7.

ARREST OF JUDGMENT.

In civil actions, see Judgment, § 266.

ASSAULT AND BATTERY.

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I. CIVIL LIABILITY.

(A) Acts Constituting Assault or Battery and Liability Thereof.

Liability of corporation, see Corporations, § 493.

II. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 67. The right of self-defense defined.—*Evans v. State* (Tex. Cr. App.) 392.

(B) Prosecution and Punishment.

§ 97. The jury, on a prosecution for assault, must find the grade of the offense.—*Evans v. State* (Tex. Cr. App.) 392.

ASSESSMENT.

Of compensation for property taken for public use, see Eminent Domain, §§ 203-262.

Of damages, see Damages, §§ 206-218.

Of expenses of public improvements, see Municipal Corporations, §§ 414-485, 558-568.

Of loss on insured, see Insurance, § 198.

Of tax, see Taxation, §§ 376-406.

ASSETS.

Of estate of decedent, see Executors and Administrators, §§ 39-51.

ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 719-742.

Incorporation in brief, see Appeal and Error, § 759.

ASSIGNMENTS.

For benefit of creditors, see Assignments for Benefit of Creditors.

Fraud as to creditors, see Fraudulent Conveyances.

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See Bills and Notes, § 200; Covenants, §§ 70-78; Insurance, §§ 212, 219.

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I. REQUISITES AND VALIDITY.

(A) Property, Estates, and Rights Assignable.

§ 19. Rights growing out of contracts which involve relations of personal confidence cannot be transferred by one party without the consent of the other.—*Smith v. Pitts* (Tex. Civ. App.) 46.

§ 19. A contract between a purchaser in a contract of sale of real estate and a third person held a personal contract, whereby the purchaser undertook to perform specified things which he could not shift to others without the consent of the third person.—*Smith v. Pitts* (Tex. Civ. App.) 46.

IV. ACTIONS.

Right of assignee to intervene in action involving assigned claim, see Parties, § 40.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See Bankruptcy, §§ 140, 326.

II. CONSTRUCTION AND OPERATION IN GENERAL.

§ 178. Since under Ky. St. § 84 (Russell's St. § 396), fraudulent transfer of property void as to transferee's creditors would be void as to his assignee for creditors, the fact that a pledge of property by an assignor without delivering possession was good between it and the pledgees would not prevent the assignee from setting it aside as against the assignor's creditors.—*Burnes v. Daviess County Bank & Trust Co.'s Assignee* (Ky.) 182; *Franke v. Same*, Id.

VII. ACCOUNTING, SETTLEMENT, AND DISCHARGE OF ASSIGNEE.

§ 399. Where the effect of the lower court's holding was to sustain a demurrer to the exceptions to the assignee's report denying appellant a lien on the mortgaged property, on appeal, the allegations of the exceptions must be taken to be true.—*Perkins & Manning Co. v. Drew & Landrum's Assignee* (Ky.) 523.

ASSOCIATIONS.

Mutual benefit insurance associations, see Insurance, §§ 694-819.

ASSUMPSIT, ACTION OF.

See Money Received; Work and Labor.

ASSUMPTION.

By judge as to facts, see Criminal Law, § 761; Trial, § 191.
Of risk by employé, see Master and Servant, §§ 203-226, 295.

ATTACHMENT.

See Execution; Garnishment.
Exemptions, see Homestead.

III. PROCEEDINGS TO PROCURE.

(B) Affidavits.

§ 122. Under Rev. St. 1890, § 413 (Ann. St. 1906, p. 501), plaintiff in attachment *held* entitled, pending the hearing of a motion to dissolve the attachment for failure to sign the affidavit, to amend by signing the affidavit or by filing a new one.—*Marshall v. Brown* (Mo. App.) 790.

VIII. CLAIMS BY THIRD PERSONS.

§ 287. The seller, after giving notice of the exercise of his right of stoppage in transitu, may interplead in attachment proceedings by a creditor of the buyer—*Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co.* (Mo. App.) 10.

§ 300. The seller, after giving notice of the exercise of his right of stoppage in transitu may enforce his right to possession by an appropriate action against the officer who levied an attachment against the goods at the suit of a creditor of the buyer, or by an action against the creditor and officer jointly.—*Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co.* (Mo. App.) 10.

ATTORNEY AND CLIENT.

Admissions by attorney as evidence, see Evidence, § 246.

Argument and conduct of counsel at trial in civil actions, see Trial, §§ 122-133.

Arguments and conduct of counsel at trial in criminal prosecutions, see Criminal Law, §§ 715-730.

Attorneys in fact, see Principal and Agent.

Harmless error in argument and conduct of counsel, see Appeal and Error, § 1060; Criminal Law, § 1171.

Objections to argument of counsel, for purpose of review, see Criminal Law, § 1037.

Service of citation in error on attorney as service on client, see Appeal and Error, § 407.

II. RETAINER AND AUTHORITY.

§ 101. An attorney in a divorce action is without authority to compromise by accepting a less amount of alimony than awarded by the decree in satisfaction thereof without express authority of his client, and such a compromise is voidable at the client's option.—*Sebastian v. Rose* (Ky.) 120.

§ 103. Where an attorney compromised a suit without authority by accepting a less amount of alimony than awarded his client, the client, upon learning thereof, must either ratify or disaffirm it, and, on disaffirming, must occupy the same position as before the compromise.—*Sebastian v. Rose* (Ky.) 120.

IV. COMPENSATION AND LIEN OF ATTORNEY.

(A) Fees and Other Remuneration.

Recovery in action for fraud, see Fraud, § 60.

ATTORMENT.

By tenant as source of adverse possession against landlord, see Adverse Possession, § 50.

AUTHORITY.

Of agent, see Principal and Agent, §§ 69, 101-123.

Of attorney, see Attorney and Client, §§ 101, 103.

Of broker, see Brokers, §§ 7-14.

Of corporate officers, see Corporations, § 433.

BAIL.

II. IN CRIMINAL PROSECUTIONS.

Authority of Supreme Court to grant on certiorari to review denial by trial court, see Courts, § 207.

False statement in justification as surety as perjury, see Perjury, § 6.

§ 44. Under Cr. Code Prac. § 75, the trial court could not admit an accused to bail after conviction, and before the mandate reversing the judgment was filed below, so that a bail bond given on its attempt to do so was void.—*Howerton v. Commonwealth* (Ky.) 173.

§ 45. Where a judgment of conviction was reversed by the Supreme Court on September 29th, the judgment was not vacated until the decision on appeal became final, when the mandate was lodged in the trial court on November 5th, pursuant to Cr. Code Prac. § 360, as amended by Act March 21, 1904 (Acts 1904, p. 144, c. 64), providing that no mandate shall issue or decision become final until after 30 days, excluding Sundays, from the day the decision was rendered.—*Howerton v. Commonwealth* (Ky.) 173.

§ 49. When an order denying bail in a capital case, under the constitutional provision making all persons bailable before conviction, with specified exceptions, should be affirmed on review by the Supreme Court, stated.—*Carr v. State* (Ark.) 631.

§ 77. Under Code Cr. Proc. 1895, art. 480, a return of service of citation in proceedings to forfeit a bail bond *held* not sufficient to sustain a default judgment against the surety thereon.—Couch v. State (Tex. Cr. App.) 24.

§ 80. Under Code Cr. Proc. 1895, art. 479, subd. 4, *held*, it is enough that in scire facias on a forfeited bail bond the writ describe the offense as "swindling," without reciting whether it is a felony or misdemeanor (Code Cr. Proc. 1895, art. 309, subd. 3, as amended in 1899 [Laws 1899, p. 111, c. 74]).—Callaghan v. State (Tex. Cr. App.) 879.

§ 93. A return on a scire facias in proceedings to forfeit a recognizance bond *held* insufficient, under Code Cr. Proc. 1895, art. 480.—Harryman v. State (Tex. Cr. App.) 898.

§ 93. Misrecitals in the judgment in scire facias on a forfeited bail bond *held* surplusage and immaterial.—Callaghan v. State (Tex. Cr. App.) 879.

BAILMENT.

Embezzlement or larceny by bailee, see Embezzlement.

Particular species of bailments, and bailments incident to particular occupations.

See Banks and Banking, §§ 134-153; Carriers, §§ 84-200; Livery Stable Keepers; Pledges; Warehousemen.

§ 16. Evidence *held* insufficient to show conversion by a bailee of a horse.—Bryant v. State (Tex. Cr. App.) 543.

BALLOTS.

See Elections, § 184.

BAND STAND.

In street as continuing nuisance, see Municipal Corporations, § 697.

BANKRUPTCY.

See Assignments for Benefit of Creditors.

III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§ 140. A trustee in bankruptcy may recover funds deposited in a bank by the bankrupt for the benefit of all the creditors, pursuant to an agreement between the creditors, including the bank.—Wagner v. Citizens' Bank & Trust Co. (Tenn.) 245.

(F) Claims Against and Distribution of Estate.

§ 326. Bankr. Act July 1, 1898, c. 541, § 68a, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), *held* not to enlarge the doctrine of set-off.—Wagner v. Citizens' Bank & Trust Co. (Tenn.) 245.

BANKS AND BANKING.

II. BANKING CORPORATIONS AND ASSOCIATIONS.

(D) Officers and Agents.

§ 54. Failure of directors of a bank to perform the supervisory duties required of them by Kirby's Dig. §§ 841, 863, 864, *held* to render them personally liable to the creditors of the bank for debts incurred during the period.—Bailey v. O'Neal (Ark.) 503.

III. FUNCTIONS AND DEALINGS.

(C) Deposits.

Right of trustee in bankruptcy to recover deposit by bankrupt for benefit of creditors, see Bankruptcy, § 140.

§ 134. A bank, dealing with a depositor as trustee, and recognizing funds standing in his name as trust funds, *held* not entitled to appropriate the same to the payment of an individual debt to it of the trustee.—Wagner v. Citizens' Bank & Trust Co. (Tenn.) 245.

§ 134. Deposits in a bank *held* a trust fund, precluding the right of set-off in the funds.—Wagner v. Citizens' Bank & Trust Co. (Tenn.) 245.

§ 136. The relation of a bank to its general depositor is that of debtor to the depositor, and the bank holds a lien on the general deposit to secure repayment of the depositor's indebtedness.—Wagner v. Citizens' Bank & Trust Co. (Tenn.) 245.

§ 136. A bank, dealing with a depositor as trustee, and recognizing funds standing in his name as trust funds, *held* not entitled to appropriate the same to the payment of an individual debt to it of the trustee.—Wagner v. Citizens' Bank & Trust Co. (Tenn.) 245.

§ 153. A bank does not have a lien on special deposits, or on money deposited for a specific purpose, as for collateral security, or for the payment of a particular debt.—Wagner v. Citizens' Bank & Trust Co. (Tenn.) 245.

(D) Collections.

§ 165. A bank receiving a draft for collection is not the owner of its proceeds, but they belong to the drawer, and they are subject to garnishment.—Hobart Nat. Bank v. Fordtran (Tex. Civ. App.) 413.

IV. NATIONAL BANKS.

Taxation of, see Taxation, §§ 10-12.

BAR.

Of action by former adjudication, see Judgment, § 570.

Of action by limitation, see Limitation of Actions, § 167.

BASTARDS.

III. PROCEEDINGS UNDER BASTARDY LAWS.

§ 19. Proceedings to affiliate a bastard, and compel the reputed father to aid in its support, are of a civil, and not criminal, nature.—Qualls v. State (Ark.) 498.

§ 65. Under the statute making the mother of a bastard a competent witness in cases of bastardy, unless legally incompetent, and in the absence of any statute requiring the testimony of prosecutrix to be corroborated, the jury, in proceedings to affiliate a bastard, may find that defendant is the father of the child upon the sole testimony of the mother, provided they believe it credible.—Qualls v. State (Ark.) 498.

§ 65. In proceedings to affiliate a bastard, and compel the reputed father to aid in its support, evidence *held* to support a verdict finding defendant the father of the child.—Qualls v. State (Ark.) 498.

§ 70. Though 280 days is recognized as the usual period of gestation, yet, as the birth of a child is liable to be accelerated or delayed by circumstances, the length of the period is purely a matter of fact to be decided upon all the evidence, physical and moral, in each particular case.—Qualls v. State (Ark.) 498.

BENEFICIAL ASSOCIATIONS.

Mutual benefit insurance associations, see Insurance, §§ 694-819.

BENEFITS.

Acceptance of, as ground of estoppel, see Estoppel, §§ 63-95.
Acceptance of, as ground of ratification, see Principal and Agent, §§ 163-173.
Acceptance of, as waiver of right to appeal, see Appeal and Error, § 154.

BEQUESTS.

See Wills.

BEST AND SECONDARY EVIDENCE.

In civil actions, see Evidence, §§ 158-184.

BETTING.

See Gaming.

BIAS.

Of witness, see Witnesses, §§ 370-377.

BILL OF EXCEPTIONS.

See Exceptions, Bill of.

BILL OF EXCHANGE.

See Bills and Notes.

BILLS AND NOTES.

I. REQUISITES AND VALIDITY.

(B) Form and Contents of Promissory Notes and Duebills.

§ 34. An undated promissory note may be valid under either the law merchant or under Negotiable Instrument Law 1905, p. 243 (Ann. St. 1906, § 463-1).—Bank of Houston v. Day (Mo. App.) 756.

(C) Execution and Delivery.

§ 60. Under Negotiable Instrument Law 1905, pp. 244, 245, 246, 265, §§ 6, 12, 13, 17, 191 (Ann. St. 1906, §§ 463-8, 463-12, 463-13, 463-17, 463-191) the original holder of an undated accommodation note held without authority to postdate the note and bind the accommodation indorsers.—Bank of Houston v. Day (Mo. App.) 756.

§ 60. The right of the holder to fill in the blank date of a note determined.—Bank of Houston v. Day (Mo. App.) 756.

§ 63. Certain notes for money loaned held not to constitute contracts for the payment of money for want of delivery to the lender.—Morris v. Butler (Mo. App.) 377.

II. CONSTRUCTION AND OPERATION.

§ 120. A vendor's lien note held properly construed to impose a joint and several liability on the makers.—Dolinski v. First Nat. Bank (Tex. Civ. App.) 276.

IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

§ 162. Checks issued to employes payable in merchandise held not negotiable instruments, and mere possession by a third person raises no

(C) Transfer Without Indorsement.

§ 209. Holders of a negotiable note payable to order, and not indorsed, would hold it, under Laws 1905, p. 243, §§ 1, 30, 31 (Ann. St. 1906, §§ 463-1, 463-30, 463-31), with notice of whatever equities the maker might have.—Sublette v. Brewington (Mo. App.) 1150.

V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(D) Bona Fide Purchasers.

§ 340. Banks in buying drafts accepted by a corporation held not charged with notice of its want of power to make the acceptances.—Lake Charles Nat. Bank v. J. I. Campbell Co. (Tex. Civ. App.) 601.

§ 368. A bona fide holder without notice of a note held entitled to enforce it notwithstanding the fact that the payee inserted an improper date therein.—Bank of Houston v. Day (Mo. App.) 756.

§ 368. A holder of a commercial paper in due course within Negotiable Instrument Law 1905, p. 245, § 13 (Ann. St. 1906, § 463-13), defined.—Bank of Houston v. Day (Mo. App.) 756.

§ 370. A failure of the consideration for drafts as between the drawer and drawee would not affect the right of a bona fide purchaser of the drafts for value before maturity, without notice thereof, to recover thereon against the drawee.—Smith Bros. v. Flanders (Tex. Civ. App.) 80.

§ 373. Where plaintiff was an innocent purchaser for value of drafts given by defendant in payment for goods sold through fraud, but obtained knowledge of the fraud and of defendant's refusal to pay for them before maturity, defendant could set up the fraud as a defense in an action thereon by plaintiff only as to such drafts as matured when plaintiff had in its possession funds of the drawer sufficient to pay them.—Johnson County Sav. Bank v. Renfro (Tex. Civ. App.) 37.

§ 373. Where the drawee when he paid drafts was not fully aware of the fraud inducing the sale of goods for which they were given, or, if so, was then trying to adjust his differences with the drawer, the payment by the drawee did not preclude him from urging the fraud as a defense against one holding the drafts at maturity, with knowledge of the fraud, acquired after transfer, who then had sufficient of the drawer's funds to pay them.—Johnson County Sav. Bank v. Renfro (Tex. Civ. App.) 37.

VIII. ACTIONS.

§ 443. That the payee of a promissory note was also one of the makers would not prevent his maintaining an action at law thereon.—O'Day v. Sanford (Mo. App.) 3.

§ 499. In an action on a note executed to a decedent in which defendant pleaded payment, the production by defendant of receipts for money advanced, signed by decedent, would not of itself throw the burden of proving nonpayment on plaintiff.—Steltemeier v. Barrett (Mo. App.) 1095.

§ 537. In an action on a note, evidence held sufficient to go to the jury on the question of payment.—Nail v. First Nat. Bank (Tex. Civ. App.) 268.

§ 538. In an action on a promissory note, requested instructions held erroneous as attempting to shift the burden of proof.—Steltemeier v. Barrett (Mo. App.) 1095.

§ 538. In an action on a note executed to a decedent in which defendant claimed payment and produced receipts, requested instructions by defendant as to the effect of the receipts as payment, etc., *held* misleading and properly refused.—*Steltemeier v. Barrett* (Mo. App.) 1095.

§ 538. In an administrator's action on a note, in which defendant pleaded payment and offered several receipts for money advanced by decedent, signed by him, requested instructions to find for defendant, without finding that the payments receipted for were made on account of the note, which was the question in controversy, were erroneous.—*Steltemeier v. Barrett* (Mo. App.) 1095.

BONA FIDE PURCHASERS.

At execution sale, see Execution, § 273.
Of bill of exchange or promissory note, see Bills and Notes, §§ 340-373.
Of lands, see Vendor and Purchaser, §§ 220-245.
Of standing timber, see Logs and Logging, § 3.

BOND RECORDERS.

In cities, see Municipal Corporations, § 162.

BONDS.

Of school district, see Schools and School Districts, § 97.
Sureties on bonds, see Principal and Surety.
Taxation of, see Taxation, § 7.

Bonds for performance of duties of trust or office.

Next friend of infant, see Infants, § 105.

Bonds in judicial proceedings.

See Appeal and Error, §§ 387, 1232; Bail.
Appeal from justice's court, see Justices of the Peace, § 191.

BOUNDARIES.

Of school district, see Schools and School Districts, §§ 30-41.

I. DESCRIPTION.

§ 3. A marked line, referred to in a deed, being indisputably established, the other part of the description should be read to harmonize with it.—*Bentley v. Napier* (Ky.) 180.

§ 3. The name of a water course on which land is located, as a part of the description of its boundaries, is no more conclusive than any other part of the description.—*Scott v. Alpine Coal Co.* (Ky.) 202.

§ 3. The original surveyor's lines on the ground not referred to in his field notes cannot control calls in the patent of the survey.—*Goldman v. Hadley* (Tex. Civ. App.) 282.

§ 3. Statement as to controlling calls in patent.—*Goldman v. Hadley* (Tex. Civ. App.) 282.

§ 3. Where nothing appears on the face of grants or from testimony to indicate that any other course was observed in making the surveys than true north and south lines, and the adoption of magnetic lines would lead to results inconsistent with calls of one of the grants, the true north and south lines should control.—*Barraera v. Guerra* (Tex. Civ. App.) 902.

II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 33. The burden is on plaintiff of showing the land in dispute to be a part of the tract owned by him as alleged, rather than a part of the

tract owned by defendant.—*Thacker v. Wilson* (Tex. Civ. App.) 938.

§ 35. Reputation as to the location of lines and corners of a survey is admissible as evidence.—*Scott v. Alpine Coal Co.* (Ky.) 202.

§ 35. Testimony as to marks made on ground by the original surveyor *held* objectionable, where witness does not show how he knew they were so made.—*Goldman v. Hadley* (Tex. Civ. App.) 282.

§ 35. A witness *held* properly allowed to testify that a surveyor was with him when he found a marked boundary line concerning which he testified.—*Myers v. Moody* (Tex. Civ. App.) 920.

§ 35. In a boundary line dispute, a witness could state the fact of having run a line at a certain place and time, whether he knew where the original line was run or not.—*Myers v. Moody* (Tex. Civ. App.) 920.

§ 35. Evidence of reputation, so far as it definitely exists, is admissible to prove the location of private boundaries.—*Thacker v. Wilson* (Tex. Civ. App.) 938.

§ 37. Evidence *held* to show the location of a marked line, referred to in the description in a deed, was the line intended by the parties.—*Bentley v. Napier* (Ky.) 180.

§ 37. Evidence *held* to sustain a judgment establishing a boundary line between certain surveys.—*Myers v. Moody* (Tex. Civ. App.) 920.

§ 40. Evidence as to the boundary between tracts of land *held* to raise a question for the jury.—*Thacker v. Wilson* (Tex. Civ. App.) 938.

§ 46. An agreement between adjoining landowners fixing their boundary, executed either by a marked line or by actual possession, is notice to all the world of such boundary.—*Walker v. Cornett* (Ky.) 841.

§ 49. When the location of a line as actually made by the parties to a deed is established, this must control.—*Bentley v. Napier* (Ky.) 180.

§ 54. Effect stated, where there is a discrepancy between a tract of land as located and the description in a patent.—*Scott v. Alpine Coal Co.* (Ky.) 202.

BREACH.

Of contract, see Contracts, §§ 284-322; Sales, §§ 150-182; Vendor and Purchaser, §§ 129-176.

Of covenant, see Covenants, §§ 94-100.

Of warranty, see Sales, §§ 261-287, 435-442.

BREACH OF MARRIAGE PROMISE.

Seduction under promise of marriage, see Seduction, § 46.

BREACH OF THE PEACE.

§ 1. A policeman *held* to be within the protection of an ordinance making it an offense to disturb the peace of any person.—*City of De Soto v. Hunter* (Mo. App.) 1092.

§ 4. An indictment for breach of the peace *held* fatally defective.—*Bales v. State* (Tex. Cr. App.) 874.

§ 10. Evidence in a prosecution for breach of the peace *held* sufficient to take the case to the jury.—*City of De Soto v. Hunter* (Mo. App.) 1092.

§ 10. In a prosecution for breach of the peace, whether the act of accused amounted to a breach of the peace *held* to be a question for the jury.—*City of De Soto v. Hunter* (Mo. App.) 1092.

Equitable relief to persons in good faith discounting county warrant illegally, issued for construction of bridge, see Counties, § 167.

§ 20. Although the fiscal court cannot delegate to an agent the discretion with which the law clothes it, it may after determining that a bridge is necessary appoint a commissioner, not a member of the court, to construct a bridge or contract for its construction.—*Milliken v. George L. Gillum & Son* (Ky.) 151.

BRIEFS.

On appeal or writ of error, see Appeal and Error, §§ 755-773; Criminal Law, § 1130.

BROKERS.

See Principal and Agent.

II. EMPLOYMENT AND AUTHORITY.

Implied authority to make sales on credit, see Principal and Agent, §§ 103, 155.

§ 7. Evidence *held* to show an employment of plaintiff as broker to sell defendant's land.—*Montgomery v. Amsler* (Tex. Civ. App.) 307.

§ 8. Evidence, in an action to recover part of a commission alleged to have been earned for assisting defendant in making a sale, *held* sufficient to sustain a verdict for plaintiff.—*Handlan v. Miller* (Mo. App.) 751.

§ 14. The word "amount" in a letter regarding the sale by plaintiff, a broker, of defendant's land, reading "\$22,250 your commission \$1,112.50, this amount will buy the place," *held* to refer to the total of the two sums.—*Smith v. Fears* (Tex. Civ. App.) 433.

III. DUTIES AND LIABILITIES TO PRINCIPAL.

§ 19. Where persons buy goods through brokers paying them a specified brokerage, any rebate to the brokers received from the other party should inure to the buyers.—*Plotner & Stoddard v. Markham Warehouse & Elevator Co.* (Tex. Civ. App.) 443.

IV. COMPENSATION AND LIEN.

Inconsistent conduct ground for equitable estoppel affecting right, see Estoppel, § 63.

§ 44. Defendant *held* not entitled to withdraw authority to plaintiff, a broker, to sell land, after plaintiff had procured a purchaser.—*Montgomery v. Amsler* (Tex. Civ. App.) 307.

§ 55. The owner, in absence of contract to the contrary, may employ a number of agents to sell land, and the agent who is the procuring cause of the sale is entitled to the commissions.—*Smith & Sholars v. Fowler* (Tex. Civ. App.) 598.

§ 55. Appellants, real estate brokers, *held* the sole procuring cause of a sale, and entitled to commissions.—*Smith & Sholars v. Fowler* (Tex. Civ. App.) 598.

§ 56. A real estate broker *held* not the efficient agent in or the procuring cause of a contract for the sale of timber, and not entitled to a commission.—*Goff v. Hurst* (Ky.) 148.

§ 58. One *held* not estopped to assert, against a claim for commissions for buying coal lands, that one of the owners was an infant, and so was not bound by his contract of sale.—*Mitchell v. Weddington* (Ky.) 802.

§ 61. A broker knowing at the time he undertakes to sell land of defects in the title cannot hold the owner responsible for the failure of the sale of a portion of the land because of such defects.—*Montgomery v. Amsler* (Tex. Civ. App.) 307.

§ 63. On the wrongful refusal of defendants to complete a land sale made by plaintiff, a broker, in accordance with his contract, they became liable to him in the amount to which he would have been entitled under the contract had they ratified the sale.—*Montgomery v. Amsler* (Tex. Civ. App.) 307.

V. ACTIONS FOR COMPENSATION.

§ 85. In a broker's action for commissions, evidence that, to enable the purchasers to make the cash payment required, plaintiff agreed to lend them the amount of the commission claimed by him, *held* admissible on the issue whether plaintiff was a joint purchaser.—*Smith v. Fears* (Tex. Civ. App.) 433.

§ 86. Evidence *held* to sustain a finding by the jury that there was an agreement between the parties to divide commissions.—*Handlan v. Miller* (Mo. App.) 751.

§ 86. Evidence, in an action to recover part of a commission earned by a sale of property, *held* to sustain a finding by the jury that plaintiff acted in the particular transaction for himself.—*Handlan v. Miller* (Mo. App.) 751.

§ 87. Where a broker sued on his contract for commissions, his damages were limited to those he sustained by the breach of the contract, and he was not entitled to any part of the profits made by defendants on a subsequent sale of the land.—*Montgomery v. Amsler* (Tex. Civ. App.) 307.

§ 88. In an action by a land broker for commissions, evidence *held* to warrant submitting to the jury the question whether plaintiff was a joint purchaser.—*Smith v. Fears* (Tex. Civ. App.) 433.

VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

Right of purchaser to enforce contract for sale made without authority of agent, see Principal and Agent, § 155.

BUILDING RESTRICTIONS.

Covenants, see Covenants, § 51.

BUILDINGS.

School buildings, see Schools and School Districts, § 67.

BURDEN OF PROOF.

In criminal prosecutions, see Homicide, §§ 147, 152.

BURGLARY.

II. PROSECUTION AND PUNISHMENT.

Evidence of acts of third persons not brought home to accused, see Criminal Law, § 427.

Evidence of other offenses, see Criminal Law, § 369.

§ 31. Evidence that a search warrant had been sued out, either by the prosecuting witness or by a third person, *held* inadmissible.—*Elkins v. State* (Tex. Cr. App.) 393.

§ 46. Where the court charges as to possession of recently stolen property, it must charge that possession, to be evidence of guilt, must be recent, personal, and exclusive.—*Leonard v. State* (Tex. Cr. App.) 549.

CALENDARS.

Of causes for trial, see Trial, § 11.

CANCELLATION OF INSTRUMENTS.

See Quieting Title; Reformation of Instruments.

Rescission of contracts, see Vendor and Purchaser, §§ 108, 105.

Setting aside fraudulent conveyances, see Fraudulent Conveyances, §§ 282, 299.

Grounds for cancellation and cancellation or rescission of particular instruments by act of parties.

Contracts for sale of goods, see Sales, §§ 94-131.

Contracts in general, see Contracts, § 266.

II. PROCEEDINGS AND RELIEF.

§ 51. In an action to set aside a deed for fraud, a charge on the burden of proof *held* erroneous.—*Koppe v. Koppe* (Tex. Civ. App.) 68.

CARNAL KNOWLEDGE.

See Rape.

CARRIERS.

Judicial notice that railroads are engaged in interstate and intrastate commerce, see Evidence, § 20.

I. CONTROL AND REGULATION OF COMMON CARRIERS.

(A) In General.

§ 4. A coal company constructing a switch to its mine under Ky. St. 1909, § 815 (Russell's St. § 5352), *held* not a common carrier in violation of Const. § 210.—*Straight Creek Coal Mining Co. v. Straight Creek Coal & Coke Co.* (Ky.) 842.

II. CARRIAGE OF GOODS.

(D) Transportation and Delivery by Carrier.

§ 84. The duty of a carrier accepting freight for transportation does not end by merely carrying the goods in its cars to the point of destination, but it must deliver them at such place in or about its station as will enable consignee to conveniently get them.—*Lewis v. Louisville & N. R. Co.* (Ky.) 184.

§ 92. Gen. St. Kan. 1901, §§ 5278, 5282, place the defendant's property in custodia legis from the time of service of notice of attachment upon the garnishee, so that a railroad company ceased to hold defendant's property as a carrier after service of notice upon it in garnishment proceedings.—*Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co.* (Mo. App.) 10.

§ 93. A carrier, issuing a bill of lading in favor of the buyer of goods, *held* to act at its peril when, as carrier or warehouseman, it diverts the goods.—*F. H. Smith Co. v. Louisville & N. R. Co.* (Mo. App.) 342.

§ 94. Whether a buyer suing a carrier for nondelivery of goods had advanced money to the seller on account of the goods is a question of fact for the trial court to determine.—*F. H. Smith Co. v. Louisville & N. R. Co.* (Mo. App.) 342.

(E) Delay in Transportation or Delivery.

§ 98. A claim for loss of profits by being compelled to stop an electric plant, because the shaft used therein was broken en route and returned to the repair shop by the express company to be repaired before it was forwarded to the plant, *held* based upon the owner's being deprived of the use of the shaft, so that the cause of the delay was immaterial.—*Stone v. Adams Express Co.* (Ky.) 200.

§ 99. A statute *held* to exonerate the carrier garnisheed in an action against the shipper or the consignee from liability for delay caused by the garnishment.—*A. L. Haase & Sons Fish Co. v. Merchants' Despatch Transp. Co.* (Mo. App.) 362.

§ 104. One suing a carrier for negligent delay in transporting freight *held* not to make a prima facie case of negligence by certain proof.—*A. C. L. Haase & Sons Fish Co. v. Merchants' Despatch Transp. Co.* (Mo. App.) 362.

§ 104. In an action against a carrier for mental anguish caused by delay in transporting plaintiff's wife's body, certain evidence *held* inadmissible.—*Missouri, K. & T. Ry. Co. of Texas v. Vandiver* (Tex. Civ. App.) 955.

§ 105. Certain facts *held* not to put an express company's agent upon notice as to the purpose of the machinery shipped for repairs so as to make the express company liable for special damages by loss of profits caused by being compelled to stop business.—*Stone v. Adams Express Co.* (Ky.) 200.

§ 105. Loss of profits in being prevented from running an electric plant while a shaft which was broken en route was being repaired *held* special damages, which could not be recovered unless the carrier had notice of the use for which the shaft was intended.—*Stone v. Adams Express Co.* (Ky.) 200.

§ 105. A notice *held* sufficient to charge a carrier with notice of special damages by loss of business in case a car of coke was not promptly delivered to the consignee.—*Texarkana & Ft. S. Ry. Co. v. Neches Iron Works* (Tex. Civ. App.) 64.

§ 105. In an action against a carrier for mental anguish caused by delay in not carrying plaintiff's wife's body on the train upon which plaintiff was carried, recovery could not be had for mental anguish sustained by plaintiff's daughter and sister-in-law as a result of the delay.—*Missouri, K. & T. Ry. Co. of Texas v. Vandiver* (Tex. Civ. App.) 955.

(F) Loss of or Injury to Goods.

§ 108. A common carrier is an insurer of freight, and can only escape liability for loss or damage by showing it was caused by act of God, or the public enemy, or by inherent defects in the goods.—*Lewis v. Louisville & N. R. Co.* (Ky.) 184.

§ 108. The carrier is responsible for goods in its possession for transportation unless the loss is due to an act of God, the public enemy, an inherent defect, or negligence of the shipper.—*Abbott Gin Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 284.

§ 113. Where goods intended for immediate shipment are destroyed in the carrier's possession, the carrier is responsible unless the loss is due to an act of God, the public enemy, an inherent defect, or negligence of the shipper.—*Abbott Gin Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 284.

§ 113. Defendant railroad company *held* not liable as a carrier for the destruction of cotton seed in certain storage houses on its right of way, the seed not having been accepted for immediate shipment.—*Abbott Gin Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 284.

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§ 114. A carrier *held* to be an insurer of the safety of goods wherever kept till consignee has reasonable time to remove them after their arrival.—*Lewis v. Louisville & N. R. Co.* (Ky.) 184.

§ 114. The period of reasonable time for the removal of goods begins when the consignee knows, or in the exercise of reasonable diligence should know, that they have arrived.—*Lewis v. Louisville & N. R. Co.* (Ky.) 184.

§ 119. The flood on May 30 and 31, 1903, at the junction of the Kaw and Missouri rivers, *held* an act of God, and a carrier was not liable for loss of freight in such flood.—*Merritt Creamery Co. v. Atchison, T. & S. F. Ry. Co.* (Mo. App.) 322.

§ 119. Though defendant railroad was negligent in not getting a car containing plaintiff's butter out of its yards before the destructive part of an unprecedented flood, it was not liable, unless warned of the approach, not merely of a rise in the river, but of the flood.—*Merritt Creamery Co. v. Atchison, T. & S. F. Ry. Co.* (Mo. App.) 322.

§ 134. In absence of proof that the carrier received the goods claimed to be lost and damaged, a judgment against him in an action for damages is not sustained by evidence.—*Missouri, K. & T. Ry. Co. of Texas v. Cumby Mercantile & Lumber Co.* (Tex. Civ. App.) 568.

§ 135. The measure of actual damages for injury to a shaft while being transported, by falling out of the car and breaking, was the difference between the value of the shaft before and after the damage to it.—*Stone v. Adams Express Co.* (Ky.) 200.

§ 136. Reasonable time for removal of goods by a consignee and reasonable diligence to inform himself of their arrival are in general questions for the jury.—*Lewis v. Louisville & N. R. Co.* (Ky.) 184.

(H) Limitation of Liability.

Authority of agent of owner of goods to contract for limitation of liability, see Principal and Agent, § 101.

§ 149½. In view of Const. § 196, forbidding a common carrier to contract for relief from its common-law liability, a common carrier cannot, by any stipulation in the contract or bill of lading, reduce its liability as an insurer of the safety of goods till the consignee has had a reasonable time after their arrival in which to remove them.—*Lewis v. Louisville & N. R. Co.* (Ky.) 184.

§ 156. A shipping contract construed, and *held* to release a claim of the shipper for damages for failure to furnish cars.—*Freeman v. St. Louis & S. F. R. Co.* (Mo. App.) 1.

§ 156. Certain proof *held* not to show a leakage within a bill of lading relieving a carrier from liability for damages caused by leakage.—*A. C. L. Haase & Sons Fish Co. v. Merchants' Despatch Transp. Co.* (Mo. App.) 362.

§ 163. A recital in a shipping contract *held* prima facie evidence that the rate named therein is a reduced rate, so that the shipper has the burden of proving the contrary.—*Freeman v. St. Louis & S. F. R. Co.* (Mo. App.) 1.

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it.—*A. C. L. Haase & Sons Fish Co. v. Merchants' Despatch Transp. Co.* (Mo. App.) 362.
§ 177. A connecting carrier *held* not liable for damages occurring on the initial carrier's line, notwithstanding Rev. St. 1895, art. 331a.—*Houston, E. & W. T. Ry. Co. v. Eastern Texas Ry. Co.* (Tex. Civ. App.) 972.

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§ 199. A coal company *held* not to discriminate in trackage rates over its switch.—*Straight Creek Coal Mining Co. v. Straight Creek Coal & Coke Co.* (Ky.) 842.

§ 199. A railroad *held* not to operate as part of its general system the switch track of a coal company, so as to be subject to a charge of discrimination, because of the coal company's trackage charges to others.—*Straight Creek Coal Mining Co. v. Straight Creek Coal & Coke Co.* (Ky.) 842.

§ 200. The trackage charges of a coal company, being such as were agreed on with the parties using its switch before it was constructed, may not be complained of by them as extortionate till it has been paid its outlay for construction.—*Straight Creek Coal Mining Co. v. Straight Creek Coal & Coke Co.* (Ky.) 842.

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§ 228. Proof of delay in the transportation of live stock, unaccompanied by proof that it was caused by negligence, does not prove the negligence of the carrier.—*Clark v. St. Joseph & G. I. Ry. Co.* (Mo. App.) 318.

§ 228. A shipper, suing a carrier for delay in transporting live stock, has the burden of proving that the delay was caused by the negligence of the carrier.—*Clark v. St. Joseph & G. I. Ry. Co.* (Mo. App.) 318.

§ 228. In an action against a carrier for negligent delay in shipping cattle, a recovery of damages for decline in the market price *held* not sustained by the evidence.—*Dawson v. Quincy, O. & K. C. R. Co.* (Mo. App.) 335.

§ 228. In an action against a carrier for negligent delay in shipping cattle, an instruction relative to the measure of damages for loss occasioned by the stale appearance of the cattle *held* erroneous.—*Dawson v. Quincy, O. & K. C. R. Co.* (Mo. App.) 335.

§ 229. A shipper of cattle is entitled to recover compensation for the actual loss he suffers on account of the negligent delay of the carrier, which loss may consist of depreciation in market value, of loss in weight, and of loss on account of the stale appearance of the animals.—*Dawson v. Quincy, O. & K. C. R. Co.* (Mo. App.) 335.

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§ 244. One riding on the bumper of a crowded street car *held* to be a passenger.—*Beaumont Traction Co. v. Happ* (Tex. Civ. App.) 610.

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§ 280. Degree of care that a street railway company should exercise towards passengers stated.—*Gardner v. Metropolitan St. Ry. Co.* (Mo.) 1068.

§ 280. A carrier *held* not liable for an injury to a stockman staying in the stock car instead of in the caboose.—*Fusselman v. Wabash R. Co.* (Mo. App.) 1137.

§ 282. The general duty of a carrier to run its train with care becomes a particular duty to no one until some person is in a position to complain.—*Fusselman v. Wabash R. Co.* (Mo. App.) 1137.

§ 282. A mother, who refuses to pay proper fare for her son and forcibly resists his eviction, forfeits her rights as a passenger and is only entitled to ordinary care by the carrier for her safety.—*Williamson v. Chicago, R. I. & G. Ry. Co.* (Tex. Civ. App.) 897.

§ 283. Where trainmen were attacked and the flagman in the performance of his duty while repelling the attack shot and injured an innocent passenger, the carrier was liable if the act was wrongful.—*Illinois Cent. R. Co. v. Gunterman* (Ky.) 514.

§ 284. It is a carrier's duty to protect passengers from unruly persons.—*Illinois Cent. R. Co. v. Gunterman* (Ky.) 514.

§ 287. Where an opening in a train at a crossing has been made for the passage of persons, the duty to give warning before closing the space is not satisfied by merely ringing the engine bell or sounding the whistle.—*Louisville & N. R. Co. v. Smith* (Ky.) 806.

§ 292. Liability of a street railway company for injuries to a passenger from negligent construction of support to a trolley wire stated.—*Gardner v. Metropolitan St. Ry. Co.* (Mo.) 1068.

§ 292. A street railway company *held* bound to exercise the same care as to equipment furnishing the motive power as it does in furnishing safe cars for passengers.—*Gardner v. Metropolitan St. Ry. Co.* (Mo.) 1068.

§ 293. Injury to a passenger while riding on the bumper of a crowded street car *held* to be the result of the company's negligence.—*Beaumont Traction Co. v. Happ* (Tex. Civ. App.) 610.

§ 297. A carrier operating its train at ordinary speed is not liable to a passenger thrown from the back platform, on which he was riding, while the train was on a curve.—*Crawford v. Louisville & N. R. Co.* (Ky.) 220.

§ 298. It is the duty of railroads to operate their passenger trains so as to avoid unnecessary lurches that may injure passengers.—*Flucks v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 348.

§ 302. It is the duty of a carrier to protect its passengers while they are alighting and until they have a reasonable time to leave the platform.—*Illinois Cent. R. Co. v. Gunterman* (Ky.) 514.

§ 303. The measure of carrier's duty to provide its passengers with means for alighting defined.—*Missouri, K. & T. Ry. Co. of Texas v. Dunbar* (Tex. Civ. App.) 574.

§ 304. A carrier must exercise ordinary care for the safety on its premises of a person going to a train to meet a friend.—*Louisville & N. R. Co. v. Smith* (Ky.) 806.

§ 304. A person going to a train to meet a passenger need not wait until the train actually arrives before going to the platform, in order to avail himself of the rule of law that requires a

carrier to exercise ordinary care for his safety.—*Louisville & N. R. Co. v. Smith* (Ky.) 806.

§ 305. Where a conductor, hearing a disturbance in a car, quieted the passengers causing the trouble, his failure to eject them was not the proximate cause of injury to an innocent passenger from a renewal of the difficulty.—*Illinois Cent. R. Co. v. Gunterman* (Ky.) 514.

§ 314. Complaint, in action by passenger for injuries, *held* not demurrable as raising an inference of contributory negligence.—*Beaumont Traction Co. v. Happ* (Tex. Civ. App.) 610.

§ 315. Where plaintiff alleged that he was injured on a south-bound car on the west side of a viaduct, he could not recover upon proof that he was injured on a north-bound car on the east side of the viaduct.—*Gardner v. Metropolitan St. Ry. Co.* (Mo.) 1068.

§ 316. In a personal injury action against a carrier where the petition charges negligence specifically, the burden is on plaintiff to prove his case and continues with him throughout the trial.—*Gardner v. Metropolitan St. Ry. Co.* (Mo.) 1068.

§ 317. In an action for injuries to a street car passenger struck by a cross beam near the track on a curve, evidence that one track at that place was higher than the other causing a rapidly moving car passing the beam to lurch, throwing the car near to the beam, was admissible on the question of the company's negligence.—*Gardner v. Metropolitan St. Ry. Co.* (Mo.) 1068.

§ 317. A passenger injured by the upsetting of a step box may show that step boxes had upset on other occasions.—*Missouri, K. & T. Ry. Co. of Texas v. Dunbar* (Tex. Civ. App.) 574.

§ 318. Evidence, in an action for injuries at a crossing, *held* to show that plaintiff was injured by defendant's reckless disregard of its duty to him.—*Louisville & N. R. Co. v. Smith* (Ky.) 806.

§ 319. Street car men *held* guilty of gross negligence authorizing the award of punitive damages in an action for injuries to a passenger.—*Lexington Ry. Co. v. Johnson* (Ky.) 830.

§ 319. An award of punitive damages in an action against a street railroad *held* not excessive.—*Lexington Ry. Co. v. Johnson* (Ky.) 830.

§ 320. In an action for injuries to a passenger from a shot fired at a third person by the carrier's flagman, evidence *held* to warrant submission to the jury.—*Illinois Cent. R. Co. v. Gunterman* (Ky.) 514.

§ 320. Whether sufficient warning is given before closing the space left for the passage of persons between cars at a crossing is a question for the jury.—*Louisville & N. R. Co. v. Smith* (Ky.) 806.

§ 320. Whether the speed with which a train was run around a curve was dangerous and negligent is a question for the jury.—*Flucks v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 348.

§ 320. Whether the *prima facie* case made by showing the derailment of a train and the consequent injury to a passenger was rebutted *held* under the evidence for the jury.—*International & G. N. R. Co. v. Sandlin* (Tex. Civ. App.) 60.

§ 321. In an action by a passenger for injury from being shot, the evidence being conflicting, the jury should have been instructed to find for defendant if the shot was fired by a passenger.—*Illinois Cent. R. Co. v. Gunterman* (Ky.) 514.

§ 321. In an action against a carrier for injury to a passenger from being shot by a trainman, instruction *held* erroneous.—*Illinois Cent. R. Co. v. Gunterman* (Ky.) 514.

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§ 321. An instruction assuming that the operation of a train around a curve "at an unusually high rate of speed" was negligent *held* erroneous.—*Flucks v. St. Louis, I. M. & S. Ry. Co.* (Mo. App.) 348.

§ 321. A charge that a carrier was liable to a passenger injured in alighting, if its failure to provide a safe step box was the proximate cause of the injury, was not erroneous, though the use of the box on a rough pavement was alleged as the proximate cause.—*Missouri, K. & T. Ry. Co. of Texas v. Dunbar* (Tex. Civ. App.) 574.

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§ 331. A stockman who voluntarily placed himself in a place of danger *held* negligent, though he may not have anticipated danger.—*Fusselman v. Wabash R. Co.* (Mo. App.) 1137.

§ 336. Where a passenger was injured in a collision while riding on the bumper of a crowded street car, *held*, that he was not guilty of contributory negligence, and that his injury did not result from any risk assumed.—*Beaumont Traction Co. v. Happ* (Tex. Civ. App.) 610.

§ 337. Plaintiff *held* not guilty of such contributory negligence in crossing a railroad track as to prevent his recovery for injuries, under the laws in Alabama as to the effect of contributory negligence.—*Louisville & N. R. Co. v. Smith* (Ky.) 806.

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II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 46. Where a statute may be sustained as a local or special law, the court will not inquire whether the statute, if treated as a general law, is unconstitutional.—Cravens v. State (Tex. Or. App.) 29.

III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.**(A) Legislative Powers and Delegation Thereof.**

§ 62. Acts 1895, p. 70, c. 54, amending School Law (Acts 1873, p. 41, c. 25) § 8, relating to the qualifications of county superintendent of public schools, *held* not unconstitutional, as delegating legislative power to the board of education.—State v. Evans (Tenn.) 81.

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§ 91. The right under Const. § 1, subsec. 6, to petition the Legislature for a proper purpose includes the right to lawfully circulate a petition and procure others to sign it.—Yancey v. Commonwealth (Ky.) 123.

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§ 93. Act Nov. 29, 1871 (Laws 2d Sess. 1871, p. 45, c. 57), forfeiting a location and a survey on a certificate if conditions for perfecting title be not complied with in a certain time, *held* not retroactive or to impair the obligation of contracts or vested rights in contravention of Const. art. 1, § 16.—Keith v. Guedry (Tex.) 17.

VII. OBLIGATION OF CONTRACTS.**(B) Contracts of States and Municipalities.**

§ 123. Act Nov. 29, 1871 (Laws 2d Sess. 1871, p. 45, c. 57), forfeiting a location and a survey on a certificate if conditions for perfecting title be not complied with in a certain time, *held* not retroactive or to impair the obligation of contracts or vested rights in contravention of Const. art. 1, § 16.—Keith v. Guedry (Tex.) 17.

(C) Contracts of Individuals and Private Corporations.

§ 165. Acts 1901, p. 248, c. 141, *held* not invalid as impairing the obligation of a contract of insurance.—Snyder v. Supreme Ruler of Fraternal Mystic Circle (Tenn.) 981.

§ 190. Act Nov. 29, 1871 (Laws 2d Sess. 1871, p. 45, c. 57), forfeiting a location and a survey on a certificate if conditions for perfecting title be not complied with in a certain time, *held* not retroactive or to impair the obligation of contracts or vested rights in contravention of Const. art. 1, § 16.—*Keith v. Guedry* (Tex.) 17.

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§ 210. The word "person," as used in Const. Tex. art. 1, § 3, and Const. U. S. Amend. 14, § 1, prohibiting states from denying to any person the equal protection of the law, includes corporations.—*Beaumont Traction Co. v. State* (Tex. Civ. App.) 615, 618.

§ 211. The effect of Const. Tex. art. 1, § 3, and Const. U. S. Amend. 14, § 1, prohibiting the states from denying to any person the equal protection of the law, stated.—*Beaumont Traction Co. v. State* (Tex. Civ. App.) 615, 618.

§ 220. An assessment of intangible property of a railroad situated in a county *held* violative of Const. U. S. Amend. 14.—*Missouri, K. & T. Ry. Co. of Texas v. Kone* (Tex. Civ. App.) 424.

§ 241. Kirby's Dig. §§ 6634, 6636, imposing different penalties on railroad companies and their agents for failure to provide waiting rooms with wholesome drinking water, was not unconstitutional as depriving railroad companies of the equal protection of the laws.—*State v. St. Louis & S. F. R. Co.* (Ark.) 627.

§ 241. Acts 28th Leg. p. 178, c. 112, § 1, approved April 8, 1903, making it unlawful for corporations operating electric railways to operate the cars without certain screens, *held* to contravene Const. Tex. art. 1, § 3, and Const. U. S. Amend. 14, § 1, relating to equal protection of the law.—*Beaumont Traction Co. v. State* (Tex. Civ. App.) 615, 618.

XI. DUE PROCESS OF LAW.

§ 301. Act Mo. Feb. 28, 1907 (Laws 1907, p. 181) § 1, requiring railroads to block frogs, switches, etc., and depriving them of the defense of contributory negligence in actions for injuries resulting from noncompliance with the act, *held* not to deprive the railroad company of its property without due process of law.—*St. Louis, I. M. & S. R. Co. v. McNamare* (Ark.) 102.

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(B) Parties, Proposals, and Acceptance.

§ 22. Though a subcontractor's contract with defendant's agent was unilateral in the first instance, *held* binding; plaintiff having performed and incurred expenses under it.—*Nicholson v. Acme Cement Plaster Co.* (Mo. App.) 773.

(C) Formal Requisites.

§ 42. Though a contract is signed by a party, it is not executed until delivered.—*American Copying Co. v. Muleski* (Mo. App.) 334.

(D) Consideration.

For grant of easement, see Easements, § 12.

§ 52. The contract of a subcontractor with defendant's agent *held* a binding contract, supported by a valid consideration.—*Nicholson v. Acme Cement Plaster Co.* (Mo. App.) 773.

§ 56. The contract of a subcontractor with defendant's agent *held* a binding contract; its consideration being the mutual promises of the parties.—*Nicholson v. Acme Cement Plaster Co.* (Mo. App.) 773.

§ 71. Abandonment of a will contest *held* sufficient consideration for a contract.—*Parriss v. Jewell* (Tex. Civ. App.) 399.

(E) Validity of Assent.

§ 94. A competent business man laboring under no disability is bound by a contract signed by him without reading it.—*United Breeders' Co. v. Wright* (Mo. App.) 1106.

§ 96. Influence to be exerted must not only exist, but there must be proof that it was effectually exerted.—*Borchers v. Barckers* (Mo. App.) 357.

§ 99. The exertion of influence and its effect in inducing a will or contract may be shown by circumstances and need not be directly proved, but there must be some evidence circumstantial or direct, tending to prove the facts, and not merely raising a suspicion of their existence, or showing opportunity for exercise of improper influence without showing that it actually was exercised.—*Borchers v. Barckers* (Mo. App.) 357.

§ 99. Weakness of a person's mind does not, ipso facto, prove he was unduly influenced, but circumstances must be proved pointing to the successful employment of undue influence or positive testimony to that effect.—*Borchers v. Barckers* (Mo. App.) 357.

(F) Legality of Object and of Consideration.

Agreements in violation of public land laws, see Public Lands, § 139.

§ 108. "Unconscionable" contract defined.—*Wenninger v. Mitchell* (Mo. App.) 1130.

§ 111. A contract of marriage brokerage held invalid.—*Wenninger v. Mitchell* (Mo. App.) 1130.

§ 139. Parties to a contract of marriage brokerage held not in pari delicto, and the party paying a consideration under the contract held entitled to recover the same.—*Wenninger v. Mitchell* (Mo. App.) 1130.

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§ 164. A note and an instrument creating a lien to secure payment constitute one contract, and must be construed together.—*Fuller v. Pryor* (Tex. Civ. App.) 418.

§ 168. What is mutually understood and agreed to by the parties enters into and becomes a part of the contract.—*Postal Telegraph Cable Co. v. Louisville Cotton Oil Co.* (Ky.) 832.

§ 176. The construction of an unambiguous and entire contract, pleaded as the basis of the action, is for the court.—*Meek v. Hurst* (Mo.) 1022.

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§ 247. Evidence that a member of defendant's committee had agreed to set certain grade stakes for plaintiff in performing a contract for the construction of a road held inadmissible.—*Palo Duro Club v. McAlister* (Tex. Civ. App.) 971.

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§ 266. Where a widow repudiated a contract to permit defendants to use certain land so long as they should support her, defendants, having had the use of the land prior to the repudiation, could not claim the value of their services.—*Glass v. Hampton* (Ky.) 808.

V. PERFORMANCE OR BREACH.

Measure of damages for breach, see Damages, § 122.

§ 284. Where it is agreed between parties to a building contract that all work shall be executed to the satisfaction of the architect, his honest and fair judgment will be binding on the parties, and to go behind such decision there must be allegation and proof of fraud, collusion,

or mistake upon his part.—*Kettler Brass Mfg. Co. v. O'Neil* (Tex. Civ. App.) 900.

§ 300. A contractor failing to complete a building within the agreed time held not entitled to escape liability by proving a certain fact.—*Smith v. Gunn* (Tex. Civ. App.) 919.

§ 322. In an action for breach of contract, certain evidence held admissible.—*Kettler Brass Mfg. Co. v. O'Neil* (Tex. Civ. App.) 900.

VI. ACTIONS FOR BREACH.

Amendment of pleading setting up different cause of action, see Pleading, § 248.

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§ 334. A petition to recover on a promise to pay for support of infants held insufficient in not alleging consideration.—*Funk v. Funk* (Ky.) 511.

§ 342. In an action on a contract, the defense of illegality must be specially set up.—*American Copying Co. v. Muleski* (Mo. App.) 384.

§ 346. Plaintiff, who pleads performance of a condition precedent, cannot recover on proof of a waiver by defendant of such performance.—*Dolinaki v. First Nat. Bank* (Tex. Civ. App.) 278.

§ 349. An owner, suing the contractor for the rental value of a building because of the failure of the contractor to complete the building within the time agreed, held improperly required to testify to a certain fact.—*Smith v. Gunn* (Tex. Civ. App.) 919.

§ 349. In an action for the rental value of the building during the time the contractor delayed its construction, any testimony bearing on the question of rental value is admissible.—*Smith v. Gunn* (Tex. Civ. App.) 919.

§ 350. Evidence of a parol rescission of a contract held sufficient to go to the jury and to warrant an instruction as to its effect if found to have been agreed on.—*Keeney v. Waters* (Ky.) 837.

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§ 152. Power of a corporation to make interest or dividends on stock prior to demands of creditors *held* to depend on legislative grant.—Kidd v. Puritana Cereal Food Co. (Mo. App.) 784.

§ 155. Effect of guaranteeing dividends of a corporation, stated.—Kidd v. Puritana Cereal Food Co. (Mo. App.) 784.

§ 155. Remedy to compel declaring of dividends on preferred shares *held* to be in equity.—Kidd v. Puritana Cereal Food Co. (Mo. App.) 784.

§ 156. The right of a preferred stockholder under Burns' Ann. St. Ind. 1901, §§ 5064-5068, stated.—Kidd v. Puritana Cereal Food Co. (Mo. App.) 784.

§ 156. Power of a corporation to confer rights on preferred stockholders, stated.—Kidd v. Puritana Cereal Food Co. (Mo. App.) 784.

§ 156. Principles to be applied in determining status of preferred stockholders stated under Rev. St. 1899, § 4160 (Ann. St. 1906, p. 2252).—Kidd v. Puritana Cereal Food Co. (Mo. App.) 784.

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(D) Liability for Corporate Debts and Acts.

§ 349. Under Kirby's Dig. §§ 841, 848, 859, 862-864, the creditors of a corporation *held* entitled to sue the directors thereof, though the

VII. CORPORATE POWERS AND LIABILITIES.

(A) Extent and Exercise of Powers in General.

§ 388. If a sale of a minor's land to a corporation upon petition by the guardian was otherwise valid, and the minors have received the consideration of the sale, they cannot assert want of power in the corporation to take and hold the land as a ground for vacating the sale.—Ancell v. Southern Illinois & M. Bridge Co. (Mo.) 709.

(B) Representation of Corporation by Officers and Agents.

§ 433. In an action for injury to plaintiff's wife from fright and humiliation caused by defendant's agents going upon plaintiff's premises in the nighttime, where the evidence showed that defendant's agents were guilty of trespass, *held*, that whether defendant's agents were acting within the line of their duty should have been submitted to the jury.—Alexander v. St. Louis Southwestern Ry. Co. of Texas (Tex. Civ. App.) 572.

(C) Property and Conveyances.

§ 439. Purchaser of assets of a corporation sold for value and in good faith *held* to take them discharged of any trust in favor of the creditors of the selling corporation.—Warren v. Mayer Fertilizer & Junk Co. (Mo. App.) 1087.

§ 445. In an equitable action by a creditor of a corporation, which had transferred its assets to another corporation, to subject the conveyed assets to satisfaction of his debt, *held*, that he could not assert a right based upon a naked legal obligation as against equities of defendant.—Warren v. Mayer Fertilizer & Junk Co. (Mo. App.) 1087.

(E) Torts.

§ 493. A corporation is liable for an assault authorized by it.—Medlin Milling Co. v. Boutwell (Tex. Civ. App.) 442.

(F) Civil Actions.

Evidence of self-serving declarations, see Evidence, § 271.

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§ 499. Where, at the time a corporation was sued, it had not failed to pay its franchise tax, a condition precedent to its right to do business in the state, it would not be deprived of the right to defend the action by afterwards failing to pay such tax.—J. T. Stark Grain Co. v. Harry Bros. Co. (Tex. Civ. App.) 947.

VIII. INSOLVENCY AND RECEIVERS.

§ 542. Evidence *held* to show that a corporation transferring its assets to another corporation did so in good faith and for an adequate consideration.—Warren v. Mayer Fertilizer & Junk Co. (Mo. App.) 1087.

§ 547. Fact that the claim of a creditor of a corporation was pending in the Supreme Court when the corporation transferred its assets to another company would not prevent the claim from being a lien on the assets, if the conveyance was not in good faith and for adequate consideration.—Warren v. Mayer Fertilizer & Junk Co. (Mo. App.) 1087.

§ 565. As a condition to participation in assets of a receivership, *held* a creditor who has obtained assets of the insolvent corporation in receivership proceedings in another state, into which all creditors were not allowed to participate, may be required to pay them into court.

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—Lake Charles Nat. Bank v. J. I. Campbell Co. (Tex. Civ. App.) 601.

§ 565. Creditors of an insolvent corporation *held* not estopped to claim to be a creditor, because of their action in receivership proceedings in another state in excluding other creditors.—Lake Charles Nat. Bank v. J. I. Campbell Co. (Tex. Civ. App.) 601.

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§ 51. Plaintiff, who was not entitled to maintain an action at the commencement thereof, and before filing an amended petition, is liable for costs accruing before such amendment.—City of Columbus v. Bank of Columbus (Ky.) 835.

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§ 146. Under Rev. St. 1895, arts. 1421, 2491, defendant against whom costs have been adjudged is liable for only such amount of plaintiff's costs as plaintiff is primarily liable for.—Wichita Mill & Elevator Co. v. State (Tex. Civ. App.) 427.

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§ 238. The costs of an appeal, unnecessarily taken after the subject-matter of the litigation had been finally settled by another tribunal, should be taxed against appellants.—Young v. Boles (Ark.) 496.

§ 241. In trespass to try title, in which defendant brought in as a party his vendor, and sought to recover on his warranty, the question of costs determined.—Schwartz v. Jones (Tex. Civ. App.) 956.

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§ 42. Neither a county judge nor his son can act as members of the fiscal court in fixing the salary of the county judge.—Grayson County v. Rogers (Ky.) 866.

§ 46. As the county judge cannot also hold the office of supervisor of roads, the fiscal court has no authority to make such judge an extra allowance of salary as such supervisor.—Grayson County v. Rogers (Ky.) 866.

§ 53. A mistake in the entry of an order of the fiscal court may be corrected by that court summarily during the term at which it was made, or after the term, on reasonable notice to persons affected.—Grayson County v. Rogers (Ky.) 866.

§ 57. Under Ky. St. §§ 1835, 1842, 1843 (Russell's St. §§ 2971, 2976, 2977), an alleged error in an order of the fiscal court fixing the salary of the county judge cannot be shown in a collateral action.—Grayson County v. Rogers (Ky.) 866.

(D) Officers and Agents.

§ 64. An order of the fiscal court appointing one of its members a commissioner to build a bridge was void.—Milliken v. George L. Gillum & Son (Ky.) 151.

§ 85. Under Rev. St. 1899, § 10194 (Ann. St. 1906, p. 4629), a report of a county surveyor made in his name by his deputy *held* valid.—Halter v. Leonard (Mo.) 706.

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§ 155. The fiscal court *held* without power to order the county treasurer to pay the county's money into the hands of a third person, to be later paid out by him, to satisfy a county indebtedness created by him.—Milliken v. George L. Gillum & Son (Ky.) 151.

§ 167. A county *held* liable in equity for money furnished on void warrants for the construction of a bridge; the bridge having been accepted by the fiscal court, and in use by the public since its completion.—Milliken v. George L. Gillum & Son (Ky.) 151.

§ 167. A bridge commissioner *held* liable for the difference between what plaintiffs paid him for void warrants of the fiscal court for building a bridge and the amount recovered from the county.—Milliken v. George L. Gillum & Son (Ky.) 151.

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§ 1. Jurisdiction is the right to hear and determine.—*Staples v. Shiver* (Ky.) 828.

§ 7. An action for tort to the person *held* transitory, so that the courts of one state may acquire jurisdiction of actions for torts based on acts or omissions done or occurring in sister states.—*Morgan's L. & T. R. & S. S. Co. v. Street* (Tex. Civ. App.) 270.

§ 7. The right of the courts of one state to take jurisdiction of causes of action for torts to persons based on acts or omissions done or occurring in sister states *held* not affected by the fact that there is a dissimilarity between the laws of the two states as applicable to the action.—*Morgan's L. & T. R. & S. S. Co. v. Street* (Tex. Civ. App.) 270.

§ 17. A court of general jurisdiction is possessed of jurisdiction of the subject-matter if it has jurisdiction to hear and determine causes of the general class of the one under consideration.—*Cook v. Spence* (Mo. App.) 340.

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§ 48. While a seal is not necessary to a court of record, the term "court of record" implies that it has a seal.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

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§ 85. The rules of practice of the Supreme Court apply to all persons, cases, and representatives of clients alike, and must be construed in one case just as they have been or will be in another, irrespective of the case, the parties, or their counsel.—*Kolokas v. Missouri Pac. Ry. Co.* (Mo.) 1082.

(D) Rules of Decision, Adjudications, Opinions, and Records.

§ 89. Where ruling precedents as to the construction of a statute are long and definitely settled, and the business of the state has become adapted to it, the construction will not be departed from.—*Commonwealth v. Louisville Gas Co.* (Ky.) 164.

§ 90. The appellate court should be controlled by previous adjudications of the court on the same question.—*Schwalk's Adm'r v. City of Louisville* (Ky.) 800.

§ 91. The Court of Appeals is bound by a decision of the Supreme Court in a case where the question decided was in issue.—*O'Day v. Sanford* (Mo. App.) 3.

§ 91. The Court of Appeals must follow the decisions of the Supreme Court.—*Martin v. Bennett* (Mo. App.) 779.

§ 91. It is the duty of the Court of Civil Appeals to follow rulings of the Supreme Court, though it might have reached a different conclusion had the question been presented as an original proposition.—*Missouri, K. & T. Ry. Co. of Texas v. Graves* (Tex. Civ. App.) 458.

§ 95. The right of recovery for injuries at a railroad crossing in another state is, in the absence of a statutory provision, to be determined by the laws of that state as declared by its Supreme Court.—*Louisville & N. R. Co. v. Smith* (Ky.) 806.

§ 116. A court may amend its record by a nunc pro tunc order so as to make it speak the truth, but not to make it speak what it ought to have spoken.—*Bouldin v. Jennings* (Ark.) 639.

III. COURTS OF GENERAL ORIGINAL JURISDICTION.**(B) Courts of Particular States.**

§ 124. Where the issue was involved whether the amount paid by plaintiff was a lien on a lot when it was conveyed to him by defendant, the circuit court had jurisdiction of the case, though the amount involved was less than \$100.—*Naylor v. McNair* (Ark.) 662.

§ 154. The circuit court has jurisdiction of the trial of a contest over the offices of mayor and alderman; no tribunal being provided for the induction of these officers.—*Adcock v. Houk* (Tenn.) 979.

V. COURTS OF PROBATE JURISDICTION.

§ 202. An alleged affidavit for an appeal *held* not properly sworn to.—*Walker v. Noll* (Ark.) 488.

§ 202. A motion to dismiss an appeal from the probate to the circuit court *held* a direct attack on the order granting the appeal.—*Walker v. Noll* (Ark.) 488.

§ 202. An appeal from the probate to the circuit court *held* not properly taken for want of presentation of a proper affidavit, action thereon, and an order granting the appeal, as required by Kirby's Dig. § 1348.—*Walker v. Noll* (Ark.) 488.

VI. COURTS OF APPELLATE JURISDICTION.**(A) Grounds of Jurisdiction in General.**

§ 207. Const. art. 7, § 4. *held* not to authorize a judge of the Supreme Court to issue certiorari to review an order of the trial court denying bail, so that the order of such judge granting bail was unauthorized.—*Carr v. State* (Ark.) 631.

(B) Courts of Particular States.

§ 223. The Court of Appeals has jurisdiction on appeal from a judgment denying relief in a suit to enjoin the enforcement of a void judgment for less than \$200.—*Staples v. Shiver* (Ky.) 826.

§ 231. An appeal in a railroad condemnation proceeding should be taken direct to the Supreme Court as involving title to realty.—*Southern Missouri & A. R. Co. v. Wyatt* (Mo.) 688.

§ 231. That the trial court misconstrued the act of Congress for the removal of causes (Act

March 3, 1875, c. 137, § 2, 18 Stat. 470 [U. S. Comp. St. 1901, p. 509]], or erroneously decided that a defendant was not entitled to remove the case under the facts presented in the petition, would not draw into question the validity of the act of Congress, within Const. art. 6, § 12, so as to give the Supreme Court jurisdiction of the appeal from its decision.—Schwyhart v. Barrett (Mo.) 1049.

§ 231. Under Act June 12, 1909 (Acts 1909, p. 397), giving the Courts of Appeals jurisdiction of cases where the amount in dispute does not exceed \$7,500, construed in view of other provisions, *held*, that the "amount in dispute" should be determined as of the date the judgment was rendered, so that where the amount of a judgment appealed from was \$7,500, interest up to the passage of the act could not be added to enable the Supreme Court to retain jurisdiction of the appeal.—Schwyhart v. Barrett (Mo.) 1049.

§ 231. A suit to set aside a deed for fraud *held* to involve title to real estate, within the Constitution, defining the jurisdiction of the Supreme Court.—Schroeder v. Turpin (Mo. App.) 1.

§ 231. Action *held* to involve title to real estate, and that an appeal therein to the Court of Appeals must be certified to the Supreme Court.—Long v. Green County Abstract & Loan Co. (Mo. App.) 3.

§ 246. Under Acts 1907, p. 233, c. 82, § 7, the Supreme Court *held* not to have jurisdiction of a suit to establish certain rights in a homestead, as a homestead cannot exceed \$1,000 in value.—Bell v. Noe (Tenn.) 81.

VII. UNITED STATES COURTS.

(B) Jurisdiction Dependent on Nature of Subject-Matter.

§ 289. Where a railroad company, while operating its road in Missouri, violated a law of the state to the injury of a person therein, the fact that it was also engaged in interstate transportation was not material in determining state or federal jurisdiction.—Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.) 1025.

(C) Jurisdiction Dependent on Citizenship, Residence, or Character of Parties.

§ 300. A federal court has no jurisdiction of a suit between two citizens of the same state on a cause of action arising within the state and under its laws.—Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.) 1025.

COVENANTS.

In lease, construction, see Landlord and Tenant, § 44.

II. CONSTRUCTION AND OPERATION.

(B) Covenants of Title.

§ 42. A vendor, by conveying to a remote assignee of his purchaser with covenant to defend against claims and liens, *held* not bound to defend against liens created by intermediate parties interested.—Naylor v. McNair (Ark.) 662.

(C) Covenants as to Use of Real Property.

§ 51. Change in conditions *held* not to prevent enforcement of a building restriction, subject to which plaintiffs and defendants bought lots.—Spahr v. Cape (Mo. App.) 379.

(D) Covenants Running with the Land.

§ 70. An instrument granting permission to construct a drainage ditch through land *held* a mere license, revocable at the will of the li-

censor, and not a covenant running with the land.—Williams v. Beatty (Mo. App.) 323.

§ 74. A contract of warranty contained in a deed of real estate involves a personal obligation on the part of the grantor to which the grantee has a right, and which cannot be denied him or switched to another without his consent.—Smith v. Pitts (Tex. Civ. App.) 46.

§ 78. Plaintiffs who bought lots in an addition subject to a building restriction may enforce it against defendants who bought other lots subject to like restriction, though, after the sale to them, the platters of the addition abandoned the restriction scheme.—Spahr v. Cape (Mo. App.) 379.

III. PERFORMANCE OR BREACH.

§ 94. Where a vendor attempts to convey land with a covenant for fee-simple title when he has no legal title whatever, *held*, that the covenantee may sue on the covenant when he has suffered substantial damages, though there has been no eviction.—Pineland Mfg. Co. v. Guardian Trust Co. (Mo. App.) 1133.

§ 96. The existence of a street assessment lien which is valid against property at the time the owner deeds it, by statutory warranty deed, to one having no notice of the lien, is a breach of covenant of title.—Reis v. Epperson (Mo. App.) 353.

§ 100. A covenant of title of a grantor, conveying land owned in part by another, and while the latter's title to the other part was maturing by adverse possession, *held* only breached as to the extent the latter then owned the land.—Schwartz v. Jones (Tex. Civ. App.) 950.

IV. ACTIONS FOR BREACH.

§ 116. In an action for breach of covenant of title, in that there were assessment liens against the property, defendant *held* to have admitted by his answer that there was proper service of notice of the assessment on himself, and hence a judgment declaring the assessment a lien was properly admitted in evidence.—Reis v. Epperson (Mo. App.) 353.

§ 118. In an action for breach of covenant of title, an instruction placing the burden of proof of certain matters on plaintiff *held* erroneous.—Reis v. Epperson (Mo. App.) 353.

§ 132. Necessary proceedings of a covenantee, after default of covenantor to furnish title which it covenanted to convey, *held* substantial damage which can be recovered under the covenant.—Pineland Mfg. Co. v. Guardian Trust Co. (Mo. App.) 1133.

§ 132. In an action for breach of a covenant to convey fee-simple title, attorney's fees and necessary reasonable expenses and proper court costs *held* allowable.—Pineland Mfg. Co. v. Guardian Trust Co. (Mo. App.) 1133.

§ 135. In an action for breach of covenant of title, instructions *held* to properly present issues to the jury.—Reis v. Epperson (Mo. App.) 353.

COVERTURE.

See Husband and Wife.

Affecting running of limitations, see Limitation of Actions, § 73.

CREDIBILITY.

Of witness, see Witnesses, §§ 318-410.

CREDIT.

Authority of agent to sell property of principal on credit, see Principal and Agent, § 103.

Effect of unauthorized sale by agent on credit, see Principal and Agent, § 155.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances. Of devisees or legatees, see Wills, § 872. Remedies against surety, see Principal and Surety, § 142. Rights and remedies of surety, see Principal and Surety, § 194. Subrogation to rights of creditor, see Subrogation.

CRIMINAL LAW.

Authority of law officers to take and use photographs of persons confined in jail on criminal charge, see Torts, § 8. Bail, see Bail, §§ 44-93. Indictment, information, or complaint, see Indictment and Information. Pardon, see Pardon. Restraining criminal acts by injunction, see Injunction, § 103. Restraining taking or use of photographs of persons arrested, see Injunction, § 96. Searches and seizures, see Searches and Seizures.

Offenses by particular classes of persons.
See Infants, § 69.

Particular offenses.

See Abduction; Assault and Battery, §§ 67, 97; Breach of the Peace; Burglary; Embezzlement; False Pretenses; Forgery; Gaming, § 98; Homicide; Larceny; Libel and Slander, § 148; Malicious Mischief; Perjury; Rape; Robbery; Seduction, §§ 45, 46; Trespass, §§ 78, 84.

Against liquor laws, see Intoxicating Liquors, §§ 134, 163, 205-239.

Bastardy, see Bastards, §§ 19-70.

Carrying weapons, see Weapons.

Offenses against election laws, see Elections, §§ 311-329.

Violation of stock law, see Animals, § 57.

I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 15. Rev. St. 1899, § 3047 (Ann. St. 1906, p. 1746), relating to the sale of liquors by druggists, *held* repealed, not merely suspended, by the adoption of prohibition under the local option law, so that one violating its provisions prior to such adoption was subject to conviction thereafter under section 2392 (page 1466).—State v. Tuller (Mo. App.) 313.

V. VENUE.

(A) Place of Bringing Prosecution.

Amendment of statute relating to, see Statutes, § 138.

Subject and title of statute relating to, see Statutes, § 118.

VI. LIMITATION OF PROSECUTIONS.

§ 157. One charged with a misdemeanor may, as a general rule, be convicted for any violation occurring within two years prior to the return of the indictment.—Matthews v. State (Tex. Cr. App.) 544.

VII. FORMER JEOPARDY.

§ 165. "What constitutes legal jeopardy" defined.—State v. Keating (Mo.) 699.

§ 206. Since the act securing the right to a preliminary examination did not become effective until July 14, 1907, accused was not entitled to a preliminary examination in a prosecution for larceny under an information filed April 1, 1907.—State v. Payne (Mo.) 1062.

IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 278. Pleas in abatement are founded on some defect apparent on the face of the indictment, or on some matter outside the record going to the insufficiency of the indictment.—State v. Firey (Mo.) 1007; Same v. Chambers (Mo.) 1008; Same v. Miller, *Id.*

§ 278. Certain matter *held* properly pleaded in abatement of an indictment.—State v. Firey (Mo.) 1007; Same v. Chambers (Mo.) 1008; Same v. Miller, *Id.*

X. EVIDENCE.

In particular criminal prosecutions.

See Abduction, § 12; Burglary, § 37; False Pretenses, §§ 41, 49; Forgery, § 44; Gaming, § 98; Homicide, §§ 147-254; Larceny, §§ 44-59; Rape, §§ 40-51; Robbery, § 24; Seduction, § 45.

For carrying weapons, see Weapons, § 17.

For offenses against liquor laws, see Intoxicating Liquors, §§ 226-236.

For violation of election laws, see Elections, § 329.

(A) Judicial Notice, Presumptions, and Burden of Proof.

§ 304. The court knows judicially that a girl just over 12 years of age could not marry in Texas; 14 years being the youngest age at which a marriage could occur.—Munger v. State (Tex. Cr. App.) 874.

§ 304. The court knows judicially that in Texas a marriage between a white man and negro woman could not be had.—Munger v. State (Tex. Cr. App.) 874.

§ 311. Declarations made by a patient in an insane hospital *held* presumptively incompetent.—State v. Vaughn (Mo.) 677.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 338. In a criminal prosecution, evidence as to why another person was not also indicted for the offense was irrelevant.—Zachary v. State (Tex. Cr. App.) 263.

§ 364. A statement by accused, just prior to his disturbance of a religious assembly, *held* admissible as res gestæ.—Boyd v. State (Tex. Cr. App.) 393.

§ 364. Evidence in a prosecution for violating the local option law *held* not admissible as part of the res gestæ.—Haney v. State (Tex. Cr. App.) 34.

§ 366. Declarations made by a patient in an insane hospital *held* presumptively incompetent.—State v. Vaughn (Mo.) 677.

(C) Other Offenses, and Character of Accused.

§ 369. In a prosecution for violating the local option law, requiring defendant to testify to former convictions *held* error.—Haney v. State (Tex. Cr. App.) 34.

§ 369. In a burglary case, evidence of the identification of goods in accused's possession by third persons as belonging to them *held* inadmissible.—*Elkins v. State* (Tex. Cr. App.) 393.

§ 371. In a prosecution under Rev. St. 1899, § 2213 (Ann. St. 1906, p. 1410), for fraudulently obtaining money by means of a worthless check, *held* that evidence of defendant's perpetrating, or undertaking to perpetrate, similar frauds on others was competent.—*State v. Wilson* (Mo.) 701.

(D) Materiality and Competency in General.

§ 382. The complaint and affidavit, made by the prosecuting witness before a justice of the peace, *held* properly excluded, in absence of any tendency to prove or disprove any of the issues involved, or to contradict or impeach any witness.—*State v. Wilson* (Mo.) 701.

§ 390. Prosecuting witness, in a prosecution for aggravated assault, *held* entitled on direct examination to explain why she had not informed on accused to his wife.—*Ferguson v. State* (Tex. Cr. App.) 551.

§ 392. The county attorney may, to explain why the prosecutor is not called, prove that prosecutor is insane.—*Evans v. State* (Tex. Cr. App.) 392.

(E) Best and Secondary and Demonstrative Evidence.

§ 404. A rope found around the neck of deceased *held* admissible.—*State v. Wilson* (Mo.) 671.

(F) Admissions, Declarations, and Hearsay.

§ 413. In a prosecution for swindling, evidence of a declaration by defendant to his mother, while in jail after his arrest, *held* inadmissible, as self-serving.—*Glover v. State* (Tex. Cr. App.) 396.

§ 418. In a prosecution for swindling, evidence of a statement by defendant's mother to him, after his arrest, *held* inadmissible.—*Glover v. State* (Tex. Cr. App.) 396.

§§ 419, 420. In a rape case, testimony of prosecutrix's mother as to whether, before the alleged intercourse with accused, she did not hear that the school trustees were threatening to expel prosecutrix for immoral conduct, was properly excluded as hearsay.—*Zachary v. State* (Tex. Cr. App.) 263.

(G) Acts and Declarations of Conspirators and Codefendants.

§ 427. Evidence of acts of third persons as to carrying property from the burglarized house and secreting it, not brought home to accused, was inadmissible.—*Elkins v. State* (Tex. Cr. App.) 393.

(I) Opinion Evidence.

§ 478. A witness *held* competent to testify which one of the bullet wounds on the body of decedent was the place of entry.—*Welch v. State* (Tex. Cr. App.) 880.

§ 494. Evidence as to handwriting *held* insufficient to support a conviction of forgery, under Code Cr. Proc. 1895, art. 794.—*Brooks v. State* (Tex. Cr. App.) 386.

(J) Testimony of Accomplices and Codefendants.

§ 508. That an accomplice not jointly prosecuted with the defendant is a competent witness for the state is clearly settled under Rev. St. 1899, § 4680 (Ann. St. 1906, p. 2549).—*State v. Shelton* (Mo.) 732.

§ 508. Any inducements held out to an accomplice and the fact that he admitted that he was an accomplice are questions which affect only his credibility and the weight of his testimony, which are matters for the jury's consideration, and do not affect his competency.—*State v. Shelton* (Mo.) 732.

(K) Confessions.

§ 519. If there is no improper conduct of officers, or any flattery of hope, promise of immunity, or use of threats, to induce confessions, they are voluntary, and are admissible.—*State v. Wilson* (Mo.) 671.

§ 519. In a criminal case, evidence of a conversation between accused and officers who afterward had him arrested *held* admissible, though such officers testified that they would not have permitted accused to leave, had he attempted to do so.—*Martin v. State* (Tex. Cr. App.) 538.

(M) Weight and Sufficiency.

In particular criminal prosecutions.

See Abduction, § 12; False Pretenses, § 49; Forgery, § 44; Gaming, § 98; Homicide, §§ 234-234; Larceny, §§ 55, 59; Rape, § 51; Robbery, § 24; Seduction, § 45.

For offenses against liquor laws, see Intoxicating Liquors, § 236.

For violation of election laws, see Elections, § 329.

§ 561. The guilt of accused must be established by evidence beyond a reasonable doubt.—*Sprouse v. Commonwealth* (Ky.) 134.

§ 564. Evidence *held* to show that accused unlawfully sold liquor in the county in which the indictment was found.—*Matthews v. State* (Tex. Cr. App.) 544.

XI. TIME OF TRIAL AND CONTINUANCE.

§ 575. One convicted at a term of the county court fixed by commissioner's court, as authorized by Const. art. 5, § 29, cannot complain of the failure of the county court to hold a term every month for criminal business, as required by section 17.—*Matthews v. State* (Tex. Cr. App.) 544.

§ 594. The denial of an application for a continuance for absence of a witness *held* erroneous.—*Mason v. State* (Tex. Cr. App.) 871.

§ 595. In a prosecution for assault to murder, *held* error to deny a first application for a continuance to enable accused to procure absent witness.—*Cameron v. State* (Tex. Cr. App.) 870.

§ 596. A continuance for absent testimony is properly refused, where such testimony could only be used to impeach a state's witness.—*Gee v. State* (Tex. Cr. App.) 23.

§ 598. A motion for a continuance *held* insufficient.—*McRae v. State* (Ark.) 479.

§ 598. A sufficient excuse for want of diligence in obtaining testimony, for absence of which continuance is sought, *held* shown.—*Richardson v. State* (Tex. Cr. App.) 560.

§ 599. In a prosecution for violating the local option law, *held* error to deny an application for continuance to enable accused to procure two witnesses who would deny the testimony of the state's witness.—*Rankin v. State* (Tex. Cr. App.) 25.

§ 603. An application for a continuance for the want of certain witnesses, which did not set out what facts it was expected would be testified to by them, was properly refused.—*Zachary v. State* (Tex. Cr. App.) 263.

§ 614. A continuance *held* erroneously refused.—Elkins v. State (Tex. Cr. App.) 393.

XII. TRIAL.

In particular criminal prosecutions.

See Breach of the Peace, § 10; Burglary, § 46; False Pretenses, § 52; Homicide, §§ 295-310; Larceny, §§ 68-77; Perjury, § 37; Rape, § 59.

For offenses against liquor laws, see Intoxicating Liquors, § 239.

(A) Preliminary Proceedings.

§ 628. Accused *held* to be in no position to complain of indorsement of names of witnesses on the information after the case had been called for trial, where there was no suggestion of surprise or application for a continuance.—State v. Wilson (Mo.) 671.

(C) Reception of Evidence.

§ 666. The county attorney may put any witness on the stand he sees fit, and he need not call the prosecutor as a witness.—Evans v. State (Tex. Cr. App.) 392.

§ 670. Where the court was not informed as to what a witness would testify to in response to a question objected to, there was no error in sustaining the objection.—Welch v. State (Tex. Cr. App.) 880.

§ 673. In a prosecution for unlawfully carrying a weapon, a requested charge *held* erroneously refused.—Benjamin v. State (Tex. Cr. App.) 542.

§ 678. In a prosecution for rape, the state may be required to elect on which of several instances of intercourse it will rely for a conviction.—Bader v. State (Tex. Cr. App.) 555.

§ 681. The state *held* authorized to prove by a witness the position of the body of decedent, without first showing that it had not been disturbed.—Welch v. State (Tex. Cr. App.) 880.

(D) Objections to Evidence, Motions to Strike Out, and Exceptions.

§ 696. A motion to exclude all of the testimony of a witness is properly overruled if a part of it is competent.—Nichols v. State (Ark.) 1003.

(E) Arguments and Conduct of Counsel.

§ 715. On a trial for assault with intent to kill, accused *held* not prejudiced by certain argument of the state's attorney.—Derrick v. State (Ark.) 506.

§ 721. Questions asked accused on cross-examination *held* not open to the objection that they alluded to the failure of accused to testify or make any statement at the examining trial.—Welch v. State (Tex. Cr. App.) 880.

§ 729. The conduct of the state's attorney in the examination of a witness *held* not ground for reversal, in view of the instructions of the court.—Welch v. State (Tex. Cr. App.) 880.

§ 730. Argument of the state's attorney concerning certain contradictory statements of witnesses *held* not error.—Ferguson v. State (Ark.) 236.

§ 730. The error of the prosecuting attorney in his argument to the jury *held* obviated by the charge of the court.—Craft v. State (Tex. Cr. App.) 547.

§ 730. Under Code Cr. Proc. 1895, art. 770, *held*, that it was reversible error to ask defendant whether he testified on a former trial.—Brown v. State (Tex. Cr. App.) 565.

(F) Province of Court and Jury in General.

In particular criminal prosecutions.

See Breach of the Peace, § 10; Larceny, § 68.

§ 737. The jury are the exclusive judges of the facts proved.—Roberts v. State (Tex. Cr. App.) 388.

§ 739. Where there was no evidence that the conviction pleaded in bar was final, or whether an appeal had been taken therein, or a motion for new trial therein granted, the court properly refused to submit the issue, notwithstanding Code Cr. Proc. 1895, art. 750.—Lindley v. State (Tex. Cr. App.) 873.

§ 739. Where the conviction relied on in bar is no defense, the evidence and plea of former conviction may be disregarded; but, where there is any view of the evidence under which the plea amounts to a bar, the issue must be submitted.—Lindley v. State (Tex. Cr. App.) 873.

§ 741. In a prosecution for seduction, the jury *held* to be judges of the weight of the corroborating evidence.—Nichols v. State (Ark.) 1003.

§ 741. It is only where there is no evidence tending to connect accused with the commission of the crime that the court is warranted in taking the case from the jury.—Spencer v. Commonwealth (Ky.) 800.

§ 741. It is the exclusive province of the jury to determine the weight of testimony introduced both by the state and defendant.—State v. Shelton (Mo.) 732.

§ 741. Where the evidence tended to prove every material fact necessary to conviction, requested instructions in the nature of demurrers to the evidence were properly refused.—State v. Payne (Mo.) 1062.

§ 741. It is the province of the court to pass on the question whether the state's evidence has enough probative force to raise an issue of fact.—State v. Claybaugh (Mo. App.) 319.

§ 742. In a prosecution for robbery, the jury *held* to have the right to accept the identification of defendant by the prosecuting witnesses as against that of accused and his witnesses.—Wynn v. Commonwealth (Ky.) 516.

§ 742. The jury are the exclusive judges of the credibility of witnesses.—Roberts v. State (Tex. Cr. App.) 388.

§ 753½. In declaring the law on any subject, the court should not comment on the facts.—State v. Shelton (Mo.) 732.

§ 761. In the absence of evidence as to possession of recently stolen property, a charge thereon is erroneous as assuming a fact.—Leonard v. State (Tex. Cr. App.) 549.

§§ 763, 764. Instruction that there was evidence "tending" to impeach witnesses *held* on the weight of evidence.—McCleary v. State (Tex. Cr. App.) 26.

§§ 763, 764. An instruction on a trial for theft *held* erroneous, as on the weight of the evidence.—Lee v. State (Tex. Cr. App.) 399.

§§ 763, 764. In a prosecution for theft of cotton in the open boll by a lessee from his lessor, an instruction which was on the weight of the evidence *held* erroneous.—Gipson v. State (Tex. Cr. App.) 557.

(G) Necessity, Requisites, and Sufficiency of Instructions.

In particular criminal prosecutions.

See Burglary, § 46; False Pretenses, § 52; Homicide, §§ 295-310; Larceny, §§ 70-77; Perjury, § 37; Rape, § 59.

For offenses against liquor laws, see Intoxicating Liquors, § 239.

§ 770. There was no error in an instruction which fully covered the charge in the information, and required the jury to find every essential fact necessary to constitute the offense.—State v. Wilson (Mo.) 701.

§ 770. In a prosecution for assault to murder a child, *held* error to refuse to charge on a certain theory.—*Martin v. State* (Tex. Cr. App.) 558.

§ 770. In support of the presumption of innocence, every theory of the crime which the evidence suggests should be charged, upon accused's request.—*Martin v. State* (Tex. Cr. App.) 558.

§ 772. On a trial for violating the local option law, an instruction *held* not subject to the criticism that it did not correctly state the law as to the time within which accused might or might not be convicted.—*Matthews v. State* (Tex. Cr. App.) 544.

§ 775. An instruction as to an alibi *held* to sufficiently cover the defense.—*State v. Shelton* (Mo.) 732.

§ 775. In a prosecution for carrying a pistol, refusal of accused's request on alibi *held* error.—*Schaper v. State* (Tex. Cr. App.) 257.

§ 778. An instruction, fully covering the presumption of innocence, and informing the jury that the burden of proof rests on the state, is proper.—*State v. Wilson* (Mo.) 701.

§ 778. A charge *held* to correctly instruct as to the presumption of innocence.—*Flournoy v. State* (Tex. Cr. App.) 26.

§ 780. An instruction as to the testimony of an accomplice *held* to substantially accord with the uniform rulings of the Supreme Court.—*State v. Shelton* (Mo.) 732.

§ 784. It is only when a conviction is sought on circumstantial evidence alone that it is necessary to charge on the weight of such evidence.—*State v. Hubbard* (Mo.) 694.

§ 784. An instruction as to circumstantial evidence *held* to have declared the law substantially in harmony with holdings of the Supreme Court.—*State v. Shelton* (Mo.) 732.

§ 785. An instruction as to the credibility of witnesses and the weight of testimony *held* sufficient.—*State v. Shelton* (Mo.) 732.

§ 786. In a murder case, *held* that the jury were properly instructed as to statements by defendant.—*State v. Wilson* (Mo.) 701.

§ 787. An instruction in a misdemeanor case, that the jury could not use as a fact against accused that he failed to testify in his own behalf, was proper.—*Matthews v. State* (Tex. Cr. App.) 544.

§ 789. An instruction, requiring the jury to find defendant's guilt beyond a reasonable doubt, and directing them in the usual manner that, if they entertain such a doubt, they should give him the benefit of it, is proper.—*State v. Wilson* (Mo.) 701.

§ 789. A charge *held* to correctly instruct as to reasonable doubt.—*Flournoy v. State* (Tex. Cr. App.) 26.

§ 811. In declaring the law on any subject, the court should not call the jury's attention especially to particular facts developed in the testimony.—*State v. Shelton* (Mo.) 732.

§ 811. The manner and means of inducing an accomplice to testify with a view to a lighter punishment are matters for argument to the jury, but it would be error to point out those facts, and tell the jury to specially consider them in weighing his testimony.—*State v. Shelton* (Mo.) 732.

§ 814. In a prosecution for swindling, a requested instruction that the state was bound to prove certain facts, which were undisputed, beyond a reasonable doubt, *held* properly refused.—*Glover v. State* (Tex. Cr. App.) 396.

§ 823. On a trial for assault with intent to kill, an instruction *held* not misleading in view

of other instructions.—*Derrick v. State* (Ark.) 506.

(H) Requests for Instructions.

§ 823. Where accused requested a charge on manslaughter, which was given as asked, and requested no other on that subject, and saved no exceptions to the failure of the court to instruct more fully on that degree of defense, he could not complain.—*State v. Linn* (Mo.) 679.

§ 829. Where the charge given covers the rights of accused, and states the law as fully and favorably to him as he could ask, it is not error to refuse other charges, though correct in law.—*State v. Linn* (Mo.) 679.

§ 829. A requested instruction covered by those given *held* properly refused.—*State v. Fleetwood* (Mo.) 696; *Same v. Payne* (Mo.) 1062.

§ 829. An instruction as to the testimony of an accomplice *held* sufficient to cover a requested instruction.—*State v. Shelton* (Mo.) 732.

§ 830. Accused requesting an instruction submitting an issue must request a correct instruction.—*Jackson v. State* (Ark.) 101.

§ 830. In a prosecution under an indictment for theft and for fraudulently receiving stolen property, *held*, that a special instruction requested by defendant should, at least in substance, have been given.—*Eubanks v. State* (Tex. Cr. App.) 35.

§ 830. In a prosecution for theft, under Pen. Code 1895, art. 869, a request to charge, though erroneous, *held* sufficient to call the court's attention to its omission to require the jury to find the value of the property taken, etc.—*Johnson v. State* (Tex. Cr. App.) 877.

(K) Verdict.

In prosecution for assault and battery, see Assault and Battery, § 97.

XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

§ 921. Where there was no exception to the admission of evidence, the question cannot be raised on motion for a new trial.—*Batte v. State* (Tex. Cr. App.) 561.

§ 925. A certain showing *held* not ground for setting aside the verdict in a criminal case.—*State v. Linn* (Mo.) 679.

§ 941. Certain newly discovered evidence *held* merely cumulative, and not ground for a new trial.—*Roberts v. State* (Tex. Cr. App.) 388.

§ 957. Jurors speak through their verdict, and cannot violate secrets of the jury room and tell of partiality or misconduct that transpired there, nor speak of methods which induced to produce the verdict.—*State v. Linn* (Mo.) 679.

§ 958. An affidavit on the subject of newly discovered evidence must be supported by oath of the accused and affidavits of the proposed witnesses, and an affidavit by counsel is insufficient.—*State v. Wilson* (Mo.) 671.

XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

Right to correct sentence on habeas corpus proceedings to obtain discharge, see Habeas Corpus, § 100.

Suspension of sentence as constituting a parole, see Pardon, § 7.

§ 993. A court *held* to have no power, where its judgment of conviction has partly been complied with, to revise it, and substitute therefor an entirely new judgment, at least at a subsequent term.—*Ex parte Cornwall* (Mo.) 666.

XV. APPEAL AND ERROR, AND CERTIORARI.

(A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1024. The state cannot appeal from a judgment for accused, unless a right of appeal is given by statute.—*State v. Craig* (Mo.) 1006; *Same v. Smith* (Mo.) 1007; *Same v. Ballard, Id.*; *Same v. Geier, Id.*; *Same v. Chambers* (Mo.) 1008; *Same v. Miller, Id.*

§ 1024. Under Rev. St. 1899, §§ 2708, 2709 (Ann. St. 1906, pp. 1592, 1593), the state cannot appeal from a judgment overruling a demurrer to a plea in abatement of the indictment, based upon matters dehors the face of the indictment.—*State v. Craig* (Mo.) 1006; *Same v. Smith* (Mo.) 1007; *Same v. Ballard, Id.*; *Same v. Geier, Id.*; *Same v. Chambers* (Mo.) 1008; *Same v. Miller, Id.*

(B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1033. To take advantage, on appeal, of insufficient proof of venue, there must have been a contest over it in the trial court, except where the issue is fought out on the trial as to whether the offense was in the county where the venue was laid.—*Munger v. State* (Tex. Cr. App.) 874.

§ 1037. An assignment of error as to improper argument is not before the court for review, in absence of the proper preservation of objections and exceptions to the court's action on objections during the argument.—*State v. Wilson* (Mo.) 671.

§ 1038. Statement of what must be done in the trial court, that a charge in a misdemeanor case may be reviewed for omissions therein.—*Durham v. State* (Tex. Cr. App.) 553.

§ 1043. An objection to evidence to be considered on appeal should at least briefly indicate some reason therefor.—*State v. Wilson* (Mo.) 701.

§ 1044. Objections that the indictment was found without evidence, and that the names of registration officers were not indorsed thereon, could not be raised for the first time on appeal.—*State v. Tiernan* (Mo.) 728.

§ 1051. To take advantage, on appeal, of insufficient proof of venue, the matter must be preserved by bill of exceptions, except where the issue is fought out on the trial as to whether the offense was in the county where the venue was laid, when it will be noticed without bill of exceptions.—*Munger v. State* (Tex. Cr. App.) 874.

§ 1056. Criticism of a charge made in the brief on appeal cannot be considered, when not mentioned on the motion for new trial, nor presented by exceptions on the trial.—*Flournoy v. State* (Tex. Cr. App.) 26.

§ 1064. The action of the trial court in including evidence not being preserved by the motion for new trial, *held*, it cannot be considered on appeal.—*State v. Fleetwood* (Mo.) 696.

§ 1064. Objections that the indictment was found without evidence, and that the names of registration officers were not indorsed thereon, could not be raised on appeal, where no motion to quash, or for a new trial or in arrest had been made.—*State v. Tiernan* (Mo.) 728.

§ 1064. An objection that accused, after being arrested, was taken before the circuit attorney for a statement, and the latter's statement with reference thereto, not having been raised by motion for a new trial, could not be considered on appeal.—*State v. Tiernan* (Mo.) 728.

§ 1064. Whatever occurs during the examination and qualification of a panel of jurors from which the trial panel is to be selected must be

preserved, not only in the bill of exceptions, but attention must be directed to a complaint concerning the same in the motion for a new trial.—*State v. Shelton* (Mo.) 732.

§ 1064. Criticism of a charge made in the brief on appeal cannot be considered, when not mentioned on the motion for new trial, nor presented by exceptions on the trial.—*Flournoy v. State* (Tex. Cr. App.) 26.

§ 1064. Accused's motion for a new trial, which merely quoted several paragraphs of the charge and complained of harmful error in giving them, without pointing out the defect, was too general to warrant consideration of the assignment on appeal.—*Yell v. State* (Tex. Cr. App.) 871.

(C) Proceedings for Transfer of Cause, and Effect Thereof.

§ 1074. Under Const. art. 7, § 42, the filing of an affidavit *held* not a prerequisite to an appeal from a conviction of a criminal case in justice's court.—*Potts v. State* (Ark.) 481.

§ 1074. Kirby's Dig. § 4666, taken from Acts 1873, p. 430, *held* to apply only to civil actions in justice's courts.—*Potts v. State* (Ark.) 481.

§ 1074. Under Acts 1905, p. 375, and Cole Cr. Proc. (Kirby's Dig. § 2576-2582), a circuit court *held* not authorized to dismiss an appeal in a criminal case because of the want of an affidavit of appeal.—*Potts v. State* (Ark.) 481.

(D) Record and Proceedings Not in Record.

§ 1086. The arraignment of accused and the entry of a plea must be shown by the record proper, or the conviction must be reversed.—*State v. Vaughn* (Mo.) 677.

§ 1086. The record on appeal from the county court *held* required to show the indictment was presented in the district court and transferred to the county court.—*Richardson v. State* (Tex. Cr. App.) 560.

§ 1087. An extreme doubt as to whether the disclosure of the record on appeal as to the entry of a nunc pro tunc order, extending the time for filing a bill of exceptions, authorized the filing of the bill, will be resolved in favor of defendant, though the action after lapse of two terms, without notice to the prosecuting officer and without any showing as to any memorandum, either on the court's docket or record, that error was committed in preserving the record, is by no means approved.—*State v. Shelton* (Mo.) 732.

§ 1090. On appeal, certain matters as to which no bill of exception was reserved *held* not reviewable.—*Franks v. State* (Tex. Cr. App.) 21.

§ 1090. That a jury received evidence and wrong information as to the evidence in the case from one of their members cannot be reviewed, in the absence of bill of exceptions.—*Brandt v. State* (Tex. Cr. App.) 23.

§ 1090. Where the indictment is valid, and there is neither bill of exceptions, statement of facts, nor motion for new trial, the judgment will be affirmed.—*Walters v. State* (Tex. Cr. App.) 26.

§ 1091. Where there is an issue between the explanation of a bill of exceptions by the court and the matters recited and proved up by bystanders, which is in doubt, the recitals in the statement of facts may be looked to.—*Zachary v. State* (Tex. Cr. App.) 263.

§ 1091. A statement of the judge to a bill of exceptions in part refused *held* to be accepted, where the bill as proved by bystanders did not in terms deny it.—*Zachary v. State* (Tex. Cr. App.) 263.

§ 1091. Bills of exception setting out objections to testimony of accused's wife on cross-examination as not limited to a cross-examination of her direct testimony, but stating nothing to show that it was not so limited, cannot be considered.—*Ferguson v. State* (Tex. Cr. App.) 551.

§ 1091. A bill of exceptions, grouping all the matters complained of on the trial, will not be reviewed.—*Cabral v. State* (Tex. Cr. App.) 872.

§ 1092. A bill of exceptions not filed within the time fixed cannot be considered.—*State v. Elschinger* (Mo.) 691.

§ 1092. An order extending the time for filing the bill of exceptions, made in vacation after the expiration of the time fixed by a prior order, is void.—*State v. Elschinger* (Mo.) 691.

§ 1092. That bills of exceptions and the statement of facts filed after adjournment may be considered, *held*, the record must show an order authorizing such filing.—*Durham v. State* (Tex. Cr. App.) 533.

§ 1093. A bill of exceptions *held* not to be aided by statement of facts or other parts of the record.—*Munger v. State* (Tex. Cr. App.) 874.

§ 1094. Where, on appeal, the record contains neither bill of exceptions nor statement of facts, the judgment will be affirmed.—*English v. State* (Tex. Cr. App.) 389.

§ 1097. In absence of a statement of facts proved at trial, the Court of Criminal Appeals *held* unable to review the denial of a motion for new trial in a criminal case on the ground of newly discovered evidence showing insanity.—*Groves v. State* (Tex. Cr. App.) 258.

§ 1097. The prosecuting attorney's reference, in violation of Code Cr. Proc. 1895, art. 770, to defendant's failure to testify, *held* available on review, even in the absence of a statement of facts.—*Brown v. State* (Tex. Cr. App.) 565.

§ 1098. A literal transcript of the stenographer's notes will not be considered on review as a statement of facts.—*Brown v. State* (Tex. Cr. App.) 565.

§ 1104. In transcript on appeal the matters of the record proper should be distinct from the bill of exceptions.—*State v. Vaughn* (Mo.) 677.

§ 1109. Under Rev. St. 1899, § 2716 (Ann. St. 1906, p. 1595), an appeal case will not be dismissed for failure of defendant to file an abstract of the case, where he presents a complete record of the case.—*State v. Tuller* (Mo. App.) 313.

§ 1109. Conviction affirmed on defective record.—*English v. State* (Tex. Cr. App.) 389.

§ 1114. Where the record did not contain the testimony or any bills of exception, *held*, that only the record proper can be reviewed.—*State v. Linn* (Mo.) 740.

§ 1114. In the absence of a statement of facts, the bill of exceptions must show that it contains all the evidence as to the matter complained of.—*Brown v. State* (Tex. Cr. App.) 565.

§ 1118. That refusal of continuance may be reviewed, *held* the application therefor must be preserved in the bill of exceptions.—*State v. Fleetwood* (Mo.) 696.

§ 1119. There is no merit in a complaint that an attorney for defendant in his preliminary hearing took a seat at the counsel table for the state and began assisting the prosecuting attorney, where no more appears than the fact that defendant interposed an objection to his sitting as counsel for the state, and the court sustained it.—*State v. Wilson* (Mo.) 671.

§ 1120. A bill of exceptions complaining of the exclusion of evidence *held* defective for fail-

ing to show what the answer of a witness would have been.—*Wesley v. State* (Tex. Cr. App.) 550.

(E) Assignment of Errors and Briefs.

§ 1130. Where accused files no brief, and is not represented on appeal, the Supreme Court can only look to the errors designated in the motion for a new trial.—*State v. Wilson* (Mo.) 671.

§ 1130. Under Rev. St. 1899, § 2716 (Ann. St. 1906, p. 1595), an appeal case will not be dismissed for failure of defendant to file a brief and argument, where he presents a complete record of the case.—*State v. Tuller* (Mo. App.) 313.

(G) Review.

§ 1137. Under Rev. St. 1899, § 2535 (Ann. St. 1906, p. 1509), accused cannot complain on appeal of a charge given for her.—*State v. Payne* (Mo.) 1062.

§ 1144. In the absence of bill of exceptions and of any error in the record proper, it will be presumed that the accused had a fair trial, and the judgment must be affirmed.—*State v. Elschinger* (Mo.) 691.

§ 1144. In absence of a statement of facts to enable the appellate court to consider the ground urged in the motion for new trial, which was made on the ground of newly discovered evidence, all presumptions will be indulged in favor of the judgment of conviction.—*Groves v. State* (Tex. Cr. App.) 258.

§ 1144. Where there is no special plea in the record, the court cannot assume that a plea of former conviction was interposed, requiring a submission of the issue to the jury.—*Lindley v. State* (Tex. Cr. App.) 873.

§ 1144. Where the court excluded a conversation introductory to impeaching matter testified to, and the record did not contain a statement of the purport of the introductory conversation, the ruling should not be disturbed.—*Welch v. State* (Tex. Cr. App.) 880.

§ 1151. In the absence of a showing of abuse of discretion, *held*, refusal of continuance cannot be reviewed.—*State v. Fleetwood* (Mo.) 696.

§ 1153. The allowing of leading questions by the state's attorney in examining a witness is not reversible error unless the trial judge abused his discretion.—*Derrick v. State* (Ark.) 506.

§ 1158. The conclusion of the trial court, after hearing evidence, that defendant had waived a preliminary examination before a justice of the peace, as recited in his transcript, *held* not to be disturbed on appeal.—*State v. Shelton* (Mo.) 732.

§ 1159. A verdict of the jury as to questions of fact will not be disturbed on appeal if there is substantial evidence to support it.—*Ferguson v. State* (Ark.) 236.

§ 1159. Where there is evidence sufficient to take the case to the jury, the verdict will not be disturbed, in the absence of other errors, though the evidence is slight.—*Spencer v. Commonwealth* (Ky.) 800.

§ 1159. There being substantial evidence to support a verdict of guilty, *held*, it cannot be reviewed.—*State v. Fleetwood* (Mo.) 696.

§ 1159. Where a verdict has been approved by the trial court, and the evidence, if believed, is sufficient, the conviction will not be disturbed.—*Brandt v. State* (Tex. Cr. App.) 23.

§ 1159. Where, in a prosecution for disturbing religious worship, there was some evidence justifying a finding of guilty, the judgment of conviction will be affirmed.—*Buckley v. State* (Tex. Cr. App.) 546.

§ 1167. Where the court withdrew from the jury the first count of the information, and submitted the case on the second count only, a misjoinder of the counts was not prejudicial to accused.—*State v. Keating* (Mo.) 699.

§ 1167. Under Rev. St. 1899, § 2522 (Ann. St. 1906, p. 1503), that the first information was not formally quashed on the record when the amended information was filed is not available as a ground for reversal on appeal.—*State v. Payne* (Mo.) 1062.

§ 1167. One convicted of simple assault cannot complain because the information, attempting to charge an aggravated assault, is defective.—*Jaehnig v. State* (Tex. Cr. App.) 267.

§ 1169. Error in the admission of evidence, in a prosecution for violating the local option law, *held* not cured by an instruction taking the evidence from the jury.—*Haney v. State* (Tex. Cr. App.) 34.

§ 1169. Evidence in a prosecution for violating the local option law, *held* inadmissible, as tending to bring about a higher punishment than the minimum.—*Haney v. State* (Tex. Cr. App.) 24.

§ 1169. Accused *held* not prejudiced by the erroneous admission of evidence that witness, after warning accused, left a religious meeting because he believed there was going to be a disturbance.—*Boyd v. State* (Tex. Cr. App.) 393.

§ 1169. The error, if any, in allowing evidence of a fact established by evidence received without objection, and not contradicted, is not ground for reversal.—*Welch v. State* (Tex. Cr. App.) 880.

§ 1170. A ruling excluding testimony *held* not prejudicial error, where there was an opportunity afterwards to introduce the same evidence.—*Zachary v. State* (Tex. Cr. App.) 263.

§ 1171. On trial for assault with intent to kill, an inaccuracy in the argument of the state's attorney *held* not ground for reversal.—*Derrick v. State* (Ark.) 506.

§ 1172. In a larceny prosecution, under an information containing a count under the habitual criminal statute (Rev. St. 1899, § 2379 [Ann. St. 1906, p. 1461]), error in an instruction submitting the case on that count for not requiring a finding that the larceny was committed in the county of the venue did not prejudice accused, where she was not convicted under the statute.—*State v. Payne* (Mo.) 1062.

§ 1172. One convicted of simple assault cannot complain because the court misdirected the jury as to the law on aggravated assault.—*Jaehnig v. State* (Tex. Cr. App.) 267.

§ 1172. An instruction in a rape case *held* not reversible error.—*Munger v. State* (Tex. Cr. App.) 874.

§ 1180. A decision on appeal that the evidence is sufficient to take the case to the jury is the law of the case, and is conclusive on a subsequent appeal, where the evidence is substantially the same.—*Spencer v. Commonwealth* (Ky.) 800.

(H) Determination and Disposition of Cause.

§ 1182. Where no error appears in a record containing no statement of facts or bill of exceptions, the judgment will be affirmed.—*Meyer v. State* (Tex. Cr. App.) 22; *Davis v. Same*, *Id.*

St. 1906, p. 1461), in a prosecution for larceny, the state could plead accused's former conviction for grand larceny and imprisonment in, and discharge from, the state penitentiary, and could show such fact by the record in the former prosecution and the penitentiary records showing service of the sentence imposed therein.—*State v. Payne* (Mo.) 1062.

§ 1204. In a larceny prosecution, in which information charged an aggravated offense under the habitual criminal statute (Rev. St. 1899, § 2379 [Ann. St. 1906, p. 1461]), the state penitentiary records were admissible to identify accused as the person who had served a sentence in the penitentiary under the former conviction.—*State v. Payne* (Mo.) 1062.

XVII PUNISHMENT AND PREVENTION OF CRIME.

For offenses by infants, see *Infants*, § 69.

§ 1208. The penalty prescribed by a statute creating a new offense is exclusive.—*Rowe v. State* (Ark.) 626.

CROPS.

Evidence of damage to, see *Damages*, §§ 163, 183.

Instructions as to damage to, see *Damages*, § 217.

Measure of damages for injuries to, see *Damages*, § 112.

CROSS-EXAMINATION.

See *Witnesses*, § 277.

CROSSINGS.

Street railroad crossing steam road, see *Street Railroads*, § 41.

CROSS-PLEA.

Necessity of process, see *Process*, § 4.

CUMULATIVE EVIDENCE.

Newly discovered cumulative evidence ground for new trial, see *Criminal Law*, § 941.

CURE.

Of instructions, see *Criminal Law*, § 823.

CURTESY.

See *Dower*.

CUSTODY.

Of child, see *Divorce*, §§ 298-312; *Guardian and Ward*, § 34.

CUSTOMS AND USAGES.

§ 16. A well-established custom of the trade to which a contract relates enters into and becomes a part of it when the custom is known and understood by the parties and the contract is made with reference to it.—*Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co.* (Ky.) 852.

DAMAGES.

Compensation for property taken for public use, see *Eminent Domain*, §§ 93-136.

Damages for particular injuries.

See Death, § 78; Fraud, §§ 59, 60; Libel and Slander, §§ 114, 118; Nuisance, §§ 50, 72.
 Breach by buyer of contract for sale of goods, see Sales, §§ 370-384.
 Breach by seller of contract for sale of goods, see Sales, §§ 400-420.
 Breach of contract, see Sales, § 384.
 Breach of covenant, see Covenants, § 132.
 Breach of warranty, see Sales, § 442.
 Delay in transportation by carrier, see Carriers, § 105.
 Delay in transportation of live stock, see Carriers, § 229.
 Ejection of passenger, see Carriers, § 382.
 Flowage, see Waters and Water Courses, §§ 178, 179.
 Injuries to passenger, see Carriers, § 319.
 Loss of or injuries to shipment, see Carriers, § 135.
 Negligent transmission of telegram, see Telegraphs and Telephones, §§ 67-71.
 Wrongful eviction of tenant, see Landlord and Tenant, § 180.
Recovery in particular actions or proceedings.
 See Trover and Conversion, §§ 44, 54.

I. NATURE AND GROUNDS IN GENERAL.

§ 2. The laws of the state wherein a personal injury occurred govern the question of whether punitive damages should be awarded.—Louisville & N. R. Co. v. Smith (Ky.) 806.

II. NOMINAL DAMAGES.

§ 9. A contractor, sued for failing to complete a building within the agreed time, is liable for nominal damages and costs, though he shows that during the inexcusable delay the building would not have had a use or rental value to the owner.—Smith v. Gunn (Tex. Civ. App.) 919.

III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

(A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

Element of damages for negligent transmission of telegram, see Telegraphs and Telephones, § 68.

§ 23. A party breaching a contract held not liable for special damages unless they were within the contemplation of the parties when the contract was made, or unless the defaulting party had notice that such damages would result from its breach.—Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co. (Ky.) 852.

(B) Aggravation, Mitigation, and Reduction of Loss.

§ 62. It was plaintiff's duty, on losing a prospective tenant for his building for a stated term through defendant's failure to deliver a message, to use reasonable diligence to secure another tenant, and reduce the damages.—Western Union Telegraph Co. v. Williams (Tex. Civ. App.) 280.

(C) Interest, Costs, and Expenses of Litigation.

§ 68. Interest is recoverable in an action for breach of a verbal contract, though not stipulated for in the contract.—Wells v. Hobbs (Tex. Civ. App.) 451.

V. EXEMPLARY DAMAGES.

For ejection of passenger, see Carriers, § 382.
 For injury to passenger, see Carriers, § 319.

§ 87. Exemplary damages cannot be recovered unless the plaintiff sustained actual damages.—Thouron v. Skirvin (Tex. Civ. App.) 55.

§ 91. Where the negligence from which a personal injury results is gross, punitive damages may be awarded.—Louisville & N. R. Co. v. Smith (Ky.) 806.

VI. MEASURE OF DAMAGES.**(B) Injuries to Property.**

For negligent transmission of telegram, see Telegraphs and Telephones, § 70.

§ 109. Rule as to the measure of damages for the temporary injury to land, stated.—Adam v. Chicago, B. & Q. Ry. Co. (Mo. App.) 1136.

§ 110. Rule as to the measure of damages for the permanent injury to land, stated.—Adam v. Chicago, B. & Q. Ry. Co. (Mo. App.) 1136.

§ 112. Where a matured crop is destroyed, the crop is treated as personal property, and the measure of damages is the market value of the crop standing on the ground.—Adam v. Chicago, B. & Q. Ry. Co. (Mo. App.) 1136.

§ 112. Measure of damages laid down for destruction of a crop of alfalfa by water thrown back on the land by an insufficient railroad culvert.—Adam v. Chicago, B. & Q. Ry. Co. (Mo. App.) 1136.

§ 112. Measure of damages for growing grass burned from pasture land, stated.—Missouri, K. & T. Ry. Co. of Texas v. Couch (Tex. Civ. App.) 67.

§ 112. The measure of damages for injury to a crop is the difference between the value of what would have been produced, and what was produced, less the expense of cultivating, harvesting, and marketing.—Texas Co. v. Lacour (Tex. Civ. App.) 424.

(C) Breach of Contract.

§ 122. In an action for the contract price of a building and tanks, the measure of defendants' damages for failure to complete them within the contract time stated.—J. T. Stark Grain Co. v. Harry Bros. Co. (Tex. Civ. App.) 847.

VII. INADEQUATE AND EXCESSIVE DAMAGES.

For injuries to passenger, see Carriers, § 319.
 For negligent transmission of telegram, see Telegraphs and Telephones, § 71.

§ 131. A verdict for personal injuries for \$5,000 held so excessive as to require a new trial.—Louisville Ry. Co. v. Roser (Ky.) 149.

§ 132. In an action for injuries to a servant, a verdict allowing plaintiff \$1,500 held not excessive.—St. Louis, I. M. & S. Ry. Co. v. Reed (Ark.) 645.

§ 132. In an action for injuries to a married woman, a verdict allowing her \$3,000 held not excessive.—City of Louisville v. Tompkins (Ky.) 174.

§ 132. Evidence held to sustain a recovery of \$12,500 for personal injuries.—Louisville & N. R. Co. v. Smith (Ky.) 806.

§ 132. In an action for injuries, a verdict allowing plaintiff \$1,125 was not excessive.—Louisville & N. R. Co. v. Campbell (Ky.) 848.

§ 132. In a personal injury action, a verdict for \$3,000 held not excessive.—Galveston, H. & S. A. Ry. Co. v. Sanchez (Tex. Civ. App.) 44.

§ 133. In an action by a husband for injuries to the wife, the verdict held not excessive.—International & G. N. R. Co. v. Sandlin (Tex. Civ. App.) 60.

§ 134. \$10,000 damages for personal injuries held not excessive.—Missouri, K. & T. Ry. Co. of Texas v. Dunbar (Tex. Civ. App.) 574.

§ 143. In an action for personal injuries, special damages, to be recoverable, must be specifically alleged.—*Lexington Ry. Co. v. Johnson* (Ky.) 830.

§ 153. An allegation of special damages in a blank sum amounts to no allegation and affords no basis for a judgment therefor.—*Lexington Ry. Co. v. Johnson* (Ky.) 830.

(B) Evidence.

§ 163. In an action by the husband for personal injuries to his wife, defendant has the burden of proving that the husband could by proper care and attention avoid the damages sustained by reason of the wife's injury.—*International & G. N. R. Co. v. Sandlin* (Tex. Civ. App.) 60.

§ 163. In an action for injuries to a crop, evidence held not to shift the burden of proof to defendant to show the expense of making and marketing the crop.—*Texas Co. v. Lacour* (Tex. Civ. App.) 424.

§ 167. Where there was evidence of a permanent injury, it was not error to admit life tables to show plaintiff's expectancy.—*Louisville & N. R. Co. v. Campbell* (Ky.) 848.

§ 185. In an action for personal injuries received in a railroad wreck, evidence held to sustain a finding by the jury that plaintiff was rendered impotent.—*Epstein v. Pennsylvania R. Co.* (Mo. App.) 366.

§ 187. Where a married woman is a housekeeper, it is not necessary to prove her earning power to entitle her to recover damages for permanent injuries.—*City of Louisville v. Tompkins* (Ky.) 174.

§ 188. Evidence as to what plaintiff's crop would have afterwards brought in the market held insufficient to show the amount of loss by the injury sued for.—*Texas Co. v. Lacour* (Tex. Civ. App.) 424.

(C) Proceedings for Assessment.

§ 208. The extent of loss of a married woman's earning capacity by alleged permanent injuries is to be determined by the jury in accordance with their common knowledge and experience.—*City of Louisville v. Tompkins* (Ky.) 174.

§ 208. In an action for injury to plaintiff's wife from fright and humiliation, held, that whether the shock and results were proximately caused by defendant's acts, and whether the injury should have been foreseen as a natural and probable consequence of such acts, should have been submitted to the jury.—*Alexander v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 572.

§ 215. Where there is evidence that an injury at a crossing was caused by a reckless disregard of human life, an instruction on the subject of punitive damages is proper.—*Louisville & N. R. Co. v. Smith* (Ky.) 806.

§ 216. An instruction authorizing a recovery for doctors' fees and loss of time in excess of the amount alleged held erroneous.—*Heinz v. United Rys. Co. of St. Louis* (Mo. App.) 346.

§ 217. An instruction, in an action against a railroad company for the destruction of a crop of alfalfa from water being thrown back upon the land because of the insufficiency of a culvert put in by the company over a natural water course, held erroneous.—*Adam v. Chicago, B. & Q. Ry. Co.* (Mo. App.) 1136.

§ 218. In an action for breach of contract, certain charges held properly refused as inap-

not misleading.—*J. T. Stark Grain Co. v. Harry Bros. Co.* (Tex. Civ. App.) 947.

DATE.

Of note, insertion of wrong date as affecting rights of bona fide holder, see *Bills and Notes*, § 368.

Of note, right of holder to fill in blank, see *Bills and Notes*, § 60.

Refreshing memory of witness as to date, see *Witnesses*, § 255.

DEAD BODIES.

Delay in transportation, see *Carriers*, §§ 104, 105.

DEATH.

Of party pending appeal, see *Appeal and Error*, § 334.

Of party to action ground for abatement, see *Abatement and Revival*, §§ 72-75.

II. ACTIONS FOR CAUSING DEATH.

(A) Right of Action and Defenses.

§ 7. Rev. St. Mo. 1899, § 2865 (Ann. St. 1906, p. 1644), giving a right of action for damages for death caused by wrongful act, held not to inflict a penalty, but merely to give compensation.—*St. Louis, I. M. & S. R. Co. v. McNamare* (Ark.) 102.

§ 8. The rights of the parties to an action for wrongful death must be determined in accordance with the law of the state where the injury occurred.—*St. Louis, I. M. & S. Ry. Co. v. Corman* (Ark.) 116.

§ 11. Rev. St. Mo. 1899, § 2865 (Ann. St. 1906, p. 1644), giving a right of action for wrongful death, held not to create a new cause of action, but to simply transmit one theretofore existing and which would otherwise have abated on the death of the injured party.—*St. Louis, I. M. & S. R. Co. v. McNamare* (Ark.) 102.

§ 31. Kirby's Dig. §§ 6289, 6290, relating to wrongful death, held to create a cause of action for the benefit of the widow and next of kin.—*St. Louis, I. M. & S. Ry. Co. v. Corman* (Ark.) 116.

§ 31. The widow of a decedent held one of his heirs at law under Kirby's Dig. §§ 6289, 6290, providing for an action for wrongful death.—*St. Louis, I. M. & S. Ry. Co. v. Corman* (Ark.) 116.

§ 31. Under Rev. St. 1899, § 2864, as amended by Laws 1905, p. 135 (Ann. St. 1906, p. 1637), the administrator held entitled to sue for the negligent death of one of mature age, unmarried, and childless.—*Pratt v. Missouri Pac. Ry. Co.* (Mo. App.) 1125.

§ 32. On the wrongful death of a person, two causes of action arise—one for the benefit of the estate and the other for the next of kin.—*Murphy v. St. Louis, I. M. & S. R. Co.* (Ark.) 636.

(B) Jurisdiction, Venue, and Limitations.

§ 35. An action held maintainable in Arkansas under Rev. St. Mo. 1899, § 2965 (Ann. St. 1906, p. 1644); such statute being substantially similar to the Arkansas statute on the subject.—*St. Louis, I. M. & S. R. Co. v. McNamare* (Ark.) 102.

§ 35. An action for wrongful death is transitory.—*St. Louis, I. M. & S. Ry. Co. v. Corman* (Ark.) 116.

(C) Parties and Process.

§ 41. Decedent's widow and child *held* his only heirs at law within Kirby's Dig. §§ 6289, 6290, and were therefore the only parties plaintiff required in a suit for wrongful death.—St. Louis, I. M. & S. Ry. Co. v. Corman (Ark.) 116.

(D) Pleading and Evidence.

§ 47. The complaint in an action for wrongful death *held* to state a cause of action under Rev. St. Mo. 1899, § 2865 (Ann. St. 1906, p. 1644), and not under section 2864.—St. Louis, I. M. & S. R. Co. v. McNamare (Ark.) 102.

§ 58. In a death action under Ky. St. § 6 (Russell's St. § 11), passed pursuant to Const. § 241, *held*, that plaintiff need not show decedent's exercise of ordinary care, or ignorance of the danger, though contributory negligence is available as a defense.—Warren's Adm'r v. Jeunesse (Ky.) 862.

(E) Damages, Forfeiture, or Fine.

§ 78. Under Rev. St. 1899, § 2864, as amended by Laws 1905, p. 135 (Ann. St. 1906, p. 1637), the jury, in imposing the penalty on a railroad for the negligent death of an employé, *held* authorized to consider the nature of the culpable act and the age and earning capacity of decedent.—Pratt v. Missouri Pac. Ry. Co. (Mo. App.) 1125.

DEBTOR AND CREDITOR.

See Assignments for Benefit of Creditors; Bankruptcy; Fraudulent Conveyances.

DECEDENTS.

Estates, see Descent and Distribution; Executors and Administrators.

Testimony as to transactions with persons since deceased, see Witnesses, §§ 140-183.

DECEIT.

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DECLARATIONS.

As evidence in civil actions, see Evidence, §§ 271, 274.

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Dying declarations, see Homicide, § 214.

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Cancellation, see Cancellation of Instruments. Covenants in deeds, see Covenants.

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Deeds by or to particular classes of persons.

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See Homestead, § 128.

Separate property of married women, see Husband and Wife, § 187.

Particular classes of deeds.

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Tax deeds, see Taxation, §§ 776, 789.

I. REQUISITES AND VALIDITY.**(A) Nature and Essentials of Conveyances in General.**

§ 19. The consideration for a deed for support *held* to have failed, authorizing cancellation.—Maddox v. Maddox (Ky.) 201.

(B) Form and Contents of Instruments.

Application of general statutes of limitation to action to correct mistake, see Limitation of Actions, § 39.

§ 40. The original grant and field notes referred to in a deed *held* to sufficiently describe the land conveyed.—Houston Oil Co. of Texas v. Kimball (Tex.) 533.

§ 40. The description of the land conveyed by a deed which referred to the grant and field notes for a more particular description was sufficient, if the description in the instruments referred to sufficiently described the land.—Houston Oil Co. of Texas v. Kimball (Tex.) 533.

(C) Execution.

§ 53. Evidence *held* not to justify a finding that a deed through which plaintiff claimed title in trespass to try title was a forgery, so that a requested charge submitting the issue of forgery was properly refused.—Houston Oil Co. of Texas v. Kimball (Tex.) 533.

III. CONSTRUCTION AND OPERATION.**(B) Property Conveyed.**

§ 111. The whole description of a deed, artificially drawn, should be read without giving special prominence to any one expression.—Bentley v. Napier (Ky.) 180.

§ 113. The words "more or less" after the description of the quantity of land conveyed *held* to relieve only the necessity for exactness.—Boggs v. Bush (Ky.) 220.

(C) Estates and Interests Created.

§ 124. A deed construed, and *held* to pass the fee to the grantee on the death of the grantor, subject only to the dower right of the grantor's wife.—Rector v. Rector (Ky.) 518.

§ 128. The rule in Shelley's Case *held* not to apply to a deed.—Hopkins v. Hopkins (Tex.) 15.

§ 129. The words "children" and "issue" in a deed are not to be given the meaning of "heirs," when to do so would defeat the lawful intention of the grantor.—Hopkins v. Hopkins (Tex.) 15.

(E) Conditions and Restrictions.

§ 145. If it be doubtful whether a clause in a deed be a condition or a covenant, courts will incline to the latter construction.—Patterson v. Patterson (Ky.) 169.

§ 147. A condition in a deed which is repugnant to the grant is void.—Levy v. McDonnell (Ark.) 1002.

IV. PLEADING AND EVIDENCE.

Opinion evidence as to mental capacity of grantor, see Evidence, § 478.

§ 199. In trespass to try title, in which defendants claimed that the deed to plaintiff's remote grantor was forged, but the evidence did not justify a finding of forgery, evidence that such grantor was reputed to be a forger of land titles was not admissible.—Houston Oil Co. of Texas v. Kimball (Tex.) 533.

§ 207. Forgery of a deed may be proved by circumstantial evidence.—Houston Oil Co. of Texas v. Kimball (Tex.) 533.

DEFICIENCY.

On foreclosure of mortgage, see Mortgages, § 558.

DEGREES.

Of manslaughter, see Homicide, § 309.
Of murder, see Homicide, § 22.

DELAY.

In delivering telegram, see Telegraphs and Telephones, § 38.
In performance of contract, see Contracts, § 300.
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In transportation or delivery of goods by carrier, see Carriers, §§ 98-105.
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DELIVERY.

Of bill of exchange or promissory note, see Bills and Notes, § 63.
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DEMONSTRATIVE EVIDENCE.

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In pleading, see Pleading, §§ 214-228.
To evidence, see Trial, § 156.

DEPOSITIONS.

See Affidavits; Witnesses.

As part of record on appeal, see Appeal and Error, § 523.

§ 2. Rev. St. 1895, art. 2286, *held* not repealed by article 2284, but both sections are in force, and must be complied with in transmitting depositions.—*Wisegarver v. Yinger* (Tex. Civ. App.) 925.

§ 75. A certificate to a deposition *held* not to comply with the statutory requirement that it either alone, or considered with the caption, must show that answers to the interrogatories and cross-interrogatories were signed and sworn to by the witness before the officer taking it.—*Missouri, K. & T. Ry. Co. of Texas v. Graves* (Tex. Civ. App.) 458.

§ 75. The certificate of the officer taking depositions on written interrogatories propounded under the general statute need not show that the witnesses were first cautioned and sworn to testify to the truth, notwithstanding the statute.—*Wisegarver v. Yinger* (Tex. Civ. App.) 925.

§ 77. Under Rev. St. 1895, arts. 2284, 3507, the certificate on the envelope inclosing depositions, must be authenticated by the official seal of the notary.—*Wisegarver v. Yinger* (Tex. Civ. App.) 925.

§ 101. A party may not read a deposition taken by the adverse party to be used as evidence without the consent of the adverse party; the deposition not having been taken under an agreement.—*Maryland Casualty Co. v. Chew* (Ark.) 642.

§ 107. Under the express provisions of Rev. St. 1899, § 2906 (Ann. St. 1906, p. 1671), the admissibility of evidence in a deposition may be objected to upon the trial, though such ob-

DEPOSITS.

In bank, see Banks and Banking, §§ 134-153.

DEPOTS.

Duties of railroads to keep supplied with drinking water, see Railroads, § 255.

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Deputy county surveyor, see Counties, § 85.

DESCENT AND DISTRIBUTION.

See Dower; Executors and Administrators; Homestead, §§ 135-153; Wills.

II. PERSONS ENTITLED AND THEIR RESPECTIVE SHARES.

(A) Heirs and Next of Kin.

§ 47. Under Kirby's Dig. § 8020, a great granddaughter of testator, who was not living when testator's will was made, *held* not entitled to a share of the estate.—*King v. Byrne* (Ark.) 96.

§ 47. Under Kirby's Dig. § 8020, a great granddaughter of testator, whose mother was living when testator's will was made, *held* not entitled to a share of the estate; the grandchildren being mentioned by class in the will.—*King v. Byrne* (Ark.) 96.

III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.

(A) Nature and Establishment of Rights in General.

Accrual of cause of action for recovery of homestead, see Limitation of Actions, § 44.

Application of general statutes of limitation to action for recovery of real property, see Limitation of Actions, § 73.

§ 71. The burden *held* to be on one claiming a share of testator's estate under Kirby's Dig. § 8020, to show his right to recover.—*King v. Byrne* (Ark.) 96.

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Of boundaries of territory covered by stock law election, see Animals, § 50.

Of land in order confirming sale of property belonging to estate of decedent, see Executors and Administrators, § 375.

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I. VOLUNTARY.

§ 11. A contention that plaintiff should have been allowed to take a nonsuit is without merit, where he had ample time to do so before final judgment against him, but made no request therefor.—*Offenstein v. Gehner* (Mo.) 715.

II. INVOLUNTARY.

§ 55. Where exceptions are sustained to parts of the petition setting up damages, and plaintiff declines to amend, the case is properly dismissed; the remaining amount in controversy not being sufficient to give jurisdiction.—*Goodhue v. Western Union Telegraph Co.* (Tex. Civ. App.) 41.

DISORDERLY CONDUCT.

See Breach of the Peace.

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Of estate of bankrupt, see Bankruptcy, § 326.

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Of wife of insured in mutual benefit insurance association, waiver by association of right to object to claim as beneficiary, see Insurance, § 771.

Separate maintenance, see Husband and Wife, § 278.

IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(A) Jurisdiction, Venue, and Limitations.

§ 57. Divorce proceedings are exclusively within the jurisdiction of the chancery courts.—*Sebastian v. Rose* (Ky.) 120.

(F) Judgment or Decree.

§ 152. While a defendant in a divorce action may refuse to defend under an agreement with plaintiff, the decree of divorce cannot be the subject of agreement, but is the court's action upon the allegations and proof.—*Sebastian v. Rose* (Ky.) 120.

§ 169. A recital in a divorce decree that a part of the judgment for alimony was paid by defendant and that the case was "filed away" was in effect keeping control of the case to be redocketed upon notice; the parties not having been dismissed.—*Sebastian v. Rose* (Ky.) 120.

(G) Appeal.

§ 177. A decree of absolute divorce is final, and cannot be reviewed on appeal by the trial court; only divorces from bed and board being subject to retrial under the direct provisions of Civ. Code Prac. § 427.—*Sebastian v. Rose* (Ky.) 120.

V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

Authority of attorney to compromise decree for alimony, see Attorney and Olient, §§ 101, 103.

§ 239. While a new trial cannot be granted by the trial court upon entering a decree of absolute divorce, and the judgment is final unless annulled upon petition of both parties under Civ. Code Prac. § 426, a new trial may be granted upon the question of allowing or refusing alimony.—*Sebastian v. Rose* (Ky.) 120.

§ 240. What may be considered in awarding the wife alimony in a divorce action stated.—*Sebastian v. Rose* (Ky.) 120.

§ 245. Ky. St. 1909, § 2123 (Russell's St. § 73), contemplates further control by chancery courts over decrees of divorce adjudging alimony, so that the court granting a divorce may modify the decree by enlarging, lessening, or suspending the allowance of alimony.—*Sebastian v. Rose* (Ky.) 120.

§ 269. While under the direct provisions of Ky. St. 1909, § 1663 (Russell's St. § 154), a chancery judgment may be enforced by writs allowable on a judgment at law, under subsection 2 circuit courts may as an incident to their chancery jurisdiction summarily enforce their decrees by attachment and imprisonment, so that payment of the balance of an alimony decree could be enforced by contempt proceedings.—*Sebastian v. Rose* (Ky.) 120.

§ 280. Judgments allowing or refusing alimony are reviewable.—*Sebastian v. Rose* (Ky.) 120.

§ 286. On appeal from an order denying a motion for rule to show cause why defendant should not be compelled to pay the balance of alimony awarded plaintiff in a divorce action, the question whether plaintiff is entitled to

alimony is not open; the only question being the amount thereof.—*Sebastian v. Rose* (Ky.) 120.

VI. CUSTODY AND SUPPORT OF CHILDREN.

§ 298. On the granting of a divorce, the custody of very young children will generally be awarded to the mother.—*Shallcross v. Shallcross* (Ky.) 223.

§ 298. Where a child of divorced parents has reached years of discretion, its wishes as to custody will be considered, but are not controlling.—*Shallcross v. Shallcross* (Ky.) 223.

§ 298. In divorce proceedings, the paramount consideration as to awarding the custody of the children held the welfare of the child.—*Knepper v. Knepper* (Mo. App.) 1117.

§ 298. That plaintiff, a divorced woman, spent two nights at a hotel with her present husband before her marriage to him, held not to show that she was so depraved as to be unfit to retain the custody of an 11 year old daughter of the former marriage.—*Knepper v. Knepper* (Mo. App.) 1117.

§ 303. Ky. St. 1909, § 2123 (Russell's St. § 73), held not to prevent the court from modifying a divorce decree in so far as it related to the custody and care of children, on its own motion or without petition by either parent.—*Shallcross v. Shallcross* (Ky.) 223.

§ 303. A husband, having instituted a proceeding to compel his wife to comply with a visitation proceeding in a divorce decree, could not object to the modification of the decree striking out his right of visitation because he was not served with a notice of such proceedings.—*Shallcross v. Shallcross* (Ky.) 223.

§ 303. A provision in a divorce decree as to seeing the son of the parties held properly stricken, where, by reason of the father's inebriety and profligate habits, he was not a proper person to associate with his son.—*Shallcross v. Shallcross* (Ky.) 223.

§ 312. A decree on a cross-petition in divorce proceedings held not to be presumed to have included a finding that the wife was an adulteress.—*Knepper v. Knepper* (Mo. App.) 1117.

DOCKETS.

Of causes for trial, see Trial, § 11.
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As evidence in civil actions, see Evidence, § 342.

DOMICILE.

Residence as ground of jurisdiction, see Courts, § 300.

§ 1. Every person has a legal domicile.—*Helm's Trustee v. Commonwealth* (Ky.) 196.

§ 1. In determining the domicile of a person, all surrounding circumstances which tend to influence or explain her acts by which her residence is sought to be established, such as the facts stated, should be considered.—*Helm's Trustee v. Commonwealth* (Ky.) 196.

§ 1. The question of domicile is usually one of intent; slight circumstances often being sufficient to determine the question.—*Helm's Trustee v. Commonwealth* (Ky.) 196.

§ 10. Where a domicile is once established, intent to abandon it and adopt a new one must be satisfactorily shown.—*Helm's Trustee v. Commonwealth* (Ky.) 196.

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DOWER.

III. RIGHTS AND REMEDIES OF WIDOW.

§ 79. In proceedings for assignment of dower, evidence held not to support a finding that the land could not be divided without prejudice to the widow and heirs.—*Johnson v. Johnson* (Ark.) 636.

§ 101. A widow's dower is to be carved out of the specific property of which her husband was possessed, and not out of the proceeds of its sale.—*Johnson v. Johnson* (Ark.) 636.

§ 101. Kirby's Dig. § 2707, relating to sale of lands in proceedings to allot dower, construed.—*Johnson v. Johnson* (Ark.) 636.

§ 101. The fact that it would be to the best interest of the widow and heirs to sell the land and divide the proceeds instead of dividing the land itself and allotting to the widow her proportionate share held no ground for a sale of the land and division of the proceeds under Kirby's Dig. § 2707.—*Johnson v. Johnson* (Ark.) 636.

DRAINS.

Drainage of highways, see Highways, § 120.
In cities, see Municipal Corporations, § 834.
License to construct ditch distinguished from covenant running with land, see Covenants, § 70.

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Public easements, see Highways.

I. CREATION, EXISTENCE, AND TERMINATION.

§ 5. The right to a way by prescription may be established by adverse possession for 10 years.—*Sanford v. Kern* (Mo.) 1051.

§ 8. A private way could not be acquired by adverse possession if the use was permissive.—*Roland v. O'Neal* (Ky.) 827.

§ 8. Adverse possession sufficient to establish a right to a passageway across land is not destroyed by its use by others with the acquiescence of the person claiming under adverse possession, as under Rev. St. 1893, § 9463 (Ann. St. 1906, p. 4346), private roads shall be free to be traveled by all persons as a public road.—*Sanford v. Kern* (Mo.) 1051.

§ 9. An adverse possession to give title to an easement for a passageway across land must originate in a claim of right.—*Sanford v. Kern* (Mo.) 1051.

§ 9. A passageway across land held to be claimed adversely by the user.—*Sanford v. Kern* (Mo.) 1051.

§ 10. The granting of a right of way and its acceptance by proper authority and in a proper manner will be presumed from an uninterrupted adverse user for 15 years.—*City of Louisville v. Tompkins* (Ky.) 174.

§ 12. A contract to give an easement across land for a passageway *held* executed.—Sanford v. Kern (Mo.) 1051.

§ 12. The consideration for a passageway *held* adequate.—Sanford v. Kern (Mo.) 1051.

§ 12. A license for a passageway across land *held* not affected by the fact that the person giving the license was not the legal owner.—Sanford v. Kern (Mo.) 1051.

§ 18. Where there was no outlet to the public highway from land sold, the law implied a grant of a reasonable right of way from the remainder of the vendor's land to the vendee, and subsequent grantees of the vendor took subject to such right of way.—Roland v. O'Neal (Ky.) 827.

§ 26. A license to use a passageway across land *held* not revocable at the pleasure of the licensor.—Sanford v. Kern (Mo.) 1051.

§ 36. Evidence *held* sufficient to establish right to an easement.—Sanford v. Kern (Mo.) 1051.

II. EXTENT OF RIGHT, USE, AND OBSTRUCTION.

§ 48. Where a purchaser of land was entitled to a way of necessity over the vendor's land, if the vendor permitted the use of a certain way, he could not afterwards withdraw his permission.—Roland v. O'Neal (Ky.) 827.

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Of passenger, see Carriers, §§ 351-384.

EJECTMENT.

See Trespass to Try Title.

II. JURISDICTION, PARTIES, PROCESS, AND INCIDENTAL PROCEEDINGS.

Amendment of pleading affecting limitations, see Limitation of Actions, § 127.

III. PLEADING AND EVIDENCE.

§ 86. Where the defendant in ejectment show *prima facie* title, plaintiff must overcome such title and show title in himself, as he can only rely on his own title.—Maney v. Burke (Ark.) 111.

§ 95. Proof that land was assessed for taxes in the name of one person, and the taxes paid by him, *held* not sufficient to establish ownership in him so as to sustain a recovery of the land against the holder of a *prima facie* title in possession.—Maney v. Burke (Ark.) 111.

EJUSDEM GENERIS.

Application of doctrine to construction of statute relating to licenses to practice medicine, see Physicians and Surgeons, § 2.

ELECTION.

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ELECTIONS.

Of particular officers.

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To determine particular questions.

Alteration of school districts, see Schools and School Districts, § 38.

Issuance of school district bonds, see Schools and School Districts, § 97.

Local option, see Intoxicating Liquors, §§ 33-36.

Stock law elections, see Animals, § 50.

IV. QUALIFICATIONS OF VOTERS.

§ 65. Under Act March 24, 1908 (Acts 1908, p. 133, c. 56), re-enacting as a part thereof Ky. St. 1909, §§ 4464-4500a (Russell's St. §§ 5736-5785), relating to graded common schools, women are no longer entitled to vote in graded common school elections.—Jeffries v. Board of Trustees of Columbia Graded Common School (Ky.) 813.

V. REGISTRATION OF VOTERS.

§ 95. The registration laws authorized by Const. art. 4, § 1, authorizing the General Assembly to enact laws to secure the freedom of elections and the purity of the ballot box, prescribe no qualifications of electors, but are to regulate the exercise of the elective franchise.—State v. Weaver (Tenn.) 465.

§ 96. Shannon's Code, §§ 1189, 1198, 1199, requiring registration of voters, *held* to apply to municipal elections in the town of Lonsdale, Knox county, though its charter (Laws 1907, p. 1048, c. 305) does not provide for registration.—State v. Weaver (Tenn.) 465.

§ 97. In view of Shannon's Code, § 1217, *held*, that a voter must register in the civil district, ward, or voting precinct where he offers to vote.—State v. Weaver (Tenn.) 465.

VII. BALLOTS.

§ 184. By analogy to Const. art. 4, § 28 (Ann. St. 1906, p. 185), a proposition submitted to a vote of the people for their adoption must be "single" as that word is defined in the law; the vote of the people on such a proposition being in the nature of a legislative act.—State ex rel. School Dist. of Memphis v. Gordon (Mo.) 1008.

§ 184. Where a proposition to borrow money is submitted to the people, the object to which the borrowed money is to be appropriated is an integral part of the proposition.—State ex rel. School Dist. of Memphis v. Gordon (Mo.) 1008.

§ 184. An entire subject of a statute within Const. art. 4, § 28 (Ann. St. 1906, p. 185), and by analogy the entire subject of a proposition to be submitted to a vote of the people may be composed of parts, and any part, by further refinement, may be composed of other parts.—State ex rel. School Dist. of Memphis v. Gordon (Mo.) 1008.

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Restraining issuance of certificate of election, see Injunction, § 80.

X. CONTESTS.

Determination by state senate as to election of members, see States, § 30.

§ 273. An election may be contested, not only by candidates for the office, but by the incumbent, or a contest could be raised by the court of its own motion.—Adcock v. Houk (Tenn.) 979.

§ 305. Under Kirby's Dig. §§ 1227, 1228, where appellee showed by the statement of facts in his motion to dismiss the appeal in an election contest that the contest had been finally determined by an adjudication of the Senate, the appeal will be dismissed.—Young v. Boles (Ark.) 496.

XI. VIOLATIONS OF ELECTION LAWS.

§ 311. Act March 4, 1891 (Laws 1891, pp. 48, 51, 52) §§ 38, 43, and 44, relating to elec-

lating to the same subject.—Campbell v. Samples (Ark.) 110.

§ 313. Voting at a municipal election without registration *held* to constitute a misdemeanor, under Code 1858, § 4596.—State v. Weaver (Tenn.) 465.

§ 328. An information charging one with fraudulently registering, *held* not required to allege that he was sworn when he made application for registration.—State v. Keating (Mo.) 699.

§ 328. In a prosecution for fraudulent registration, evidence that the name signed by defendant in the primary books on two occasions was slightly misspelled did not constitute a fatal variance.—State v. Exnicious (Mo.) 730.

§ 329. A witness, knowing the facts, could testify that there was a general registration on certain days, where defendant was charged to have illegally registered.—State v. Tiernan (Mo.) 728.

§ 329. Evidence *held* to sustain a conviction of fraudulent registration.—State v. Exnicious (Mo.) 730.

§ 329. The secretary of the board of election commissioners *held* competent to testify that there was a general registration of voters in St. Louis on September 15, 1908, when accused was charged with fraudulent registration.—State v. Exnicious (Mo.) 730.

ELIGIBILITY.

Of county school superintendent, see Schools and School Districts, § 46.

EMBEZZLEMENT.

§ 10. Where no fiduciary relation existed between prosecuting witness and defendant, the latter was not guilty of embezzlement.—Bryant v. State (Tex. Cr. App.) 543.

EMINENT DOMAIN.

Public improvements by municipalities, see Municipal Corporations, §§ 284-568.

I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 10. Gen. Laws 1907, p. 23, c. 15, *held* not to apply to street railways.—Galveston, H. & S. A. Ry. Co. v. Houston Electric Co. (Tex. Civ. App.) 287.

§ 49. The homestead right of a minor in land can be taken by eminent domain.—Ancell v. Southern Illinois & Mo. Bridge Co. (Mo.) 709.

II. COMPENSATION.

(B) Taking or Injuring Property as Ground for Compensation.

§ 93. The owner of land sought to be condemned by a gas company for a pipe line *held* not entitled to add to the value of the property to be taken the damages from the supposed exhaustion of the gas reservoir under his property by the use which the gas company intends to make of its gas wells.—Calor Oil & Gas Co. v. Franzell (Ky.) 188.

§ 120. An electric street railway *held* not to be an additional servitude in a street, and that it could cross over the tracks of a steam railroad crossing the highway without complying with conditions other than those to which the general public is subject in traveling over the highway.—Galveston, H. & S. A. Ry. Co. v. Houston Electric Co. (Tex. Civ. App.) 287.

tain its tracks thereafter was admissible.—Louisville & N. R. Co. v. City of Louisville (Ky.) 849.

§ 136. The measure of compensation for the right to lay a pipe line along a railroad right of way across the owner's land *held* the fair market value of the property at a fair and voluntary sale.—Calor Oil & Gas Co. v. Franzell (Ky.) 188.

III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

Appellate jurisdiction as dependent on title to realty being involved, see Courts, § 231.

§ 203. In proceedings to condemn a right of way for a pipe line, evidence of the value of the land, based on any supposedly peculiar adaptability for pipe line purposes, *held* inadmissible.—Calor Oil & Gas Co. v. Franzell (Ky.) 188.

§ 203. Evidence that damage sustained by a railroad company from inability to lay a third track over a street crossing would be from \$15,000 to \$25,000 *held* properly rejected.—Louisville & N. R. Co. v. City of Louisville (Ky.) 849.

§ 205. A verdict allowing only nominal damages for the acquisition of a street crossing over a railroad right of way *held* not contrary to the evidence.—Louisville & N. R. Co. v. City of Louisville (Ky.) 849.

§ 238. On appeal in condemnation proceedings, the condemnor has the burden of proof, and is entitled to the concluding argument.—Calor Oil & Gas Co. v. Franzell (Ky.) 188.

§ 239. An order *held* to amount to a vacation of the report of commissioners in a condemnation proceeding within Rev. St. 1899, § 1268 (Ann. St. 1906, p. 1040).—Southern Missouri & A. R. Co. v. Wyatt (Mo.) 688.

§ 239. Vacation of a commissioners' report in condemnation proceedings, under Rev. St. 1899, § 1268 (Ann. St. 1906, p. 1040), *held* not a condition precedent to the award of a reassessment by jury.—Southern Missouri & A. R. Co. v. Wyatt (Mo.) 688.

§ 239. A general verdict allowing damages for the taking of two separate tracts for a railroad right of way *held* not erroneous on its face.—Southern Missouri & A. R. Co. v. Wyatt (Mo.) 688.

§ 262. A general verdict in condemnation proceedings allowing damages for two separate tracts of land *held* not to be presumed defective on appeal, for failure to make a separate award as to each, where such objection was not presented at the trial by motion in arrest of judgment, and there was no bill of exceptions.—Southern Missouri & A. R. Co. v. Wyatt (Mo.) 688.

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§ 66. One coming into equity must do equity, and cannot repudiate a transaction without returning to the other party what he has received thereunder.—*Dalpine v. Lume* (Mo. App.) 776.

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§ 87. When the equitable defense of laches is available stated.—*Rutter v. Carothers* (Mo.) 1058.

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§ 377. In a suit involving matters of equitable cognizance, the chancellor has a right to submit issues to a jury on his own motion.—*Stirman v. Crabtree* (Ky.) 194.

§ 379. If a chancellor is to accept the findings of a jury, they should be advised of the contention of both parties, so that, when they come to consider their verdict, they may have before them the case of each.—*Stirman v. Crabtree* (Ky.) 194.

§ 381. In a suit involving matters of equitable cognizance, if the chancellor submits the issues to a jury, he need not follow their findings.—*Stirman v. Crabtree* (Ky.) 194.

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§ 54. One *held* not estopped from claiming damages for the timber cut on his land, because his agent had pointed out to defendant the lines within which the timber could be cut.—*Clevenger v. Blount* (Tex.) 529.

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§ 63. Where a party gives a reason for his conduct touching anything involving any controversy, he is estopped, after litigation is begun, from changing his ground, and putting his conduct on another and different ground.—*Snyder v. Supreme Ruler of Fraternal Mystic Circle* (Tenn.) 981.

§ 63. In an action by a land broker for commissions, a plea of estoppel *held* insufficient.—*Montgomery v. Amsler* (Tex. Civ. App.) 307.

§ 68. Relator, in quo warranto to test the right of defendant to hold over an office, *held* estopped by his position in his pleading to insist that the defendant should test his right to hold the office by some independent proceeding.—*State v. Evans* (Tenn.) 81.

§ 78. A grantee who had received a check as full payment for land conveyed to him by one whose title was defective by reason of a prior recorded but not properly acknowledged deed *held* not entitled to repudiate the payment, and to reassert his claim to the land.—*Abernathy v. Pickett* (Tex. Civ. App.) 579.

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§ 1. Judicial notice cannot be taken of controverted questions of fact.—Carr v. Fair (Ark.) 659.

§ 10. The court will take notice of the location of the Columbia Male and Female High School building in the town of Columbia.—Jeffries v. Board of Trustees of Columbia Graded Common School (Ky.) 813.

§ 10. The court takes judicial notice of geographical subdivisions of the state, and of state and federal boundaries.—Cator v. Hays (Tex. Civ. App.) 953.

§ 12. Courts do not take judicial notice of a city census which was not made in compliance with Rev. St. 1899, §§ 3028, 6300 (Ann. St. 1906, pp. 1735, 3147).—State ex rel. Ryan v. Wooten (Mo. App.) 1101.

§ 18. A controverted question of value of timber cannot be settled by the judicial knowledge of the chancellor.—Carr v. Fair (Ark.) 659.

§ 20. Courts will take judicial notice that trunk line railroads are engaged in both intrastate and interstate traffic.—Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.) 1025.

§ 20. Though it is matter of common knowledge that the business of operating electric street railways is generally carried on by corporations, it cannot be judicially known that no others than corporations are carrying on such business in the state.—Beaumont Traction Co. v. State (Tex. Civ. App.) 615, 618.

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§ 80. In the absence of proof of the law as to punitive damages for personal injuries in another state, where the injury occurred, the law of that state is presumed to be the same as that of the forum.—Louisville & N. R. Co. v. Smith (Ky.) 806.

§ 84. From the known powers of appellate courts and pursuant to statute, the Supreme Court will presume that the Supreme Court of Louisiana is a court of record, and hence has a seal.—Houston Oil Co. of Texas v. Kimball (Tex.) 533.

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§ 113. Evidence of the price paid for property is not evidence of its market value.—Texarkana & Ft. S. Ry. Co. v. Neches Iron Works (Tex. Civ. App.) 64.

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§ 123. In an action by a passenger for the misconduct of the conductor, the statement of a fellow passenger held inadmissible as the opinion of a stranger as to the conduct of the conductor.—Texas & N. O. R. Co. v. Marshall (Tex. Civ. App.) 946.

(C) Similar Facts and Transactions.

§ 130. In an action to replevin property mortgaged to secure a note given for a store account, in which the defense was payment, testimony that, when witness went to plaintiff's store to settle an account, the bookkeeper claimed that witness still owed another account, but upon examining his papers admitted that it had been settled, held irrelevant and incompetent.—McCown v. Wilson (Ark.) 478.

§ 142. In ascertaining the value of land, rule as to admissibility of evidence of the value of other lands stated.—Koppe v. Koppe (Tex. Civ. App.) 68.

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§ 143. A letter passing between opposite counsel as to the submission to examination out of court of receipts relied on by defendant which were in controversy held properly excluded; the receipts having been admitted in evidence and inspected by the jury.—Steltemeier v. Barrett (Mo. App.) 1005.

(E) Competency.

§ 151. An injured servant held entitled to testify that he did not know of the danger of performing the work in which he was injured, in the way he did.—Texas & N. O. R. Co. v. Plummer (Tex. Civ. App.) 942.

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§ 158. The memoranda kept in a telephone exchange held the best evidence of what they contain.—Edwards v. Adams (Tex. Civ. App.) 898.

§ 168. The contents of a letter not produced are inadmissible as a rule.—Merriman v. Black (Tex. Civ. App.) 403.

§ 174. A record book kept by a railroad, showing the names of employes in a railroad yard, compiled from time slips made in the yard by an employe required to keep the time of employes, held inadmissible.—Pratt v. Missouri Pac. Ry. Co. (Mo. App.) 1125.

§ 184. The memoranda kept in a telephone exchange being the best evidence of what they contain, secondary evidence held not admissible on proof that the telephone business had been sold and papers delivered to new owner.—Edwards v. Adams (Tex. Civ. App.) 898.

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§ 220. The execution of a chattel mortgage on a filly in controversy by defendant in decedent's presence held admissible as an admission by decedent that the filly was owned by defendant and not by him.—Bailey v. Bailey (Mo. App.) 1099.

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§ 236. In an action for wrongful death, admissions by decedent held inadmissible.—Murphy v. St. Louis, I. M. & S. R. Co. (Ark.) 636.

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§ 274. Evidence of declarations by a surveyor since deceased *held* inadmissible because hearsay.—Thacker v. Wilson (Tex. Civ. App.) 938.

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§ 317. Evidence, in an action for malicious prosecution, *held* inadmissible as hearsay.—Lindsay v. Bates (Mo.) 682.

§ 317. Certain testimony in an action on a debt *held* hearsay.—Byrne v. Hafner Feed Co. (Mo. App.) 349.

§ 317. In trespass to try title, in which defendant claimed under a deed from an independent executrix, to pay the debts of testator, declarations of the executrix as to the existence of debts at the time of the sale, made after the sale, are inadmissible as hearsay.—Haring v. Shelton (Tex.) 13.

§ 317. In a suit against a railroad for negligence in providing an injured employé with medical attention, certain testimony of plaintiff in regard to what a third person had told him defendants' local agent had said, in relation to plaintiff's being carried by train to the place where defendants' local agent resided, *held* to be hearsay.—Missouri, K. & T. Ry. Co. of Texas v. Graves (Tex. Civ. App.) 438.

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§ 342. Under Rev. St. 1895, arts. 62, 2306, 2308, sketches and plats of the General Land Office from maps of H. county *held* admissible in a boundary line dispute without proof that they were made contemporaneously with the different surveys.—Myers v. Moody (Tex. Civ. App.) 920.

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§ 387. The fiscal court, like other courts, must speak through its records, and extraneous evidence is not admissible to show the meaning of its orders.—Milliken v. George L. Gillum & Son (Ky.) 151.

§ 406. A warehouse receipt issued by a warehouseman *held* a contract fixing the rights of the parties, and not to be varied by parol in the absence of an averment of fraud or mistake.—Offutt & Blackburn v. Doyle (Ky.) 156.

§ 411. Parol evidence *held* admissible to show the nature and character of a special contract referred to in an application for insurance.—State Mut. Life Ins. Co. v. Ballard (Tex. Civ. App.) 267.

§ 419. In a suit for possession of a farm, *held* competent for defendant to show by parol that, as part of the consideration for sale of other real estate deeded by defendant to plaintiff, plaintiff agreed to buy a farm for defendant.—Stirman v. Crabtree (Ky.) 194.

§ 419. The true consideration of a mortgage given to secure future advances may be shown by parol testimony.—Perkins & Manning Co. v. Drew & Landrum's Assignee (Ky.) 526.

§ 419. A recital in a deed that the purchase price had been paid is as between the parties in the nature of a receipt and subject to explanation.—Shelton v. Cooksey (Mo. App.) 331.

(B) Invalidating Written Instrument.

§ 431. Where there is a denial of the execution of a written contract relied on, parol evidence is admissible.—Offutt & Blackburn v. Doyle (Ky.) 156.

§ 432. Where there is an averment of want of consideration for a written instrument, parol evidence is admissible.—Offutt & Blackburn v. Doyle (Ky.) 156.

§ 433. Where there is an averment that by mutual mistake a written instrument does not contain the contract, parol evidence is admissible.—Offutt & Blackburn v. Doyle (Ky.) 156.

§ 433. Parol evidence is inadmissible to show an error in the entry of an order of the fiscal court fixing the salary of the county judge.—Grayson County v. Rogers (Ky.) 866.

§ 434. Where there is an averment of fraud in the execution of a written instrument, parol evidence is admissible.—Offutt & Blackburn v. Doyle (Ky.) 156.

(C) Separate or Subsequent Oral Agreement.

§ 441. Where no reason is given why a writing does not represent the agreement of the parties, it cannot be affected by a parol contemporaneous agreement.—American Copying Co. v. Muleski (Mo. App.) 384.

§ 441. An oral promise by the payee to the surety on a note, when executed, not to enforce its payment against him, does not affect the surety's obligation.—Fambro v. Keith (Tex. Civ. App.) 40.

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§ 457. Abbreviations in mechanic's lien statement *held* explainable by parol.—Wilson-Reheis-Rolfes Lumber Co. v. Capron (Mo. App.) 1085.

§ 460. Parol proof is always admissible to show where the objects called for in a deed are located on the ground.—Bentley v. Napier (Ky.) 180.

§ 460. In an action to recover for a deficit in land sold, *held*, that the court could look to the negotiations leading up to the deed to determine the nature of the transaction.—Boggs v. Bush (Ky.) 220.

XII. OPINION EVIDENCE.

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§ 471. Testimony that plaintiff was weak of mind and had no appreciation of the value of money or property *held* not objectionable as being an opinion involving a legal conclusion.—Koppe v. Koppe (Tex. Civ. App.) 68.

§ 471. Testimony of witnesses that a plaintiff did not in their opinion have sufficient mental capacity to fully understand a transaction in question *held* inadmissible as involving a legal conclusion.—Koppe v. Koppe (Tex. Civ. App.) 68.

§ 471. In trespass to try title, testimony by an attorney that he investigated plaintiff's title, and declined to institute suit for recovery of the land, was immaterial and irrelevant, being a mere expression of opinion as to the validity of plaintiff's claim.—Merriman v. Bialack (Tex. Civ. App.) 403.

§ 471. Answers *held* not objectionable as witnesses' conclusions.—Merriman v. Bialack (Tex. Civ. App.) 403.

§ 471. Testimony of witness *held* to be a statement of a fact within his knowledge, and

not merely a conclusion.—*J. T. Stark Grain Co. v. Harry Bros. Co.* (Tex. Civ. App.) 947.

§ 474. Persons who had observed and measured railway tracks with a yardstick or straight edge and a tape line could testify that one rail at a curve was an inch higher than the other, though they did not appear to be experts in such matters, and it was not shown that the measurements were made with a spirit level.—*Gardner v. Metropolitan St. Ry. Co.* (Mo.) 1068.

§ 477. A husband suing for a personal injury to his wife held authorized to testify, though not an expert, that his wife's limbs are paralyzed.—*International & G. N. R. Co. v. Sandlin* (Tex. Civ. App.) 60.

§ 478. In an action to set aside a deed from plaintiff to his stepmother, certain evidence held admissible.—*Koppe v. Koppe* (Tex. Civ. App.) 68.

§ 501. In an action to set aside a deed as fraudulent, testimony of witnesses as to plaintiff's mental incapacity held not incompetent because the witnesses failed to state specifically the acts upon which their opinions were based.—*Koppe v. Koppe* (Tex. Civ. App.) 68.

(B) Subjects of Expert Testimony.

§ 512. While expert testimony is admissible to prove the character of treatment which should be given a patient, or the probable effect of the lack thereof, the opinion of an expert as to whether another physician should or should not have gone to a patient under particular circumstances is inadmissible.—*Missouri, K. & T. Ry. Co. of Texas v. Graves* (Tex. Civ. App.) 458.

§ 513. In an action for death of a servant, where an issue is made as to whether an appliance alleged to have caused the death was reasonably safe, competent and experienced persons may, as experts, give their opinion based upon actual experience, observation, or technical knowledge, with their reasons therefor.—*Warren's Adm'r v. Jeunesse* (Ky.) 862.

§ 513. Whether it is feasible for a railroad to establish a grade crossing over its tracks at a particular place is a subject for expert testimony.—*Gulf, C. & S. F. Ry. Co. v. City of Belton* (Tex. Civ. App.) 413.

§ 513. In an action for breach of contracts to pay for an elevator building, tanks, etc., a witness of large experience in the construction of such structures could express an opinion that the building, etc., were constructed in accordance with the contracts.—*J. T. Stark Grain Co. v. Harry Bros. Co.* (Tex. Civ. App.) 947.

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§ 539½. Motormen held competent to testify as to the distance in which a car could be stopped.—*Batsch v. United Rys. Co. of St. Louis* (Mo. App.) 371.

§ 539½. A civil engineer held competent to give his opinion as to whether it is feasible to establish a grade crossing at a particular point.—*Gulf, C. & S. F. Ry. Co. v. City of Belton* (Tex. Civ. App.) 413.

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§ 556. In an action for injuries to a servant, testimony of a medical witness in which he based a statement on well-known medical authority, held to be hearsay.—*Missouri, K. & T. Ry. Co. of Texas v. Graves* (Tex. Civ. App.) 458.

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§ 586. Negative testimony by a witness who, because of an impaired sense or of an admitted lack of attention, did not see or hear, is not equal to that of positive testimony of a witness who did, and is devoid of evidentiary strength.—*Williamson v. Wabash R. Co.* (Mo. App.) 1113.

§ 589. Where a witness is a party in interest, his credibility is largely a fact to be considered in determining what effect should be given to his testimony.—*Bell County v. Felts* (Tex. Civ. App.) 269.

§ 594. The jury need not believe the evidence of a party, though not directly contradicted.—*Hobart Nat. Bank v. Fordtran* (Tex. Civ. App.) 413.

EXAMINATION.

Of expert witnesses, see Evidence, § 556.

Of person accused of crime, see Criminal Law, § 206.

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EXCEPTIONS.

In judicial proceedings.

Necessity for purpose of review, see Appeal and Error, §§ 263-270; Criminal Law, § 1031.

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EXCEPTIONS, BILL OF.

Necessity for purpose of review, see Appeal and Error, §§ 547-554; Criminal Law, §§ 1090-1094.

Presentation in appeal record for purpose of review, see Appeal and Error, § 511.
Taking exceptions at trial, see Criminal Law, § 696; Trial, §§ 84-105, 272.

I. NATURE, FORM, AND CONTENTS IN GENERAL.

§ 6. The office of a bill of exceptions *held* to bring before the appellate court a record authenticated by the trial judge, of things which transpired in the trial court, that do not appear in the record book of the trial court.—Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co. (Ky.) 852.

EXCESSIVE DAMAGES.

See Damages, §§ 131-134.

EXCHANGE OF PROPERTY.

§ 3. If a person alleged to have been defrauded in an exchange of property mortgaged the property received by him and treated it as his own, *held*, that he ratified the transaction, where it was not contended that he was of insufficient mental capacity to understand the nature of his acts.—Koppe v. Koppe (Tex. Civ. App.) 68.

§ 3. Right of a person to recover for fraud of another in an exchange of land between them *held* not to depend upon his sole reliance upon the other's representations.—Koppe v. Koppe (Tex. Civ. App.) 68.

§ 8. Where defendant, in an action to set aside a deed, in addition to the general denial, specially pleaded plaintiff's ratification of the transaction, the burden was upon defendant to establish the ratification.—Koppe v. Koppe (Tex. Civ. App.) 68.

§ 8. In determining whether plaintiff was defrauded in an exchange of lands, *held*, that only the market value of the land at the time of the transaction, where it had such a market value, could be considered.—Koppe v. Koppe (Tex. Civ. App.) 68.

EXCISE.

Regulation of traffic in intoxicating liquors, see Intoxicating Liquors.

EXCUSABLE HOMICIDE.

See Homicide, §§ 105-122.

EXECUTION.

See Attachment; Garnishment; Judicial Sales. Exemptions, see Homestead. Of deed, see Deeds, § 53.

V. STAY, QUASHING, VACATING, AND RELIEF AGAINST EXECUTION.

§ 171. The owner of land, holding it under a deed duly recorded prior to a levy to satisfy a judgment against another, has an adequate remedy at law, and the sale of the property under the levy will not be enjoined.—Latham Co., Bankers, v. Shelton (Tex. Civ. App.) 941.

VII. SALE.

(B) Title and Rights of Purchaser.

§ 273. Where land is bought at execution sale by the judgment creditor, *held*, that he is presumed not to have paid cash, but to have credited his bid on the judgment.—Lightfoot v. Horst (Tex. Civ. App.) 606.

§ 273. The judgment creditor buying at execution sale and crediting his bid on the judg-

ment *held* not a bona fide purchaser.—Lightfoot v. Horst (Tex. Civ. App.) 606.

EXECUTORS AND ADMINISTRATORS.

See Descent and Distribution; Wills.

Courts of probate, see Courts, § 202.

Testamentary trustees, see Trusts.

Testimony as to transactions with decedents, see Witnesses, §§ 140-183.

II. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 21. The appointment of an administrator c. t. a., governed, as provided by Ky. St. § 3591, by sections 3896, 3897 (Russell's St. §§ 3937, 3919, 3920), *held* not void, but erroneous, though another was entitled to the appointment, so that it could be reviewed only by an appeal within 60 days thereof.—Phillips v. Hundley (Ky.) 147.

III. ASSETS, APPRAISAL, AND INVENTORY.

§ 39. Title to real estate of an intestate vests directly in his heirs.—Seilert v. McAnally (Mo.) 1064.

§ 43. Title to the personality of an intestate passes to his administrator, and the title to the personality of a testator passes to his executor.—Seilert v. McAnally (Mo.) 1064.

§ 46. An undivided interest in a paid-up policy on the life of another *held* to be an asset of the beneficiary's estate after insured's death, and payment by insurer, although the beneficiary died before insured.—In re Ulrici's Estate (Mo. App.) 761.

§ 51. Kirby's Dig. §§ 6289, 6290, relating to wrongful death, *held* to create a cause of action for the benefit of decedent's estate.—St. Louis, I. M. & S. Ry. Co. v. Corman (Ark.) 116.

IV. COLLECTION AND MANAGEMENT OF ESTATE.

(B) Real Property and Interests Therein.

Rights as to homestead, see Homestead, § 153.

§ 148. Where a will does not authorize the independent executrix to sell real estate, a purchaser from her has the burden of proving that at the time of the sale such conditions existed as would authorize the probate court to order a sale.—Haring v. Shelton (Tex.) 13.

§ 150. A lease executed by a person as administratrix and executrix of an estate *held* to be good as her individual lease.—Pine Bluff Aerie No. 209, Fraternal Order of Eagles, v. Dreyfus (Ark.) 655.

V. ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILDREN.

§ 190. Rev. St. 1899, § 185 (Ann. St. 1906, p. 399), *held* not to apply to the demand of a widow for a cash allowance in lieu of provisions for one year's support, as authorized by sections 105, 106 (pages 372, 373).—In re Ulrici's Estate (Mo. App.) 761.

§ 190. Limitations prescribed by Rev. St. 1899, § 4273 (Ann. St. 1906, p. 2349), *held* not to begin to run against the demand of a widow for a cash allowance in lieu of provisions for one year's support, until letters of administration have been granted.—In re Ulrici's Estate (Mo. App.) 761.

§ 190. A widow seeking a cash payment in lieu of an allowance for provisions *held* not guilty of laches.—In re Ulrici's Estate (Mo. App.) 761.

VI. ALLOWANCE AND PAYMENT OF CLAIMS.**(A) Liabilities of Estate.**

§ 221. Services between persons in family relation are presumed to be gratuitous.—*Rose v. Mayes* (Mo. App.) 769.

§ 221. An intention to charge and to pay for services between persons in family relation may be proved by circumstantial evidence.—*Rose v. Mayes* (Mo. App.) 769.

§ 221. Evidence in support of a mother's claim for services against the estate of her deceased daughter examined, and *held* to justify the direction of a verdict for the administrator.—*Rose v. Mayes* (Mo. App.) 769.

(B) Presentation and Allowance.

§ 227. An affidavit of a nonresident corporation claimant against the estate of a decedent *held* insufficient in view of Ky. St. § 3870 (Russell's St. § 3901), and Civ. Code Prac. §§ 117, 544, 549, subsec. 2, 550, subsec. 1.—*Crane & Breed Mfg. Co. v. Stagg's Adm'r* (Ky.) 225.

§ 227. An affidavit of a claimant against a decedent's estate *held* insufficient under Ky. St. § 3871 (Russell's St. § 3902).—*Crane & Breed Mfg. Co. v. Stagg's Adm'r* (Ky.) 225.

§ 227. An affidavit of a claimant against a decedent's estate made by the claimant's employe *held* insufficient under Ky. St. § 3870 (Russell's St. § 3901).—*Crane & Breed Mfg. Co. v. Stagg's Adm'r* (Ky.) 225.

§ 237. A judgment establishing a claim against the estate of a deceased widow *held* res judicata in proceedings to charge the estate of the deceased husband, leaving a will disposing of his property after the payment of the widow's debts.—*Pierce v. Pierce* (Mo. App.) 1147.

VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.**(B) Application and Order.**

§ 356. Where, at the time judgment was rendered directing land to be sold for a decedent's debts in a suit by a creditor, a cross-petitioner's petition alleging his ownership of the land and praying that title be adjudged in him was on file before the court, the judgment necessarily adjudged that cross-petitioner had no title, though his name was not mentioned therein.—*Little v. Cardwell* (Ky.) 799.

(C) Sale.

§ 375. An order for the sale of land belonging to the estate of a decedent *held* defective, and that the court could not amend the order approving the sale by an order nunc pro tunc.—*Bouldin v. Jennings* (Ark.) 639.

IX. INSOLVENT ESTATES.

Rights of administrator of insolvent as to homestead, see *Homestead*, § 153.

X. ACTIONS.

§ 431. A suit by a creditor to compel an administrator to settle the estate under Civ. Code Prac. § 428, and to compel payment of debts, *held* improperly dismissed because of plaintiff's failure to present his claim accompanied by affidavits verified, as required by statute.—*Crane & Breed Mfg. Co. v. Stagg's Adm'r* (Ky.) 225.

§ 431. 1 Sayles' Ann. Civ. St. 1897, art. 2082, *held* not to require the presentation to and rejection by the executor of an unliquidated claim for services against the estate, before suing thereon.—*Wells v. Hobbs* (Tex. Civ. App.) 451.

XI. ACCOUNTING AND SETTLEMENT.**(E) Stating, Settling, Opening, and Review.**

§ 513. Under the Constitution and Kirby's Dig. § 140, a judgment of the probate court confirming the final settlement of an administrator *held* to terminate the jurisdiction of the probate court notwithstanding section 46.—*Beckett v. Whittington* (Ark.) 633.

§ 516. A court of chancery *held* authorized on a proper showing to set aside an order of the probate court confirming the final settlement of the administrator, and permit the heir, distributee, or creditor to recover assets.—*Beckett v. Whittington* (Ark.) 633.

EXEMPLARY DAMAGES.

See *Damages*, §§ 87, 91, 215.

EXEMPTIONS.

See *Homestead*.

From taxation, see *Taxation*, § 217.

EXHIBITS.

Annexed to pleading, see *Pleading*, §§ 310, 311.

EXPERT TESTIMONY.

In civil actions, see *Evidence*, §§ 471-536.

In criminal prosecutions, see *Criminal Law*, §§ 478, 494.

EX POST FACTO LAWS.

Constitutional restrictions, see *Constitutional Law*, § 190.

FACTORS.

See *Brokers*; *Principal and Agent*.

FALSE IMPRISONMENT.

See *Malicious Prosecution*.

I. CIVIL LIABILITY.**(A) Acts Constituting False Imprisonment and Liability Therefor.**

§ 7. Defendant, in an action for false imprisonment, *held* protected from liability by the warrant being legal on its face.—*Campbell v. Hyde* (Ark.) 99.

§ 7. A process is fair on its face which proceeds from a court or magistrate, or body having authority by law to issue process of that nature, and which is legal in form, and on its face contains nothing to notify or fairly apprise the officer that it issued without authority.—*Campbell v. Hyde* (Ark.) 99.

§ 7. While a person who procures a warrant may be liable to an action for malicious prosecution if he acts maliciously and without probable cause, he is not liable to an action for false imprisonment.—*Campbell v. Hyde* (Ark.) 99.

FALSE PRETENSES.

Application of instructions to case, see *Criminal Law*, § 814.

Declaration by third person as evidence, see *Criminal Law*, § 418.

Evidence of other offenses, see *Criminal Law*, § 371.

Self-serving declaration by accused, see *Criminal Law*, § 413.

§ 16. Rev. St. 1899, § 2213 (Ann. St. 1906, p. 1410), *held* directed against obtaining money or property from one whose confidence has first been secured by fraudulent representations in

§ 26. An indictment for swindling held to state an offense.—Glover v. State (Tex. Cr. App.) 396.

§ 34. An information held to sufficiently charge an offense under Rev. St. 1899, § 2213 (Ann. St. 1906, p. 1410).—State v. Wilson (Mo.) 701.

§ 38. In a prosecution for swindling, evidence held not objectionable because the indictment did not allege that defendant represented he had money on deposit in the bank on which the check was drawn.—Glover v. State (Tex. Cr. App.) 396.

§ 38. In a prosecution for swindling by means of a worthless check, the check held admissible.—Glover v. State (Tex. Cr. App.) 396.

§ 41. In a prosecution for swindling by means of a worthless check, evidence of the bookkeeper of the bank on which the check was drawn that the check was presented to the bank for payment, and payment refused, was proper.—Glover v. State (Tex. Cr. App.) 396.

§ 49. Evidence held to sustain a conviction in a prosecution under Rev. St. 1899, § 2213 (Ann. St. 1906, p. 1410).—State v. Wilson (Mo.) 701.

§ 52. In a prosecution under Rev. St. 1899, § 2213 (Ann. St. 1906, p. 1410), for fraudulently obtaining money on a worthless draft, an instruction limiting the purpose of evidence of frauds by defendant on other persons, at or near the time of the offense in question, was entirely proper.—State v. Wilson (Mo.) 701.

FALSE SWEARING.

See Perjury.

FAMILY.

Claims against decedent's estate for services by members of, see Executors and Administrators, § 221.

Recovery by daughter for services rendered father, see Work and Labor, § 7.

FEDERAL COURTS.

See Courts, §§ 289, 300.

FEDERAL QUESTIONS.

Ground for jurisdiction, see Courts, § 289.

Ground for removal of cause, see Removal of Causes, §§ 19, 25.

FEES.

Of clerk of court, see Clerks of Courts, §§ 11, 24.

FEE SIMPLE.

Created by deed, see Deeds, § 124.

FENCES.

Duty of railroad to fence track, see Railroads, § 411.

FILING.

Bill of exceptions, showing to be made in appeal record, see Criminal Law, § 1092.

FINAL JUDGMENT.

Appealability, see Appeal and Error, §§ 60-80.

On reference, see Reference, §§ 99, 103.
Review on appeal or writ of error, see Appeal and Error, §§ 1008-1015.
Setting aside, see New Trial, §§ 66-72.

FIRE INSURANCE.

See Insurance.

FIRES.

Caused by operation of railroad, see Railroads, §§ 484, 485.

FISCAL COURT.

See Counties, § 64.

Construction of bridges, see Bridges, § 20.
Parol or extrinsic evidence of orders of, see Evidence, § 387.

FIXTURES.

§ 4. The principal criterion for determining whether an article became a fixture is the owner's intention in putting the material in or on the land or building—whether his purpose was to make it permanently a part thereof.—Banner Iron Works v. Aetna Iron Works (Mo. App.) 762.

§ 4. If the owner of land or building purposed in putting an article in or on the same to make it permanently a part thereof, it will usually be treated as a fixture and lienable, though it is fastened only slightly and may be displaced without injuring the freehold.—Banner Iron Works v. Aetna Iron Works (Mo. App.) 762.

§ 4. In ascertaining the intention to make machinery or other articles permanently a part of a factory building, adaptability to the work or business is important, and if necessary thereto, or to the purpose for which the building was designed and used, or a convenient accessory, or commonly employed, intention to annex permanently may be inferred.—Banner Iron Works v. Aetna Iron Works (Mo. App.) 762.

§ 7. Whether an article became a fixture is not determinable altogether, or even principally, by the mode of its attachment, and whether that is slight or strong, or whether the article can be removed readily without damage to the freehold, though these circumstances are to be considered.—Banner Iron Works v. Aetna Iron Works (Mo. App.) 762.

FLOODS.

Liability of carrier for injuries to goods caused by, see Carriers, § 119.

FLOWAGE.

See Waters and Water Courses, §§ 171-179.

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FORECLOSURE.

Of lien, see Mechanics' Liens, § 304.
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FORGERY.

Evidence of forgery of deed as affecting title, see Deeds, §§ 190, 207.

Sufficiency of opinion evidence as to handwriting, see Criminal Law, § 494.

§ 22. Under Code Cr. Proc. 1895, art. 225, *held*, that one passing a forged check in Texas may be prosecuted there, even if the forgery were committed beyond the state, where the bank on which it was purported to be drawn is situated.—*Batte v. State* (Tex. Cr. App.) 561.

§ 44. Evidence *held* to sustain a conviction of forgery.—*Batte v. State* (Tex. Cr. App.) 561.

§ 44. Under Code Cr. Proc. 1895, art. 794, *held* not necessary that there should be positive testimony, in addition to proof by comparison of handwriting, in a forgery case.—*Batte v. State* (Tex. Cr. App.) 561.

FORMER ADJUDICATION.

See Judgment, §§ 570, 707-743.

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Bar to prosecution, see Criminal Law, §§ 165, 170.

FORMS OF ACTION.

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FRANCHISES.

Forfeiture of franchise of water company, see Waters and Water Courses, § 188.

Nonpayment of franchise tax as affecting right of corporation to defend action against it, see Corporations, § 499.

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FRAUD.

See False Pretenses; Fraudulent Conveyances. Fraudulent registration by voters, see Elections, §§ 328, 329.

Parol or extrinsic evidence of, see Evidence, § 434.

In particular classes of conveyances, contracts, transactions, or proceedings.

See Exchange of Property, §§ 3, 8; Release, § 17.

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Particular remedies.

Equitable relief against judgment, see Judgment, § 443.

I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.

§ 25. A vendor fraudulently induced to accept a reconveyance in satisfaction of the vendor's lien notes cannot recover for the fraud in

the absence of a showing that injury resulted.—*Thouren v. Skirvin* (Tex. Civ. App.) 53.

II. ACTIONS.**(C) Evidence.**

§ 56. Evidence *held* admissible on the question whether one was deceived by false representations.—*Goldman v. Hadley* (Tex. Civ. App.) 282.

§ 58. Fraud need not be shown by direct evidence, but may be proved by circumstances.—*Russell v. Brooks* (Ark.) 649.

(D) Damages.

§ 59. In an action for deceit in exchange of property, the measure of damages was the difference between the actual value of the land received and what it would have been worth had it been as represented.—*Hawman v. McLean* (Mo. App.) 1094.

§ 59. A vendor fraudulently induced to accept a reconveyance in satisfaction of the vendor's lien notes cannot keep the property and recover the amount of the notes as damages for the fraud.—*Thouren v. Skirvin* (Tex. Civ. App.) 55.

§ 60. Attorney's fees are not recoverable as actual damages in a suit for depriving one of his property by fraud.—*Thouren v. Skirvin* (Tex. Civ. App.) 55.

FRAUDS, STATUTE OF.**VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.**

§ 63. An oral agreement by the grantee to reconvey land to the grantor *held* void under the statute of frauds (Rev. St. 1899, § 3416 [Ann. St. 1906, p. 1949]).—*Shelton v. Cooksey* (Mo. App.) 331.

§ 70. A verbal agreement between adjoining landowners fixing the boundaries so as to avoid litigation is not within the statute of frauds.—*Walker v. Cornett* (Ky.) 841.

§ 73. A contract *held* not one for sale of land within the statute of frauds.—*Parriss v. Jewell* (Tex. Civ. App.) 399.

VIII. REQUISITES AND SUFFICIENCY OF WRITING.

§ 116. While authority to convey land must be given by an instrument of equal dignity with the deed, authority to contract to convey may be given verbally.—*Davis & Rhea v. Spann* (Ark.) 495.

IX. OPERATION AND EFFECT OF STATUTE.

§ 140. Though a contract is required by statute to be in writing, it may be rescinded by parol.—*Keeney v. Waters* (Ky.) 837.

FRAUDULENT CONVEYANCES.**I. TRANSFERS AND TRANSACTIONS INVALID.****(C) Property and Rights Transferred.**

§ 52. A voluntary conveyance by a debtor of his homestead is not fraudulent as against his creditors, in the absence of any statutory prohibition.—*Seilert v. McAnally* (Mo.) 1064.

(J) Knowledge and Intent of Grantee.

§ 158. Mere inadequacy of price *held* not sufficient to put a purchaser on inquiry or to invalidate the sale, but a grossly inadequate price is evidence affecting the purchaser's good faith.—*Beebe Stave Co. v. Austin* (Ark.) 482.

III. REMEDIES OF CREDITORS AND PURCHASERS.

(G) Evidence.

§ 282. Under Rev. St. 1899, § 3399 (Ann. St. 1906, p. 1933), a subsequent purchaser seeking to set aside a prior voluntary conveyance of his grantor to his wife *held* required to show that the wife participated in the grantor's fraud.—*Seilert v. McNally* (Mo.) 1064.

§ 290. In an action to set aside deeds as in fraud of creditors, evidence *held* to show that one of the deeds conveyed a lot as security for money advanced by the grantee, which was paid to the creditors on the judgment, so that the grantee had a lien on the lot for that sum and interest prior to the creditors' claim.—*Akers v. Nicholson* (Ky.) 805.

FRIGHT.

Frightening animals on or near railroad track, see Railroads, § 300.

GAMING.

III. CRIMINAL RESPONSIBILITY.

(B) Prosecution and Punishment.

§ 98. In a prosecution for gaming, evidence *held* not to sustain a conviction.—*Lucas v. State* (Tex. Cr. App.) 387.

§ 98. Where the state proved that accused bet on a game of cards, and he introduced no evidence, a conviction of gaming was supported by the evidence.—*Coots v. State* (Tex. Cr. App.) 543.

GARBAGE.

Disposition of, by city so as to constitute nuisance, see Municipal Corporations, § 730; Nuisance, § 3.

GARNISHMENT.

See Attachment; Execution.

Of carrier, effect on liability for delay in transportation, see Carriers, § 99.

II. PERSONS AND PROPERTY SUBJECT TO GARNISHMENT.

Proceeds of draft received by collecting bank as subject to garnishment, see Banks and Banking, § 165.

Property in hands of carrier, see Carriers, § 92.

§ 52. The rule that the possession of the agent is the possession of the principal does not apply to garnishment proceedings, as the object there is to seize or detain the res which is the subject-matter of the litigation.—*Shelton v. Cooksey* (Mo. App.) 331.

VIII. CLAIMS BY THIRD PERSONS.

§ 206. The court in garnishment proceedings *held* to have jurisdiction of the garnishee, notwithstanding the failure to notify and make a claimant a party, as required by Rev. St. 1899, § 3459 (Ann. St. 1906, p. 1985).—*Shelton v. Cooksey* (Mo. App.) 331.

IX. OPERATION AND EFFECT OF GARNISHMENT, JUDGMENT, OR PAYMENT.

Garnishment of goods in the hands of carrier, effect on seller's right to stoppage in transitu, see Sales, § 204.

GAS.

Condemnation of property for pipe lines, compensation, see Eminent Domain, §§ 93, 136.

Condemnation of right of way for pipe line, evidence as to damages, see Eminent Domain, § 203.

GIFTS.

I. INTER VIVOS.

§ 86. A parent has a right to give property to a wayward child, and neither his other heirs nor a jury are entitled to select the object of his bounty and set aside a gift because they think it undeserved.—*Borchers v. Borchers* (Mo. App.) 357.

GOOD FAITH.

Of purchaser, see Bills and Notes, §§ 340-373; Vendor and Purchaser, §§ 220-245.

Of purchaser of standing timber, see Logs and Logging, § 3.

GRAND JURY.

See Indictment and Information.

Privilege of witness, see Witnesses, § 297.

GRANTS.

Of public lands, see Public Lands.

GUARANTY.

See Indemnity; Principal and Surety.

Guaranty insurance, see Insurance, § 435.

Of dividends by corporation, see Corporations, § 155.

GUARDIAN AND WARD.

III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 34. The property of a ward is not vested in the guardian; but, in the absence of an express trust, the title thereto remains in the ward, and his title cannot be disturbed without his being a party to the suit involving the issue.—*Seilert v. McNally* (Mo.) 1064.

IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

Lack of corporate power to purchase as ground for vacation of sale, see Corporations, § 388.

§ 79. The homestead right of minors in land of their deceased father is "real estate" within the meaning of Rev. St. 1899, §§ 3504, 3510 (Ann. St. 1906, pp. 2000, 2002).—*Ancell v. Southern Illinois & M. Bridge Co.* (Mo.) 709.

§ 84. There is no presumption of law that a guardian is so interested personally in a proceeding to sell the ward's real estate that a guardian ad litem should be appointed to represent the minor.—*Ancell v. Southern Illinois & M. Bridge Co.* (Mo.) 709.

§ 87. No notice of the guardian's application to sell a minor's real estate for his maintenance and education need be given to the minor under Rev. St. 1899, § 3505 (Ann. St. 1906, p. 2000).—*Ancell v. Southern Illinois & M. Bridge Co.* (Mo.) 709.

§ 88. That the order of sale of a minor's land was made the same day the petition therefor was filed by the guardian *held* an irregularity which did not invalidate the sale; Rev. St. 1899, §§ 148, 3505 (Ann. St. 1906, pp. 386, 2000), not applying to guardian's sales so as to require the sale to be made at the next term of court.—*Ancell v. Southern Illinois & M. Bridge Co.* (Mo.) 709.

§ 105. Since the probate court had jurisdiction of the sale of a ward's real estate for his maintenance, etc., the sufficiency of the guard-

ian's petition for the sale was for it to determine, and its action in approving the petition cannot be reviewed in absence of fraud.—*Ancell v. Southern Illinois & M. Bridge Co. (Mo.)* 709.

§ 105. A sale of a ward's land will not be declared invalid because the appraisers could not remember years afterward, upon testifying in proceedings to set aside the sale, of having appraised the land.—*Ancell v. Southern Illinois & M. Bridge Co. (Mo.)* 709.

V. ACTIONS.

§ 126. In a suit to divest title to real estate out of an infant and to vest it in plaintiff, the infant must be sued in his own name, and his guardian must defend the action.—*Sellert v. McAnally (Mo.)* 1064.

HABEAS CORPUS.

I. NATURE AND GROUNDS OF REMEDY.

§ 30. A writ of habeas corpus cannot be invoked to question a judgment merely erroneous, and not absolutely void.—*Ex parte Cassens (Tex. Cr. App.)* 888, 891.

§ 30. In a prosecution for selling liquors to a minor, a decision of the court having jurisdiction whether the law on which the prosecution was based had been superseded *held* at most erroneous, and not reviewable on habeas corpus.—*Ex parte Cassens (Tex. Cr. App.)* 888, 891.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 100. A court *held* to have no power in habeas corpus proceedings, either under or without. Rev. St. 1899, §§ 2720, 3615 (Ann. St. 1906, pp. 1596, 2033) to enter, in place of the original judgment imposing imprisonment, one imposing a fine.—*Ex parte Cornwall (Mo.)* 666.

HABITUAL CRIMINALS.

See Criminal Law, §§ 1202, 1204.

HAND BILLS.

Advertising resale of goods after default of vendee in conditional sale contract, see Sales, § 479.

Giving notice of sale of goods retaken by conditional seller on default of buyer, see Sales, § 479.

HARMLESS ERROR.

Ground for new trial, see New Trial, § 41. In civil actions, see Appeal and Error, §§ 1027-1071.

In criminal prosecutions, see Criminal Law, § 1167; Homicide, §§ 339, 341.

HEARING.

In equity, see Equity, §§ 377-381.

On appeal or writ of error, see Appeal and Error, § 832.

HEARSAY.

In civil actions, see Evidence, § 317.

In criminal prosecutions, see Criminal Law, §§ 419, 420.

HEIRS.

See Descent and Distribution.

Designation of, in deed, see Deeds, § 129.

HIGHWAYS.

See Bridges; Municipal Corporations, §§ 697, 759-821.

Accidents at railroad crossings, see Railroads, §§ 312-351.

Application of statute against perpetuities to conveyance of property for highway, see Perpetuities, § 6.

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I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(B) Establishment by Statute or Statutory Proceedings.

§ 19. Act No. 247, p. 568, Acts 1907, authorizing the forming of road improvement districts in Jefferson county, *held* not violative of Const. art. 7, § 28.—*Parkview Land Co. v. Road Improvement Dist. No. 1 of Jefferson County (Ark.)* 241.

§ 29. Under Rev. St. 1899, § 9414 (Ann. St. 1906, p. 4327), the petition for a new road *held* to confer jurisdiction on the county court to find that the petition is accompanied by the list of the landowners required by the statute.—*Halter v. Leonard (Mo.)* 706.

§ 53. A road *held* not illegal because of a variance between the calls of the order directing it to be laid out and the report of the jury of view.—*Cator v. Hays (Tex. Civ. App.)* 953.

§ 63. Under Rev. St. 1899, § 9414 (Ann. St. 1906, p. 4327), the judgment of the county court on the petition for a new road *held* not open to collateral attack.—*Halter v. Leonard (Mo.)* 706.

II. HIGHWAY DISTRICTS AND OFFICERS.

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§ 120. An abutting landowner *held* not entitled to change the position of a public road without complying with Rev. St. 1899, § 9414 (Ann. St. 1906, p. 4327), requiring that application for the change of roads shall be made by petition to the county court.—*Williams v. Beatty (Mo. App.)* 323.

§ 120. The owner of land threatened with danger from the alteration of a road and drainage ditch *held* entitled to an injunction.—*Williams v. Beatty (Mo. App.)* 323.

§ 120. Right of a party threatened with injury from the alteration of a road and drainage ditch *held* not precluded by an instrument from his grantor to the other party granting permission to construct a drainage ditch through the grantor's land.—*Williams v. Beatty (Mo. App.)* 323.

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(A) Nature, Creation, and Duration of Estate or Right in General.

§ 2. The right of homestead is purely the creation of statute, which has no extraterritorial force.—*Cherokee Const. Co. v. Harris (Ark.)* 485.

§ 31. Evidence *held* to show that a carpenter had no intention of occupying the premises as a homestead.—Parker v. Cook (Tex. Civ. App.) 419.

(D) **Property Constituting Homestead.**

§ 77. The proceeds of a homestead are not subject to garnishment.—Kimberlin v. Gordon (Mo. App.) 1144.

§ 84. A homestead right may attach to land held by husband and wife as tenants in common.—Kimberlin v. Gordon (Mo. App.) 1144.

(E) **Liabilities Enforceable Against Homestead.**

§ 95. Any homestead interest *held* subject to rights under a contract made prior to acquisition of such interest.—Parriess v. Jewell (Tex. Civ. App.) 399.

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§ 128. As the owner of a homestead has a right to sell the same, the purchaser takes the property free from the lien of judgments on demands originating after the acquisition of the homestead.—Kimberlin v. Gordon (Mo. App.) 1144.

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Accrual of cause of action by adult heirs for recovery of homestead, see Limitation of Actions, § 44.

Homestead as subject to sale under law authorizing sale of infant ward's real estate to provide support, see Guardian and Ward, § 79.

Rights of minor as subject to taking under power of eminent domain, see Eminent Domain, § 49.

§ 135. Sayles' Ann. Civ. St. 1897, art. 2055, *held* unconstitutional in so far as it attempted to give a widow and remaining constituents of the family the absolute title to a homestead of the husband's set apart to them under article 2046.—Dorman v. Grace (Tex. Civ. App.) 401.

§ 142. Under Const. art. 9, § 6, the widow and minor children entitled to the homestead during the life of the widow and during the minority of the children *held* not entitled to open on the land new mines and to mine and sell mineral therefrom or to lease the same to others for that purpose.—Cherokee Const. Co. v. Harris (Ark.) 485.

§ 143. Under Const. art. 9, §§ 6, 10, a sale of the homestead by the surviving mother *held* void as against minor children.—Smith v. Scott (Ark.) 501.

§ 153. Under Sayles' Ann. Civ. St. 1897, arts. 2046, 2055, 2060, a homestead passing to a widow as the only remaining constituent of the family *held* not to be taken as assets by an administrator of the deceased husband.—Dorman v. Grace (Tex. Civ. App.) 401.

§ 153. A contention that it would be inequitable for collateral heirs of a husband, on death of the wife, to claim that the wife took absolute title as against creditors of an estate, *held* of no avail.—Dorman v. Grace (Tex. Civ. App.) 401.

IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§ 164. The entry on government land *held* not to constitute an abandonment of a homestead.—Kimberlin v. Gordon (Mo. App.) 1144.

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II. MURDER.

§ 22. Premeditation and deliberation *held* essential elements of murder in the first degree defined by Kirby's Dig. § 1766.—Ferguson v. State (Ark.) 236.

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§ 63. Blows inflicted on decedent by accused *held* the cause of decedent's death, authorizing the conviction of involuntary manslaughter.—Gilmore v. State (Ark.) 493.

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§ 86. If accused placed a child to which his sister-in-law had just given birth in an exposed position near his house, without any intent to kill it, but to hide his sister-in-law's shame and his own paternity of it until it could be carried away, he would not be guilty of assault to murder, but of some lesser degree, if of anything.—Martin v. State (Tex. Cr. App.) 558.

§ 96. The jury, in considering whether one charged with assault with intent to kill acted in self-defense, *held* required to consider all the facts shown by the evidence.—Derrick v. State (Ark.) 506.

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§ 105. While an officer authorized to arrest for a misdemeanor may use such force as is necessary to overcome the resistance, he may not, if the resistance is not forcible, wantonly shoot or injure the person arrested.—Commonwealth v. Marcum (Ky.) 215.

§ 112. A certain remark *held* not justification for an assault, but only to be considered as mitigation of the offense.—Griffin v. State (Tex. Cr. App.) 553.

§ 116. Accused *held* entitled to defend himself against an assault, and to use such force as reasonably appeared to him necessary at the time.—Gilmore v. State (Ark.) 493.

§ 119. A person, committing a homicide under certain circumstances, *held* justified in self-defense.—State v. Linn (Mo.) 679.

§ 122. If a person believed that another was going to assault the person's brother, such person could defend his brother to the extent that the brother could defend himself.—Griffin v. State (Tex. Cr. App.) 553.

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§ 127. An information *held* to sufficiently charge murder in the first degree.—State v. Shelton (Mo.) 732.

§ 135. An information charging murder *held* sufficiently to allege that the mortal wound was inflicted with the knife alleged to have been used.—State v. Linn (Mo.) 679.

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(A) **Presumptions and Burden of Proof.**

§ 147. It is not necessary that the intention to kill be conceived for any particular period of time to constitute murder in the first degree.—Ferguson v. State (Ark.) 236.

§ 152. Under Kirby's Dig. §§ 1766, 1767, where the fact of killing alone is proved, it will be presumed that the crime is murder in the second degree.—Ferguson v. State (Ark.) 236.

§ 152. Presumption as to premeditation from fact of death.—*Ferguson v. State* (Ark.) 236.

(B) Admissibility in General.

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§ 166. It is not improper to supplement evidence indicating that robbery was the motive for a killing, with proof that deceased usually had money in his possession.—*State v. Shelton* (Mo.) 732.

§ 171. Where it was shown that the body of decedent, when seen, by a witness, had been practically undisturbed, it was not error to permit the witness to prove the position of the body.—*Welch v. State* (Tex. Cr. App.) 880.

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§ 214. The state held entitled to show a certain statement of decedent as a part of his dying declarations.—*Craft v. State* (Tex. Cr. App.) 547.

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§ 234. Evidence held not to support a conviction of murder.—*Southern v. State* (Tex. Cr. App.) 259.

§ 235. On a trial for murdering a child by setting fire to the house in which the child dwelt, evidence held not to support a conviction.—*Sprouse v. Commonwealth* (Ky.) 134.

§ 253. In a prosecution for homicide, evidence held to sustain a verdict of murder in the first degree.—*Ferguson v. State* (Ark.) 236.

§ 253. Evidence held sufficient to justify a conviction of murder in the first degree.—*State v. Wilson* (Mo.) 671.

§ 253. Evidence held sufficient to support a verdict convicting of murder in the first degree in a case wherein the conviction rested largely on testimony of an accomplice.—*State v. Shelton* (Mo.) 732.

§ 254. Evidence held to justify a conviction of murder in the second degree.—*Welch v. State* (Tex. Cr. App.) 890.

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Instructions as to credibility of witnesses, see Criminal Law, § 785.

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§ 295. The failure to give a charge submitting the issue of manslaughter held erroneous.—*Craft v. State* (Tex. Cr. App.) 547.

§ 298. An instruction as to a peace officer's right to overcome resistance in the arrest of a passenger for disorderly conduct held erroneous.—*Commonwealth v. Marcum* (Ky.) 215.

§ 298. An instruction as to the right of a city marshal to kill deceased while resisting arrest for disorderly conduct as a passenger on a railroad train held proper.—*Commonwealth v. Marcum* (Ky.) 215.

§ 299. On a trial for homicide, the instructions held to sufficiently charge on the issue of robbery, within Pen. Code 1895, art. 675, subds. 1-3, 5.—*Welch v. State* (Tex. Cr. App.) 880.

§ 300. Instruction as to self-defense held to place an improper limitation on defendant's

rights by the words "on a peaceable mission."—*McCleary v. State* (Tex. Cr. App.) 26.

§ 300. Held error to refuse a charge on self-defense.—*Griffin v. State* (Tex. Cr. App.) 553.

§ 309. Instructions on manslaughter held proper under the evidence.—*Gilmore v. State* (Ark.) 493.

§ 310. In a prosecution for assault to murder a child to which accused's sister-in-law gave birth at his house, which was found some distance therefrom, his sister-in-law claiming that accused was its father, evidence held to require a charge on the theory that the child was put where it was found without any intent to kill it, to prevent the exposure of his sister-in-law's shame and his connection with its paternity.—*Martin v. State* (Tex. Cr. App.) 553.

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§ 339. The exclusion of cumulative evidence to show ill will and threats toward deceased by a third person does not require a reversal.—*Spencer v. Commonwealth* (Ky.) 800.

§ 341. Failure of the court to more fully define manslaughter held not reversible error.—*State v. Linn* (Mo.) 679.

§ 341. The jury having been required to find every essential element of murder in the first degree, and having found defendant guilty thereof, and fixed his punishment pursuant to Act March 18, 1907 (Laws 1907, p. 235, § 1), amending section 1817, Rev. St. 1899 (Ann. St. 1906, p. 1262), providing for decision by the jury of the punishment to be inflicted, defendant was not injured by the court's failure to designate the punishment they might inflict.—*State v. Shelton* (Mo.) 732.

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§ 138. Evidence held not to show that a wife knew that the husband had exceeded his authority as agent by assigning her contract of lease to secure his note.—*Latham v. First Nat. Bank* (Ark.) 992.

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§ 171. It is competent for a wife to mortgage her lands to secure her husband's debt, and,

cure her husband's debt is not released on the taking of a judgment against him.—Jones v. Edeman (Mo.) 1047.

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§ 187. Where the statute directing the manner in which married women could convey real estate was not complied with in the execution of a title bond by a married woman, it was ineffectual to convey her interest therein.—Kidd v. Bell (Ky.) 232.

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§ 223. Under Rev. St. 1895, art. 1246, *held*, on death of one of the plaintiffs, the action was properly continued without new petition for benefit of her heirs on suggestion filed and order made.—Parriss v. Jewell (Tex. Civ. App.) 390.

§ 238. On foreclosure of a mortgage given by a husband and wife on her land to secure his debt, a defense that the mortgage was released by the taking of a personal judgment against him was open to her, and neither she nor he can be heard to urge it in a subsequent action of ejectment as against the title acquired through the purchaser on the foreclosure.—Jones v. Edeman (Mo.) 1047.

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§ 4. At common law, the true owner of land *held* entitled to enter thereon and own the improvements placed thereon by a bona fide possessor, while equity required the value of the permanent improvements to be offset against the owner's claim for rents and profits.—McDonald v. Rankin (Ark.) 88.

§ 4. Under the betterment act (Kirby's Dig. §§ 2754-2757), a true owner seeking to recover possession of the land, and the rents from the occupants claiming under a void judicial sale, *held* entitled to have the rents that accrued prior to the three years before the institution of the suit set off without restriction against the claim of the occupants for reimbursement of the purchase money received by the true owner.—McDonald v. Rankin (Ark.) 88.

§ 4. In a restitution suit by the true owner of land against the occupants, the occupants *held* properly chargeable with rents for certain years, though they had been collected by their predecessor in occupancy, who had since died, and whose estate was not brought into the suit.—McDonald v. Rankin (Ark.) 88.

§ 4. The betterment act (Kirby's Dig. §§ 2754-2757) *held* to give the true owner the net rents during a specified period while the land was in the possession of another.—McDonald v. Rankin (Ark.) 88.

§ 4. On repudiation of a life tenant's contract to give defendants the use of property for support, defendants *held* entitled to a lien for the increase of the vendible value of the property because of permanent improvements.—Glass v. Hampton (Ky.) 803.

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§ 36. That plaintiff and defendant differently construed a timber deed from the latter as to the timber conveyed held not to entitle plaintiff to an injunction restraining defendant from interfering with plaintiff's cutting and removing the timber.—Burnside v. Union Sawmill Co. (Ark.) 98.

§ 46. A landowner may sue in equity to restrain trespasses on the land, under Ky. St. 1909, § 2361 (Russell's St. § 17).—Dixon v. Driskill (Ky.) 204; Lowery v. Same, Id.

§ 52. Plaintiff, the purchaser of standing timber from a grantee of defendant, held not entitled to an injunction restraining defendant from interfering with plaintiff's cutting and removing the timber; plaintiff having a complete remedy at law.—Burnside v. Union Sawmill Co. (Ark.) 98.

§ 52. A complaint in an action for injunction held not to show that the mischief sought to be enjoined was remediless at law; it not alleging defendant's insolvency.—Burnside v. Union Sawmill Co. (Ark.) 98.

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§ 103. Plaintiff's right to cultivate land held a property right which equity would protect by injunction from threatened violence to plaintiff, if he cultivated it.—*Ramon v. Saenz* (Tex. Civ. App.) 928.

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§ 26. A judgment adjudicating a husband a lunatic held conclusive of that question in a subsequent proceeding by the wife to obtain a decree authorizing her to sell her land freed from her husband's claim under Ky. St. § 2131 (Russell's St. § 4634).—*Smith v. Ruehl* (Ky.) 145.

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§ 71. Under Ky. St. § 2131 (Russell's St. § 4634), a decree authorizing a wife to convey her property free from any interest of her insane husband based on the wife's petition held valid, though the husband's committee or guardian was not made a party defendant.—*Smith v. Ruehl* (Ky.) 145.

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§ 73. The contract of an insane person is voidable only.—*Newman v. Taylor* (Tex. Civ. App.) 425.

§ 79. An insane person may on recovering his reason ratify a contract.—*Newman v. Taylor* (Tex. Civ. App.) 425.

§ 79. An insane person making a contract must, on recovering his reason, elect whether he will affirm or disaffirm the contract.—*Newman v. Taylor* (Tex. Civ. App.) 425.

§ 79. A person purchasing machinery while insane held to have ratified the contract after regaining his reason.—*Newman v. Taylor* (Tex. Civ. App.) 425.

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§ 212. In a suit by the administrator of insured to determine the right to proceeds of a life insurance policy, the burden is on plaintiff to establish that an assignment by insured of his interest in the policy to one of his sons was procured by undue influence.—*Borchers v. Barckers* (Mo. App.) 357.

§ 219. A transfer of a casualty policy does not extend its terms to cover a class of employees of the transferee not included in the policy at the time of its execution.—*Maryland Casualty Co. v. Little Rock Ry. & Electric Co.* (Ark.) 994.

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§ 435. A casualty policy held not to include employees in the engine and boiler rooms of an electric power house.—*Maryland Casualty Co. v. Little Rock Ry. & Electric Co.* (Ark.) 994.

(E) Accident and Health Insurance.

§ 450. No indemnity should be allowed for an insured under an accident policy on account of an extension of the injury occasioned by his negligence to observe directions of his physician.—*Maryland Casualty Co. v. Chew* (Ark.) 642.

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§ 586. One having an undivided interest in a paid-up policy on the life of another held to possess a vested interest.—*In re Ulric's Estate* (Mo. App.) 761.

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§ 668. Where, in an action on an insurance policy, there is evidence of delay in paying the loss, the question of plaintiff's right to the penalty provided by Rev. St. 1899, § 8012 (Ann. St. 1906, p. 3808), held for the jury.—*Utz v. Insurance Co. of North America* (Mo. App.) 318.

XX. MUTUAL BENEFIT INSURANCE.

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§ 694. In view of the by-laws of a fraternal benefit society, and Rev. St. 1899, § 1408 (Ann. St. 1906, p. 1111), held that there could be no recovery upon a benefit certificate, where the applicant died after the certificate had been issued and delivered to him and the first assessment collected, but before he had been initiated.—*Shartle v. Modern Brotherhood of America* (Mo. App.) 1139.

(B) The Contract in General.

§ 724. When a fraternal benefit association may be estopped to deny liability on a certificate notwithstanding noncompliance by a member with provisions of the by-laws, stated.—*Shartle v. Modern Brotherhood of America* (Mo. App.) 1139.

§ 724. A fraternal benefit society held not estopped from denying liability on a certificate by reason of any conduct leading decedent to believe that he need not comply with the by-laws requiring an initiation before becoming a member.—*Shartle v. Modern Brotherhood of America* (Mo. App.) 1139.

§ 724. A member of a fraternal benefit society could not be misled by the nonenforcement of the by-laws as to matters essential to constitute membership, so as to estop the society from denying liability on the certificate for noncompliance with such by-laws, where he did not know of their nonenforcement.—*Shartle v. Modern Brotherhood of America* (Mo. App.) 1139.

(D) Forfeiture or Suspension.

§ 755. A fraternal order held estopped from insisting on a forfeiture of a certificate because the beneficiary therein had obtained a divorce from the member.—*Snyder v. Supreme Ruler of Fraternal Mystic Circle* (Tenn.) 981.

(E) Beneficiaries and Benefits.

§ 771. A divorced wife of a deceased member of a fraternal order held entitled to recover on the certificate.—*Snyder v. Supreme Ruler of Fraternal Mystic Circle* (Tenn.) 981.

§ 771. A fraternal order held to have waived a by-law.—*Snyder v. Supreme Ruler of Fraternal Mystic Circle* (Tenn.) 981.

(F) Actions for Benefits.

§ 817. It must be assumed, in an action on a fraternal benefit association certificate, that the certificate holder knew of the provisions of the by-laws of the association.—*Shartle v. Modern Brotherhood of America* (Mo. App.) 1139.

§ 819. In an action on a benefit certificate, void on the death of the member caused by the use of drugs, evidence held to show that the death of the member was not caused by the use of drugs.—*Snyder v. Supreme Ruler of Fraternal Mystic Circle* (Tenn.) 981.

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§ 39. It being the duty of a broker through whom goods are bought to notify the buyer of the arrival of goods at place of delivery, the broker, upon recovering the price therefor, would be entitled to interest only from the time of such notification.—Plotner & Stoddard v. Markham Warehouse & Elevator Co. (Tex. Civ. App.) 443.

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§ 33. If notice of a local option election, which need only be published in one paper, be published in more than one, it must be published in each for the full time.—State ex rel. Doran v. Johnson County Court (Mo. App.) 316.

§ 33. If the last day of publication of notice of a local option election be the day after the election, it cannot be counted in determining the time.—State ex rel. Doran v. Johnson County Court (Mo. App.) 316.

§ 33. Evidence held to show that the day of publication of a paper containing notice of a local option election was the date on which it purported to be actually published.—State ex rel. Doran v. Johnson County Court (Mo. App.) 316.

§ 33. Where two papers are designated to publish a notice, proper publication only in the one designated as the official paper is insufficient.—State ex rel. Doran v. Johnson County Court (Mo. App.) 316.

§ 33. Whether an order for publication of a notice is for "four full consecutive weeks" or for "four consecutive weeks," the time required is the same.—State ex rel. Doran v. Johnson County Court (Mo. App.) 316.

§ 33. The findings of the county court relating to a local option election, under Rev. St. 1899, § 3027 (Ann. St. 1906, p. 1733), held not to be attacked on mandamus to compel the issuance of a liquor license pursuant to section 2993 (page 1717).—State ex rel. Ryan v. Wooten (Mo. App.) 1101.

§ 33. The findings of the county court relating to a local option election is conclusive on any appellate court, on collateral attack by mandamus.—State ex rel. Ryan v. Wooten (Mo. App.) 1101.

§ 36. The court, on a trial for a violation of the local option law, held required to assume that the election putting the law in force was valid, where there was no contest, as provided by Acts 30th Leg. 1907, p. 447, c. 8.—Weasley v. State (Tex. Cr. App.) 550.

§ 40. Under the Cammack act (Act March 14, 1906 [Acts 1906, p. 86, c. 21]), relating to local option election, the county is the absolute unit except in counties in which a city of the first, second, third, or fourth class is situated, and in such counties the territory outside of such city is an absolute unit, and the city is a separate unit.—May v. Ferguson (Ky.) 208.

§ 40. Where prohibition has been established in an entire county under the Cammack act (Act March 14, 1906 [Acts 1906, p. 86, c. 21]), a vote cannot be taken in any subdivision of the county other than in a city of a designated class unless it is taken in the entire county.—May v. Ferguson (Ky.) 208.

§ 40. A person can be convicted of giving intoxicating liquors to a minor, regardless of whether the local option law was in force in the county.—*Ex parte Cassens* (Tex. Cr. App.) 888, 891.

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§ 61. A county clerk *held* not liable on his bond for wrongful refusal to issue a state liquor license to one presenting a license from a city with the proper fee.—*Commonwealth v. Blackburn* (Ky.) 818.

§ 69. It is the county court's mandatory duty to grant a liquor license on a petition signed by two-thirds of the qualified petitioners in a block as required by law.—*State ex rel. Doran v. Johnson County Court* (Mo. App.) 316.

§ 69. Rev. St. 1899, § 2903 (Ann. St. 1906, p. 1717), relating to the granting of liquor licenses, *held* mandatory.—*State ex rel. Ryan v. Wooten* (Mo. App.) 1101.

§ 71. The judgment of the county court, rejecting an application for license to sell liquor, under Ky. St. 1909, § 4205 (*Russell's St.* § 6147), *held* a bar to a renewal of the application within a year.—*Commonwealth v. Schoenthaler* (Ky.) 828.

§ 71. Evidence *held* to show one was not entitled to a liquor license, under Ky. St. 1909, § 4205 (*Russell's St.* § 6147), as a merchant.—*Commonwealth v. Ewing* (Ky.) 851.

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§ 134. Ky. St. 1909, § 2557 (*Russell's St.* § 3635), *held* not violated by sale in prohibited local option territory of nonintoxicating malt liquor.—*City of Bowling Green v. McMullen* (Ky.) 823; *Same v. Barrone* (Ky.) 825; *Same v. McIner, Id.*; *Same v. Higgins, Id.*

§ 163. An innkeeper by serving liquor with Sunday meals *held* to violate Ky. St. §§ 1303, 1304 (*Russell's St.* §§ 3630, 3631).—*Seelbach Hotel Co. v. Commonwealth* (Ky.) 190.

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§ 205. An information charging a violation of the local option law *held* sufficient, without alleging in terms that the county judge published the order declaring the result of the local option election.—*Wesley v. State* (Tex. Cr. App.) 550.

§ 223. A person can be convicted of giving intoxicating liquors to a minor on a complaint charging the selling and giving of such liquors.—*Ex parte Cassens* (Tex. Cr. App.) 888, 891.

§ 226. Evidence in a prosecution for violating the local option law *held* inadmissible.—*Haney v. State* (Tex. Cr. App.) 34.

§ 231. On a trial for selling intoxicating liquor, evidence of a witness as to the nonintoxicating quality of the liquor *held* admissible.—*Martin v. State* (Tex. Cr. App.) 24.

§ 233. Evidence that the proprietor of the drug store where the alleged sale of liquor was made had employed the accused to haul away empty bottles *held* inadmissible.—*Hankins v. State* (Tex. Cr. App.) 21.

§ 235. On a trial for violating the local option law, the court properly permitted the state

to show that a witness had recently purchased whisky, none of which he had sold.—*Wesley v. State* (Tex. Cr. App.) 550.

§ 236. Evidence *held* sufficient to justify a conviction for violating the local option law.—*Gee v. State* (Tex. Cr. App.) 23.

§ 239. On a trial for selling intoxicating liquors on election day, the evidence *held* to raise the question of honest mistake of fact on the part of accused.—*Martin v. State* (Tex. Cr. App.) 24.

§ 239. On an indictment, under Pen. Code 1895, art. 400, for selling or giving liquor to a minor, an instruction that, if accused "was instrumental or in any way concerned" in the giving of liquor to a minor, etc., he should be convicted, being within the broader terms of Acts 30th Leg. 1907, p. 216, c. 116, was erroneous.—*Walker v. State* (Tex., Cr. App.) 395.

§ 239. On a trial for violating the local option law, the jury *held* sufficiently charged that local option was in force.—*Matthews v. State* (Tex. Cr. App.) 544.

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§ 22. Under Const. §§ 161, 235, if the fiscal court does not fix the salary of the county judge before election, it may do so afterward, but if such salary is fixed before election, it cannot be changed during the term.—*Grayson County v. Rogers* (Ky.) 866.

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§ 45. A judge *held* disqualified under Const. art. 5, § 11, from hearing an action.—*Duncan v. Herder* (Tex. Civ. App.) 904.

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§ 251. The court *held* required to disregard an erroneous portion of a verdict and enter judgment on the other portion, as required by Civ. Code Prac. § 386.—Lexington Ry. Co. v. Johnson (Ky.) 830.

§ 256. The court may not pass on any issue of fact on which the jury has failed to return a finding, no matter how conclusive the evidence may be.—Smith v. Pitts (Tex. Civ. App.) 46.

§ 266. The office of a motion in arrest of judgment is to direct the attention of the court to errors apparent on the face of the record proper.—Southern Missouri & A. R. Co. v. Wyatt (Mo.) 688.

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§ 272. District court rule 66, prohibiting the entry of judgments within two days of the adjournment of the court for the term, does not apply to judgments entered on verdicts.—Saxton v. Corbett (Tex. Civ. App.) 75.

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(B) *Grounds.*

§ 486. Only a void judgment is subject to collateral attack.—Staples v. Shiver (Ky.) 826.

§ 486. A personal judgment in favor of the assignee of a note secured by mortgage pending a suit to foreclose the mortgage for a personal judgment rendered by a court having jurisdiction of the subject-matter and of the parties *held* not void, though erroneous.—Staples v. Shiver (Ky.) 826.

§ 496. A judgment without any statement of facts constituting the cause of action is void on collateral attack.—Wilson v. Darrow (Mo.) 1077.

§ 501. The merits of a judgment in a case wherein the court had jurisdiction of the subject-matter and the parties cannot be inquired into collaterally.—Jones v. Edeman (Mo.) 1047.

XII. CONSTRUCTION AND OPERATION IN GENERAL.

§ 525. Where a court, even of limited jurisdiction, is acting within the limit of that jurisdiction, its recitals are, at least, *prima facie* evidence of the facts there set out.—Reis v. Epperson (Mo. App.) 353.

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§ 570. Dismissal of a seller's action for the price *held* no bar to a subsequent action for breach of contract.—Fairbanks, Morse & Co. v. S. W. Heltsley & Co. (Ky.) 198.

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§ 719. A former judgment *held* conclusive as between the same parties or their privies as to every question within the issues in the former suit.—*Pierce v. Pierce* (Mo. App.) 1147.

§ 743. In trespass to try title, certain evidence *held* admissible.—*Ingalls v. Orange Lumber Co.* (Tex. Civ. App.) 53.

XVII. FOREIGN JUDGMENTS.

§ 822. In an action for breach of covenant of title, in that there were outstanding street assessment liens against the property, recitals in a judgment confirming the assessment and declaring it a lien on the property in question *held* to be *prima facie* true.—*Reis v. Epperson* (Mo. App.) 353.

XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

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§ 53. A sale under a void decree confers no title, and the purchaser, though a stranger to the suit, is not an innocent purchaser so as to acquire title.—*McDonald v. Rankin* (Ark.) 88.

§ 55. The rule that a purchaser at a void judicial sale is not an innocent purchaser so as to acquire title *held* not to apply to the rights under the betterment act (Kirby's Dig. §§ 2754-2757) to compensation for improvements placed on the land.—*McDonald v. Rankin* (Ark.) 88.

§ 55. A purchaser at a void judicial sale and his grantees *held* to occupy the land under color of title and in good faith, and entitled to compensation for improvements placed thereon under the betterment act (Kirby's Dig. §§ 2754-2757).—*McDonald v. Rankin* (Ark.) 88.

§ 55. An occupant of land under a void judicial sale, who is liable under the betterment act (Kirby's Dig. §§ 2754-2757) to account to the true owner for the rents of the land, *held* not liable for insurance money recovered on a fire policy.—*McDonald v. Rankin* (Ark.) 88.

§ 55. An owner of land, entitled to recover rents under the betterment act (Kirby's Dig. §§ 2754-2757) from occupants under a void judicial sale, is entitled to interest on all rents from the time they were received by the occupants and those under whom they claimed.—*McDonald v. Rankin* (Ark.) 88.

§ 55. Occupants of land under a void judicial sale are entitled to recover all taxes paid on the

land, with interest on the taxes paid by them, and those under whom they hold the land, from the time such taxes were paid.—*McDonald v. Rankin* (Ark.) 88.

§ 55. The value of improvements placed on the land of another by a bona fide occupant thereof under a void judicial sale is determined as of the time of the recovery by the true owner; that being the time the improvements are turned over to and go into the usable possession of, the true owner.—*McDonald v. Rankin* (Ark.) 88.

§ 55. Manner of determining the value of improvements placed on land by a bona fide occupant under a void judicial sale stated.—*McDonald v. Rankin* (Ark.) 88.

§ 55. Under the betterment act (Kirby's Dig. § 2755), an owner, entitled to the possession of land in the occupancy of one claiming in good faith under a void judicial sale, *held* not entitled to the possession until an accounting of the profits and the value of the improvements made and taxes paid has been had.—*McDonald v. Rankin* (Ark.) 88.

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II. RIGHT TO TRIAL BY JURY.

§ 10. The provision of Const. art. 2, § 28 (Ann. St. 1906, p. 162), as to the right of trial by jury, means that, if prior to its adoption defendant by law or practice is entitled to a jury, such right must remain inviolate, and the only inhibition on the Legislature was to prevent depriving a party of a jury trial where he had theretofore enjoyed the right.—*Berry v. St. Louis & S. F. R. Co.* (Mo.) 1043.

§ 13. Rev. St. 1899, § 654 (Ann. St. 1906, p. 670), permitting a reply showing that the discharge of a cause of action sued on was fraudulently or wrongfully procured, and providing for the submission to a jury of the issue

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§ 95. The refusal to continue consolidated actions presented by a cross petition or to impanel a new jury held not erroneous.—*Offutt & Blackburn v. Doyle* (Ky.) 156.

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I. APPOINTMENT, QUALIFICATION, AND TENURE.

Effect of pardon of justice for crime carrying with it removal from office, see Pardon, § 9.

§ 10. Under Const. art. 5, §§ 4, 5, and Shannon's Code, §§ 6117, 6721, a judgment convicting a justice of the peace of oppression in office held an impeachment proceeding, in so far as it ousted him from his office, and was properly so rendered, without the necessity of quo warranto proceedings, under sections 5165-5187.—*State v. Parks* (Tenn.) 977.

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§ 92. A defendant in justice's court need not file a written pleading; but, where he does, he is bound by the allegations thereof.—*Houston, E. & W. T. Ry. Co. v. Eastern Texas Ry. Co.* (Tex. Civ. App.) 972.

§ 98. In a suit in justice's court for goods sold and delivered, the failure of plaintiff to file the written contract does not affect the jurisdiction of the court.—*United Breeders' Co. v. Wright* (Mo. App.) 1105.

§ 124. The answer of a carrier sued in justice's court for injury to a shipment of stock held not to support a judgment in its favor against another carrier.—*Houston, E. & W. T. Ry. Co. v. Eastern Texas Ry. Co.* (Tex. Civ. App.) 972.

§ 124. A pleading in justice's court which asks a specific and definite relief, held not to support a judgment granting different relief.—*Houston, E. & W. T. Ry. Co. v. Eastern Texas Ry. Co.* (Tex. Civ. App.) 972.

§ 133. Under Rev. St. 1899, § 4028 (Ann. St. 1906, p. 2195), held, that a justice's judgment cannot be revived after 10 years from the rendition thereof, and that, in view of section 4024, an application for revival must be made at least 10 days before the limitation period has expired.—*German Literary Society v. Bloch* (Mo. App.) 351.

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§ 162. Justice's judgment after appeal is not final, and does not merge the cause of action.—*St. Louis, I. M. & S. R. Co. v. Bryant* (Ark.) 996.

§ 174. On appeal from a justice, plaintiff may add new claims by amendment not amounting to new causes of action.—*St. Louis, I. M. & S. R. Co. v. Bryant* (Ark.) 996.

§ 174. When a case comes to the circuit court from that of a justice of the peace, no

§ 191. Sureties on an appeal bond from a justice's court held bound only to the amount of the bond.—*Edwards v. Adams* (Tex. Civ. App.) 898.

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Validity of lease by executrix, see Executors and Administrators, § 150.

I. CREATION AND EXISTENCE OF THE RELATION.

§ 9. A provision of a deed absolutely conveying land held not to create the relation of landlord and tenant between the grantor and grantee, upon the latter's default in payment of a purchase-money note.—*Levy v. McDonnell* (Ark.) 1002.

II. LEASES AND AGREEMENTS IN GENERAL.

(B) Construction and Operation.

§ 44. A stipulation in a lease forbidding the sale of intoxicating liquors on the premises, under penalty of a forfeiture of the lease, runs with the land.—*Ft. Worth Driving Club v. Ft. Worth Fair Ass'n* (Tex.) 254.

III. LANDLORD'S TITLE AND REVERSION.

(B) Estoppel of Tenant.

Attornment by tenant as source of adverse possession against landlord, see Adverse Possession, § 50.

IV. TERMS FOR YEARS.

(B) Assignment, Subletting, and Mortgage.

Restraining acts by sub-lessee in violation of original lease, see Injunction, § 62.

(D) Termination.

§ 108. A lessee could not waive, in favor of a sublessee, a stipulation in the original lease against the selling of intoxicating liquors on the premises and providing for a forfeiture for violation of such stipulation.—*Ft. Worth Driving Club v. Ft. Worth Fair Ass'n* (Tex.) 254.

VII. PREMISES AND ENJOYMENT AND USE THEREOF.

(B) Possession, Enjoyment, and Use.

§ 129. Measure of damages for failure of a landlord to furnish a part of the ground to the

tenant which he has leased to him, stated.—*Pressler v. Warren* (Tex. Civ. App.) 909.

§ 129. In an action against the landlord for failure to give the tenant possession of all the land leased, evidence as to the value of the crop raised on the land furnished *held* admissible.—*Pressler v. Warren* (Tex. Civ. App.) 909.

(F) Eviction.

Wrongful conversion of property of tenant on eviction, see *Trover and Conversion*, § 4.

§ 180. A tenant from month to month *held* not entitled to possession and to recover damages for an eviction after termination of his lease by default in rent.—*Wilson v. Moore* (Tex. Civ. App.) 577.

§ 180. In a suit for wrongful eviction and conversion of a tenant's property, evidence *held* insufficient to justify the direction of a verdict for plaintiff.—*Wilson v. Moore* (Tex. Civ. App.) 577.

§ 180. Where, in a suit for wrongful eviction, the undisputed testimony showed the value of the use of the premises did not exceed the amount of rent to be paid, plaintiff failed to show damage.—*Wilson v. Moore* (Tex. Civ. App.) 577.

VIII. RENT AND ADVANCES.

(A) Rights and Liabilities.

§ 207. Evidence *held* to show that a corporation, and not its president, was a tenant, relieving the president from personal liability for the rent.—*Keinstra v. King* (Mo. App.) 337.

(B) Actions.

Variance between indictment and proof of name of accused, see *Indictment and Information*, § 173.

IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.

Liability of constable for enforcing writ of restitution on void judgment, see *Sheriffs and Constables*, § 98.

LAND OFFICE.

Records of as evidence, see *Evidence*, § 342.

LANDS.

See *Public Lands*.

LARCENY.

See *Embezzlement*; *False Pretenses*; *Robbery*. Property rights of owner of stolen goods, see *Property*, § 7.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 3. If accused took a pistol dropped by a policeman while attempting to arrest him only to disarm him, he was not guilty of larceny.—*Bailey v. State* (Ark.) 497.

§ 3. An intent to steal is an essential element of larceny.—*Bailey v. State* (Ark.) 497.

§ 3. A criminal intent is the principal element of the offense of larceny.—*State v. Claybaugh* (Mo. App.) 319.

§ 3. One who, in good faith and under color of a rightful claim, converts to his own use the property of another, is not guilty of theft.—*State v. Claybaugh* (Mo. App.) 319.

§ 7. A joint owner of cotton in the open boll *held* not to have severed his relation to the cotton, so as to be convicted of theft of it.—*Gipson v. State* (Tex. Cr. App.) 557.

§ 12. Accused, if not engaged in the original taking of property, *held* liable only for receiving stolen property.—*Lee v. State* (Tex. Cr. App.) 389.

§ 15. The buyer of personalty on conditional sale acquires an interest therein which he may sell or mortgage, and is not a bailee within Kirby's Dig. § 1839, making it larceny for a bailee to convert to his own use property placed in his custody.—*Settles v. State* (Ark.) 500.

§ 23. In a prosecution for robbery, *held* error not to have instructed on petit larceny.—*Wynn v. Commonwealth* (Ky.) 516.

§ 23. Where different articles are alleged to have been stolen at different times, and the value is affixed to each separate article, the evidence must show a taking of articles of the value of \$50 or over at one time, in order to sustain a conviction under Pen. Code 1895, art. 869.—*Johnson v. State* (Tex. Cr. App.) 877.

§ 27. Accused, under certain circumstances, *held* not guilty of cattle theft as a principal.—*Jones v. State* (Tex. Cr. App.) 31.

II. PROSECUTION AND PUNISHMENT.

(A) Indictment and Information.

§ 32. An information *held* insufficient to charge larceny.—*State v. Clark* (Mo.) 665.

§ 40. Where punishment is fixed for theft of a particular kind of property, it is unnecessary to allege or prove the value; but it is otherwise as to all other classes of property.—*Johnson v. State* (Tex. Cr. App.) 877.

(B) Evidence.

Identity of accused under habitual criminal statute, see *Criminal Law*, § 1204.

§ 44. In a prosecution for stealing a pistol dropped by a policeman while attempting to arrest accused, who claimed that he took it merely to disarm the policeman, evidence that the policeman had repeatedly threatened to kill accused was admissible.—*Bailey v. State* (Ark.) 497.

§ 52. In a prosecution for theft of a mower, accused claiming that he bought it from others, and paid part down, and subsequently paid the remaining 25 cents, could show that he paid the money for the mower, so that evidence that he stated at the time what he paid the 25 cents for was admissible.—*White v. State* (Tex. Cr. App.) 391.

§ 55. Evidence *held* to support a conviction of larceny.—*State v. Hubbard* (Mo.) 694.

§ 55. Evidence *held* sufficient to sustain a conviction for theft of hogs.—*Carr v. State* (Tex. Cr. App.) 258.

§ 59. Evidence *held* to sustain a conviction of theft of personal property over the value of \$50.—*Cabral v. State* (Tex. Cr. App.) 872.

(C) Trial and Review.

§ 68. In a prosecution for larceny in taking a pistol which a policeman dropped, whether accused took the pistol merely to disarm the policeman *held* for the jury.—*Bailey v. State* (Ark.) 497.

§ 68. In a trial for larceny, where accused claims ownership of the property, and there is no substantial evidence of criminal intent, the court should not send the case to the jury.—*State v. Claybaugh* (Mo. App.) 319.

§ 68. In a trial for larceny, evidence of a criminal intent *held* insufficient to warrant the submission of the case to the jury.—*State v. Claybaugh* (Mo. App.) 319.

§ 70. Where accused was prosecuted under an indictment charging the committing of cattle theft as a principal, he was entitled to a clear-cut charge that if he was not a principal under the statute he should be acquitted, and that the fact that he was an accomplice, or a receiver of the stolen animal, would not authorize his conviction.—*Jones v. State* (Tex. Cr. App.) 31.

§ 71. In a prosecution for stealing a pistol from a policeman, *held*, that the court should have instructed that, if accused took the pistol to disarm the policeman they should acquit; a general instruction authorizing conviction upon belief beyond a reasonable doubt that accused took the pistol with intent to steal being insufficient.—*Bailey v. State* (Ark.) 497.

§ 72. Under Pen. Code 1895, art. 869, a charge failing to require the jury to find the value of the property alleged to have been taken *held* erroneous.—*Johnson v. State* (Tex. Cr. App.) 877.

§ 73. An indictment for theft must aver possession of the property stolen, and that it was taken from the possession of the owner or person holding for him, and in submitting that issue it must be substantially in the terms of the indictment.—*Eubanks v. State* (Tex. Cr. App.) 35.

§ 73. A portion of a charge submitting the issue of the owner's possession of stolen sacks *held* to be defective, in that the jury were not required to find that the property was taken from the possession of the person as laid in the indictment.—*Eubanks v. State* (Tex. Cr. App.) 35.

§ 77. Where an issue of theft was raised by the state's case, and defendant admitted manual taking, but claimed it was under circumstances not imputing crime, but in pursuance of purchase, *held*, that it was error to submit the issue of voluntary return of stolen property.—*Eubanks v. State* (Tex. Cr. App.) 35.

LAW OF THE CASE.

Decision on appeal, see Appeal and Error, §§ 1099, 1195; Criminal Law, § 1180.

LEADING QUESTIONS.

Examination of witnesses, see Witnesses, § 240.

LEASE.

See Landlord and Tenant.

LEGACIES.

See Wills.

LEGISLATIVE POWER.

See Constitutional Law, § 62.

LEVEES.

§ 27. A levee tax foreclosure proceeding *held* not a proceeding in rem against the land, but an adversary proceeding against the owners.—*Maney v. Burke* (Ark.) 111.

LEVY.

Of school taxes, see Schools and School Districts, § 103.

LEX LOCI.

See Damages, § 2; Homestead, § 2; Torts, § 2. Actions for causing death, see Death, § 8. Recovery for mental anguish for negligent transmission of telegram, see Telegraphs and Telephones, § 27.

LIBEL AND SLANDER.

I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§ 5. Where words spoken are slanderous per se, it is presumed that they were spoken maliciously, in the absence of evidence tending to show the contrary.—*Mayo v. Goldman* (Tex. Civ. App.) 449.

§§ 9, 10. Words affecting one injuriously in his office, profession, or occupation are actionable per se.—*Mayo v. Goldman* (Tex. Civ. App.) 449.

§ 10. To falsely impute to a clerk that he has been bribed to betray the confidence of his employer is per se slanderous.—*Mayo v. Goldman* (Tex. Civ. App.) 449.

III. JUSTIFICATION AND MITIGATION.

§ 54. Under Gen. Laws 1901, p. 30, c. 26, the defense of truth pleaded and proved in libel *held* to be a complete defense, though the statements complained of were libelous per se.—*Wheless v. W. Y. Davis & Son* (Tex. Civ. App.) 929.

§ 54. In libel, evidence *held* to prove the truth of the statements complained of.—*Wheless v. W. Y. Davis & Son* (Tex. Civ. App.) 929.

IV. ACTIONS.

(A) Right of Action and Defenses.

Liability of partner for slanderous statement by co-partner, see Partnership, § 153.

(D) Damages.

§ 114. When words spoken are slanderous per se because imputing a crime or tending to injuriously affect complainant in his business, trade, or calling, he is entitled to at least nominal damages, if the speaking is not privileged, and the imputation conveyed is false.—*Mayo v. Goldman* (Tex. Civ. App.) 449.

§ 118. In an action for slander, plaintiff *held* not entitled to damages because of his loss of employment in the company of which defendant was manager.—*Mayo v. Goldman* (Tex. Civ. App.) 449.

(E) Trial, Judgment, and Review.

§ 123. In libel, a peremptory instruction for defendant *held* proper, in view of the evidence.—*Wheless v. W. Y. Davis & Son* (Tex. Civ. App.) 929.

§ 124. In an action for slander, where there was no evidence tending to show that the words as charged were used jocularly or otherwise innocently, and were not intended to convey the imputation claimed for them, the court should in charging the jury have assumed that the words, if spoken at all, were spoken maliciously.—*Mayo v. Goldman* (Tex. Civ. App.) 449.

VI. CRIMINAL RESPONSIBILITY.

(A) Offenses.

§ 148. In a prosecution for criminal libel, defendant *held* to have the right to inquire, of a third person, as to his knowledge of the unfitness and incompetency of an officer, and to ask the assistance of the third person in procuring the impeachment of the officer.—*Yancey v. Commonwealth* (Ky.) 123.

§ 148. In a prosecution for criminal libel, defendant, who had circulated a petition for impeachment, as provided by Ky. St. 1909, § 2172 (Russell's St. § 172), *held* to be acting within the scope of his duty as an officer and good citizen.—*Yancey v. Commonwealth* (Ky.) 123.

§ 148. The right conferred by Ky. St. 1909, § 2172 (Russell's St. § 172), to file the affidavits of other persons in proceedings for the impeachment of an officer necessarily carries with it the right to make reasonable and proper inquiry to obtain them.—*Yancey v. Commonwealth* (Ky.) 123.

§ 148. An impeachment proceeding is a judicial proceeding, and petitions, affidavits, or pleas which may properly be used therein are, as to their statements of fact, as much privileged as other writings or pleadings prepared for use or filed in the course of ordinary litigation.—*Yancey v. Commonwealth* (Ky.) 123.

LICENSES.

For sale of intoxicating liquors, see *Intoxicating Liquors*, §§ 61-71.

I. FOR OCCUPATIONS AND PRIVILEGES.

Non-payment of franchise tax as affecting right of corporation to defend action against it, see *Corporations*, § 499.

II. IN RESPECT OF REAL PROPERTY.

Distinguished from covenants running with land, see *Covenants*, § 70.

LIENS.

Issues involving as affecting jurisdiction of particular courts, see *Courts*, § 124.

Particular classes of liens.

See *Mechanics' Liens*.

For levee taxes, see *Levees*, § 27.

Of bank on deposit, see *Banks and Banking*, § 136.

Of bank on special deposit, see *Banks and Banking*, § 153.

Of purchaser at tax sale, see *Taxation*, § 827.

Pledge, see *Pledges*.

Vendor's lien on lands sold, see *Vendor and Purchaser*, §§ 252-299.

§ 15. One having a lien on property, which is converted by another with notice of the lien, may have his lien fixed on the proceeds.—*Beebe Stave Co. v. Austin* (Ark.) 482.

LIFE ESTATES.

See *Dower*.

§ 11. A tenant for life or years may not commit waste thereon.—*Cherokee Const. Co. v. Harris* (Ark.) 485.

§ 12. It is waste for a tenant for life or years to open lands to search for new mines, but, where there are mines opened when he takes the estate, it is not waste to continue to work them.—*Cherokee Const. Co. v. Harris* (Ark.) 485.

LIFE INSURANCE.

See *Insurance*.

LIMITATION OF ACTIONS.

See *Adverse Possession*.

Laches, see *Equity*, § 87.

Particular actions or proceedings.

See *Quieting Title*, § 29.

Criminal prosecution, see *Criminal Law*, § 157.

On special tax bill, see *Municipal Corporations*, § 564.

Probate proceedings, see *Wills*, § 260.

To establish charge against devisee or legatee, see *Wills*, § 872.

To reform deed, see *Reformation of Instruments*, § 32.

I. STATUTES OF LIMITATION.

(A) Nature, Validity, and Construction in General.

§ 5. Statutes of limitations, being enacted to protect litigants from the infirmities of memory as well as to end litigation, are based upon sound public policy, and should be construed so as to effectuate the legislative intent.—*Rutter v. Carothers* (Mo.) 1056.

§ 11. Limitations run against a county, and in favor of one in adverse possession of its swamp lands.—*Nall v. Conover* (Mo.) 1039.

(B) Limitations Applicable to Particular Actions.

§ 28. An action to enforce an undertaking to support and care for a minor assumed by one accepting property under a will held to be governed by the five-year limitation of Ky. St. § 2515 (Russell's St. § 224), as to contracts not in writing.—*Low v. Ramsey* (Ky.) 167.

§ 39. An equitable action to correct mistakes in field notes in deeds to a party's predecessors in title would be barred by four years' limitations under Rev. St. 1895, art. 3358.—*William Carlisle & Co. v. King* (Tex. Civ. App.) 581.

II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

§ 44. Limitations with which adult heirs must sue for the possession of the homestead held not to begin to run until the minor heir has reached full age.—*Smith v. Scott* (Ark.) 501.

§ 47. An action on a vendor's covenant to convey a fee-simple title held not barred by 10 years' limitation.—*Pineland Mfg. Co. v. Guardian Trust Co.* (Mo. App.) 1133.

§ 55. The rule that, where an injury to real estate results from the construction of a permanent structure, the cause of action accrues on the completion of the structure, held not applicable to an action for damages to land from the overflow of a stream, the channel of which was changed by the construction of a railroad.—*Illinois Cent. R. Co. v. Haynes* (Ky.) 210.

(C) Personal Disabilities and Privileges.

§ 72. Where an infant was entitled under a will to support and maintenance by a devisee till she reached the age of 15, her cause of action thereunder to enforce a lien on the land first accrued when the devisee failed to furnish her support, and her full cause of action was perfected when she reached that age.—*Low v. Ramsey* (Ky.) 167.

§ 72. In view of Ky. St. § 2525 (Russell's St. § 191), held, that one who was an infant when a right of action accrued had the same length of time to sue after becoming of age that she would have had had she been of age when the cause of action accrued.—*Low v. Ramsey* (Ky.) 167.

§ 73. Under Rev. St. 1899, §§ 4262, 4263, 4265, 4267 (Ann. St. 1906, pp. 2335, 2338, 2342), held, that heirs of a married woman, to whom a right of action to recover an interest in land accrued May 12, 1898, could bring the action within 10 years thereafter, and were not bound to bring it within three years after her death on July 28, 1898.—*Rutter v. Carothers* (Mo.) 1056.

§ 78. Tacking or cumulating disabilities under the statute of limitations is not allowable.—*Rutter v. Carothers* (Mo.) 1056.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

§ 103. If a person held title to land in trust for a county, his possession would not be adverse, so as to start the statute of limitations, until there was a repudiation of the trust.—*Bell County v. Felts* (Tex. Civ. App.) 209.

(H) Commencement of Action or Other Proceeding.

§ 127. An amended complaint in ejectment filed after running of limitations *held* not to change the cause of action.—*Smith v. Scott* (Ark.) 501.

III. ACKNOWLEDGMENT, NEW PROMISE, AND PART PAYMENT.

§ 143. Where, at the time land is conveyed, there is an existing vendor's lien against the land, the grantor cannot, after the conveyance, by his acts and declarations, stop the running of limitations against such lien; the grantee not having assumed such debt and having no knowledge of it.—*Benedict v. Griffith* (Ark.) 479.

§ 155. Part payment made by an agent of the debtor tolls the statute of limitations as effectually as payment by the debtor.—*McAbee v. Wiley* (Ark.) 623.

IV. OPERATION AND EFFECT OF BAR BY LIMITATION.

§ 167. A lien on land for purchase money expires when the debt is barred by limitations.—*Benedict v. Griffith* (Ark.) 479.

V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

§ 180. A defendant may take advantage of limitations by demurrer, when the face of the petition shows the bar to be complete.—*Pineland Mfg. Co. v. Guardian Trust Co.* (Mo. App.) 1133.

§§ 180, 182. The statute of limitations must be pleaded, unless the petition shows not only a sufficient lapse of time, but nonexistence of any ground of avoidance; but when the petition shows that the action is barred, and that plaintiff is not within any exception in the statute, the question may be raised by demurrer.—*Low v. Ramsey* (Ky.) 167.

§ 195. The burden was upon one claiming land by adverse possession against a married woman under a deed from her husband to show that the period within which she could have asserted her rights to prevent the running of limitations after her husband's death had elapsed.—*Kidd v. Bell* (Ky.) 232.

§ 197. Proof of payment on an indebtedness so as to toll the statute of limitations may be shown by direct or circumstantial evidence, the fact of payment tolling the statute, and not its indorsement on the evidence of indebtedness, and the debtor's admission of a payment, he being the only witness at trial to deny payment, is proof of the strongest kind.—*McAbee v. Wiley* (Ark.) 623.

§ 197. In an action on a note on which was indorsed a partial payment made within the period of limitations, in which defendant pleaded limitations and denied making the payment, evidence *held* to sustain a finding that defendant made the payment as of the date of the indorsement, so as to justify a verdict for plaintiff.—*McAbee v. Wiley* (Ark.) 623.

LIMITATION OF LIABILITY.

For negligence in transmission of telegram, see *Telegraphs and Telephones*, § 54.
Of carrier, see *Carriers*, §§ 149½-163.

LIQUOR SELLING.

See *Intoxicating Liquors*.

LIS PENDENS.

Pendency of other action ground for abatement, see *Abatement and Revival*, § 13.

§ 24. The doctrine of *lis pendens* applies to purchasers or others acquiring title from a party to a pending action, and generally does not apply to strangers to the suit.—*McDonald v. Rankin* (Ark.) 88.

§ 26. The provisions of the betterment act Kirby's Dig. §§ 2754-2757, granting to a bona fide possessor of land of another a recovery for the value of the improvements made thereon, *held* based from public policy, and not to be subordinated to the doctrine of *lis pendens*.—*McDonald v. Rankin* (Ark.) 88.

LISTS.

Of land delinquent, see *Taxation*, § 630.

LIVERY STABLE KEEPERS.

§ 12. In an action against a hirer of a livery team for negligently overdriving the team, the failure to charge on the issue of contributory negligence *held* erroneous.—*Edwards v. Adams* (Tex. Civ. App.) 898.

§ 12. The jury, in an action against a hirer of a livery team for overdriving, *held* required to determine whether plaintiff acted as a man of ordinary prudence would have acted under similar circumstances.—*Edwards v. Adams* (Tex. Civ. App.) 898.

LIVE STOCK.

Carriage of, see *Carriers*, §§ 228, 229.

Injuries from operation of railroads, see *Railroads*, §§ 411-446.

LOCAL ACTIONS.

See *Courts*, § 7.

LOCAL LAWS.

See *Statutes*, § 93.

LOCAL OPTION.

Traffic in intoxicating liquors, see *Intoxicating Liquors*, §§ 33, 40.

LOCATION.

Of street railroad, see *Street Railroads*, § 20.

LOGS AND LOGGING.

Cutting timber as a trespass, liability of vendor for acts of vendee, see *Trespass*, § 30.

Motion to make pleading more definite and certain in action for cutting timber, see *Pleading*, § 367.

Restraining cutting and removal of timber, see *Injunction*, §§ 52, 118.

§ 3. One purchasing timber from a grantee of land *held* a bona fide purchaser, and not subject to the vendor's lien.—*Beebe Stave Co. v. Austin* (Ark.) 482.

§ 3. Where a purchaser of standing timber without notice of a lien on the land executed negotiable notes for the price which the vendor accepted as payment, and then transferred them to an innocent person, the purchaser made full payment, and was a bona fide purchaser, and

acquired the timber bought freed from the lien.—*Beebe Stave Co. v. Austin* (Ark.) 482.

§ 3. Where defendant paid the purchase price of timber under a valid contract to purchase, and entered upon the land by permission and cut the timber, he was its equitable owner, so that it was immaterial whether the agent executing the timber deed had authority to do so.—*Davis & Rhea v. Spann* (Ark.) 496.

§ 3. A deed of timber *held* not to be based on any consideration, and vendor was entitled to cancellation and judgment for timber cut.—*Risner v. Dunn* (Ky.) 203.

LUMBER.

See Logs and Logging.

LUNATICS.

See Insane Persons.

MACHINERY.

Liability of employer for defects, see Master and Servant, §§ 101-129.

MAIL.

Carrying mail as affecting status of railroad, see Street Railroads, § 2.

Mailing deposition, see Depositions, § 2, 77.

MAINTENANCE.

See Champerty and Maintenance.

MALICE.

See Malicious Mischief.

Element of liability for slander, see Libel and Slander, § 5.

MALICIOUS MISCHIEF.

§ 1. In a prosecution for injuries to the building of another, in violation of Shannon's Code, § 6490, subd. 1, possession only need be proved.—*Deaderick v. State* (Tenn.) 975.

MALICIOUS PROSECUTION.

See False Imprisonment.

II. WANT OF PROBABLE CAUSE.

§ 19. The issue, in an action for malicious prosecution, stated.—*Lindsay v. Bates* (Mo.) 682.

V. ACTIONS.

Hearsay evidence, see Evidence, § 317.

§ 56. In an action for malicious prosecution, the burden is on plaintiff to establish his case.—*Lindsay v. Bates* (Mo.) 682.

§ 58. Evidence, in an action for malicious prosecution, *held* irrelevant.—*Lindsay v. Bates* (Mo.) 682.

§ 59. Evidence, in an action for malicious prosecution, *held* admissible.—*Lindsay v. Bates* (Mo.) 682.

§ 64. Evidence, in an action for malicious prosecution, *held* sufficient to sustain a verdict for defendant.—*Lindsay v. Bates* (Mo.) 682.

§ 71. Evidence, in an action for malicious prosecution, *held* sufficient to make the question of whether defendant had reasonable ground for believing that plaintiff committed the offense, for which he was prosecuted, one for the jury.—*Lindsay v. Bates* (Mo.) 682.

§ 72. Instructions, in an action for malicious prosecution, *held* not conflicting, and not unfavorable to plaintiff.—*Lindsay v. Bates* (Mo.) 682.

MALICIOUS TRESPASS.

See Trespass, §§ 78, 84.

MANDAMUS.

I. NATURE AND GROUNDS IN GENERAL.

§ 3. The remedy of a stockholder, denied permission to inspect the corporate books, *held* to be by mandamus, and not by mandatory injunction.—*Brown v. Crystal Ice Co.* (Tenn.) 84.

§ 3. The remedy by mandatory injunction to compel a corporation to permit a stockholder to inspect the corporate books *held* not concurrent with the remedy by mandamus, notwithstanding the act of 1877 (Acts 1877, p. 119, c. 97) giving the chancery court jurisdiction of cases at law.—*Brown v. Crystal Ice Co.* (Tenn.) 84.

II. SUBJECTS AND PURPOSES OF RELIEF.

(B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 76. Under Acts 29th Leg. 1905, p. 285, c. 124, § 89, the appointment of a census trustee by the county superintendent of public instruction is a ministerial duty, which may be enforced by mandamus.—*Crow v. Falls* (Tex. Civ. App.) 933.

§ 79. The duties under Rev. St. 1895, art. 3993c, added by Laws 1897, p. 211, c. 146, § 1, of a county commissioners' court, to recognize a common school district and accord it the privileges of such a district, *held* ministerial, which could be enforced by mandamus.—*Crow v. Falls* (Tex. Civ. App.) 933.

III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 146. Where, in mandamus, objection is made on the ground that the name of the state is not used, the court may allow an amendment inserting the name of the state.—*Brown v. Crystal Ice Co.* (Tenn.) 84.

§ 152. One to whom school lands were awarded after the award thereof to relator was canceled *held* not a necessary party to mandamus to compel the commissioner to reinstate the award to relator.—*Byrne v. Robison* (Tex.) 256.

§ 159. Where in mandamus respondent waives the alternative writ and demurs, the petition stands as and for such writ.—*State ex rel. School Dist. of Memphis v. Gordon* (Mo.) 1008.

§ 167. In mandamus to compel a county commissioners' court to recognize a school district, under allegations of the petition, petitioners *held* entitled to show any fact which made void the act of the commissioners in changing a district, including the fact that the change was without the consent of the majority of the legal voters thereof.—*Crow v. Falls* (Tex. Civ. App.) 933.

§ 176. In mandamus to compel a county commissioners' court to recognize a school district and require it to canvass the returns and declare the result of an election for school trustee, the judgment, upon decreeing that the district was legally formed, need not further direct the commissioners to perform ministerial duties imposed upon them by statute as to legal school districts.—*Crow v. Falls* (Tex. Civ. App.) 933.

§ 178. In mandamus to compel the county commissioners' court to canvass the returns of an election held for school trustees, and declare the result, and, upon a finding that no election was legally held, to declare a vacancy in the board of trustees and require the county superintendent to fill it, the decree, by declaring

§ 187. In mandamus to compel a county commissioners' court to recognize a school district and require it to canvass the returns and declare the result of an election for school trustee held therein, any error in the decree in not directing the commissioners' court to perform any ministerial duty, upon decreeing that the district was legally formed, was not prejudicial to defendant.—*Crow v. Falls* (Tex. Civ. App.) 933.

§ 187. In mandamus to compel the county commissioners' court to canvass the returns of an election held by school trustees, and declare the result, and, upon a finding that no election was legally held, to declare a vacancy in the board of trustees and required it to be filled, defendants could not complain that the judgment did not expressly declare that the election was not legally held upon decreeing that the vacancy existed and directing that it be filled.—*Crow v. Falls* (Tex. Civ. App.) 933.

MANDATE.

See Mandamus.

MANDATORY INJUNCTION.

Existence of remedy by as ground for denial of mandamus, see Mandamus, § 3.

MANSLAUGHTER.

See Homicide.

MARKET VALUE.

Relevancy of evidence as to, see Evidence, § 113.

MARRIAGE.

See Divorce; Husband and Wife.

Judicial notice as to age at which persons may legally marry, see Criminal Law, § 304.

Validity of contract to aid in securing husband, see Contracts, § 111.

MARRIED WOMEN.

See Husband and Wife.

MASTER AND SERVANT.

See Work and Labor.

I. THE RELATION.

(B) Statutory Regulation.

§ 14. Acts 28th Leg. 1903, p. 178, c. 112, § 1, approved April 3, 1903, *held* a penal statute, and hence will not be construed beyond the plain import of its terms.—*Beaumont Traction Co. v. State* (Tex. Civ. App.) 615, 618.

§ 14. Acts 28th Leg. p. 178, c. 112, § 1, approved April 3, 1903, requiring electric railways to provide appliances to protect motormen from the weather, *held* valid as a police regulation if otherwise valid.—*Beaumont Traction Co. v. State* (Tex. Civ. App.) 615, 618.

§ 14. Acts 28th Leg. p. 178, c. 112, §§ 1, 2, approved April 3, 1903, making it unlawful to operate electric street cars without providing screens, and providing a penalty for each offense, *held* so uncertain as to what constituted an offense thereunder that it cannot be enforced.—*Beaumont Traction Co. v. State* (Tex. Civ. App.) 615, 618.

employés payable in merchandise, see Bills and Notes, § 162.

§ 70. Only actual notice of the reduction of an employé's wages by a general reduction of employés' wages, given directly by the employer or indirectly through other employés, would terminate the contract of employment, and there could be no constructive notice, nor was the employé bound to exercise diligence to learn of a reduction.—*Pennington v. Thompson Bros. Lumber Co.* (Tex. Civ. App.) 923.

§ 70. While an employé's continuance in service after full knowledge of a general reduction of wages would show an acceptance of such reduction, knowledge that the wages of other employés had been reduced *held* not necessarily notice of a reduction as to him.—*Pennington v. Thompson Bros. Lumber Co.* (Tex. Civ. App.) 923.

§ 79. An employer issuing checks to his employés payable only in merchandise *held* not liable in money to the employés or their assignee for the amount of the check unless demand for payment in merchandise is refused.—*Attoyac River Lumber Co. v. Payne* (Tex. Civ. App.) 278.

§ 80. In an employé's action for the difference between his original salary and the amount which the employer claimed was his salary after it had been reduced by a general notice of reduction of wages, a requested charge *held* misleading.—*Pennington v. Thompson Bros. Lumber Co.* (Tex. Civ. App.) 923.

§ 80. In an employé's action for the difference between his original salary and the amount which the employer claimed was his salary after it had been reduced by a general notice of reduction of wages, certain testimony *held* inadmissible under the issues.—*Pennington v. Thompson Bros. Lumber Co.* (Tex. Civ. App.) 923.

§ 80. In an employé's action for the difference between his original salary and the amount which the employer claimed was his salary after it had been reduced by giving notice to employés of a general reduction in wages, testimony by defendant's manager of a notice of reduction of wages given at a meeting of employés *held* admissible.—*Pennington v. Thompson Bros. Lumber Co.* (Tex. Civ. App.) 923.

§ 83. Where a railroad had incurred a penalty for failure to promptly pay wages due discharged employés under Kirby's Dig. § 6649, amended by Acts 1905, p. 537, a tender of the wages due with interest without the accrued penalty was sufficient to stop the accumulation of the penalty.—*St. Louis, I. M. & S. R. Co. v. Bryant* (Ark.) 996.

§ 83. A tender of wages and interest due discharged railroad employés without accrued penalty *held* not to bar the employés' rights to recover the penalty so accrued under Kirby's Dig. § 6649, amended by Acts 1905, p. 537.—*St. Louis, I. M. & S. R. Co. v. Bryant* (Ark.) 996.

§ 83. A tender of wages sued for to the justice of the peace before whom the action was pending *held* not sufficient to stop the penalty imposed by Kirby's Dig. § 6649, amended by Acts 1905, p. 537.—*St. Louis, I. M. & S. R. Co. v. Bryant* (Ark.) 996.

§ 83. "Further employment" offered to discharged railroad employés in order to constitute a defense to a penalty imposed by Kirby's Dig. § 6649, amended by Acts 1905, p. 537, must be employment of the same class and kind and in the same locality in which the wages sued for were earned.—*St. Louis, I. M. & S. R. Co. v. Bryant* (Ark.) 996.

III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

(A) Nature and Extent in General.

Expert testimony in action for negligence in regard to furnishing medical attention, see Evidence, § 556.

Hearsay evidence in action for negligence in regard to furnishing medical attention, see Evidence, § 317.

Release after accrual of liability, see Release, §§ 16, 17, 55.

§ 92. In a suit against a railroad for negligence in providing an injured employé with medical attention, the duty of defendant in respect to sending plaintiff to the place where the company's nearest local surgeon resided stated.—Missouri, K. & T. Ry. Co. of Texas v. Graves (Tex. Civ. App.) 458.

(B) Tools, Machinery, Appliances, and Places for Work.

Power of state to make regulations relative to blocking switches, etc., as dependent on non-exercise of power by Congress, see Commerce, § 10.

Regulations as to blocking switches, etc., validity as dependent on due process of law, see Constitutional Law, § 301.

§§ 101, 102. A master *held* not bound to furnish absolutely safe appliances, but only to exercise reasonable care to furnish such appliances as are suitable for the purposes for which they are intended, and to exercise ordinary care to see that they are kept in such condition.—Arkansas Smokeless Coal Co. v. Pippins (Ark.) 113.

§§ 101, 102. "Suitable appliance" defined.—Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.) 1025.

§ 103. It is an absolute duty of a master to furnish his employé a reasonably safe place in which to work.—English v. Roberts, Johnson & Rand Shoe Co. (Mo. App.) 747.

§ 103. Where the master intrusts to another a duty which he cannot delegate, and such other neglects the same, and a servant is injured, the master is liable.—English v. Roberts, Johnson & Rand Shoe Co. (Mo. App.) 747.

§ 103. Right of master to delegate his duties to servants determined.—English v. Roberts, Johnson & Rand Shoe Co. (Mo. App.) 747.

§ 107. The master *held* bound to make a ditch reasonably safe by shoring the walls; such precaution being possible at slight expense, and the danger from working without it not being obvious.—City of Owensboro v. Gabbert (Ky.) 178.

§ 109. Liability of a master who negligently furnishes his servant with a mule of such a vicious nature that the servant is liable to be injured by it stated.—Arkansas Smokeless Coal Co. v. Pippins (Ark.) 113.

§ 110. A railroad *held* not liable for injuries to a servant in performing certain switching operations with a road engine, for failure to provide a switch engine.—Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.) 1025.

§ 113. A railroad is liable for injuries occasioned by its neglect in maintaining obstruction near track.—Louisville & N. E. Co. v. Hahn's Adm'r (Ky.) 142.

§ 118. In an action by a servant for personal injuries from being kicked by a mule off a coal car and between it and the walls of a passageway of a coal mine, the employer *held* not negligent in the construction of the passageway.—Arkansas Smokeless Coal Co. v. Pippins (Ark.) 113.

§ 124. A master's duty to provide reasonably safe machinery and appliances requires the mak-

ing of a reasonable inspection.—St. Louis, I. M. & S. Ry. Co. v. Reed (Ark.) 645.

§ 129. In an action for injuries to a switchman, the equipment of the engine with a Leeds instead of a Tower coupler *held* not the proximate cause of the accident.—Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.) 1025.

§ 129. Where the mud on a rail was a concurring cause with the defective condition of the wheel and axle of a motor car and of excessive speed of the car in producing its derailment, injuring a servant, the presence of the mud on the rail did not defeat an action for the injury.—Morgan's L. & T. R. & S. S. Co. v. Street (Tex. Civ. App.) 270.

§ 129. In an action for injuries to a servant, the master's failure to warn plaintiff *held* not the proximate cause of the accident.—Brazos Oil & Light Co. v. Crawford (Tex. Civ. App.) 916.

(C) Methods of Work, Rules, and Orders.

§ 137. A railroad *held* not to owe to a watchman employed to keep trespassers on the track from being injured by trains the duty of regulating the speed of its trains.—Wickham's Adm'r v. Louisville & N. R. Co. (Ky.) 154.

§ 137. Where an engine was detached from a train of camp cars, containing a repair crew, at an intermediate station, the ringing of the bell *held* a sufficient warning of its return to recouple to the occupants of the cars.—Chesapeake & O. Ry. Co. v. Nash (Ky.) 509.

§ 139. Proximate cause of the death of a switchman engaged as brakeman on a loaded coal car *held* the negligence of fellow servants.—Pratt v. Missouri Pac. Ry. Co. (Mo. App.) 1125.

§ 139. In a servant's action for injuries sustained while removing the nipple on the bottom of an oil tank car by the oil rushing out into his eyes, negligence of plaintiff's foreman in directing that the nipple be removed without having closed the valve inside the tank *held* to have caused plaintiff's injury.—Galveston, H. & S. A. Ry. Co. v. Sanchez (Tex. Civ. App.) 44.

§ 149. An order to an employé to hurry up the work *held* not negligence.—English v. Roberts, Johnson & Rand Shoe Co. (Mo. App.) 747.

§ 149. Liability of master for orders in the prosecution of the work determined.—English v. Roberts, Johnson & Rand Shoe Co. (Mo. App.) 747.

§ 149. If defendant knew of the danger in sending an employé under an oil tank car to unscrew the nipple of the pipe when the valve was open, so as to permit the oil to rush out when the nipple was removed, but the servant did not know of the danger and could not discover it, defendant would be liable for resulting injuries.—Galveston, H. & S. A. Ry. Co. v. Sanchez (Tex. Civ. App.) 44.

(D) Warning and Instructing Servant.

§ 153. In an action for injuries to a minor servant, defendant *held* negligent in failing to instruct plaintiff as to the proper method of cleaning a machine, and of not warning him of the danger of cleaning it while in motion.—Texas & N. O. R. Co. v. Plummer (Tex. Civ. App.) 942.

§ 158. Plaintiff's injury *held* to have proximately resulted from defendant's negligence in failing to instruct him as to the proper method of cleaning a machine, and in failing to warn him of the danger of cleaning it while in motion.—Texas & N. O. R. Co. v. Plummer (Tex. Civ. App.) 942.

(E) Fellow Servants.

§ 168. Reasonable care in the selection of persons fit to perform the master's duty of in-

§ 177. Where the undisputed evidence showed that a servant was injured by negligence of a fellow servant, there could be no recovery from the master.—*Reliance Textile & Dye Works Co. v. Williams* (Ky.) 207.

§ 179. The court must give to the fellow servant statute such an interpretation as will best afford employes, working in dangerous positions, protection.—*Pratt v. Missouri Pac. Ry. Co.* (Mo. App.) 1125.

§ 180. Rev. St. 1899, § 2864, as amended by Laws 1905, p. 135 (Am. St. 1906, p. 1637), *held* to cover the operation of trains and cars at terminal yards.—*Pratt v. Missouri Pac. Ry. Co.* (Mo. App.) 1125.

§ 188. Where an employe is injured through the negligence of a superior servant, a ground of action against the master is *prima facie* shown.—*English v. Roberts, Johnson & Rand Shoe Co.* (Mo. App.) 747.

§ 188. It is the character of the act complained of, and not the rank of the servant, which determines the master's liability for the acts of a servant occupying the dual capacity of fellow and also superior servant.—*English v. Roberts, Johnson & Rand Shoe Co.* (Mo. App.) 747.

§ 190. A master is liable for injuries to a servant whether the negligent act was done by a superior servant or by another under his orders.—*John Diebold & Sons v. Wollborn* (Ky.) 212.

§ 190. When a foreman temporarily takes a place vacant by the absence of a laborer under him, he does not surrender a superior's duties and obligations; but the master will be responsible for his negligence resulting in injury to a subordinate employe.—*John Diebold & Sons v. Wollborn* (Ky.) 212.

§ 190. The act of one occupying the dual capacity of superior and fellow servant in prematurely starting a machine at which both he and plaintiff worked, resulting in plaintiff's injury, was in the capacity of fellow servant, for which the master is not liable.—*English v. Roberts, Johnson & Rand Shoe Co.* (Mo. App.) 747.

§ 190. A servant injured by the acts of another occupying the dual capacity of superior and fellow servant cannot recover against the master without showing that the injury resulted from an act in the exercise of the authority of the master, distinct from any manual act in the common employment.—*English v. Roberts, Johnson & Rand Shoe Co.* (Mo. App.) 747.

§ 190. Where an employe is injured through the negligence of a superior servant in exercising the authority of the master by negligently directing the performance of a dangerous task, the master is *prima facie* liable for the injury.—*English v. Roberts, Johnson & Rand Shoe Co.* (Mo. App.) 747.

§ 191. A servant is entitled to recover against the master for injuries caused by the negligence of a collaborer engaged in a different line of work.—*Broadway Coal Mining Co. v. Davis* (Ky.) 228.

§ 197. An engineer in charge of a derrick engine used to hoist stones for the walls of a building and a stone mason charged with the duty of receiving and placing them in position are fellow servants; but the rule does not apply when the foreman acts in the engineer's place in his temporary absence.—*John Diebold & Sons v. Wollborn* (Ky.) 212.

§ 201. A railroad brakeman *held* entitled to recover for injuries sustained by the railroad company's negligence, though the negligence of his fellow servants concurred in producing the

the master for injuries caused by the gross negligence of a superior servant.—*Broadway Coal Mining Co. v. Davis* (Ky.) 228.

(F) Risks Assumed by Servant.

§ 203. A servant does not assume risks created by the negligence of his master.—*Pratt v. Missouri Pac. Ry. Co.* (Mo. App.) 1125.

§ 205. Rule as to assumption of risks by servants, stated.—*Warren's Adm'r v. Jeunesse* (Ky.) 862.

§ 205. In a servant's action for injuries sustained while removing the nipple from the bottom of an oil tank car, by the oil rushing into his eyes, by reason of the valve inside the tank not having been closed, plaintiff *held* not to have assumed the risk of injury from such cause.—*Galveston, H. & S. A. Ry. Co. v. Sanchez* (Tex. Civ. App.) 44.

§ 210. A trainman knowing of obstruction maintained by the railroad near track does not assume the risk.—*Louisville & N. R. Co. v. Hahn's Adm'r* (Ky.) 142.

§ 216. Where two employes are working together in the performance of a common task, and the inferior servant is injured by the negligence of the superior in the performance of an act incident to the common employment, the master is not liable as the risk ordinarily incident to the employment was assumed.—*English v. Roberts, Johnson & Rand Shoe Co.* (Mo. App.) 747.

§ 217. Where a master negligently furnishes his servant with a mule of such a vicious nature that the servant is liable to be injured by it, the master will not be liable, if the servant knew that the animal was dangerous, but continued to use it.—*Arkansas Smokeless Coal Co. v. Pippins* (Ark.) 113.

§ 217. A railroad brakeman *held* not to have assumed the risk as a matter of law of the danger of injuries from a collision between a train on which he was riding and certain ballast cars permitted to run onto the main track because of the railroad's failure to provide a derailler or other safety device.—*St. Louis, I. M. & S. Ry. Co. v. Corman* (Ark.) 116.

§ 218. A minor servant does not assume the risk unless he not only knows the danger, but is aware of its extent, and has sufficient discretion to comprehend the risk.—*Texas & N. O. R. Co. v. Plummer* (Tex. Civ. App.) 942.

§ 218. The rule relating to a minor servant's assumption of risk is not affected by the fact that the contract of employment was made by his parents.—*Texas & N. O. R. Co. v. Plummer* (Tex. Civ. App.) 942.

§ 219. A ditch, which a servant was digging when the sides caved and injured him, *held* not such an obviously dangerous place of work that one of common understanding would not have continued to work therein.—*City of Owensboro v. Gabbert* (Ky.) 178.

§ 222. The master, by directing plaintiff to work in a ditch after his attention was called to its dangerous condition and the necessity of bracing it, *held* liable for injuries caused by its caving, even if the place was such that plaintiff created the danger in working, so that the rule as to a safe place of work would not apply.—*City of Owensboro v. Gabbert* (Ky.) 178.

§ 222. The rule as to a servant's assumption of risk of injury from working in an unsafe place when he continues to work under the master's direction, stated.—*City of Owensboro v. Gabbert* (Ky.) 178.

§ 226. A servant assumes the risk of all dangers incident to the service, but not those arising from his employer's negligence of which he has no knowledge.—*St. Louis, I. M. & S. Ry. Co. v. Corman* (Ark.) 116.

(G) **Contributory Negligence of Servant.**
Laws depriving railroad companies of defense of contributory negligence in actions for injuries caused by unblocked switches, etc., as denial of due process of law, see Constitutional Law, § 301.

§ 231. Where plaintiff notified his superior that a coal car was off the track, and the latter brought a gang and replaced it on the track, and plaintiff left the car before it was chocked, plaintiff could assume that the car was securely chocked.—*Broadway Coal Mining Co. v. Davis* (Ky.) 228.

§ 231. In a servant's action for injuries sustained while removing the nipple from the bottom of an oil tank car, by the oil rushing into his eyes, by reason of the valve inside the tank not having been closed, plaintiff held not guilty of contributory negligence.—*Galveston, H. & S. A. Ry. Co. v. Sanchez* (Tex. Civ. App.) 44.

§ 236. A watchman suddenly stepping without looking from a place of safety before an approaching train, which he knew was due, held guilty of negligence as a matter of law.—*Wickham's Adm'r v. Louisville & N. R. Co.* (Ky.) 154.

§ 236. A servant held precluded by his neglect from recovering for injuries received.—*Trosper v. East Jellico Coal Co.* (Ky.) 205.

§ 236. Rule applicable to stationary structures at the side of railroad tracks or overhead bridges held not applicable to a low cross-beam in a mine.—*Trosper v. East Jellico Coal Co.* (Ky.) 205.

§ 236. A teamster, injured by being caught between a load of lumber and the top of a shed, held negligent though he was assured that he could pass under the shed with safety.—*Slagel v. Chas. H. Nold Lumber Co.* (Mo. App.) 321.

§ 236. A section hand injured from being struck by a train held negligent as a matter of law.—*Williamson v. Wabash R. Co.* (Mo. App.) 1113.

§ 248. In actions for injuries to section hands, the humanitarian doctrine held not applicable until the engineer is made aware from the appearance of the section hand that he is in real peril.—*Williamson v. Wabash R. Co.* (Mo. App.) 1113.

(H) Actions.

Actions for wrongful death, see Death, § 47.

Expert testimony, see Evidence, § 556.

Expert testimony as to safety of appliances, see Evidence, § 513.

Hearsay evidence, see Evidence, § 317.

Competency of evidence as to knowledge of danger, see Evidence, § 151.

Penalty recoverable for wrongful death, see Death, § 78.

§ 262. In an action for the death of a servant, held necessary to plead the defense of contributory negligence.—*Lewis v. Texas & P. Ry. Co.* (Tex. Civ. App.) 605.

§ 264. In a servant's action for injuries by oil spouting from the bottom of a tank into plaintiff's eyes, when he removed the nipple from the pipe, evidence that gravel in the valve caused the oil to spout upon its removal held properly refused under the pleadings.—*Galveston, H. & S. A. Ry. Co. v. Sanchez* (Tex. Civ. App.) 44.

§ 264. In an action against a railroad for death of a locomotive engineer, certain evidence

held admissible under the pleadings.—*International & G. N. R. Co. v. Bradt* (Tex. Civ. App.) 59.

§ 265. In an action by a servant for personal injuries, the burden is on the servant to show that the master was negligent.—*Arkansas Smokeless Coal Co. v. Pippins* (Ark.) 113.

§ 265. A master's negligence in failing to provide safe machinery may be shown by proof that the defect was discoverable by the exercise of reasonable care, so that the master was either negligent in failing to discover it or was negligent in failing to repair it after discovery.—*St. Louis, I. M. & S. Ry. Co. v. Reed* (Ark.) 645.

§ 265. Proof that the death of deceased, an engineer, was caused by a displaced, unlocked switch held to make out a prima facie case of negligence against defendant railroad.—*International & G. N. R. Co. v. Bradt* (Tex. Civ. App.) 59.

§ 265. A master, sued for the negligent death of a servant, has the burden of proving the knowledge of the servant of the conditions on which to predicate assumption of risk.—*Lewis v. Texas & P. Ry. Co.* (Tex. Civ. App.) 605.

§ 270. In an action for death of a servant alleged to have been caused by defective instrumentalities, including an engine, testimony of a witness that, when he examined the engine months afterwards, it was sufficient, was inadmissible, where he could not say, except inferentially, that the engine was in the same condition when the accident happened.—*Warren's Adm'r v. Jeunesse* (Ky.) 862.

§ 270. In an action for death of a servant from alleged insufficient instrumentalities certain evidence as to the sufficiency of the appliances held competent.—*Warren's Adm'r v. Jeunesse* (Ky.) 862.

§ 270. Evidence of the general abandonment of a particular appliance is inadmissible, unless it appears that it was abandoned because another appliance was safer.—*Shohoney v. Quincy, O. & K. C. Ry. Co.* (Mo.) 1025.

§ 270. In an action at common law for injuries to a switchman, evidence of an interstate commerce inspector that all railroads are doing away with the Leeds coupler because the law makes them held inadmissible.—*Shohoney v. Quincy, O. & K. C. Ry. Co.* (Mo.) 1025.

§ 270. In a suit against a railroad for negligence in providing an injured employé with medical attention, the testimony of a witness that at plaintiff's request he notified defendants' local agent of the injury was admissible.—*Missouri, K. & T. Ry. Co. of Texas v. Graves* (Tex. Civ. App.) 458.

§ 276. In an action for the death of a locomotive fireman, evidence held to support a finding that decedent was struck by a semaphore pole maintained so close to the track as to authorize a recovery.—*Louisville & N. R. Co. v. Hahn's Adm'r* (Ky.) 142.

§ 278. Evidence held to sustain a finding that defendant railroad company was negligent in failing to install a derailing device to prevent the escape of certain cars from a storage track constructed on a descending grade.—*St. Louis, I. M. & S. Ry. Co. v. Corman* (Ark.) 116.

§ 278. In an action for injuries to a servant by the breaking of the crank lever of a railroad hand car, evidence held to warrant a finding that there was a visible defect in the bar, and that defendant was negligent in failing to discover it.—*St. Louis, I. M. & S. Ry. Co. v. Reed* (Ark.) 645.

§ 279. In a coal miner's action for injuries by being run over by a coal car which was chocked under the direction of another employé,

as entitled an injured employé to go to the jury.—*Rippeto v. Missouri, K. & T. Ry. Co. (Mo. App.)* 314.

§ 286. A master's negligence in failing to exercise ordinary care in discovering or repairing a visible defect in machinery which caused an accident is for the jury.—*St. Louis, I. M. & S. Ry. Co. v. Reed (Ark.)* 645.

§ 286. In a switchman's action for injuries caused by being thrown from a switch engine cab, whether plaintiff was thrown from the engine by the gross negligence of the engineer in running it at a dangerous speed *held* for the jury.—*Louisville & N. R. Co. v. Crutcher (Ky.)* 191.

§ 286. On the evidence, whether the engineer signaled approach of engine and cars temporarily detached to be recoupled to train *held* for the jury.—*Chesapeake & O. Ry. Co. v. Nash (Ky.)* 509.

§ 286. The use of a Leeds coupler, which did not comply with the standard prescribed by the safety appliance act of Congress (Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), did not constitute negligence per se, unless it was not reasonably safe.—*Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.)* 1025.

§ 286. In an action for injuries to a switchman, evidence of the engineer's negligence in prematurely running his engine forward after a coupling had failed *held* for the jury.—*Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.)* 1025.

§ 287. Where the evidence was conflicting, the question of negligence *held* for the jury.—*International & G. N. R. Co. v. Wynne (Tex. Civ. App.)* 50.

§ 289. Whether a locomotive fireman killed by being struck by a semaphore pole near the track was guilty of contributory negligence *held* for the jury.—*Louisville & N. R. Co. v. Hahn's Adm'r (Ky.)* 142.

§ 289. Railroad employé *held* not negligent as matter of law in attempting to pass from car to car while engine was uncoupled, in the absence of warning of return of engine.—*Chesapeake & O. Ry. Co. v. Nash (Ky.)* 509.

§ 289. Whether one had the right to rely on assurances of his boss as to the safety of the roof of a mine, rather than on the warnings of his associates, is a question for the jury.—*McHenry Coal Co. v. Phelps (Ky.)* 829.

§ 289. In an action for injuries to a section hand struck by a train, *held* that, notwithstanding plaintiff's negligence, he was entitled to go to the jury on the issue of last clear chance negligence.—*Williamson v. Wabash R. Co. (Mo. App.)* 1113.

§ 289. Whether a switchman, killed while engaged as a brakeman on a loaded coal car in a collision with another car, was guilty of contributory negligence, *held* for the jury.—*Pratt v. Missouri Pac. Ry. Co. (Mo. App.)* 1125.

§ 289. The selection by a servant of the more dangerous of two or more ways of doing a given act *held* not as a matter of law to constitute contributory negligence.—*Lewis v. Texas & P. Ry. Co. (Tex. Civ. App.)* 605.

§ 291. In a servant's action for injuries by oil spouting from the bottom of an oil tank into his eyes because the valve was open when he removed the nipple from the pipe, allegations of the answer *held* to authorize an instruction that defendant would be liable if the spouting oil was a latent danger known to defendant but not to

as requiring instruction as requiring instruction by experts in cast iron.—*St. Louis, I. M. & S. Ry. Co. v. Reed (Ark.)* 645.

§ 293. In a switchman's action for injuries by being thrown from a switch engine, an instruction on plaintiff's right to recover *held* not sufficiently concrete as to plaintiff's contention, and that the court should have instructed as stated.—*Louisville & N. R. Co. v. Crutcher (Ky.)* 191.

§ 293. A charge *held* not erroneous for omitting to predicate liability on failure to scale the roof of a mine; no precautions having been taken to make it safe.—*McHenry Coal Co. v. Phelps (Ky.)* 829.

§ 293. In an action for death of a servant, a certain charge *held* not objectionable.—*Warren's Adm'r v. Jeunesse (Ky.)* 862.

§ 293. In an action for injuries to plaintiff, an instruction authorizing consideration of the alleged general abandonment of the Leeds coupler, with which plaintiff was required to work at the time of the injury, in determining whether or not it was sufficient, *held* erroneous.—*Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.)* 1025.

§ 293. In an action for injuries to a switchman, an instruction that if the Leeds coupler had been generally abandoned, and was not reasonably safe, and another kind was safe and easily accessible, it was defendant's duty to discard the Leeds *held* erroneous.—*Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.)* 1025.

§ 293. In an action against a railroad for death of an engineer through the derailment of his engine at an open switch, a charge that negligence of a servant was negligence of the master *held* proper under the evidence.—*International & G. N. R. Co. v. Bradt (Tex. Civ. App.)* 59.

§ 293. In a suit against a railroad for negligence in providing an injured employé with medical attention, *held*, that it was error to refuse a charge exonerating defendant from liability on a particular state of facts.—*Missouri, K. & T. Ry. Co. of Texas v. Graves (Tex. Civ. App.)* 458.

§ 294. In a coal miner's action for injuries by a coal car breaking loose and running over him an instruction *held* erroneous as authorizing a recovery if the accident was caused by the negligence of a fellow servant in chocking the car under orders from the foreman.—*Broadway Coal Mining Co. v. Davis (Ky.)* 228.

§ 295. In a switchman's action for injuries by being thrown from a switch engine cab, which plaintiff claimed was caused by the engine swaying violently when run at a high speed, an instruction on assumed risk *held* not sufficiently concrete, and that the court should have instructed as stated.—*Louisville & N. R. Co. v. Crutcher (Ky.)* 191.

§ 295. In an action for death of a servant, a charge *held* misleading.—*Warren's Adm'r v. Jeunesse (Ky.)* 862.

§ 295. An instruction *held* not objectionable as requiring both a finding of assumed risk and contributory negligence to prevent a recovery by a servant.—*Texas & N. O. R. Co. v. Plummer (Tex. Civ. App.)* 942.

§ 296. In a switchman's action for injuries by being thrown from a switch engine cab, an instruction on contributory negligence *held* not sufficiently concrete to present the issues, and that the court should have instructed as stated.—*Louisville & N. R. Co. v. Crutcher (Ky.)* 191.

§ 296. A charge as to contributory negligence on the part of one injured by the fall of the roof of a mine *held* sufficient.—McHenry Coal Co. v. Phelps (Ky.) 829.

§ 296. An instruction *held* not objectionable as requiring both a finding of assumed risk and contributory negligence to prevent a recovery by a servant.—Texas & N. O. R. Co. v. Plummer (Tex. Civ. App.) 942.

§ 296. An instruction for injuries to a minor *held* not objectionable as giving an incorrect statement of the degree of care required of him.—Texas & N. O. R. Co. v. Plummer (Tex. Civ. App.) 942.

IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

(A) Acts or Omissions of Servant.

§ 302. An act *held* not within the scope of a servant's authority, so as to make the master liable therefor.—Corrigan v. Hunter (Ky.) 131.

§ 302. The master, though a corporation, *held* to have authorized an assault on a new employé by old employés in the course of an "initiation," and so to be liable.—Medlin Milling Co. v. Boutwell (Tex. Civ. App.) 442.

(C) Actions.

§ 330. Evidence *held* not to show ratification by a master of the servant's unauthorized act.—Corrigan v. Hunter (Ky.) 131.

§ 330. Where an engineer was charged with negligently operating a train, proof of his reputation as being a careful and prudent engineer *held* inadmissible.—Adams v. International & G. N. R. Co. (Tex. Civ. App.) 895.

MATERIALITY.

Of evidence in civil actions, see Evidence, § 143.

Of evidence in criminal prosecutions, see Criminal Law, §§ 382-392.

MAXIMS.

Of equity, see Equity, §§ 65, 66.

MEASURE OF DAMAGES.

See Damages, §§ 109-122.

MECHANICS' LIENS.

II. RIGHT TO LIEN.

(A) Nature of Improvement.

§ 32. No material or machinery furnished for use in a factory is lienable except such as becomes a part of the realty.—Banner Iron Works v. Aetna Iron Works (Mo. App.) 762.

§ 32. Iron castings furnished to a tobacco company *held* not to be material or machinery, within Rev. St. 1899, § 4203 (Ann. St. 1906, p. 2277), giving a lien to a person furnishing the same for a building.—Banner Iron Works v. Aetna Iron Works (Mo. App.) 762.

III. PROCEEDINGS TO PERFECT.

§ 139. Use of ordinary trade abbreviations in describing materials in a mechanic's lien account *held* to satisfy the requirements of Rev. St. 1899, § 4207 (Ann. St. 1906, p. 2290).—Wilson-Reheis-Rolfes Lumber Co. v. Capron (Mo. App.) 1085.

VII. ENFORCEMENT.

§ 304. A contract between an owner of property abutting on a street and a contractor for the construction of a sidewalk *held* to person-

ally bind the owner though the contractor had a lien, under Ky. St. § 2463 (Russell's St. § 2383).—Dersch v. Miller (Ky.) 177.

MEMBERSHIP.

In mutual benefit insurance association, see Insurance, § 694.

MEMORANDA.

Required by statute of frauds, see Frauds, Statute of, § 116.

MENTAL CAPACITY.

Of insured assigning policy, see Insurance, § 212.

Opinion evidence, see Evidence, § 471.

MENTAL SUFFERING.

Element of damages for negligent transmission of telegram, see Telegraphs and Telephones, § 65.

MERCHANDISE.

Nonnegotiable character of checks issued to employés payable in merchandise, see Bills and Notes, § 162.

Payment of wages in merchandise, see Master and Servant, § 79.

MERGER.

Of cause of action in judgment, see Judgment, § 570.

MINES AND MINERALS.

By occupants of homestead, as waste, see Homestead, § 142.

Mine owners and operators as employers, see Master and Servant, § 118.

Right of life tenant to open and operate mines, see Life Estates, § 12.

MINORS.

See Infants.

MISCEGENATION.

Judicial notice of invalidity of marriage between white and colored persons, see Criminal Law, § 304.

MISREPRESENTATION.

See False Pretenses; Fraud.

MISTAKE.

Adverse possession of land entered by mistake, see Adverse Possession, § 65.

In release, see Release, § 16.

Parol or extrinsic evidence, see Evidence, § 433.

Remedies, see Reformation of Instruments, § 19.

MITIGATION.

Of damages, see Damages, § 62.

MODIFICATION.

Of judgment or order on appeal, see Appeal and Error, § 1151.

MONEY RECEIVED.

Recovery of premiums paid, see Insurance, § 198.

Recovery of price paid for goods, see Sales, § 397.

§ 15. Persons *held* to have lost title to trust deeds and notes, so that they could not maintain an action for money had and received thereon.—*Cooper v. Commonwealth Trust Co. (Mo. App.) 791.*

MOOT QUESTIONS.

Determination on appeal, see Appeal and Error, § 19.

MORTGAGES.

By or to husband or wife, see Husband and Wife, § 171.

On personal property, see Chattel Mortgages.

On separate property of wife, see Husband and Wife, § 171.

I. REQUISITES AND VALIDITY.

(A) Nature and Essentials of Conveyances as Security.

Parol or extrinsic evidence contradicting or varying terms of instrument, see Evidence, § 419.

§ 16. A mortgage given to secure future advances *held* valid and a lien upon the mortgaged property for advances not exceeding the amount specified in the mortgage, though the mortgage on its face purported to secure an indebtedness already accrued.—*Perkins & Manning Co. v. Drew & Landrum's Assignee (Ky.) 526.*

§ 27. A deed *held* not to create an equitable mortgage on a crop raised on the land.—*Levy v. McDonnell (Ark.) 1002.*

VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

Mortgage of separate property of married women for debts of husband, see Husband and Wife, § 171.

Personal judgment against husband as constituting release of mortgage on separate property of wife for debts of husband, see Husband and Wife, § 238.

IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

§ 361. Where a trust deed required the trustee to sell for cash, upon foreclosure, he could not give credit on a note secured by a senior trust deed, alleged to have been assumed by the mortgagor in his trust deed.—*Jones v. Shepard (Mo. App.) 764.*

§ 376. A defense *held* not allowable under the allegations of an answer being in direct opposition thereto.—*Jones v. Shepard (Mo. App.) 764.*

§ 376. If a lienee under junior trust deed had assumed a senior trust deed, and there had been a valid sale under the senior trust deed, and the note secured thereby had been satisfied, the holder thereof would not be entitled to the surplus of the proceeds of the sale under the junior trust deed.—*Jones v. Shepard (Mo. App.) 764.*

§ 376. Ordinarily a trustee who sells property under a trust deed must ascertain the method of disposing of the proceeds from the direction of the trust deed, providing they are not unlawful.—*Jones v. Shepard (Mo. App.) 764.*

§ 376. Upon a foreclosure sale under a junior trust deed as between senior lienors and the junior mortgagor, the mortgagor is entitled to the surplus, unless he had relinquished as

creditor, and the surplus, stated.—*Jones v. Shepard (Mo. App.) 764.*

§ 376. If a mortgagor's equity of redemption is transferred in invitum, the transferee will step into his shoes in respect of his right to the proceeds at a foreclosure sale.—*Jones v. Shepard (Mo. App.) 764.*

§ 376. Foreclosure of a senior mortgage *held* not to transfer the equity to redeem from a junior mortgage to the purchaser at the sale under the senior mortgage.—*Jones v. Shepard (Mo. App.) 764.*

§ 376. A trustee selling land under a trust deed, *held* not, under certain circumstances, justified in turning over surplus proceeds as a credit on a note, in violation of the provisions of his trust deed.—*Jones v. Shepard (Mo. App.) 764.*

X. FORECLOSURE BY ACTION.

(F) Pleading and Evidence.

Waiver of answer, see Pleading, § 409.

(K) Deficiency and Personal Liability.

§ 559. Under Civ. Code Prac. § 20, an assignee of a note and mortgage pending a suit to enforce the mortgage *held* entitled to a personal judgment against the maker and his sureties.—*Staples v. Shiver (Ky.) 826.*

(L) Disposition of Proceeds and Surplus.

Pleading inconsistent defenses in action to recover surplus proceeds, see Pleading, § 93.

MOTIONS.

Relating to pleadings, see Pleading, §§ 350-367.

For particular purposes or relief.

Arrest of judgment in civil actions, see Judgment, § 266.

Change of venue in civil actions, see Venue, § 65.

New trial in civil actions, see New Trial, § 117.

New trial in criminal prosecutions, see Criminal Law, §§ 921-958.

Presentation of objections for review, see Appeal and Error, §§ 189-238.

Striking out evidence, see Criminal Law, § 696; Trial, §§ 84-105.

MULES.

Liability of master for injury to servant caused by vicious mule, see Master and Servant, § 109.

MUNICIPAL CORPORATIONS.

See Counties; Schools and School Districts, §§ 11-111.

Exemption of property from taxation, see Taxation, § 217.

Judicial notice of population, see Evidence, § 12.

Mandamus, see Mandamus, §§ 76, 79.

Municipal census, see Census, § 9.

Ordinances relating to intoxicating liquors, see Intoxicating Liquors.

Street railroads, see Street Railroads.

Water supply, see Waters and Water Courses, §§ 188, 201.

V. OFFICERS, AGENTS, AND EMPLOYÉS.

(A) Municipal Officers in General.

Jurisdiction of particular courts to determine right to office, see Courts, § 154.

Ross (Ky.) 161.

§ 162. Ky. St. § 2947 (Russell's St. § 626), relating to bond recorders in cities, construed, and *held* to import that the bond recorder is to receive \$4,000 a year and \$1,000 a year for each deputy actually employed, not exceeding two.—*Commonwealth v. Ross* (Ky.) 161.

(B) Municipal Departments and Officers Thereof.

§ 177. A vacancy in the police and fire commission of a city of the second class *held*, under the facts, not to arise so as to authorize the mayor under Ky. St. 1909, § 3137 (Russell's St. § 1144), to fill it without the approval of the board of aldermen.—*Ulrich v. Koustmer* (Ky.) 857.

§ 195. A member of the police and fire commission of a city of the second class *held*, under Ky. St. 1909, § 3137 (Russell's St. § 1144), not to hold over till his successor is appointed and qualified (sections 3118, 3126, 3143 [Russell's St. §§ 1216, 1028, 1080]).—*Ulrich v. Koustmer* (Ky.) 857.

VII. CONTRACTS IN GENERAL.

§ 248. The doctrine of ratification, as applied to the acts of municipal officers, stated.—*Gallup v. Liberty County* (Tex. Civ. App.) 291.

§ 252. A contract of a city to supply water *held* terminable at will.—*Sturgeon v. City of Paris* (Tex. Civ. App.) 967.

IX. PUBLIC IMPROVEMENTS.

(A) Power to Make Improvements or Grant Aid Therefor.

§ 284. A provision in a street improvement contract requiring the contractor to proceed on notice from the city engineer *held* not objectionable as a delegation of legislative power to the city engineer.—*Halsey v. Richardson* (Mo. App.) 326.

(B) Preliminary Proceedings and Ordinances or Resolutions.

§ 304. Failure of an ordinance to specify a time within which a public improvement should be completed *held* not a fatal defect.—*Halsey v. Richardson* (Mo. App.) 326.

§ 305. A form of contract attached to plans and specifications for a street improvement *held* not made a part of the ordinance by reference therein to the plans and specifications for information respecting details.—*Halsey v. Richardson* (Mo. App.) 326.

(C) Contracts.

§ 362. Whether a municipal contractor completed his contract within a reasonable time *held* a question of fact, to be solved by the trier of fact in the light of the surrounding circumstances.—*Halsey v. Richardson* (Mo. App.) 326.

§ 364. A city contractor *held* not responsible for delay in improving a street caused by the city engineer's failure to set grade stakes and because of a street railway company's failure to replace its rails.—*Halsey v. Richardson* (Mo. App.) 326.

(E) Assessments for Benefits, and Special Taxes.

Existence of lien as breach of covenant against incumbrances, see *Covenants*, § 96.

§ 414. It was no valid objection to an assessment for a street improvement that it included payment for work done on the side-

§ 456. Under St. Louis City Charter, lots made by the use of the owner into one lot *held* required to be assessed for a public improvement as one lot.—*Fruin v. Meredith* (Mo. App.) 1107.

§ 485. Special tax bills, if regular in form, make out a *prima facie* case against the owner of the property.—*Halsey v. Richardson* (Mo. App.) 326.

§ 485. The courts could not invalidate special tax bills on doubtful grounds.—*Fruin v. Meredith* (Mo. App.) 1107.

§ 485. The questions whether a street improvement was made in accordance with the contract and at a reasonable price, and was an improvement enhancing the value of the property assessed, are not open to inquiry, in an action on special tax bills.—*Fruin v. Meredith* (Mo. App.) 1107.

(F) Enforcement of Assessments and Special Taxes.

§ 558. An action on a special tax bill is an action at law.—*Fruin v. Meredith* (Mo. App.) 1107.

§ 564. St. Louis City Charter, art. 6, § 25, as amended in 1901 (Ann. St. 1906, p. 4863), *held* not to bar an action on special tax bills payable in installments in two years after the failure to pay an installment.—*Fruin v. Meredith* (Mo. App.) 1107.

§ 567. In an action on special tax bills, the defense that one tax bill should have been issued *held* available under the general denial.—*Fruin v. Meredith* (Mo. App.) 1107.

§ 568. In an action on special tax bills on distinct lots, defended on the ground that the use by the owner had made the lots one lot for purposes of assessment, evidence *held* to support a finding that the lots remained distinct lots for assessment, and that the special tax bills were valid.—*Fruin v. Meredith* (Mo. App.) 1107.

X. POLICE POWER AND REGULATIONS.

(A) Delegation, Extent, and Exercise of Power.

§ 605. Rev. St. 1895, arts. 419, 453, 460, *held* to authorize a city council to abate a nuisance unless the thing complained of is not a nuisance per se.—*Gulf, C. & S. F. Ry. Co. v. City of Belton* (Tex. Civ. App.) 413.

XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

(A) Streets and Other Public Ways.

§ 697. A band stand in the street *held* to be a continuing nuisance, against which injunction would lie after its completion.—*Atterbury v. West* (Mo. App.) 1106.

XII. TORTS.

(A) Exercise of Governmental and Corporate Powers in General.

§ 733. The law in exempting a municipality from liability for defects in its public buildings used for governmental purposes, etc., *held* to place them on the same footing with the state and counties thereof.—*Schwalk's Adm'r v. City of Louisville* (Ky.) 860.

§ 733. That municipalities are liable for negligence in not keeping their streets in repair

held an exception to the general rule exempting municipalities from liability for negligence in the performance of governmental duties.—*Schwalk's Adm'r v. City of Louisville (Ky.)* 860.

§ 736. A city acts in its individual, and not in its governmental capacity, in disposing of its garbage, and is liable as an individual for creating a nuisance in doing so, so that it would be liable to an adjoining owner, irrespective of negligence, where it established a garbage dump on its own land, the noxious odors from which made it uncomfortable and dangerous to reside on adjacent land.—*City of Paris v. Jenkins (Tex. Civ. App.)* 411.

(B) Acts or Omissions of Officers or Agents.

§ 747. A municipality in maintaining a city hall *held* performing a governmental duty, and not liable for negligence of servants performing its business therein.—*Schwalk's Adm'r v. City of Louisville (Ky.)* 860.

§ 747. Persons employed in a city hall in managing and conducting the affairs of the municipality are public officers, charged with the performance of public duties, so that the doctrine of respondeat superior does not apply to such employments.—*Schwalk's Adm'r v. City of Louisville (Ky.)* 860.

(C) Defects or Obstructions in Streets and Other Public Ways.

§ 759. That a city was without funds to construct sidewalks *held* no defense to an action for injuries from falling on a defective sidewalk.—*City of Mayfield v. Hughley (Ky.)* 838.

§ 775. A city has no authority to incurber one of its streets with paving material to be used in the improvement of another street.—*City of Louisville v. Tompkins (Ky.)* 174.

§ 788. The duty of a municipality to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon extends to cases where the obstructions or unsafe conditions of the street is brought about by persons other than the agents of the city; but the party seeking to recover for failure to perform that duty must show that the city had knowledge of the defect, or might have had knowledge thereof by the use of reasonable care.—*City of Mayfield v. Hughley (Ky.)* 838.

§ 791. In an action for injuries from falling over an obstruction in a street, the city *held* chargeable with notice thereof.—*City of Mayfield v. Hughley (Ky.)* 838.

§ 800. The negligence of a city in maintaining a defective sidewalk *held* the proximate cause of the injury to a pedestrian.—*Snickles v. City of St. Joseph (Mo. App.)* 1122.

§ 812. Rev. St. 1899, § 5724 (Ann. St. 1906, p. 2909), relating to notice of injury on a defective sidewalk, *held* satisfied where the notice given will enable the city officers to locate the defect causing the injury.—*Snickles v. City of St. Joseph (Mo. App.)* 1122.

§ 812. A notice of injury to a pedestrian on a defective sidewalk *held* sufficient within Rev. St. 1899, § 5724 (Ann. St. 1906, p. 2909).—*Snickles v. City of St. Joseph (Mo. App.)* 1122.

§ 821. A traveler's failure to observe an obstruction in a street by which she was thrown from her wagon and injured *held* not contributory negligence as a matter of law.—*City of Louisville v. Tompkins (Ky.)* 174.

§ 821. A city *held* to impliedly invite a pedestrian to use a sidewalk, so that the issue of his contributory negligence is for the jury.—*Snickles v. City of St. Joseph (Mo. App.)* 1122.

(D) Defects or Obstructions in Sewers, Drains, and Water Courses.

§ 834. Certain evidence *held* insufficient to show that defendant city had assumed jurisdiction and supervision over a street laid out over a fill in a stream, so as to render it liable for damages to plaintiff's property resulting from an overflow caused by the fill.—*Hedrick v. City of St. Joseph (Mo. App.)* 375.

XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

(A) Power to Incur Indebtedness and Expenditures.

Effect of partial invalidity of statute, see Statutes, § 64.

§ 871. Sp. Laws 1905, p. 87, c. 6, § 252, *held* not to authorize a city, in construction of Const. art. 3, § 52, to grant a thing of value to an individual.—*Sturgeon v. City of Paris (Tex. Civ. App.)* 907.

MURDER.

See Homicide.

MUTUAL BENEFIT INSURANCE.

See Insurance, §§ 694-819.

NAVIGABLE WATERS.

See Waters and Water Courses.

NEGLIGENCE.

Causing death, see Death, §§ 7-78.

By particular classes of persons.

See Carriers, §§ 98-105, 108-136, 149½-163, 177, 280-321; Municipal Corporations, §§ 733-834; Railroads, §§ 455-455.

Employers, see Master and Servant, §§ 92-96. Telegraph or telephone companies, see Telegraphs and Telephones, §§ 27-73.

Condition or use of particular species of property, works, machinery, or other instrumentalities.

See Railroads, §§ 255-485; Street Railroads, §§ 68-117.

I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

(A) Personal Conduct in General.

§ 3. "Gross negligence" is the absence of slight care.—*Louisville & N. R. Co. v. Smith (Ky.)* 806.

II. PROXIMATE CAUSE OF INJURY.

§ 59. Where negligence is admitted or otherwise proved, and the injuries consequent are immediate and flow directly from the negligent act, the person guilty of the act will not be excused because the particular circumstances are unusual and could not ordinarily have been foreseen.—*Fusselman v. Wabash R. Co. (Mo. App.)* 1137.

III. CONTRIBUTORY NEGLIGENCE.

Of passengers, see Carriers, §§ 331-348.

Of person injured at railroad crossing, see Railroads, § 327.

Of servant, see Master and Servant, §§ 231-248, 289, 296.

IV. ACTIONS.

(B) Evidence.

Condition of machinery causing injury to servant, see Master and Servant, § 270.

§ 121. In an action to recover for personal injuries, it is incumbent upon plaintiff to show that the accident directly caused the injury complained of.—*Epstein v. Pennsylvania R. Co.* (Mo. App.) 366.

§ 121. An accident, from an act of such a character that when due care is taken no injury ordinarily ensues, will be presumed to be negligent.—*Pratt v. Missouri Pac. Ry. Co.* (Mo. App.) 1125.

§ 122. Defendant, pleading the issue of contributory negligence as a defense, has the burden of proving it.—*Beaumont Traction Co. v. Happ* (Tex. Civ. App.) 610.

§ 130. An objection to certain testimony held to go only to the weight of the evidence, and not to its competency.—*Gulf, C. & S. F. Ry. Co. v. Fowler* (Tex. Civ. App.) 593.

§ 134. In an action to recover for personal injuries received in a railroad wreck, evidence held to sustain a finding that plaintiff's impotent condition directly resulted from the accident.—*Epstein v. Pennsylvania R. Co.* (Mo. App.) 366.

(C) Trial, Judgment, and Review.

§ 139. Instructions held not objectionable for failure to state what constitutes negligence or carelessness.—*Ripptoe v. Missouri, K. & T. Ry. Co.* (Mo. App.) 314.

§ 140. An instruction authorizing a recovery if the jury find defendant's negligence "directly contributed to cause" the injury held erroneous, where the defense of contributory negligence is in the case.—*Batsch v. United Rys. Co. of St. Louis* (Mo. App.) 371.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEWLY DISCOVERED EVIDENCE.

Ground for new trial, see Criminal Law, §§ 941-958.

Ground for new trial in civil actions, see New Trial, §§ 102, 103.

NEW PROMISE.

Within statute of limitations, see Limitation of Actions, § 143.

NEWSPAPERS.

Publication of notice of local option election, see Intoxicating Liquors, § 33.

NEW TRIAL.

In criminal prosecutions, see Criminal Law, §§ 921-938.

In proceeding for alimony, see Divorce, § 239. Necessity of motion for purpose of review, see Appeal and Error, §§ 291-302; Criminal Law, § 1064.

Remand by appellate court for new trial, see Appeal and Error, § 1195.

Review of discretionary rulings in motion for, see Appeal and Error, § 979.

II. GROUNDS.

(C) Rulings and Instructions at Trial.

§ 41. Admission of improper evidence may be ground for a new trial, though the court attempted to withdraw it by instruction.—*Hawman v. McLean* (Mo. App.) 1094.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 66. Where a case has been decided against the ruling of the trial judge, it is his duty to

set aside the verdict.—*Shohoney v. Quincy, O. & K. O. Ry. Co.* (Mo.) 1025.

§ 71. A verdict for a servant should not be set aside because defendant's evidence tended to show contributory negligence and assumption of risk; they being jury questions.—*Galveston, H. & S. A. Ry. Co. v. Sanchez* (Tex. Civ. App.) 44.

§ 72. On conflicting evidence, the court could set aside the verdict as contrary to the weight of evidence, and grant a new trial.—*Warner v. Michel* (Mo. App.) 338.

(H) Newly Discovered Evidence.

§ 102. Defendants held not to have shown sufficient diligence to entitle them to a new trial on the ground of newly discovered evidence.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 108. A new trial will not be granted for newly discovered evidence which is immaterial.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 117. Where a motion for a new trial is filed within the four days required by statute, an amendment thereto filed after the expiration of such time is a nullity.—*Fusselman v. Wabash R. Co.* (Mo. App.) 1187.

NEXT OF KIN.

See Descent and Distribution.

NOMINAL DAMAGES.

See Damages, § 9.

NONSUIT.

Before trial, see Dismissal and Nonsuit.

NOTES.

Promissory notes, see Bills and Notes.

NOTICE.

As affecting particular classes of persons.

See Carriers, § 105; Master and Servant, § 70; Municipal Corporations, § 812.

Purchasers of land, see Vendor and Purchaser, §§ 229-233.

Of particular facts, acts, or proceedings not judicial.

Application to sell property of ward, see Guardian and Ward, § 87.

Defect or obstruction in city street, see Municipal Corporations, §§ 788-791.

Delay in delivery of goods shipped, see Carriers, § 105.

Injury to person on city street, see Municipal Corporations, § 812.

Local option election, see Intoxicating Liquors, § 33.

Reduction of wages of servant, see Master and Servant, § 70.

Sale of goods retaken by conditional seller on default of buyer, see Sales, § 479.

Of particular judicial proceedings.

See Lis Pendens.

Action or process, see Process, § 96.

Appeal, see Appeal and Error, § 407.

§ 11. Publication of a notice is not the day it is set up in type and printed, but the day it may be seen and read by the public, though it need not reach every member thereof, and publication will date from the day the public begins to receive it from the publisher.—*State ex rel. Doran v. Johnson County Court* (Mo. App.) 316.

Police, § 17.
Power of police to regulate, see Municipal Corporations, § 605.

I. PRIVATE NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§ 3. One dumping garbage on his land, the noxious odors from which make it uncomfortable and dangerous to reside on adjacent land, would be liable to the adjoining owner for creating and maintaining a nuisance.—City of Paris v. Jenkins (Tex. Civ. App.) 411.

(D) Actions for Damages.

§ 50. The injury resulting to plaintiff's property by the creation of a nuisance by a city by dumping garbage held under the pleading and evidence to be only temporary, so that the measure of damages was the depreciation in rental value of the property, and not its depreciation in market value.—City of Paris v. Jenkins (Tex. Civ. App.) 411.

II. PUBLIC NUISANCES.

(B) Rights and Remedies of Private Persons.

§ 72. The law is that injunction by individuals will not lie to prevent a nuisance when injury is common to the public; but it does not apply when plaintiffs' injury is special, and they have suffered, and will suffer, damage over and above injury to the community at large.—Atterbury v. West (Mo. App.) 1103.

(C) Abatement and Injunction.

§ 84. Whether a bridge maintained by a railroad over its tracks for a public road is a nuisance is a question for the jury.—Gulf, C. & S. F. Ry. Co. v. City of Belton (Tex. Civ. App.) 413.

NUNC PRO TUNC.

Amendment of order approving sale of property belonging to estate of decedent, see Executors and Administrators, § 375.

OBJECTIONS.

In judicial proceedings.

Necessity for purpose of review, see Appeal and Error, §§ 189-238; Criminal Law, §§ 1033-1044.

To depositions, see Depositions, § 107.

OBLIGATION OF CONTRACTS.

Laws impairing, see Constitutional Law, §§ 123, 165.

OBSTRUCTIONS.

In city streets, see Municipal Corporations, § 775.

Of easements, see Easements, § 48.

OFFER.

Of proof, see Trial, § 56.

Of proof at trial, see Criminal Law, § 670.

Proposals for contract, see Contracts, § 22.

OFFICERS.

Authority of law officers to take and use photographs of persons confined in jail on criminal charge, see Torts, § 8.

Embezzlement, see Embezzlement.

Injunctions affecting, see Injunction, § 50.

Mandamus, see Mandamus, §§ 76, 79.

Quo warranto, see Quo Warranto.

Bank officers, see Banks and Banking, § 53.
Collectors of taxes, see Taxation, § 545.
Corporate officers, see Corporations, §§ 349, 433.
Court officers, see Courts, § 48.
County officers, see Counties, §§ 64, 85.
Municipal officers, see Municipal Corporations, §§ 162-195, 747.
School officers, see Schools and School Districts, § 46.
State officers, see States, § 30.

I. APPOINTMENT, QUALIFICATION, AND TENURE.

(C) Eligibility and Qualification.

Law providing for examination of candidates for office of county school superintendent by state board as delegation of legislative power to declare qualifications, see Constitutional Law, § 62.

(G) Resignation, Suspension, or Removal.

Effect of pardon of officer for crime conviction of which carries with it removal from office, see Pardon, § 9.

Privileged character of proceedings for impeachment, see Libel and Slander, § 145.

II. TITLE TO AND POSSESSION OF OFFICE.

§ 82. Equity has no power to enjoin public officers from assuming their functions, even though there was fraud in the election.—Adcock v. Houk (Tenn.) 979.

III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

Right to fix salary of judge after election to office where no amount of salary was fixed prior to election, see Judges, § 22.

OPEN AND CLOSE.

Argument at trial, see Trial, § 25.

OPENING.

Sale of property of ward, see Guardian and Ward, § 105.

OPINION EVIDENCE.

In civil actions, see Evidence, §§ 471-556.

In criminal prosecutions, see Criminal Law, §§ 478, 494.

OPINIONS.

Of courts, see Courts, §§ 89-116.

OPTIONS.

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§ 6. A false statement as to the property owned by him, made by one justifying as cognizor in a criminal prosecution, is perjury, and not false swearing.—Warren v. State (Tex. Cr. App.) 541.

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§ 214. A demurrer to a pleading held to admit allegations of fact well pleaded, but not allegations announcing a mere conclusion of law.—Meek v. Hurst (Mo.) 1022.

§ 214. The allegations of the petition must be taken as true for the purposes of a general demurrer thereto.—Ramon v. Saenz (Tex. Civ. App.) 928.

§ 218. Every reasonable intentment favorable to the petition must be indulged on general demurrer thereto.—Ramon v. Saenz (Tex. Civ. App.) 928.

§ 228. A judgment sustaining an exception to a pleading should be construed as going no further than the exception itself.—Blewitt v. Greene (Tex. Civ. App.) 914.

§ 228. Allegations of a petition must be taken as true for the purpose of exceptions thereto.—Crow v. Fails (Tex. Civ. App.) 933.

§ 248. Where both the original and amended petitions were based upon a breach of the same contract, that plaintiff construed the contract as one of agency in the original petition and as one of sale in the amended petition did not make the amended petition set up a new cause of action.—Kirby Lumber Co. v. C. R. Cummings & Co. (Tex. Civ. App.) 273.

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nite and uncertain does not lie.—Wertheimer-Swartz Shoe Co. v. McDonald (Mo. App.) 5.

§ 367. A motion to make more definite and certain a complaint for cutting and removing timber from several tracts of land *held* to be the remedy applicable, where the complaint did not set forth the description and value of the timber cut on each tract.—Stoneman-Zearing Lumber Co. v. McComb (Ark.) 648.

§ 367. Where an answer setting up breach of warranty is too indefinite and uncertain, the proper remedy is by motion to make more definite and certain.—Wertheimer-Swartz Shoe Co. v. McDonald (Mo. App.) 5.

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§ 378. An answer, containing a general denial only, puts in issue all the affirmations of the petition to which it refers.—Handlan v. Miller (Mo. App.) 751.

§ 378. In an action for delay in transmitting and delivering a telegram, the burden was on defendant, under Rev. St. 1895, art. 1193, to prove a limited liability stipulation pleaded, unless expressly admitted by plaintiff.—Postal Telegraph Cable Co. of Texas v. Harriess (Tex. Civ. App.) 891.

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§ 406. A petition for an injunction, though containing no allegation that the threatened wrong will result in irreparable injury, and that petitioner has no legal remedy, is sufficient in the absence of special exception.—Mitchell v. Burnett (Tex. Civ. App.) 937.

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§ 418. Error in overruling a demurrer to a complaint is waived by defendant pleading over.—Stoneman-Zearing Lumber Co. v. McComb (Ark.) 648.

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§ 69. A vendor purchasing other property for the purchasers held an agent of the purchasers, so as to be liable to them for a secret profit made by him on the transaction.—*Dolinski v. First Nat. Bank* (Tex. Civ. App.) 276.

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§ 101. Where an agent is in actual possession and control of land, his agreement not to hold adversely, during the pendency of a suit, is sufficient to suspend the running of limitations.—*Ellwood v. Stallcup* (Tex. Civ. App.) 906.

§ 103. An agent for the sale of land has no authority to sell on credit, unless specially authorized to do so.—*McKay v. McKinnon* (Tex. Civ. App.) 440.

§ 103. A power of attorney to sell for not less than a certain amount per acre held to authorize a sale for cash only.—*Lightfoot v. Horst* (Tex. Civ. App.) 606.

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§ 105. An agent and attorney in fact of a vendor is authorized to receive and apply as a credit on purchase-money notes in the agent's possession money borrowed by the purchaser and sent to the agent for that purpose.—*John M. Bonner Memorial Home v. Collin County Nat. Bank* (Tex. Civ. App.) 430.

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§ 150. A principal is not bound by the acts and declarations of an agent beyond the scope of his authority.—*Latham v. First Nat. Bank* (Ark.) 992.

§ 155. A contract for the sale of land which the agent of the vendor had no authority to make held unenforceable by the vendee.—*McKay v. McKinnon* (Tex. Civ. App.) 440.

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§ 163. "Ratification" of unauthorized act, defined.—*Gallup v. Liberty County* (Tex. Civ. App.) 291.

§ 166. A principal's demand on her agent for notes accepted by him in violation of his instructions, and without authority, held not a ratification of the principal's act in taking the notes.—*Morris v. Butler* (Mo. App.) 377.

§ 166. Knowledge by principal of agent's unauthorized acts, not to be presumed, and not required to be sought for by him, held essential to ratification.—*Lightfoot v. Horst* (Tex. Civ. App.) 606.

§ 170. Mere silence held not to prove ratification of agent's unauthorized act.—*Lightfoot v. Horst* (Tex. Civ. App.) 606.

§ 173. One claiming under ratification of agent's unauthorized acts held to have burden of proof.—*Lightfoot v. Horst* (Tex. Civ. App.) 606.

§ 173. Evidence held insufficient to show ratification of agent's unauthorized acts.—*Lightfoot v. Horst* (Tex. Civ. App.) 606.

PRINCIPAL AND SURETY.

See *Indemnity*.

Sureties on bonds in judicial proceedings.

See *Appeal and Error*, § 1232; *Bail*.

Appeal from justice's court, see *Justices of the Peace*, § 191.

II. NATURE AND EXTENT OF LIABILITY OF SURETY.

Evidence of parol agreement affecting liability, see *Evidence*, § 441.

III. DISCHARGE OF SURETY.

§ 104. An extension of time for payment of a note, on consideration that the maker would

pay interest accruing, *held* to release the surety.—*Fambro v. Keith* (Tex. Civ. App.) 40.

IV. REMEDIES OF CREDITORS.

§ 142. A surety on a note given for the price of corporate stock *held* not required to tender back the stock to avail himself of the defense that he was released from liability because of the extension of the note without his consent.—*Wisegarver v. Yinger* (Tex. Civ. App.) 925.

V. RIGHTS AND REMEDIES OF SURETY.

(C) As to Co-Surety.

§ 194. Where a note to defendant, on which plaintiff was surety, was sold to a bank, and renewed several times by substituting a new note given by all three of the parties, *held* that plaintiff and defendant became co-sureties for the maker, and that plaintiff was entitled to contribution on paying the judgment rendered on the last note.—*Wilson v. Kieffer* (Mo. App.) 1149.

PRIORITIES.

Between locations of school lands, see Public Lands, § 175.

PRISONS.

Use of prison records to identify accused under habitual criminal statute, see Criminal Law, § 1204.

PRIVATE NUISANCES.

See Nuisance, §§ 3, 50.

PRIVATE ROADS.

Rights of way, see Easements.

PRIVILEGE.

Effect on limitation, see Limitation of Actions, §§ 72-78.

Of witness as to testimony, see Witnesses, § 297.

PRIVILEGED COMMUNICATIONS.

See Libel and Slander, § 148.

Disclosure by witness, see Witnesses, §§ 188, 219.

PROBABLE CAUSE.

For prosecution, see Malicious Prosecution, § 19.

PROBATE.

Of wills, see Wills, §§ 280-400.

PROBATE COURTS.

See Courts, § 202.

PROCEDURE.

See cross-references under Practice.

PROCEEDS.

Of homestead, see Homestead, § 77.
Of insurance, see Insurance, § 586.

PROCESS.

Effect of appearance, see Appearance.

In particular actions or proceedings.

For forfeiture of bail, see Bail, § 93.

On appeal, see Appeal and Error, § 407.

To fix liability of surety on bail bond, see Bail, § 77.

Particular forms of writs or other process.

See Execution; Garnishment; Injunction; Mandamus; Quo Warranto; Replevin.

Search warrant, see Searches and Seizures.

I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

§ 4. Where defendants filed a cross-plea against codefendants for affirmative relief, and codefendants never appeared, in the absence of service of citation on the cross-plea, the court was without jurisdiction to award the relief prayed for.—*Mayhew & Co. v. Harrell* (Tex. Civ. App.) 957.

§ 4. In an action by an indorsee against makers and indorsers of a note secured by fire policies, *held*, that the court, on the pleadings, had no power to foreclose the lien on the policies.—*Mayhew & Co. v. Harrell* (Tex. Civ. App.) 957.

II. SERVICE.

(C) Publication or Other Notice.

§ 96. In a case to which Rev. St. 1889, § 2022, applied, *held*, that the court acquired jurisdiction over nonresident defendants by an order of publication based on an affidavit stating they were nonresidents of the state, and that the ordinary process of law could not be served on them.—*Jones v. Edeman* (Mo.) 1047.

(E) Return and Proof of Service.

In proceedings for forfeiture of bail, see Bail, § 93.

PROHIBITION.

Of traffic in intoxicating liquors, see Intoxicating Liquors.

PROMISSORY NOTES.

See Bills and Notes.

PROPERTY.

Constitutional guaranties of rights of property, see Constitutional Law, §§ 93, 301.

Particular species of property.

See Animals; Fixtures; Improvements; Logs and Logging.

Remedies involving or affecting property.

Protection of rights of property by injunction, see Injunction, §§ 30-52.

Transfers and other matters affecting title.

See Adverse Possession.

Taking for public use, see Eminent Domain.

Offenses against or involving property.

See Larceny, § 7.

Admissions as to ownership, see Evidence, § 220.

§ 7. Where property has been obtained from the owner by a felonious act, his unqualified ownership is not changed, and he may peaceably take it in whose hands he may find it.—*Russell v. Brooks* (Ark.) 649.

§ 9. On an issue as to the ownership of a filly, evidence of a joint mortgage executed thereon by defendant and deceased *held* admissible.—*Bailey v. Bailey* (Mo. App.) 1099.

PROVINCE OF COURT AND JURY.

In civil actions, see Trial, §§ 187-194.

In criminal prosecutions, see Criminal Law, §§ 737-764.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see Damages, § 23.

Of injury, see Negligence, § 59.

Of injury to passenger, see Carriers, § 305.

Of injury to servant, see Master and Servant, §§ 129-139, 158.

Of injury to traveler on city street, see Municipal Corporations, § 800.

PUBLICATION.

Notice by, see Notice, § 11.

Of lists of land delinquent, see Taxation, § 630.

Of notice of local option election, see Intoxicating Liquors, § 33.

Service of process, see Process, § 96.

PUBLIC DEBT.

See Counties, §§ 155, 167; Municipal Corporations, § 871; Schools and School Districts, §§ 97-111.

PUBLIC IMPROVEMENTS.

By municipalities, see Municipal Corporations, §§ 284-508.

PUBLIC LANDS.

Records of land office as evidence, see Evidence, § 342.

II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(B) Entries, Sales, and Possessory Rights.

Laws avoiding locations where certificates for unlocated balance are not filed within designated time as impairing obligation of contracts, see Constitutional Law, § 123; as impairing vested rights, see Constitutional Law, § 93; validity as dependent on retroactive operation, see Constitutional Law, § 190.

(F) Swamp and Overflowed Lands.

§ 61. Under Act March 1, 1855 (Laws 1855, p. 154), one *held* not to establish a legal or equitable title to swamp lands.—Nall v. Conover (Mo.) 1039.

(M) Conveyances, Contracts, and Exemptions.

§ 139. An agreement to enter under the laws of the United States lands for a homestead for the benefit of another is a violation of the statute.—Hardy v. Samuels (Ark.) 654.

III. DISPOSAL OF LANDS OF THE STATES.

Mandamus to compel reinstatement of purchaser of school land, parties, see Mandamus, § 152.

§ 172. One claiming a forfeiture, under Act Aug. 30, 1856 (Laws 1856, p. 81, c. 150), of a survey, *held* required to show that the survey was on a conditional certificate.—Keith v. Guedry (Tex.) 17.

§ 172. Statement as to necessary proof as to forfeiture of a survey under Act Nov. 29, 1871 (Laws 2d Sess. 1871, p. 45, c. 57).—Keith v. Guedry (Tex.) 17.

which was delayed.—Byrne v. Robinson (Tex.) 256.

§ 173. Under Const. art. 7, § 6. Const. 1876, art. 5, § 18, and Rev. St. 1895, arts. 1550, 4271, sales of county school lands made by the county judge under power attempted to be conferred on him by the commissioners' court *held* invalid.—Gallup v. Liberty County (Tex. Civ. App.) 291.

§ 173. Where a sale of county school lands was invalid only because made by the county judge under an ultra vires authorization, the county, having accepted and used the proceeds, ratified the sale.—Gallup v. Liberty County (Tex. Civ. App.) 291.

§ 173. Where county commissioners without authority authorized a sale of school lands by the county judge, the fact that he was allowed a commission out of the purchase price, all of which belonged to the county school fund, did not invalidate the sale.—Gallup v. Liberty County (Tex. Civ. App.) 291.

§ 175. Under Rev. St. 1895, art. 4269, and Const. art. 7, § 2, a location of public school land *held* to prevail over a subsequent location of county school land.—Ellwood v. Stallcup (Tex. Civ. App.) 906.

§ 178. A certain outstanding title to land *held* not to be asserted against a purchaser for value without notice thereof.—Ingalls v. Orange Lumber Co. (Tex. Civ. App.) 53.

PUBLIC NUISANCES.

See Nuisance, §§ 72, 84.

PUBLIC POLICY.

Affecting validity of contract, see Contracts, § 108.

PUBLIC SCHOOLS.

See Schools and School Districts, §§ 11-111.

PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

Water companies, see Waters and Water Courses, §§ 188, 201.

PUBLIC USE.

Taking property for public use, see Eminent Domain.

PUBLIC WATER SUPPLY.

See Waters and Water Courses, §§ 188, 201.

PUNISHMENT.

See Criminal Law, § 1208; Pardon.

For offenses by infant, see Infants, § 69.

For rape, see Rape, § 64.

PUNITIVE DAMAGES.

See Damages, §§ 87, 91.

QUALIFICATIONS.

Of county school superintendent, see Schools and School Districts, § 46.

QUANTUM MERUIT.

See Work and Labor.

QUESTIONS FOR JURY.

In civil actions, see Trial, §§ 139-143.

In criminal prosecutions, see Criminal Law, §§ 737-764.

QUIETING TITLE.**I. RIGHT OF ACTION AND DEFENSES.**

Title to swamp lands, sufficiency of title of grantee from state, see Public Lands, § 61.

§ 10. In a suit under Rev. St. 1899, § 650 (Ann. St. 1906, p. 667), to quiet title, plaintiff need not go back of the common source of title, but, when he relies on a paper title from the government, he must show that his title is complete and adequate.—Nall v. Conover (Mo.) 1039.

§ 10. In a suit to quiet title, evidence held to show that there was no admitted or assumed common source of title, and plaintiff, relying on a paper title from the government, must, to recover, show a complete title.—Nall v. Conover (Mo.) 1039.

II. PROCEEDINGS AND RELIEF.

§ 29. Facts stated held to show no element of equitable laches so as to bar an action to quiet title.—Rutter v. Carothers (Mo.) 1056.

QUO WARRANTO.

Equitable estoppel by position taken in quo warranto proceedings, see Estoppel, § 68.

II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 55. In quo warranto to test defendant's right to hold over the office of superintendent of public schools, relator cannot contend that defendant was a usurper, in that he did not take an oath to support the Constitution, where it does not affirmatively appear that such oath was not taken.—State v. Evans (Tenn.) 81.

§ 57. In a proceeding in the nature of quo warranto to test the right of defendant to hold over the office of county superintendent of public schools, relator's excuse for not having a certificate from the board of education, as required by Acts 1895, p. 70, c. 54, held not reviewable.—State v. Evans (Tenn.) 81.

RAILROADS.

See Street Railroads.

As employers, see Master and Servant.

Carriage of goods and passengers, see Carriers.

Condemnation of street crossing over railroad, admissibility of evidence of damages, see Eminent Domain, § 203.

Judicial notice that railroads are engaged in interstate and intrastate commerce, see Evidence, § 20.

Penalties for nonpayment of wages due employees, see Master and Servant, § 83.

Taxation of, see Taxation, § 391.

V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

Condemnation of property for right of way, trial on appeal from decision of commissioners, see Eminent Domain, § 239.

Condemnation of right to lay pipe line on right of way, see Eminent Domain, § 136.

Condemnation of street crossing over railroad, sufficiency of evidence of damages, see Eminent Domain, § 203.

§ 72. A condition in a contract held discharged by the subsequent execution of another contract taking up the subject-matter of the prior agreement.—Ozark & C. C. Ry. Co. v. Ferguson (Ark.) 624.

VI. CONSTRUCTION, MAINTENANCE, AND EQUIPMENT.

Accrual of right of action for injuries from negligence in construction, see Limitation of Actions, § 55.

§ 96. Where a street grade at a railroad crossing rendered it impossible for the company to lay a third track, it was the duty of the city to so change the grade that such track could be laid when it became necessary for the railroad company's business.—Louisville & N. R. Co. v. City of Louisville (Ky.) 849.

§ 98. In mandamus by a city to compel a railroad to establish a grade crossing, the railroad held entitled to show that it is impracticable to maintain a grade crossing.—Gulf, C. & S. F. Ry. Co. v. City of Belton (Tex. Civ. App.) 413.

X. OPERATION.

Actions for wrongful death, see Death, § 47. Crossing road by street railroad, see Street Railroads, § 41.

Liabilities for wrongful death of servant, penalty recoverable, see Death, § 78.

(B) Statutory, Municipal, and Official Regulations.

Law imposing penalty for failure to provide waiting rooms with wholesome drinking water as denial of equal protection of law, see Constitutional Law, § 241.

Regulations as to blocking switches etc., validity as dependent on due process of law, see Constitutional Law, § 301; as dependent on nonexercise of power by Congress, see Commerce, § 10.

§ 255. An indictment against a carrier for failure to provide drinking water at a passenger station held to state a violation of Kirby's Dig. § 6634.—State v. St. Louis & S. F. R. Co. (Ark.) 627.

§ 255. Kirby's Dig. §§ 6634, 6636, held to impose a duty of providing waiting rooms with water on railroad companies as corporations as well as on the agents in charge of the stations.—State v. St. Louis & S. F. R. Co. (Ark.) 627.

(C) Companies and Persons Liable for Injuries.

§ 256. Evidence held to show that a railroad company's duty as to a car on a side track had not ceased at a particular time.—Gulf, C. & S. F. Ry. Co. v. Fowler (Tex. Civ. App.) 593.

(D) Injuries to Licensees or Trespassers in General.

§ 273½. A railroad company in possession of freight as warehouseman for delivery to the consignee must exercise ordinary care in guarding the same so as to prevent injury to others.—Gulf, C. & S. F. Ry. Co. v. Fowler (Tex. Civ. App.) 593.

§ 273½. The rule that a carrier need not acquaint itself with the character of goods received for transportation held subject to the exception that it does not apply to dangerous articles, and a carrier receiving dangerous articles must exercise ordinary care to prevent injury to others.—Gulf, C. & S. F. Ry. Co. v. Fowler (Tex. Civ. App.) 593.

(F) Accidents at Crossings.

Previous decisions of courts of state in which cause of action arose as law governing action, see Courts, § 95.

§ 312. Engineer of a train approaching a private road crossing *held* not bound to look away from the track to see if he can discover approaching travelers above the sides of the cut through which the road runs.—Louisville & N. R. Co. v. Engleman's Adm'r (Ky.) 833.

§ 312. A railroad is not required to give notice of the approach of trains to a private crossing unless it has been customary for signals to be given which are relied on by persons using the crossing.—Louisville & N. R. Co. v. Engleman's Adm'r (Ky.) 833.

§ 316. A railroad may run its trains at any speed it pleases over private crossings.—Louisville & N. R. Co. v. Engleman's Adm'r (Ky.) 833.

§ 327. One having a right to cross a railroad track need not stop to look or listen before crossing, in order to discover whether a train is approaching.—Chesapeake & O. Ry. Co. v. Patrick (Ky.) 820.

§ 335. In an action for the death of a pedestrian at a crossing, evidence *held* not to show that the railroad was guilty of negligence because it ran its train at a dangerous rate of speed.—Cincinnati, N. O. & T. P. Ry. Co. v. Chavasse's Adm'r (Ky.) 171.

§ 340. A watchman maintained by a railroad at a crossing *held* not guilty of negligence in allowing a pedestrian to cross without warning him of the approach of a train.—Cincinnati, N. O. & T. P. Ry. Co. v. Chavasse's Adm'r (Ky.) 171.

§ 350. In an action for injuries in a crossing accident, whether plaintiff was negligent in standing on one track while a freight train was passing on another *held*, under the evidence, for the jury.—Chesapeake & O. Ry. Co. v. Patrick (Ky.) 820; Same v. Picklesimer's Adm'r (Ky.) 822.

§ 350. There is no presumption that a person killed at a private railroad crossing is guilty of contributory negligence; that question being for the jury.—Louisville & N. R. Co. v. Engleman's Adm'r (Ky.) 833.

§ 350. Whether the custom prevails to give signals when trains approach private crossings and people rely on such signals being given in any given case *held* for the jury.—Louisville & N. R. Co. v. Engleman's Adm'r (Ky.) 833.

§ 350. In an action for death of a person killed at a private railroad crossing, whether the custom of giving signals for a crossing prevailed to an extent that persons using the crossing could rely on the signals being given *held*, under the evidence, a question for the jury.—Louisville & N. R. Co. v. Engleman's Adm'r (Ky.) 833.

§ 351. In an action for injuries at a crossing, an instruction confining the proof of signals of an approaching engine to the ringing of the bell *held* proper.—Chesapeake & O. Ry. Co. v. Patrick (Ky.) 820; Same v. Picklesimer's Adm'r (Ky.) 822.

§ 351. In an action for death at a crossing, instructions given as to duty to give signals *held* erroneous.—Louisville & N. R. Co. v. Engleman's Adm'r (Ky.) 833.

(G) Injuries to Persons on or near Tracks.

§ 360. A railroad need not watch for persons along and near its right of way, but trainmen, becoming aware of the presence of a person on a public road near its track and that his horse is frightened, must desist from making noises frightening the horse, if consistent with their other duties.—Adams v. International & G. N. R. Co. (Tex. Civ. App.) 895.

§ 360. A railroad *held* liable for injuries caused by trainmen frightening a horse on a

public road near the track.—Adams v. International & G. N. R. Co. (Tex. Civ. App.) 895.

§ 360. A railroad *held* liable for the results of the frightening of horses by unnecessary and unusual whistling or letting off of steam, under circumstances amounting to negligence or willfulness.—Adams v. International & G. N. R. Co. (Tex. Civ. App.) 895.

§ 304. A railroad company *held* not required to load or inspect its car to prevent coal falling from it on one playing on its grounds near the track.—Covington & C. R. Transfer & Bridge Co. v. Mulvey's Adm'r (Ky.) 129.

§ 397. In an action against a railroad for frightening a horse on a public road, evidence of the habit of the engineer *held* admissible.—Adams v. International & G. N. R. Co. (Tex. Civ. App.) 895.

§ 397. Where an engineer was charged with negligently operating a train and frightening a horse, *held* error to permit the engineer to testify that in his experience he did not recall an instance of having frightened a horse.—Adams v. International & G. N. R. Co. (Tex. Civ. App.) 895.

§ 401. A charge in an action for injuries to a person struck by a locomotive *held* not objectionable on a certain ground.—Missouri, K. & T. Ry. Co. of Texas v. Reynolds (Tex.) 531.

§ 401. In an action for injuries to a person struck by a switch engine, a charge *held* erroneous as taking from the jury the question whether the acts of the switching crew on discovering plaintiff's danger were a sufficient exercise of the care required under the circumstances.—Missouri, K. & T. Ry. Co. of Texas v. Reynolds (Tex.) 531.

§ 401. In an action for injuries to a person struck by a locomotive, a requested charge *held* erroneous.—Missouri, K. & T. Ry. Co. of Texas v. Reynolds (Tex.) 531.

(H) Injuries to Animals on or near Tracks.

§ 411. No cause of action exists under Rev. St. 1899, §§ 1105, 2367 (Ann. St. 1906, pp. 945, 1649), for the mere failure of a railroad to inclose a tract of land owned by it on one side of its track.—Corcoran v. Wabash R. Co. (Mo. App.) 743.

§ 411. It is the point at which stock injured by a railroad enters the right of way that determines the liability or nonliability of the railroad under Rev. St. 1899, § 1105 (Ann. St. 1906, p. 945), requiring it to fence its right of way, and, in the absence of other proof, the place on the track where the animals were injured will be taken as marking the point of entry.—Corcoran v. Wabash R. Co. (Mo. App.) 743.

§ 411. No liability attaches to a railroad company for failure to put a cattle guard in a place where to do so would endanger the lives or limbs of its employes.—Corcoran v. Wabash R. Co. (Mo. App.) 743.

§ 412. Defendant railroad *held* liable for injuring stock which passed onto its right of way through a gap in the railroad fence.—Gulf, C. & S. F. Ry. Co. v. Benaist (Tex. Civ. App.) 587.

§ 443. In an action against a carrier of sulphuric acid for injuries caused by the escape of the acid from a car in flowing into the street, evidence *held* to show that it had notice of the dangerous character of the acid, and that it negligently permitted it to escape.—Gulf, C. & S. F. Ry. Co. v. Fowler (Tex. Civ. App.) 593.

§ 443. Evidence *held* to show that a carrier was liable to the owner for the loss of the goods, and hence liable to a third person for injuries caused by the goods.—Gulf, C. & S. F. Ry. Co. v. Fowler (Tex. Civ. App.) 593.

§ 446. In an action against a railroad for killing stock, the negligence of the railroad *held* for the jury.—Cincinnati, N. O. & T. P. Ry. Co. v. Lowry (Ky.) 128.

§ 446. Where plaintiff showed facts establishing some negligence of the railroad employes, it was for the jury to determine whether the killing of the cattle was due to want of care.—Cincinnati, N. O. & T. P. Ry. Co. v. Lowry (Ky.) 128.

§ 446. Circumstances under which the issue as to whether a cattle guard placed at a given point outside the limits of a town, but near a station, would be a menace to the safety of train operatives, would be for the court, and under which for the jury, stated.—Corcoran v. Wabash R. Co. (Mo. App.) 743.

(I) Fires.

§ 484. Evidence, in an action against a railroad company for damages from fire, *held* sufficient to take the case to the jury.—Markt v. Chicago, B. & Q. Ry. Co. (Mo. App.) 1142.

§ 484. In an action for the destruction of plaintiff's cotton seed in a storage house on defendant's right of way adjoining its cotton platform, evidence *held* to raise the issue of plaintiff's contributory negligence.—Abbott Gin Co. v. Missouri, K. & T. Ry. Co. of Texas (Tex. Civ. App.) 284.

§ 485. Instruction, in an action against a railroad for loss by fire, *held* to ignore the rights of a cropper of plaintiff, and that it should have confined recovery to the loss sustained by plaintiff alone.—Missouri, K. & T. Ry. Co. of Texas v. Couch (Tex. Civ. App.) 67.

RAPE.

I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 13. Carnal knowledge of a child under the age of consent being itself criminal, in a prosecution therefor, evidence of alleged representations of the child to accused as to her age was properly excluded.—Zachary v. State (Tex. Cr. App.) 263.

II. PROSECUTION AND PUNISHMENT.

Amendment of statute, see Statutes, § 138.
Subject and title of statute relating to venue, see Statutes, § 118.

(B) Evidence.

Hearsay, see Criminal Law, §§ 419, 420.

§ 40. On a trial for rape, the reputation of prosecutrix for chastity is admissible.—Jackson v. State (Ark.) 101.

§ 40. In a prosecution for rape, evidence of lewdness and familiarity, indicating that prosecutrix might have had intercourse with others than accused, *held* admissible.—Bader v. State (Tex. Cr. App.) 555.

§ 48. In a prosecution for rape, the details of prosecutrix's statement to her mother concerning the assault *held* admissible.—Bader v. State (Tex. Cr. App.) 555.

§ 51. Evidence *held* to show that accused, charged with rape, was not the husband of prosecutrix.—Munger v. State (Tex. Cr. App.) 874.

(C) Trial and Review.

Election between acts, see Criminal Law, § 678.

§ 59. On a trial for rape, the failure to make outcry *held* proper as showing want of resistance.—Jackson v. State (Ark.) 101.

§ 59. On a trial for rape, the refusal to charge on the failure to make immediate com-

plaint accompanied by subsequently treating accused in a friendly manner *held* erroneous.—Jackson v. State (Ark.) 101.

(D) Sentence and Punishment.

§ 64. Upon conviction of a boy under 17 years old of rape, the punishment is imprisonment for life or for not less than 5 years; the maximum punishment of death, provided by White's Ann. Pen. Code, art. 639, not applying where accused is under 17 years old.—Munger v. State (Tex. Cr. App.) 874.

RATIFICATION.

Of act of agent, see Principal and Agent, §§ 163-173.

Of contract of incompetent after restoration to sanity, see Insane Persons, § 70.

Of sale of school lands, see Public Lands, § 173.

REAL ACTIONS.

See Ejectment; Trespass to Try Title.

REAL ESTATE AGENTS.

See Brokers.

REAL PROPERTY.

See Property.

Appellate jurisdiction in action involving title to, see Courts, § 231.

REASONABLE DOUBT.

Instructions, see Criminal Law, § 789.

REBATES.

To brokers, rights of principal, see Brokers, § 19.

REBUTTAL.

Evidence, see Trial, § 60.

RECEIVERS.

Of corporation, effect on suit against stockholders, see Corporations, § 349.

Of corporations in general, see Corporations, §§ 542-563.

Of insolvent water company, see Waters and Water Courses, § 188.

IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

(D) Sale and Conveyance or Redelivery of Property.

§ 139. Facts stated in a motion to vacate a receiver's sale on the ground of collusion, etc., *held* to require the vacation of the sale, so that it was error to refuse to hear evidence to support the motion.—Dilley v. Jasper Lumber Co. (Tex.) 255.

VI. ACTIONS.

§ 174. An order of the federal court which appointed a receiver for a railroad *held* to authorize a suit by plaintiff against the receiver for injuries sustained prior to his appointment, regardless of Act Cong. March 3, 1887, c. 373, § 3, 24 Stat. 553, as amended by Act Aug. 13, 1888, c. 866, § 3, 25 Stat. 435 (U. S. Comp. St. 1901, p. 510).—International & G. N. R. Co. v. Wynne (Tex. Civ. App.) 50.

§ 183. In a suit against a railroad and its receiver, the allegation of the petition that permission to sue the receiver had been obtained from the court appointing him will be taken as true where not denied by plea under oath, as required by Rev. St. 1895, art. 1265.—Inter-

RECITALS.

In conveyance as notice to purchaser, see Vendor and Purchaser, § 230.
In judgment, see Judgment, § 525.

RECORDERS.

City bond recorder, see Municipal Corporations, § 162.

RECORDS.

Abstract for purpose of review, see Appeal and Error, §§ 580, 586.
As notice affecting good faith of purchaser of land, see Vendor and Purchaser, § 231.
Of judgment, see Judgment, § 272.
Of proceedings of county board, see Counties, § 53.
Record title to sustain adverse possession, see Adverse Possession, § 82.
Transcript on appeal or writ of error, see Appeal and Error, §§ 497-713; Criminal Law, §§ 1086-1120.
Use of prison records to identify accused under habitual criminal statute, see Criminal Law, § 1204.

REFERENCE.

II. REFEREES AND PROCEEDINGS.

§ 47. A court *held* to have authority to appoint a master.—Carr v. Fair (Ark.) 659.

III. REPORT AND FINDINGS.

§ 99. The failure of a court to give to the findings of a master the weight which the evidence shows they are entitled to will be ground for reversal on appeal.—Carr v. Fair (Ark.) 659.

§ 103. Under Kirby's Dig. § 6337, the effect of a master's report stated.—Carr v. Fair (Ark.) 659.

REFORMATION OF INSTRUMENTS.

See Cancellation of Instruments.

I. RIGHT OF ACTION AND DEFENSES.

§ 19. To justify the reformation of an instrument on the ground of mistake, the mistake must have been mutual.—Meek v. Hurst (Mo.) 1022.

II. PROCEEDINGS AND RELIEF.

Application of general statutes of limitation, see Limitation of Actions, § 39.

§ 32. An equitable action to correct a mistake in a deed, brought more than 40 years after the date thereof, with no excuse pleaded or proved for such delay, will be deemed a stale demand.—William Carlisle & Co. v. King (Tex. Civ. App.) 581.

§ 36. Though a contract may be reformed and subsequently enforced in the same suit, a reformation will not be granted, unless the elements necessary to justify it are pleaded as grounds for relief.—Meek v. Hurst (Mo.) 1022.

REGISTRATION.

Of voters, see Elections, §§ 95-97.

RELEASE.

See Accord and Satisfaction; Compromise and Settlement; Payment.

Of liability of carrier for failure to furnish cars, see Carriers, § 156.

Of mortgage of separate property of married women for debts of husband, see Husband and Wife, § 171.

I. REQUISITES AND VALIDITY.

§§ 16, 17. If an injured servant signed a release of a claim for injuries believing it to be a receipt for wages due him, and the question of a settlement was not mentioned at the time, the release was invalid as obtained either by fraud or mistake.—Louisville & N. R. Co. v. Crutcher (Ky.) 191.

III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

Right to trial by jury of issue of fraud, see Jury, § 13.

§ 50. A plaintiff claiming that the release pleaded by defendant was fraudulently procured must tender the issue by proper replication, as provided by Rev. St. 1899, § 654 (Ann. St. 1906, p. 670).—Freeman v. St. Louis & S. F. R. Co. (Mo. App.) 1.

§ 52. A reply to an answer pleading settlement of a claim for damages *held* to properly raise the issue of fraud.—Berry v. St. Louis & S. F. R. Co. (Mo.) 1043.

§ 55. A written release from all claims for personal injuries, signed by plaintiff, made a prima facie defense when introduced in a personal injury action, and the burden was on plaintiff to avoid the release by showing its invalidity.—Louisville & N. R. Co. v. Crutcher (Ky.) 191.

§ 58. Where the testimony was conflicting as to whether a release was signed under the belief that it was a receipt for wages, as claimed by one party thereto, the question was for the jury.—Louisville & N. R. Co. v. Crutcher (Ky.) 191.

§ 59. In a switchman's action for injuries by being thrown from a switch engine cab, in which defendant pleaded a release, which plaintiff claimed was signed by him under a misunderstanding, an instruction on the issue *held* not sufficiently concrete, and that the court should have instructed as stated.—Louisville & N. R. Co. v. Crutcher (Ky.) 191.

RELEVANCY.

Of evidence in civil actions, see Evidence, §§ 113-151.

Of evidence in criminal prosecutions, see Criminal Law, §§ 338-366.

REMAINDERS.

See Life Estates.

REMAND.

Of cause removed from state court, see Removal of Causes, § 107.

REMEDY AT LAW.

Effect on right to injunctive relief, see Injunction, § 16.

Effect on right to mandamus of existence of other remedy, see Mandamus, § 3.

misconstruction of act relating to by trial court as ground of appellate jurisdiction, see Courts, § 231.

II. ORIGIN, NATURE, AND SUBJECT OF CONTROVERSY.

§ 19. Where plaintiff stated a cause of action at common law, error in allowing him to take the benefit of an act of Congress, after the denial of defendant's motion to remove the cause as based on such act, could be corrected on appeal, and did not oust the state court of jurisdiction.—*Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.)* 1025.

§ 25. Defendant, by a petition to remove to the federal court, cannot change plaintiff's cause of action so as to bring it under a federal law, nor can plaintiff, by stating his cause of action, deprive defendant of his right to remove in a proper case.—*Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.)* 1025.

VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.

§ 81. The right to remove a cause to the federal court *held* waived.—*Morgan's L. & T. R. & S. S. Co. v. Street (Tex. Civ. App.)* 270.

§ 89. Where, on the record made by the filing of a petition and bond for removal, defendant is entitled to removal, its right is preserved for review both by the State Supreme Court and the United States Supreme Court.—*Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.)* 1025.

§ 95. A federal court's jurisdiction of a removed cause depends on the petition for removal and bond, and not on the order of the state court removing the cause.—*Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.)* 1025.

VII. REMAND OR DISMISSAL OF CAUSE.

§ 107. An order denying a motion to remand a cause for injuries to a servant based on the federal safety appliance act (Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) *held* not res judicata of the question of jurisdiction of a subsequent action in the state court based on defendant's common-law liability.—*Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.)* 1025.

§ 107. Where a federal court has no jurisdiction of the subject-matter, it cannot be conferred by plaintiff's failure to appeal from an order denying a motion to remand.—*Shohoney v. Quincy, O. & K. C. Ry. Co. (Mo.)* 1025.

REMOVAL OF CLOUD.

See Quieting Title.

RENT.

See Landlord and Tenant, § 207.

Recovery from occupant holding under void judicial sale, see Judicial Sales, § 55.

REPAIRS.

Of highway, see Highways, § 120.

REPEAL.

Of statute, see Statutes, § 161.

IV. PLEADING AND EVIDENCE.

§ 69. Where defendant in replevin set up ownership in his own right in the property in dispute and denied plaintiff's ownership, the issue of tender was not raised.—*Russell v. Brooks (Ark.)* 649.

§ 71. In replevin for an animal procured from plaintiff through fraudulent representations, certain evidence *held* admissible to show fraud.—*Russell v. Brooks (Ark.)* 649.

§ 71. Where, in replevin, the issue was whether plaintiff's property had been procured through the fraud of third persons, certain evidence *held* inadmissible in the absence of an offer to show that the evidence tended to prove that the third persons had perpetrated a fraud.—*Russell v. Brooks (Ark.)* 649.

VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§ 88. Whether an animal sued for in replevin was procured from plaintiff through fraudulent representations and for the felonious purpose of depriving plaintiff of his property *held* for the jury.—*Russell v. Brooks (Ark.)* 649.

REPLICATION.

See Pleading, § 177.

REPLY.

See Pleading, § 177.

REPORT.

By deputy county surveyor, see Counties, § 85. Of insurance company, see Insurance, § 9.

Of street car accident, use of by motorman to refresh memory as a witness, see Witnesses, § 255.

Of street car accident as self-serving declaration, see Evidence, § 271.

On reference, see Reference, §§ 99, 103.

REPUTATION.

As to boundaries, see Boundaries, § 35.

Evidence as to reputation of grantor as forger of land titles, see Deeds, § 199.

Evidence of reputation of prosecutrix in prosecution for rape, see Rape, § 40.

Evidence of to prove boundary, see Boundaries, § 35.

REQUESTS.

For instructions in civil actions, see Trial, §§ 255-261.

For instructions in criminal prosecutions, see Criminal Law, §§ 825-830.

RESALE.

Of goods on default of conditional vendee, see Sales, § 479.

RESCISSION.

Cancellation of written instrument, see Cancellation of Instruments.

Of contract, see Contracts, § 266.

Of contract for sale of goods, see Sales, §§ 94-131.

Of contract for sale of land, see Vendor and Purchaser, §§ 103, 105.

RESIDENCE.

See Domicile.

RES JUDICATA.

See Judgment, §§ 570, 707-743.

RESTRICTIONS.

In deeds, see Deeds, §§ 145, 147.

RETAINER.

Of attorney, see Attorney and Client, §§ 101, 103.

RETROSPECTIVE LAWS.

Constitutional restrictions, see Constitutional Law, § 190.

REVENUE.

See Taxation.

REVERSAL.

Of judgment or order on appeal, see Appeal and Error, §§ 1169-1176.

REVIEW.

See Appeal and Error; Certiorari; Criminal Law, §§ 1024-1182; Justices of the Peace, §§ 162-191.

REVIVAL.

Of action, see Abatement and Revival, §§ 72-75.

REVOCATION.

Of will, see Wills, §§ 179, 306.

RIGHT OF WAY.

See Easements.

Of railroads, see Railroads, § 72.

RIGHT TO OPEN AND CLOSE.

Argument at trial, see Trial, § 25.

RIPARIAN RIGHTS.

See Waters and Water Courses, §§ 78, 87.

RISKS.

Assumed by employé, see Master and Servant, §§ 203-226, 295.

Within insurance policy, see Insurance, §§ 435, 450.

ROADS.

See Highways.

Streets in cities, see Municipal Corporations, §§ 697, 759-821.

ROBBERY.

§ 5. Under circumstances stated, defendant *held* guilty of robbery of prisoners whom he had arrested.—*Wynn v. Commonwealth* (Ky.) 516.

§ 24. In a prosecution for robbery, evidence *held* to sufficiently identify accused as the perpetrator to warrant a verdict of guilty.—*Wynn v. Commonwealth* (Ky.) 516.

Restraining taking or use of photographs of persons arrested, see Injunction, § 96.

RULE IN SHELLEY'S CASE.

Application to deeds, see Deeds, § 128.

RULES OF COURT.

See Courts, § 85.

Submission of case by appellee on failure of appellant to so do, see Appeal and Error, § 1126.

RUNNING WITH THE LAND.

Covenants, see Covenants, §§ 70-78.

SALES.

Authority of seller as agent of buyer to contract for limitation of liability of carrier, see Principal and Agent, § 101.

Purchase pending action, see *Lis Pendens*, § 24.

Sales by or to particular classes of persons.

See Executors and Administrators, § 148; Receivers, § 139.

Partner, see Partnership, § 141.

Sales of particular species of, or estates or interests in, property.

See Homestead, § 143; Intoxicating Liquors.

Realty, see Vendor and Purchaser.

Standing timber, see Logs and Logging, § 3.

Sales on judicial or other proceedings.

See Judicial Sales.

Of homestead under order of court, see Homestead, § 143.

Of property of decedent under order of court, see Executors and Administrators, §§ 356, 375.

Of property of infant under order of court, see Guardian and Ward, §§ 79-105.

Of property of lunatic under order of court, see Insane Persons, § 71.

On execution, see Execution, § 273.

On foreclosure of mortgage, see Mortgages, §§ 361, 376.

Tax sales, see Taxation, § 630.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 22. To make a contract of sale, the proposition to sell must be accepted in the very terms of the proposition.—*Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co.* (Ky.) 852.

§ 23. To make a contract of sale, the proposition to buy must be accepted in the very terms of the proposition.—*Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co.* (Ky.) 852.

§ 23. A binding contract of sale *held* found on the jury finding that the acceptance of the proposition did not add to the terms of the contract.—*Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co.* (Ky.) 852.

II. CONSTRUCTION OF CONTRACT.

§ 62. A contract for the sale of a clover huller, feeder, and stacker *held* not divisible, in the sense that the seller was not bound to receive back the stacker and feeder because the huller did not work satisfactorily.—*Palmer v. Reeves & Co.* (Mo. App.) 1119.

§ 79. An order for coke "f. o. b. Van Buren, Ark." *held* to sufficiently fix the place of delivery.—*Kirchman v. Tuffi Bros. Pig Iron & Coke Co.* (Ark.) 239.

§ 82. Where notes were given for the price, and the seller retained a lien, the notes "to be paid as the net earnings of the gin may be able to pay them as per face of the note," such notes became a demand at maturity.—*Fuller v. Pryor* (Tex. Civ. App.) 418.

III. MODIFICATION OR RESCISSION OF CONTRACT.

(A) By Agreement of Parties.

§ 94. Brokers through whom goods were sold held not liable on an agreement that the goods should be returned to them at a certain place where the goods were destroyed by fire before they were returned there.—*Plotner & Stoddard v. Markham Warehouse & Elevator Co.* (Tex. Civ. App.) 443.

(C) Rescission by Buyer.

§ 114. The buyer of goods who has given drafts for the purchase price could rescind and cancel the contract for fraud in inducing to purchase, notwithstanding a bond indemnifying him against loss under the contract.—*Johnson County Sav. Bank v. Renfro* (Tex. Civ. App.) 37.

§ 131. Right of buyers to repudiate a transaction within a reasonable time after discovering that the goods do not conform to the contract stated.—*Plotner & Stoddard v. Markham Warehouse & Elevator Co.* (Tex. Civ. App.) 443.

IV. PERFORMANCE OF CONTRACT.

(C) Delivery and Acceptance of Goods.

§ 150. In the absence of proof to the contrary, a seller shipping the goods to the buyer must make such a contract with the carrier as will afford the buyer a remedy against the carrier for the full value of the goods in case of their loss.—*Lewis v. Imhof* (Mo. App.) 329.

§ 150. A seller of goods, who ships the goods by express addressed to the buyer, must show either express or implied authority to ship the goods under a contract limiting the liability of the carrier in case of loss.—*Lewis v. Imhof* (Mo. App.) 329.

§ 153. A seller held absolved from any further duty to tender or ship the goods after the buyer's notification that he would not accept performance.—*Kirchman v. Tuffli Bros. Pig Iron & Coke Co.* (Ark.) 239.

§ 161. Where it does not appear that goods shipped were not consigned to shipper's order, nor that the buyer received the goods from the carrier, an executed contract of sale is not shown.—*American Jobbing Ass'n v. Wesson* (Ark.) 664.

§ 168. If goods bought do not conform to the contract, the buyer will have the right to reject them after fair opportunity to examine them as to their character.—*Plotner & Stoddard v. Markham Warehouse & Elevator Co.* (Tex. Civ. App.) 443.

§ 178. Fact that a part of goods alleged by the buyers not to conform to the contract of sale was, after delivery to the buyers, delivered to their tenants after discovery of the difference would not amount to an acceptance; it appearing that such delivery to the tenants was against the positive orders of the buyers, and a mere mistake.—*Plotner & Stoddard v. Markham Warehouse & Elevator Co.* (Tex. Civ. App.) 443.

§ 179. Where buyers used a portion of goods delivered to them which they claimed did not conform to the contract of sale, they are liable for the portion used.—*Plotner & Stoddard v. Markham Warehouse & Elevator Co.* (Tex. Civ. App.) 443.

§ 181. Where it does not appear that goods shipped were not consigned to shipper's order, nor that the buyer received the goods from the carrier, an executed contract of sale is not

shown.—*American Jobbing Ass'n v. Wesson* (Ark.) 664.

§ 181. In an action for the price of goods bought, certain evidence held admissible.—*Plotner & Stoddard v. Markham Warehouse & Elevator Co.* (Tex. Civ. App.) 443.

§ 182. Whether buyers discovered an alleged variance between the goods delivered and the contract of sale and repudiated the transaction in a reasonable time, under the circumstances, held a question for the jury.—*Plotner & Stoddard v. Markham Warehouse & Elevator Co.* (Tex. Civ. App.) 443.

V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

§ 201. Where goods are bought without specific instructions as to their shipment, a delivery to the carrier for the buyer held a delivery to the buyer, subject to the right of stoppage in transitu.—*Lewis v. Imhof* (Mo. App.) 329.

§ 218½. The delivery by the seller to the buyer of the bill of lading held strong presumptive evidence that title has passed to the buyer named as consignee.—*F. H. Smith Co. v. Louisville & N. R. Co.* (Mo. App.) 342.

VI. WARRANTIES.

§ 261. What constitutes an express warranty on the sale of goods stated.—*Wertheimer-Swartz Shoe Co. v. McDonald* (Mo. App.) 5.

§ 261. A statement by the seller of chattels that his goods are equal in quality to other well-known articles similar in kind held an express warranty.—*Wertheimer-Swartz Shoe Co. v. McDonald* (Mo. App.) 5.

§ 285. A provision of a machine sale contract, requiring notice of the machine's failure to comply with the warranty by registered letter, held waived.—*Palmer v. Reeves & Co.* (Mo. App.) 1119.

§ 287. The seller of farm machinery held to have waived a provision in the contract requiring a return of the machine to its agent if not satisfactory.—*Palmer v. Reeves & Co.* (Mo. App.) 1119.

VII. REMEDIES OF SELLER.

(A) Stoppage in Transitu.

Effect of notice of stoppage in transitu on right of action against creditor and sheriff levying attachment on goods, see Attachment, § 300. Effect of notice of stoppage in transitu on right to interplead in attachment proceedings, see Attachment, § 287.

§ 289. The right of stoppage in transitu is merely an extension of the seller's lien for the payment of the purchase money.—*Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co.* (Mo. App.) 10.

§ 291. The right of stoppage in transitu arises upon the discovery by the seller while the goods are in transit that the buyer is insolvent.—*Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co.* (Mo. App.) 10.

§ 291. Right of stoppage in transitu held to exist where goods are not paid for and buyer is insolvent.—*F. H. Smith Co. v. Louisville & N. R. Co.* (Mo. App.) 342.

§ 291. The refusal of a buyer to honor drafts drawn by the seller for the price is not in itself evidence of insolvency of the buyer essential to justify the seller to exercise his right of stoppage in transitu.—*F. H. Smith Co. v. Louisville & N. R. Co.* (Mo. App.) 342.

§ 294. The seller's right of stoppage in transitu while the goods were still in the carrier's possession could not be impaired by the

shipped in the carrier's warehouse does not necessarily prevent the exercise of the right of stoppage in transitu.—Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co. (Mo. App.) 10.

§ 296. Time when right of stoppage in transitu must be exercised stated.—F. H. Smith Co. v. Louisville & N. R. Co. (Mo. App.) 342.

§ 299. The exercise of the right of stoppage in transitu by the seller vests in each party to the sale the rights he had before the goods were delivered to the carrier.—Letts-Spencer Grocer Co. v. Missouri Pac. Ry. Co. (Mo. App.) 10.

(E) Actions for Price or Value.

Motion to strike out plea, see Pleading, §§ 352, 354.

Necessity of filing written contract with complaint in justice's court, see Justices of the Peace, § 98.

Pleading inconsistent defenses, see Pleading, § 93.

§ 340. On breach of a buyer's contract of sale before tender or delivery of the goods, the seller cannot recover the price.—Fairbanks, Morse & Co. v. S. W. Heltsley & Co. (Ky.) 198.

§ 340. The remedies of the seller on the refusal of the buyer to receive goods contracted for, determined.—Avant v. Watson (Tex. Civ. App.) 586.

§ 347. Certain acts held to amount to a refusal to abide by an executory contract so as to relieve the buyer from obligation.—American Jobbing Ass'n v. Wesson (Ark.) 664.

§ 359. Evidence in an action to recover the price of goods sold held to sustain judgment for plaintiff.—Phoenix Duster & Mfg. Co. v. Landau Grocery Co. (Mo. App.) 750.

§ 364. In an action to recover the price of goods bought, held, that defendants could not complain of certain charges.—Plotner & Stoddard v. Markham Warehouse & Elevator Co. (Tex. Civ. App.) 443.

§ 364. In an action for the price of goods bought, a certain charge held properly refused.—Plotner & Stoddard v. Markham Warehouse & Elevator Co. (Tex. Civ. App.) 443.

(F) Actions for Damages.

§ 370. A buyer's repudiation of the contract while the seller is not in default may be treated by the seller as a breach thereof.—Kirchman v. Tuffli Bros. Pig Iron & Coke Co. (Ark.) 239.

§ 377. In an action for a buyer's breach of a contract for the sale of coke, the seller held not required to plead the amount it was prepared to ship, especially in view of Kirby's Dig. § 6133.—Kirchman v. Tuffli Bros. Pig Iron & Coke Co. (Ark.) 239.

§ 377. In an action by a seller for breach of a contract, repudiated by the buyer before time for performance was past, it is not necessary for plaintiff to allege the items of damages suffered.—Kirchman v. Tuffli Bros. Pig Iron & Coke Co. (Ark.) 239.

§ 382. Where a buyer claimed that the coke sold was unsuitable for the purposes for which he purchased it, the seller was entitled to show the character and efficacy of such coke.—Kirchman v. Tuffli Bros. Pig Iron & Coke Co. (Ark.) 239.

§ 383. On the buyer's breach of contract, the seller may recover damages without proof that he had the goods on hand, or tendered them or sold them for less than the contract

price.—Phoenix Duster & Mfg. Co. v. Landau Grocery Co. (Mo. App.) 750.

§ 384. For a buyer's breach of contract, the seller may recover the difference between the contract price and the market value of the goods at the time and place of delivery.—Kirchman v. Tuffli Bros. Pig Iron & Coke Co. (Ark.) 239.

§ 384. The market value of goods at a place where there is no market therefor is the value at the nearest market, plus the cost of transportation to the place of delivery.—Kirchman v. Tuffli Bros. Pig Iron & Coke Co. (Ark.) 239.

§ 384. The measure of recovery by a seller suing for damages for the buyer's refusal to receive the goods, determined.—Avant v. Watson (Tex. Civ. App.) 586.

VIII. REMEDIES OF BUYER.

(A) Recovery of Price.

Conformity of findings of court to pleadings and issues, see Trial, § 396.

§ 397. In an action by the buyer of an animal for the price paid, on the ground that the animal shipped by the seller was not the one sold, evidence that the seller did not personally know the fact on which his warranty was founded was competent, so that a finding that he did not know the fact was against the seller.—Wright v. Schultz (Ky.) 138.

§ 397. In an action by the buyer of an animal for the price paid, a finding that the measurements of the animal delivered did not correspond with the measurements of the animal which the seller agreed to deliver held justified by the evidence.—Wright v. Schultz (Ky.) 138.

(C) Actions for Breach of Contract.

§ 406. Where, in an action for breach of contract to deliver lumber sold, it appeared that the seller had no lumber on hand at the time of delivery which it intended to deliver under the contract, the buyer was not bound to inspect and select any lumber in order to sue for the seller's breach.—Kirby Lumber Co. v. C. R. Cummings & Co. (Tex. Civ. App.) 273.

§ 418. The buyer's measure of damages for the seller's failure to deliver goods intended for a particular purpose stated.—Kirby Lumber Co. v. C. R. Cummings & Co. (Tex. Civ. App.) 273.

§ 420. Where, in an action for breach of a contract of sale, the facts as to the contract and its breach are established by undisputed evidence, there is no question for the jury except the amount of damages.—Kirby Lumber Co. v. C. R. Cummings & Co. (Tex. Civ. App.) 273.

(D) Actions and Counterclaims for Breach of Warranty.

Motion to strike out plea of breach of warranty, see Pleading, § 354.

§ 435. In an action for price of goods, special pleas setting up breach of warranty held to be sufficiently certain and definite to state a good defense.—Wertheimer-Swarts Shoe Co. v. McDonald (Mo. App.) 5.

§ 441. Evidence held to require a finding that the machine sold to plaintiff failed to answer the purpose intended.—Palmer v. Reeves & Co. (Mo. App.) 1119.

§ 442. While a representation is only an inducement to the contract of sale, a warranty is a part of the contract; and hence an action for

breach of an express warranty is on the contract, and the measure of damages for false representations would not apply.—*W. T. Adams Mach. Co. v. Castleberry* (Ark.) 998.

§ 442. In an action for a seller's breach of warranty that the machine sold would be as good as similar machinery, the buyer's measure of damages stated.—*W. T. Adams Mach. Co. v. Castleberry* (Ark.) 998.

§ 442. As a rule, the damages recoverable for a manufacturer's breach of warranty of machinery sold for a known purpose *held* to include such consequential damages as are the direct and probable result of the breach, including the reasonable expense caused by the defect.—*W. T. Adams Mach. Co. v. Castleberry* (Ark.) 998.

IX. CONDITIONAL SALES.

Construction of statute relating to sale, conjunctive and disjunctive words, see Statutes, § 197.

Construction of statute relating to sale, mistakes in punctuation, see Statutes, § 200.

Mortgage or transfer of property by conditional vendee as larceny, see Larceny, § 15.

§ 479. Acts 1889, p. 117, c. 81, § 1, *held* to provide two methods of giving notice of resale of personality conditionally sold.—*J. I. Case Threshing Mach. Co. v. Watson* (Tenn.) 86.

§ 479. Acts 1889, p. 117, c. 81, *held* to require a seller, advertising the property by printed hand bills, to distribute them a reasonable time before the sale.—*J. I. Case Threshing Mach. Co. v. Watson* (Tenn.) 974.

§ 479. Failure to advertise the sale of property sold on condition, on default by the buyer, in the manner provided by Acts 1889, p. 117, c. 81, § 1, *held* to rescind the contract, so that, under section 4, the seller could not recover the purchase price.—*J. I. Case Threshing Mach. Co. v. Watson* (Tenn.) 86.

SANITY.

Of testator, presumptions, see Wills, § 52.

Presumptions in criminal prosecution, see Criminal Law, § 311.

Statements of insane persons as *res gestæ*, see Criminal Law, § 366.

SATISFACTION.

See Accord and Satisfaction; Compromise and Settlement; Payment; Release.

SCHOOLS AND SCHOOL DISTRICTS.

Qualification of voters at school elections, see Elections, § 65.

II. PUBLIC SCHOOLS.

(A) Establishment, School Lands and Funds, and Regulation in General.

§ 11. Graded schools are "common schools."—*Jeffries v. Board of Trustees of Columbia Graded Common School* (Ky.) 813.

§ 15. The public domain set aside or located for common school purposes cannot be diverted, and constitutes a trust fund for educational purposes for the entire state.—*Ellwood v. Stallcup* (Tex. Civ. App.) 906.

(B) Creation, Alteration, Existence, and Dissolution of Districts.

Mandamus to compel recognition of district, see Mandamus, §§ 79, 167, 176.

§ 30. Ky. St. 1909, § 4464 (Russell's St. § 5736), when considered in connection with sections 4439, 4481 (sections 5715, 5758) *held* to re-

quire that the 2½-mile boundary of a graded common school district shall be measured from the outer boundary of the site of the school building, providing the site does not exceed one acre.—*Clear Spring Distilling Co. v. Board of Trustees of Bardstown Graded Common School Dist.* (Ky.) 527.

§ 38. Under Rev. St. 1895, art. 3938, the change of a legally established school district by the county commissioners' court without the consent of a majority of the legal voters thereof was void.—*Crow v. Falls* (Tex. Civ. App.) 933.

§ 41. Act March 24, 1908 (Laws 1908, p. 133, c. 56), for the government and regulation of the common schools, having been enacted long after judgment was rendered against a school district, it could not affect the judgment creditor's rights or the district's prior liabilities.—*Board of Education for Pike County v. A. H. Andrews Co.* (Ky.) 207.

§ 41. Act March 24, 1908 (Laws 1908, p. 133, c. 56), for the government and regulation of common schools, *held* constitutional, though it does not provide for paying debts of districts owing at its adoption.—*Board of Education for Pike County v. A. H. Andrews Co.* (Ky.) 207.

§ 41. A school district having prior to Act March 24, 1908 (Laws 1908, p. 133, c. 56), created a debt for furniture and used and enjoyed the same, the patrons and property of the district as it stood prior to the act, and not the property of the entire county, should pay it.—*Board of Education for Pike County v. A. H. Andrews Co.* (Ky.) 207.

(C) Government, Officers, and District Meetings.

Estoppel by position taken in proceedings to determine right to office of school superintendent, see Estoppel, § 63.

Law providing for examination of candidates for county superintendency by state board as delegation of legislative power to declare qualifications, see Constitutional Law, § 62.

Mandamus to compel canvass and return of election, see Mandamus, § 178.

Mandamus to county superintendent, see Mandamus, § 76.

Quo warranto to determine right to office of county superintendent, see Quo Warranto, §§ 55, 57.

§ 46. Acts 1895, p. 70, c. 54, amending School Law (Acts 1873, p. 41, c. 25) § 8, relating to the qualifications of a county superintendent of public schools, *held* mandatory, and not directory.—*State v. Evans* (Tenn.) 81.

(D) District Property, Contracts, and Liabilities.

§ 65. Under Ky. St. 1909, § 4484 (Russell's St. § 5762), *held* that school trustees could convey certain lands held by them for school purposes.—*Jeffries v. Board of Trustees of Columbia Graded Common School* (Ky.) 813.

§ 65. The discretion of trustees elected upon the establishment of a graded common school district, as to buying a particular property for the school, which property the petition for election specified should be procured if expedient, will not be interfered with by the courts, at least in the absence of such proofs of abuse as would be tantamount to fraud.—*Jeffries v. Board of Trustees of Columbia Graded Common School* (Ky.) 813.

§ 67. Rev. St. 1890, § 9865 (Ann. St. 1906, p. 4523), *held* to authorize the board of a district organization under chapter 154, art. 2, to build additions to a primary school building when the necessities of the district do not demand a division of the district into ward schools, but prohibits the erection of more than one primary school building on one school site.—*Martin v. Bennett* (Mo. App.) 779.

though it is void.—*Bornstein v. Louisville School Board* (Ky.) 522.

(E) District Debt, Securities, and Taxation.

§ 97. A demurrer to a petition to have an election as to whether a school district should issue and sell bonds for erecting a schoolhouse declared void, and to prevent the issue of the bonds, *held* properly sustained.—*Rees v. Wilson* (Ky.) 510.

§ 97. Rev. St. 1899, § 9752, and section 9752a as added by Laws 1903, p. 266 (Ann. St. 1906, pp. 4472, 4473), relating to the submission to the people of propositions to borrow money for school purposes, construed.—*State ex rel. School Dist. of Memphis v. Gordon* (Mo.) 1008.

§ 97. A proposition submitting to the people the question of incurring an indebtedness for school purposes, under Rev. St. 1899, § 9752, and section 9752a as added by Laws 1903, p. 266 (Ann. St. 1906, pp. 4472, 4473), *held* not to embrace more than one subject, in violation of Const. art. 4, § 28 (Ann. St. 1906, p. 185), by analogy.—*State ex rel. School Dist. of Memphis v. Gordon* (Mo.) 1008.

§ 97. Under Laws 1903, p. 266 (Ann. St. 1906, § 9752a), a school board authorized by the voters of a district to purchase a site to erect a new schoolhouse *held* not authorized to use the money from the sale of bonds to erect a new schoolhouse on the old site.—*Martin v. Bennett* (Mo. App.) 779.

§ 97. An order of the board of directors of a city school district providing for the submission of the question of borrowing money to an election *held* insufficient for failing to specify the place of the election.—*Martin v. Bennett* (Mo. App.) 779.

§ 103. Under Act March 24, 1908 (Acts 1908, p. 133, c. 56), in effect re-enacting Ky. St. 1909, § 4467 (Russell's St. § 5739), relating to voting upon the establishing of a graded public common school and a tax to maintain it, *held*, that the vote on the question of tax is to be *viva voce*.—*Jeffries v. Board of Trustees of Columbia Graded Common School* (Ky.) 813.

§ 103. The participation of a judge substituted for one appointed at a school election under Act March 24, 1908 (Acts 1908, p. 133, c. 56), re-enacting in effect Ky. St. 1909, § 4467 (Russell's St. § 5739), *held* at most a harmless irregularity.—*Jeffries v. Board of Trustees of Columbia Graded Common School* (Ky.) 813.

§ 103. A petition for an election on the question of establishing a graded common school under Ky. St. 1909, §§ 4464, 4481 (Russell's St. §§ 5736, 5758) construed.—*Jeffries v. Board of Trustees of Columbia Graded Common School* (Ky.) 813.

§ 103. A petition for an election on the question of establishing a graded common school *held* to sufficiently designate the location of the schoolhouse under Ky. St. 1909, § 4464 (Russell's St. § 5736).—*Jeffries v. Board of Trustees of Columbia Graded Common School* (Ky.) 813.

§ 111. A taxpayer *held* entitled to maintain an action as such to prevent the waste of the public school fund, or to prevent the school board from making a building contract with one of its own members in violation of law.—*Bornstein v. Louisville School Board* (Ky.) 522.

§ 111. In an action to enjoin the construction of a school building on the ground that the contract was in fact made with a member of

name.—*Bornstein v. Louisville School Board* (Ky.) 522.

§ 111. The liabilities of the real and nominal contractors stated, where a contract to erect a school building is declared void, as being in fact made with a member of the school board in violation of Ky. St. §§ 2975, 2976 (Russell's St. §§ 854, 855), and where the building has been accepted by the school board, and the whole or a part of the contract price paid to the nominal contractor.—*Bornstein v. Louisville School Board* (Ky.) 522.

§ 111. Taxpaying citizens of a city school district may sue to restrain the school board from levying taxes to pay interest on illegal school district bonds.—*Martin v. Bennett* (Mo. App.) 779.

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§ 46. Corroboration, in a prosecution for seduction under Kirby's Dig. § 2043, must be as to promise of marriage and sexual intercourse.—*Nichols v. State* (Ark.) 1003.

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§ 47. Courts should not make a mere guess at the legislative intention in order to uphold and enforce a statute, where it is so uncertain as not to be susceptible of reasonable interpretation.—Beaumont Traction Co. v. State (Tex. Civ. App.) 615, 618.

§ 61. The court *held* required to presume that the Legislature, in passing a local or special law, complied with Const. art. 3, § 57, and Rev. St. 1895, art. 3260, relating to notice of intention to apply for the passage of a local or special act.—Cravens v. State (Tex. Cr. App.) 29.

§ 64. Act No. 247, p. 568, Acts 1907, *held* constitutional in so far as it provides for the formation of part of a county into a district for the improvement of roads already constructed, though invalid in authorizing the formation of the entire county into a district for the construction of new roads.—Parkview Land Co. v. Road Improvement Dist. No. 1 of Jefferson County (Ark.) 241.

§ 64. Even if Sp. Laws 1905, p. 87, c. 6, § 252, be invalid in part, *held* that the remainder, complete in itself, must be sustained.—Sturgeon v. City of Parish (Tex. Civ. App.) 967.

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§ 93. Laws governing cities of the first class *held* general laws within the Constitution, though they apply in fact to one city.—Specht v. City of Louisville (Ky.) 846.

§ 93. Acts 30th Leg. (Laws 1907, p. 177) c. 88, fixing the compensation of county attorneys in cities having a designated population, *held* not a local or special law, within Const. art. 3, § 56, but is a valid law, within article 11, § 5, permitting the amendment of charters of cities of a specified size by special act.—Cravens v. State (Tex. Cr. App.) 29.

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§ 105. Const. art. 4, § 28 (Ann. St. 1906, p. 185), relating to the titles and subjects of statutes, *held* to be liberally interpreted.—State ex rel. School Dist. of Memphis v. Gordon (Mo.) 1008.

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§ 181. A statute must be so construed as to carry out the manifest intent of the Legislature so as to avoid an absurd result.—Fruin v. Meredith (Mo. App.) 1107.

§ 190. The doctrine of practical construction cannot be applied unless the language of the statute is so ambiguous as to leave the judicial mind in doubt.—Commonwealth v. Ross (Ky.) 161.

§ 197. The word "or," in Acts 1880, p. 117, c. 81, relating to sale on default of property conditionally sold, *held* to authorize sale in either of two methods.—J. I. Case Threshing Mach. Co. v. Watson (Tenn.) 974.

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§ 206. A statute must be so construed as to give every part of it effect.—Fruin v. Meredith (Mo. App.) 1107.

§ 206. A statute should be construed so as to give effect to every part of it, and at the same time avoid absurd conditions.—J. I. Case Threshing Mach. Co. v. Watson (Tenn.) 974.

§ 215. Contemporaneous construction will not be applied where it will defeat the legislative intent.—Commonwealth v. Ross (Ky.) 161.

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§ 20. A street railway company incorporated under Rev. St. 1895, art. 642, subd. 21, *held* empowered to construct a line of road beyond the limits of the city wherein it was chartered to operate, and to a city which was practically a suburb of the other.—Galveston, H. & S. A. Ry. Co. v. Houston Electric Co. (Tex. Civ. App.) 287.

§ 23. Const. art. 10, § 7, construed as to legislative grant of right to construct street railroad.—Galveston, H. & S. A. Ry. Co. v. Houston Electric Co. (Tex. Civ. App.) 287.

§ 25. Const. art. 10, § 7, construed as to consent of highway officers to the use of a highway by a street railroad company.—Galveston, H. & S. A. Ry. Co. v. Houston Electric Co. (Tex. Civ. App.) 287.

§ 25. Permission to build a street railway along public highways of a county must be obtained from the commissioners' court in view of Const. art. 10, § 7.—Galveston, H. & S. A. Ry. Co. v. Houston Electric Co. (Tex. Civ. App.) 287.

§ 41. Where a street railway company had been given permission to construct its road along a public highway by the commissioners' court, *held*, that it could not be deprived of that right by objection of a steam railway company which had previously been permitted to cross the road.—Galveston, H. & S. A. Ry. Co. v. Houston Electric Co. (Tex. Civ. App.) 287.

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§ 68. Gen. Laws 1901, p. 255, c. 89, *held* not to apply to street railways.—Galveston, H. & S. A. Ry. Co. v. Houston Electric Co. (Tex. Civ. App.) 287.

§ 103. Where the motorman saw or could have seen the peril of a person crossing the track in time to have avoided the injury, the company is liable.—Murphy v. St. Joseph Ry., Light, Heat & Power Co. (Mo. App.) 334.

§ 117. Whether a motorman failed to keep vigilant watch to avoid a collision *held* to be a question for the jury under the evidence.—Ratsch v. United Rys. Co. of St. Louis (Mo. App.) 371.

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§ 23. A bank loaning money to make a part payment on vendor's lien notes *held* to have become subrogated pro tanto to the rights of vendor.—John M. Bonner Memorial Home v. Collin County Nat. Bank (Tex. Civ. App.) 430.

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§ 7. United States bonds are not subject to state taxation.—First Nat. Bank v. Board of Equalization of Independence County (Ark.) 988.

§ 10. Rev. St. U. S. §§ 5214, 5219 (U. S. Comp. St. 1901, pp. 3500, 3502), *held* to limit

the power of the state to tax national banks, and to limit the power of taxation to the shares of stock and real estate.—*First Nat. Bank v. Board of Equalization of Independence County (Ark.)* 988.

§ 11. A state may tax shares of stock in a national bank without regard to the fact that a part or the whole of the capital stock of the banks is invested in nontaxable bonds.—*First Nat. Bank v. Board of Equalization of Independence County (Ark.)* 988.

§ 12. Kirby's Dig. §§ 6902, 6919-6924, *held* to provide for the taxation of shares of stock of national banks, and not their capital, and hence to meet the requirements of Rev. St. U. S. § 5219 (U. S. Comp. St. 1901, p. 3502).—*First Nat. Bank v. Board of Equalization of Independence County (Ark.)* 988.

§ 12. A national bank *held* not discriminated against in the manner of assessing the shares of its stock.—*First Nat. Bank v. Board of Equalization of Independence County (Ark.)* 988.

II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

§ 45. Under Ky. St. 1909, §§ 4077, 4082 (Russell's St. §§ 6050, 6055), the tax on a franchise of a gas company *held* a property tax on intangible property within Const. § 174, and not a privilege tax for engaging in a business that natural persons could not.—*Commonwealth v. Louisville Gas Co. (Ky.)* 164.

§ 45. Under Ky. St. 1909, §§ 4077, 4082 (Russell's St. §§ 6050, 6055), and Const. § 174, a tax on a franchise of a gas company *held* not a privilege tax imposed on the right to be a corporation.—*Commonwealth v. Louisville Gas Co. (Ky.)* 164.

§ 45. An assessment of intangible property of a railroad situated in a county *held* to violate Const. art. 8, § 1, requiring equality and uniformity of taxation.—*Missouri, K. & T. Ry. Co. of Texas v. Kone (Tex. Civ. App.)* 424.

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(B) Corporations and Corporate Stock and Property.

§ 122. Under Ky. St. 1909, §§ 4077, 4082 (Russell's St. §§ 6050, 6055), stockholders of a corporation *held* not required to list their shares in the company for taxation.—*Commonwealth v. Louisville Gas Co. (Ky.)* 164.

§ 122. Under Ky. St. 1909, §§ 4077, 4082 (Russell's St. §§ 6050, 6055), a gas company holding shares in an electric company *held* not assessable on its shares.—*Commonwealth v. Louisville Gas Co. (Ky.)* 164.

(D) Exemptions.

§ 217. The city hall of the city of Louisville *held* exempt from taxation under Const. § 170.—*Schwalk's Adm'r v. City of Louisville (Ky.)* 860.

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§ 254. In a proceeding to require personality to be listed for taxation in a certain county on the ground that the owner was there domiciled, evidence *held* to show that she was a resident of another county.—*Helm's Trustee v. Commonwealth (Ky.)* 196.

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(D) Mode of Assessment of Corporate Stock, Property, or Receipts.

§ 376. Under Ky. St. 1909, §§ 4077, 4082 (Russell's St. §§ 6050, 6055), *held*, that the bonds of an electric company owned by a gas company were to be computed in determining

the value of the latter's franchise.—*Commonwealth v. Louisville Gas Co. (Ky.)* 164.

§ 391. Acts 1897, p. 102, c. 5, *held* to divide for taxation railroad property into localized and distributable property, and switch and industrial tracks off the main right of way, but used as a part of the general system, must be assessed as distributable property.—*Nashville, C. & St. L. Ry. Co. v. Patterson (Tenn.)* 467.

§ 391. An assessment of certain railroad property *held* void, under Acts 1897, p. 102, c. 5, and no tax could be collected thereon.—*Nashville, C. & St. L. Ry. Co. v. Patterson (Tenn.)* 467.

§ 406. Under Ky. St. 1909, §§ 4077, 4082 (Russell's St. §§ 6050, 6055), the burden of proof in a proceeding to assess omitted property *held* on the state to show that the bonds of an electric company held by a gas company were omitted from the latter's report of its taxable property.—*Commonwealth v. Louisville Gas Co. (Ky.)* 164.

§ 406. Under Ky. St. 1909, §§ 4077, 4082 (Russell's St. §§ 6050, 6055), bonds of an electric company held by a gas company *held* not to be omitted from the report by the gas company of its property for taxation.—*Commonwealth v. Louisville Gas Co. (Ky.)* 164.

VII. PAYMENT AND REFUNDING OR RECOVERY OF TAX PAID.

Nonpayment of franchise tax as affecting right of corporation to defend action against it, see Corporations, § 499.

§ 527. A bank *held* liable only for the difference between the unlawful tax paid and the tax which it should have paid.—*City of Columbus v. Bank of Columbus (Ky.)* 835.

§ 528. Where a city could not legally demand a franchise tax until after the commencement of the action therefor, by the passage of an ordinance authorizing it, interest on the tax before judgment is not recoverable.—*City of Columbus v. Bank of Columbus (Ky.)* 835.

VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(A) Collectors and Proceedings for Collection in General.

§ 545. Ky. St. 1909, § 2098 (Russell's St. § 947), relating to the enforcement of unpaid tax bills, *held* not invalid.—*Specht v. City of Louisville (Ky.)* 846.

(B) Summary Remedies and Actions.

§ 593. The levy of a tax by the proper authorities is presumed to be legal and correct, and the burden of proving its illegality is on the person resisting it.—*City of Columbus v. Bank of Columbus (Ky.)* 835.

IX. SALE OF LAND FOR NONPAYMENT OF TAX.

Enforcement of lien for levee taxes, see Levees, § 27.

§ 630. Under Kirby's Dig. § 7085, requiring the delinquent tax list to be published weekly for two weeks, "weekly for two weeks" means two weeks in succession, and a biweekly publication did not comply with the statute.—*Byrne v. Less (Ark.)* 635.

§ 630. Failure to publish the delinquent tax list weekly for two weeks, as required by Kirby's Dig. § 7085, *held* to render the tax sale void.—*Byrne v. Less (Ark.)* 635.

XI. TAX TITLES.

(B) Tax Deeds.

§ 776. In ejectment, a deed from the Commissioner of State Lands *held* to convey land

(C) Actions to Confirm or Try Title.

§ 805. The possession of land under a tax deed is not adverse to the owner during the two years within which the land may be redeemed.—Bledsoe v. Haney (Tex. Civ. App.) 455.

(D) Rights and Remedies of Purchaser of Invalid Title.

§ 827. An admission by plaintiff in an action to enforce a lien for taxes that the sale was void *held* to justify a finding that the sale was void necessary to support a decree enforcing the lien under Kirby's Dig. § 7112.—Caruthers v. Greer (Ark.) 629.

§ 827. In a suit by the assignee of a purchaser at a tax sale to impose a lien on the land for taxes paid, whether the sale was valid or invalid *held* immaterial to defendants.—Caruthers v. Greer (Ark.) 629.

§ 829. Purchaser's right to recover taxes on the adjudication of the invalidity of a tax sale (Act July 23, 1868 [Acts 1868, p. 281] § 72; Acts 1883, p. 275, § 152) extends to the purchaser's grantees.—Caruthers v. Greer (Ark.) 629.

§ 833. An adjudication of the invalidity of a tax sale is a condition precedent to a purchaser's right to recover taxes paid under Kirby's Dig. § 7112.—Caruthers v. Greer (Ark.) 629.

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§ 840. A bank *held* not liable for a penalty for nonpayment of a franchise tax, where it had paid a personal property tax.—City of Columbus v. Bank of Columbus (Ky.) 835.

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Admissions in pleading in action for delay, see Pleading, § 177.

Matters to be proven under pleading, in action for delay, see Pleading, § 378.

Mitigation of damages for failure to deliver telegram, see Damages, § 62.

§ 27. Statement as to right of recovery of the addressee of a telegram for mental anguish, because of nondelivery of message, sent from one state to another, the laws of which differ as to recovery for mental anguish.—Western Union Telegraph Co. v. Griffin (Ark.) 489.

§ 33. The words "business service," in a telegram company's franchise fixing rates, do not include service rendered to a telegram company under a joint traffic arrangement.—East Tennessee Telephone Co. v. City of Harrodsburg (Ky.) 126.

§ 37. Telegraph company *held* not liable for failure to deliver at the sender's residence, seven miles in the country.—Western Union Telegraph Co. v. Shockley (Tex. Civ. App.) 945.

§ 38. In an action against a telegram company for negligently delaying the delivery of a message, evidence *held* to authorize a recovery.—Western Union Telegraph Co. v. McDonald (Tex. Civ. App.) 618.

§ 54. A stipulation on the reverse side of a message that the initial telegraph company would not be liable for negligent transmission or delivery beyond its own line *held* unavailable to the initial company as a defense for the negligent acts of the connecting company.—Postal Telegraph Cable Co. of Texas v. Harriass (Tex. Civ. App.) 891.

§ 66. Evidence *held* to authorize a finding of negligence in failing to deliver a telegram.—Western Union Telegraph Co. v. Griffin (Ark.) 489.

§ 67. Where a message relates to a commercial business, the telegraph company has notice of any actual damages that may result from its negligence.—Western Union Telegraph Co. v. Askew (Ark.) 107.

§ 67. Where a message on its face furnished to a person of ordinary prudence notice that it was important, and its prompt delivery essential, or where the telegraph company or its operator receiving it had notice of its importance, special damages were recoverable for the failure to promptly transmit or deliver it.—Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co. (Ky.) 852.

§ 67. A telegraph company negligently delaying the delivery of a message *held* liable for special damages, where it had notice of the importance of the message, though it is unintelligible.—Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co. (Ky.) 852.

§ 67. A telegraph company *held* not liable for any damage that it could not reasonably know or contemplate, when it received a message, would follow from its failure to transmit and deliver it with reasonable diligence.—Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co. (Ky.) 852.

§ 67. A telegram *held* to sufficiently notify defendant telegraph company's agents that damages might result from its nondelivery.—Western Union Telegraph Co. v. Williams (Tex. Civ. App.) 280.

§ 68. A telegram announcing a death *held* to put the company on notice that the funeral would be postponed on a reasonable time.—Western Union Telegraph Co. v. Griffin (Ark.) 489.

§ 68. The relation of son-in-law of the sender of a telegram to the addressee *held* sufficient to sustain an action for mental anguish for nondelivery of the message announcing death of the sender's wife.—Western Union Telegraph Co. v. Griffin (Ark.) 489.

§ 68. Prolongation of anxiety on delivery of a message informing a daughter of her father's fatal illness *held* not a basis of damages.—Goodhue v. Western Union Telegraph Co. (Tex. Civ. App.) 41.

§ 70. In an action for the erroneous transmission of a message by which plaintiff failed to make a contract, the measure of plaintiff's damages was the difference between the contract price and the value of the goods purchased when they should have been delivered.—Western Union Telegraph Co. v. Askew (Ark.) 107.

§ 71. In an action against a telegraph company for negligent mistake in transmitting a death message, a verdict of \$450 for mental anguish *held* not excessive.—Western Union Telegraph Co. v. Taylor (Ky.) 131.

§ 73. Where a telegraph company denies that it had notice of the importance of a message, and the evidence on the issue is in doubt, the question is for the jury.—Postal Telegraph-Cable Co. v. Louisville Cotton Oil Co. (Ky.) 852.

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§ 3. Defendant was a joint tenant or tenant in common with the other owners where the deeds under which he claimed referred to the land conveyed as undivided sixth interests.—Kidd v. Bell (Ky.) 232.

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Of liability of carrier, see Carriers, § 114.

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Renewal of application for license to sell liquors, see Intoxicating Liquors, § 71.

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(A) Right of Action and Defenses.

§ 20. A party in possession of land may recover in an action for trespass thereto.—*Deaderick v. State* (Tenn.) 975.

§ 30. The buyer of timber, who goes over the line and cuts timber on adjoining land, is alone responsible therefor, and the seller is not liable where it does not appear that he was responsible for the buyer's mistaking the boundary or authorized the cutting.—*Stoneman-Zearing Lumber Co. v. McComb* (Ark.) 648.

(B) Jurisdiction, Parties, Preliminary Proceedings, and Pleading.

§ 40. In an action for cutting and removing timber from several tracts of land, it is not essential to a statement of the cause of action to set forth a description and value of the timber cut on each tract.—*Stoneman-Zearing Lumber Co. v. McComb* (Ark.) 648.

(C) Evidence.

§ 44. In an action for cutting and removing timber on plaintiff's land, the burden of proof is on him to show that defendant cut the timber, and the quantity and value of the timber cut.—*Stoneman-Zearing Lumber Co. v. McComb* (Ark.) 648.

§ 46. In an action for cutting and removing timber, proof that some of it was cut by defendant was insufficient to charge it with responsibility for all the timber missing from plaintiff's land during an indefinite period of two or three years.—*Stoneman-Zearing Lumber Co. v. McComb* (Ark.) 648.

(E) Trial, Judgment, and Review.

§ 67. In an action for injury to plaintiff's wife from fright and humiliation caused by defendant's agents going upon plaintiff's premises in the nighttime, *held* error to direct a verdict for defendant.—*Alexander v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 572.

III. CRIMINAL RESPONSIBILITY.

§ 78. Possession by occupation or inclosure of part of land covered by title papers *held* possession of the entire boundaries described therein, within Shannon's Code, § 6496, subd. 7.—*Deaderick v. State* (Tenn.) 975.

§ 84. In a prosecution for malicious mischief, in violation of Shannon's Code, § 6496, it was no defense that defendant's employers had a better title to the land in question than prosecutor.—*Deaderick v. State* (Tenn.) 975.

TRESPASS TO TRY TITLE.

See Ejectment.

to try title, *had* prior possession of the land, plaintiffs need not connect themselves with the sovereign of the soil.—*Stephenville Oil Mill Co. v. McNeill* (Tex. Civ. App.) 911.

II. PROCEEDINGS.

Hearsay evidence, see Evidence, § 317.

Opinion evidence as to validity of plaintiff's claim, see Evidence, § 471.

Restraining inclosure of land and removal of timber pending action, see Injunction, § 7.

§ 25. It is not essential to a recovery of land by force of a prior possession that the action be brought within a reasonable time after eviction.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

§ 25. Unreasonable delay in bringing a suit to try title based on prior possession *held* no bar to the action, but relevant to the question of abandonment.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

§ 35. In trespass to try title, plaintiff *held* not bound by the date of the eviction pleaded, but entitled to prove that he was evicted on an earlier date.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

§ 40. In trespass to try title, in which both parties claimed through deeds from N., a certified copy of the deed from N.'s grantee, through whom plaintiffs claimed, to another, *held* not inadmissible because it referred to a prior grant for a fuller description, and recited that it was acquired by the grantor by deed from N.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 41. Where plaintiff claimed certain land by prior possession, he was also entitled to show that one of the links in defendant's chain of title was insufficient without defeating his own prima facie right based on possession.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

§ 41. Proof of a patent to a third person *held* not to preclude plaintiff's recovery on prior possession.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

§ 44. Evidence *held* to justify the refusal to direct a verdict for defendant.—*Walker v. Corbett* (Ky.) 841.

§ 44. The direction of a verdict for plaintiff *held* error under the evidence.—*Thacker v. Wilson* (Tex. Civ. App.) 938.

§ 45. In trespass to try title, an instruction *held* not objectionable as a charge that defendants as a matter of law were entitled to judgment for the half of the tract claimed by them.—*Saxton v. Corbett* (Tex. Civ. App.) 75.

TRIAL.

See Witnesses.

Trespass to try title to real property, see Trespass to Try Title.

Trial of right to property levied on, see Attachment, §§ 287, 300.

Proceedings incident to trials.

See New Trial; Reference.

Conformity of judgment to verdict or findings, see Judgment, § 256.

Entry of judgment after trial of issues, see Judgment, §§ 251-266.

Place of trial, see Venue, § 65.

Right to trial by jury, see Jury, §§ 10-23.

Trial of actions by or against particular classes of persons.

See Brokers, § 88; Carriers, §§ 94, 136, 320, 321, 384; Master and Servant, §§ 80, 284-296; Municipal Corporations, § 821; Railroads, §§ 350-351, 401, 446, 484, 485.

Trial of particular civil actions or proceedings.

See Libel and Slander, §§ 123, 124; Malicious Prosecution, §§ 71, 72; Negligence, §§ 139, 140; Replevin, § 88; Trespass, § 67; Trespass to Try Title, §§ 44, 45.

Affiliation proceedings, see Bastards, § 70.

For breach of contract, see Sales, § 420.

For breach of covenant, see Covenants, § 135.

For compensation of broker, see Brokers, § 88.

For injuries at railroad crossings, see Railroads, § 350.

For injuries caused by operation of street railroad, see Street Railroads, § 117.

For injuries from fires set by operation of railroad, see Railroads, §§ 484, 485.

For injuries to animals on or near railroad tracks, see Railroads, § 446.

For injuries to passenger, see Carriers, §§ 320, 321, 384.

For injuries to persons on city streets, see Municipal Corporations, § 821.

For injuries to persons on or near railroad tracks, see Railroads, § 401.

For injuries to servant, see Master and Servant, §§ 284-296.

For loss of or injury to shipment, see Carriers, § 136.

For negligent transmission of telegram, see Telegraphs and Telephones, § 73.

For nondelivery of shipment, see Carriers, § 94.

For price of goods, see Sales, § 364.

For wages, see Master and Servant, § 80.

For work and labor, see Work and Labor, § 30.

On bill or note, see Bills and Notes, §§ 537, 538.

On insurance policy, see Insurance, § 668.

Suits in equity, see Equity, §§ 377-381.

Suits to try tax titles, see Taxation, § 805.

To set aside written instrument, see Cancellation of Instruments, § 51.

Trial of criminal prosecutions.

See Assault and Battery, § 97; Burglary, § 46;

Criminal Law, §§ 594-614, 628-830; False Pretenses, § 52; Homicide, §§ 295-310; Larceny, §§ 68-77; Perjury, § 37; Rape, § 59.

For offenses against liquor laws, see Intoxicating Liquors, § 239.

II. DOCKETS, LISTS, AND CALENDARS.

§ 11. A suit to foreclose a vendor's lien held properly transferred to the law docket under Civ. Code Prac. § 12, for the determination of the amount due.—Landrum & Adams v. Wells (Ky.) 213.

III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 25. In an action for injuries to a street car passenger, plaintiff held to have the burden of proof notwithstanding defendant's offer to confess judgment giving him the right to open and close.—Lexington Ry. Co. v. Johnson (Ky.) 830.

§ 25. A rule as to the right to open and close argument of trial, stated.—Reis v. Eperson (Mo. App.) 353.

§ 29. Where counsel offered a part of the testimony of a witness on a former trial to show contradictions of his testimony at the present trial, it was not error for the trial judge

to remark that counsel should have treated the witness fairly by reading the alleged contradictory statement to him, and asking him if he made it.—Steltemeier v. Barrett (Mo. App.) 1095.

IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 56. In an action by plaintiff to recover for injuries in a railroad wreck, the exclusion of the depositions of two physicians who assisted the principal physician in the examination and treatment of plaintiff at a hospital held not sustainable on the ground that the evidence was merely cumulative.—Epstein v. Pennsylvania R. Co. (Mo. App.) 366.

(B) Order of Proof, Rebuttal, and Re-opening Case.

§ 60. In an action on a note given for the price of corporate stock, defended on the ground of false representations as to the value of the stock, it is proper for the court to admit, in the first instance, evidence that third persons made false representations, and then admit evidence connecting plaintiff therewith.—Wise-garver v. Yinger (Tex. Civ. App.) 925.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 84. Under Rev. St. 1895, art. 2312, a certified copy of a deed held admissible and prima facie evidence of its execution by the grantor therein, where the objections to its admissibility permitted by the statute were not taken or urged when it was offered.—Houston Oil Co. of Texas v. Kimball (Tex.) 533.

§ 85. An objection to all of the testimony of a witness will be disregarded where a part of it is admissible.—Wells v. Hobbs (Tex. Civ. App.) 451.

§ 98. Rulings of a court should be so definite in character as to leave no room for doubt by the jury as to what evidence is admitted and what excluded.—Gardner v. Metropolitan St. Ry. Co. (Mo.) 1068.

§ 105. The court must declare the correct rule as to the remedy, although evidence received without objection should have been excluded on objection.—Pratt v. Missouri Pac. Ry. Co. (Mo. App.) 1125.

§ 105. Defendant could disprove the execution of the deed under which plaintiffs claimed in trespass to try title, so as to overcome the prima facie case made by the introduction of a certified copy, though he did not object to the copy for want of proof of the execution of the original.—Houston Oil Co. of Texas v. Kimball (Tex.) 533.

V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 122. Allusions of counsel in argument held not improper.—Kettler Brass Mfg. Co. v. O'Neil (Tex. Civ. App.) 900.

§ 120. In an action for injuries to a passenger, the railroad held not entitled to complain of the improper argument of plaintiff's counsel made in reply to remarks of counsel for the defense.—International & G. N. R. Co. v. Sandlin (Tex. Civ. App.) 60.

§ 133. Improper argument of counsel in an action for injuries to a passenger by the derailment of a train held not ground for reversal.—International & G. N. R. Co. v. Sandlin (Tex. Civ. App.) 60.

As to particular facts, issues, or subjects.

See Adverse Possession, § 115; Boundaries, § 40; Damages, § 208; Payment, § 76; Release, § 58.

Authority of corporate officers, see Corporations, § 433.

Construction of contract, see Contracts, § 176.

Contributory negligence of passenger, see Carriers, § 347.

Contributory negligence of servant, see Master and Servant, § 289.

Incompetency or negligence of fellow servant, see Master and Servant, § 287.

Mental capacity of insured assigning policy, see Insurance, § 212.

Negligence of master, see Master and Servant, § 286.

In particular civil actions or proceedings.

See Libel and Slander, § 123; Malicious Prosecution, § 71; Replevin, § 88; Trespass, § 67; Trespass to Try Title, § 44.

Affiliation proceedings, see Bastards, § 70.

For breach of contract, see Sales, § 420.

For injuries at railroad crossings, see Railroads, § 350.

For injuries caused by operation of street railroad, see Street Railroads, § 117.

For injuries from fires set by operation of railroad, see Railroads, § 484.

For injuries to animals on or near railroad tracks, see Railroads, § 446.

For injuries to passenger, see Carriers, § 320.

For injuries to persons on city streets, see Municipal Corporations, § 821.

For injuries to servant, see Master and Servant, §§ 284-289.

For loss of or injury to shipment, see Carriers, § 136.

For negligent transmission of telegram, see Telegraphs and Telephones, § 73.

On bill or note, see Bills and Notes, § 537.

On insurance policy, see Insurance, § 668.

§ 139. A demurrer to testimony should not be sustained if it is so strong that fair-minded men may differ as to the issue.—*Rose v. Mayes* (Mo. App.) 769.

§ 139. Unless the evidence is so conclusively one way that there is no room for reasonable minds to differ as to the conclusion to be reached, the trial judge should not direct a verdict.—*Alexander v. St. Louis Southwestern Ry. Co. of Texas* (Tex. Civ. App.) 572.

§ 139. Where there is any evidence supporting an issue properly pleaded, it is for the jury.—*Avant v. Watson* (Tex. Civ. App.) 962.

§ 139. The weight of the testimony is for the jury.—*Buchanan v. Rollings* (Tex. Civ. App.) 962.

§ 140. Facts indicating that plaintiff's witnesses were unworthy of belief were for the jury's consideration alone.—*City of Louisville v. Tompkins* (Ky.) 174.

§ 140. It is a question for the jury whether the testimony of a party is to be believed.—*Markt v. Chicago, B. & Q. Ry. Co.* (Mo. App.) 1142.

§ 140. The credibility of witnesses is for the jury.—*Buchanan v. Rollings* (Tex. Civ. App.) 962.

§ 141. Where the essential facts are established by undisputed evidence, there is no question for the jury.—*Kirby Lumber Co. v. C. R. Cummings & Co.* (Tex. Civ. App.) 273.

§ 143. The jury must weigh conflicting evidence and determine its probative force.—*Mor-*

vidence, and then finding for defendant on an equity count, and setting aside the verdict for plaintiff on a count at law, *held* not incongruous.—*Warner v. Michel* (Mo. App.) 338.

VII. INSTRUCTIONS TO JURY.

Assignment of errors, see Appeal and Error, § 730.

Exceptions for purpose of review, see Appeal and Error, § 263.

Harmless error in, see Appeal and Error, §§ 1064-1068.

Objections for purpose of review, see Appeal and Error, § 216.

Presentation of objections in appeal record for purpose of review, see Appeal and Error, § 500.

Presumptions on appeal, see Appeal and Error, § 928.

As to particular issues or subjects.

See Damages, §§ 215-218; Release, § 59.

Assumption of risk by servant, see Master and Servant, § 295.

Contributory negligence of passenger, see Carriers, § 348.

Contributory negligence of servant, see Master and Servant, § 286.

Incompetency or negligence of fellow servant, see Master and Servant, § 294.

Negligence of master, see Master and Servant, § 203.

Proximate cause of injury, see Negligence, § 140.

In particular civil actions or proceedings.

See Libel and Slander, § 124; Malicious Prosecution, § 72; Negligence, §§ 139-140; Trespass to Try Title, § 45; Work and Labor, § 30.

For breach of covenant, see Covenants, § 135.

For ejection of passenger, see Carriers, § 384.

For injuries at railroad crossing, see Railroads, § 351.

For injuries from fires set by operation of railroad, see Railroads, § 485.

For injuries to passenger, see Carriers, § 321.

For injuries to persons on or near railroad tracks, see Railroads, § 401.

For injuries to servant, see Master and Servant, §§ 291-296.

For price of goods, see Sales, § 364.

For wages, see Master and Servant, § 80.

On bill or note, see Bills and Notes, § 539.

To cancel written instrument, see Cancellation of Instruments, § 51.

(A) Province of Court and Jury in General.

§ 187. The credibility of witnesses and the weight to be given testimony are for the jury.—*Smith v. Fears* (Tex. Civ. App.) 433.

§ 191. In an action on an indemnity policy, a charge *held* erroneous.—*Maryland Casualty Co. v. Chew* (Ark.) 642.

§ 191. There being evidence to show that there were many other duties besides sampling cotton in the vocation of cotton factor, a charge in an action on an indemnity policy by an insured giving his occupation as a cotton factor *held* erroneous as assuming that insured was totally disabled by reason of his inability to sample cotton.—*Maryland Casualty Co. v. Chew* (Ark.) 642.

§ 191. In an action for injuries to a section hand struck by a train, an instruction given under the assumption that plaintiff had no knowledge of the near approach of the train and of his peril *held* erroneous.—*Williamson v. Wabash R. Co.* (Mo. App.) 1113.

§ 192. In trespass to try title, *held* not error to assume that possession was adverse.—*Washam v. Harrison* (Tex. Civ. App.) 52.

§ 192. In trespass to try title to land claimed by 10 years' adverse possession, where the undisputed evidence showed that plaintiff had improvements on, and held possession of, the rear part of the lot, it was not error for the court to state such fact to the jury.—*Washam v. Harrison* (Tex. Civ. App.) 52.

§ 192. The court in its instruction may assume a fact conclusively established by the evidence.—*International & G. N. R. Co. v. Sandlin* (Tex. Civ. App.) 60.

§ 193. An instruction which indicated to the jury the court's opinion as to the effect of certain evidence on plaintiff's case was improper.—*Pennington v. Thompson Bros. Lumber Co.* (Tex. Civ. App.) 923.

§ 194. A charge on the weight of the evidence is properly refused.—*Buckley v. Runge* (Tex. Civ. App.) 596.

(B) Necessity and Subject-Matter.

§ 211. In an action by an administrator on a note, a requested instruction that, as defendant could not testify to any transaction with decedent showing payment, his failure to explain any matter connected with its payment should not be considered against him, was properly refused as prejudicing the other party for exercising a lawful right, and was not authorized by Rev. St. 1899, § 4652 (Ann. St. 1906, p. 2520).—*Steltemeier v. Barrett* (Mo. App.) 1095.

(C) Form, Requisites, and Sufficiency.

§ 233. To avoid the probability of misleading the jury, they should not be instructed that all other issues raised by the pleadings, other than those submitted, are withdrawn from their consideration.—*Missouri, K. & T. Ry. Co. of Texas v. Graves* (Tex. Civ. App.) 458.

§ 237. An instruction as to preponderance of testimony *held* sufficient.—*Handlan v. Miller* (Mo. App.) 751.

§ 243. An instruction *held* erroneous as contradictory.—*Gardner v. Metropolitan St. Ry. Co.* (Mo.) 1068.

§ 244. The rule that it is not proper to point out particular evidence in an instruction or to give undue prominence to any fact applies to parol evidence, and not to written evidence of a contract.—*Offutt & Blackburn v. Doyle* (Ky.) 156.

§ 244. In an action on a note executed to a decedent in which defendant pleaded payment and produced several receipts acknowledging payment for money advanced, a requested instruction that the production of the receipts signed by decedent was a complete defense, unless overcome by proof showing that the payments were in fact made, *held* properly refused as unduly commenting on the effect of the receipts as evidence.—*Steltemeier v. Barrett* (Mo. App.) 1095.

(D) Applicability to Pleadings and Evidence.

§ 251. Where the defense of assumption of risk is not pleaded, the court should not submit such issue.—*Lewis v. Texas & P. Ry. Co.* (Tex. Civ. App.) 605.

§ 252. Where a written contract between the parties to an action is set up or relied on in the pleadings, or is introduced in the evidence, the court should instruct thereon, notwithstanding evidence of fraud, want of consideration, or mistake.—*Offutt & Blackburn v. Doyle* (Ky.) 156.

§ 252. In an action for injury to a passenger from being shot by a trainman, there being no question of negligence, an instruction on

the theory of negligence *held* erroneous.—*Illinois Cent. R. Co. v. Gunterman* (Ky.) 514.

§ 252. In an action for death at a crossing, instructions given *held* erroneous as not based on evidence.—*Louisville & N. R. Co. v. Engleman's Admr* (Ky.) 833.

§ 252. Where, in trespass to try title, there was no evidence that the tenants of defendant's grantor held possession of the land for three years, there was no error in not submitting the question of possession of such tenants in a charge upon the three year limitations as to such grantor.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 252. A requested charge, in a servant's injury action, to reject testimony as to the defective condition of machinery, was properly refused where there was no evidence of any defects in the machinery.—*Galveston, H. & S. A. Ry. Co. v. Sanchez* (Tex. Civ. App.) 44.

§ 253. In an action for injuries from the fowling of land, an instruction on the measure of damages *held* erroneous.—*Illinois Cent. R. Co. v. Haynes* (Ky.) 210.

(E) Requests or Prayers.

§ 255. Failure to charge on one of the grounds on which plaintiff sought to recover, in the absence of a request, is not error.—*Abbott Gin Co. v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 284.

§ 256. One cannot complain of an instruction which allows the jury to interpret the expression "carelessly and negligently," in the absence of a request for a more specific instruction.—*Rippetoe v. Missouri, K. & T. Ry. Co.* (Mo. App.) 314.

§ 256. A charge, in trespass for cutting timber, relating to the care of a prudent person, *held* not erroneous for failing to annex the qualifying word "ordinarily."—*Clevenger v. Blount* (Tex.) 529.

§ 256. It is not compulsory upon the judge to set out any more of the pleadings in his charge than he may deem necessary, and it is the duty of a party, if dissatisfied with the charge, to have prepared and presented a special charge covering the supposed defect, and, if he does not do so, he cannot complain.—*Estes v. Estes* (Tex. Civ. App.) 304.

§ 256. Defendant *held* not entitled to complain of a charge correct as far as it went, because it was based on one state of facts, when there were other facts in evidence presenting another theory making up a part of the defense.—*Beaumont Traction Co. v. Happ* (Tex. Civ. App.) 610.

§ 256. Complaint cannot be made that an instruction did not impose a sufficiently high degree of care on a carrier, in the absence of a special request for the instruction desired.—*Williamson v. Chicago, R. I. & G. Ry. Co.* (Tex. Civ. App.) 897.

§ 256. Where a charge given is correct so far as it goes, if a party desires fuller instructions upon the subject, they must be asked for.—*J. T. Stark Grain Co. v. Harry Bros. Co.* (Tex. Civ. App.) 947.

§ 260. A requested charge, substantially covered by the instructions given, may be properly refused.—*Rippetoe v. Missouri, K. & T. Ry. Co.* (Mo. App.) 314; *Morgan's L. & T. R. & S. S. Co. v. Street* (Tex. Civ. App.) 270; *Missouri, K. & T. Ry. Co. of Texas v. Graves* (Tex. Civ. App.) 458; *International & G. N. R. Co. v. Hood* (Tex. Civ. App.) 569; *Texas & N. O. R. Co. v. Plummer* (Tex. Civ. App.) 942; *Palo Duro Club v. McAllister* (Tex. Civ. App.) 971.

§ 260. Where the defenses of contributory negligence and assumed risk were clearly pre-

chcz (Tex. Civ. App.) 44.
§ 260. Where the jury were correctly instructed as to defendant's duty to provide means for use by passengers in alighting, it was not error to refuse a special charge to the same effect.—Missouri, K. & T. Ry. Co. of Texas v. Dunbar (Tex. Civ. App.) 574.

§ 260. Where a clause in the general charge correctly submitted an issue, a special charge submitting the same issue was properly refused.—Missouri, K. & T. Ry. Co. of Texas v. Dunbar (Tex. Civ. App.) 574.

§ 260. An instruction as to the burden of proof as to contributory negligence held sufficient.—Beaumont Traction Co. v. Happ (Tex. Civ. App.) 610.

§ 261. Requested instructions based on erroneous instructions refused held also properly refused.—Reis v. Epperson (Mo. App.) 353.

(F) Objections and Exceptions.

§ 272. Defendant was not entitled to an instruction to reject testimony of his own witnesses.—Galveston, H. & S. A. Ry. Co. v. Sanchez (Tex. Civ. App.) 44.

(G) Construction and Operation.

§ 296. Any error in an instruction, which is corrected in another given instruction, is cured.—Chesapeake & O. Ry. Co. v. Patrick (Ky.) 820; Same v. Picklesimer's Adm'r (Ky.) 822.

§ 296. The error of an instruction presenting a wrong theory of the entire case is not cured by other instructions on the right theory.—Flucks v. St. Louis, I. M. & S. Ry. Co. (Mo. App.) 348.

§ 296. In an action against a carrier for injury to live stock, a charge assuming facts held not ground for reversal in view of another charge given.—Fusselman v. Wabash R. Co. (Mo. App.) 1137.

§ 296. A charge as to the burden of proof as to contributory negligence of a passenger in a collision held not calculated to mislead the jury when taken in connection with other portions of the main charge and special charges.—Beaumont Traction Co. v. Happ (Tex. Civ. App.) 610.

§ 296. The omission of an element essential to the cause of action or defense, from one paragraph of the charge, is not material, where it is included in another.—Texas & N. O. R. Co. v. Plummer (Tex. Civ. App.) 942.

IX. VERDICT.

In equity, see Equity, § 381.
Presumptions on appeal, see Appeal and Error, § 930.

Review of verdict as dependent on motion in arrest of judgment, see Appeal and Error, § 238.

(A) General Verdict.

§ 330. Where there are several counts in a petition stating different causes of action, there should be a separate finding on each, unless they relate to the same transaction.—Southern Missouri & A. R. Co. v. Wyatt (Mo.) 688.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

Harmless error in admission of evidence, see Appeal and Error, § 1054.

§ 386. The court may refuse a requested instruction contrary to the facts found.—F. H. Smith Co. v. Louisville & N. R. Co. (Mo. App.) 342.

and Error, § 265.
Harmless error, see Appeal and Error, § 1071.
Objections for purpose of review, see Appeal and Error, § 219.
Presumptions on appeal, see Appeal and Error, § 931.

§ 392. If the trial court's finding in trespass to try title as to the improvements made upon the land by defendant's grantor were not sufficiently full or definite, plaintiff should have requested a fuller finding.—Merriman v. Blalack (Tex. Civ. App.) 403.

§ 394. A finding that a deed conveyed to the grantee all the grantor's title and interest in a league of land, including the land in controversy, did not offend against the statute requiring conclusions of fact and of law to be separate.—Merriman v. Blalack (Tex. Civ. App.) 403.

§ 396. In an action by the buyer of an animal for the price paid and express charges, on the ground that the animal shipped by the seller was not the one sold, a finding held a finding against the seller, notwithstanding the failure of the plaintiff to allege a fact in his petition.—Wright v. Schultz (Ky.) 138.

XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS.

Necessity of motion in arrest for purpose of review of defect in verdict, see Appeal and Error, § 238.

TRIAL OF RIGHT OF PROPERTY.

See Attachment, §§ 287, 300.

TROVER AND CONVERSION.

Conversion by bailee, see Bailment, § 16.

I. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR.

§ 4. A wrongful conversion of the property of an evicted tenant held not shown by the evidence.—Wilson v. Moore (Tex. Civ. App.) 577.

II. ACTIONS.

(A) Right of Action and Defenses.

§ 16. Persons held to have lost title to trust deeds and notes, so that they could not maintain an action for conversion thereof.—Cooper v. Commonwealth Trust Co. (Mo. App.) 791.

(C) Evidence.

§ 40. Evidence as to the value of a car of coke at the time of its conversion held insufficient to sustain a verdict for plaintiff.—Texarkana & Ft. S. Ry. Co. v. Neches Iron Works (Tex. Civ. App.) 64.

(D) Damages.

§ 44. The general measure of damages for conversion of property is its market value at the time and place of conversion, with legal interest.—Texarkana & Ft. S. Ry. Co. v. Neches Iron Works (Tex. Civ. App.) 64.

§ 54. In a suit for a carrier's conversion of a car of coke plaintiff, a manufacturing company held not entitled to recover for loss of an order for work subsequently filled.—Texarkana & Ft. S. Ry. Co. v. Neches Iron Works (Tex. Civ. App.) 64.

TRUST DEEDS.

See Chattel Mortgages; Mortgages.

TRUSTEE PROCESS.

See Garnishment.

TRUSTS.

Conveyances in trust for creditors, see Assignments for Benefit of Creditors.
Creation by will, see Wills, §§ 672, 686.
Effect of trust on limitation, see Limitation of Actions, § 103.

VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

§ 315. Where the will creating a trust does not declare that the trustee shall not be compensated for the services rendered in executing the trust, the court may allow him a reasonable compensation therefor.—Patrick v. Patrick (Ky.) 159.

VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.**(C) Actions.**

§ 372. In an action against a trustee, *held*, that matters set forth in the answer were not a plea of payment, but an accounting; that the remedy against him was to surcharge and falsify the items of account thus rendered, and that the burden was on plaintiff to establish a breach of the trust.—Offenstein v. Gehner (Mo.) 715.

§ 372. The presumption is that a trustee has acted in good faith and has done his duty, and the burden is on one suing him for breach of trust to allege and prove the contrary.—Offenstein v. Gehner (Mo.) 715.

TRUTH.

As justification for libel, see Libel and Slander, § 54.

TURNPIKES AND TOLL ROADS.

Application of statute against perpetuities to conveyance of property for use in connection with turnpike, see Perpetuities, § 6.

UNDISCLOSED AGENCY.

See Principal and Agent, § 145.

UNDUE INFLUENCE.

Procuring assignment of insurance policy, see Insurance, § 212.
Procuring making of contract, see Contracts, § 96.
Procuring making of will, see Wills, §§ 155-164.

UNDUE PROMINENCE.

To particular matters in instructions, see Criminal Law, § 811; Trial, § 244.

UNIFORMITY.

Of taxation, see Taxation, § 45.

UNITED STATES.

See Census.
Courts, see Courts, §§ 289, 300; Removal of Causes.
Public lands, see Public Lands, §§ 61, 139.
Taxation of bonds of, see Taxation, § 7.

I. GOVERNMENT AND OFFICERS.

Judicial notice of boundaries, see Evidence, § 10.

USAGES.

See Customs and Usages.

USURY.**I. USURIOUS CONTRACTS AND TRANSACTIONS.****(A) Nature and Validity.**

§ 16. Ky. St. 1909, § 2908 (Russell's St. § 947), imposing a penalty on delinquent taxes, *held* not to impose a usurious rate of interest in violation of sections 2218, 2219 (Russell's St. §§ 1814, 1815).—Specht v. City of Louisville (Ky.) 846.

VACATION.

Of particular acts, instruments, or proceedings.
Receiver's sale, see Sales, § 139.
Sale of property of ward, see Guardian and Ward, § 105.
Sale of school lands, see Public Lands, § 173.

VALUE.

Relevancy of evidence as to, see Evidence, § 113.

VARIANCE.

Between pleading and proof in civil action, see Pleading, §§ 378-398.
Between pleading and proof in criminal prosecutions, see Indictment and Information, § 173.

VENDOR AND PURCHASER.

See Exchange of Property; Sales.
Requirements of statute of frauds, see Frauds, Statute of, §§ 63-73.
Specific performance of contract, see Specific Performance.

Sales by or to particular classes of persons.
See Executors and Administrators, § 148.

Sales of particular species of, or estates or interests in, property.

See Homestead, § 143.
Standing timber, see Logs and Logging, § 3.
Swamp lands, see Public Lands, § 61.

Sales on judicial or other proceedings.
Of homestead under order of court, see Homestead, § 143.
Of property of infant under order of court, see Guardian and Ward, §§ 79-105.
Of property of lunatic under order of court, see Insane Persons, § 71.
Sale on execution, see Execution, § 273.
Tax sale, see Taxation, §§ 630, 827-833.

I. REQUISITES AND VALIDITY OF CONTRACT.

§ 3. A contract *held* to create the relation of principal and agent, and to authorize the latter to sell the former's real estate, precluding him from becoming the purchaser.—Meek v. Hurst (Mo.) 1022.

§ 18. No title passed under an option to purchase land which required the owners to furnish the option holder a survey and tender an acceptable title within 90 days, where it did not appear that any survey or abstract of title was ever tendered, or that the option holder paid anything for the land.—Little v. Cardwell (Ky.) 799.

III. MODIFICATION OR RESCISSION OF CONTRACT.**(A) By Agreement of Parties.**

Requirements of statute of frauds as to reconveyance, see Frauds, Statute of, § 63.

(B) Rescission by Vendor.

§ 103. A vendor having permitted a part of the land to be sold off without attempting to

son were fixed by recording of a trust deed.—*John M. Bonner Memorial Home v. Collin County Nat. Bank* (Tex. Civ. App.) 430.

§ 105. On repudiation of a contract of sale, the vendee may remove permanent improvements, if practicable, which do not enhance the value of the premises.—*Glass v. Hampton* (Ky.) 803.

IV. PERFORMANCE OF CONTRACT.

(A) Title and Estate of Vendor.

§ 129. Under a contract of sale calling for a general warranty deed, a purchaser could not be compelled to accept a conveyance, where the legal title is outstanding in a third person.—*Pineland Mfg. Co. v. Guardian Trust Co.* (Mo. App.) 1133.

(D) Payment of Purchase Money.

Subrogation to rights of vendor by party furnishing money for payment of price, see Subrogation, § 23.

§ 176. Where there was a deficiency in the quantity of land sold of 33½ per cent., equity would grant relief, whether the sale was in gross or by the acre, or whether the loss occurred through fraud or mistake.—*Landrum & Adams v. Wells* (Ky.) 213.

§ 176. In an action to recover for a deficit in land sold, a contention that the purchaser got all he bargained for and that there was no loss of any part of the property held not pertinent.—*Boggs v. Bush* (Ky.) 220.

§ 176. In an action to recover for a deficit in lands sold, whether the sale was by the acre or in gross held immaterial.—*Boggs v. Bush* (Ky.) 220.

§ 176. Under the rule that relief will be denied for a deficit in land sold where the deficit is less than 10 per cent. and granted where 10 or more, a purchaser held entitled to relief for a deficit of 12 acres out of 90.—*Boggs v. Bush* (Ky.) 220.

V. RIGHTS AND LIABILITIES OF PARTIES.

(A) As to Each Other.

Parol evidence to show assumption of Incumbrances, see Evidence, § 419.

§ 196. Where a fee-simple title is conveyed, rents not due until after the conveyance pass to the grantee.—*Latham v. First Nat. Bank* (Ark.) 992.

(C) Bona Fide Purchasers.

§ 220. Under the law of 1837, a deed which passed no title had no effect, so that, if a description in a subsequent deed to the same land was insufficient to pass title, title would remain in the prior grantee under an unrecorded deed.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 229. A purchaser of realty from a devisee thereof held chargeable with notice of the terms of the will and took only the devisee's title.—*Haring v. Shelton* (Tex.) 13.

§ 230. A provision in the deed of a junior grantee held not evidence that he had knowledge of a senior conveyance of the land by his grantor to a third person or to show that he suspected it was forged.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 230. A purchaser of land is bound to take notice of the recitals in the patent forming a

lisle & Co. v. King (Tex. Civ. App.) 581.

§ 230. A recital in a deed of payment by the grantee is not evidence of such payment to make him a bona fide purchaser as against others claiming under another deed.—*William Carlisle & Co. v. King* (Tex. Civ. App.) 581.

§ 231. Under Rev. St. 1899, §§ 923, 3399 (Ann. St. 1906, pp. 845, 1933), a subsequent purchaser held not entitled to sue to set aside a prior conveyance duly recorded.—*Seilert v. McAnally* (Mo.) 1064.

§ 231. A purchaser need only examine the record for conveyances made prior to his purchase by his immediate or remote vendor.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 231. The existence of two recorded deeds held sufficient notice to a subsequent purchaser of the rights of one claiming under a recorded, but not duly acknowledged, deed.—*Abernathy v. Pickett* (Tex. Civ. App.) 579.

§ 231. Under Rev. St. 1895, arts. 4607, 4642, held, that a deed filed for record with the proper officer constitutes notice from that time whether in fact recorded or not.—*William Carlisle & Co. v. King* (Tex. Civ. App.) 581.

§ 231. A recorded deed, by virtue alone of the record, is constructive notice only of what appears on the face of the deed.—*William Carlisle & Co. v. King* (Tex. Civ. App.) 581.

§ 231. One held to have notice from records of a sale by an attorney in fact unauthorized by his power, and so not a bona fide purchaser.—*Lightfoot v. Horst* (Tex. Civ. App.) 606.

§ 233. Under the law of 1837, a conveyance of the same land made after a prior conveyance to another by an unrecorded deed vested in the subsequent grantee the legal title with an equity in the prior grantee to show a superior title by proving notice to the subsequent grantee, or want of a valuable consideration, and, since the latter need not record his deed to give notice to the prior grantee, and he or his vendees were not bound to examine the record for subsequent conveyances, the doctrine of innocent purchasers would not apply.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

§ 242. One claiming under a junior deed taken while Act Dec. 20, 1836 (1 Laws 1836, p. 156, § 40; Hart. Dig. art. 2757), was in force, held to take title as against one claiming under a prior unrecorded deed until the latter proved that the junior grantee was not a purchaser for value without notice; the burden not being on those claiming under the junior grantee to prove that fact.—*Houston Oil Co. of Texas v. Kimball* (Tex.) 533.

VI. REMEDIES OF VENDOR.

Subrogation to rights of vendor by party furnishing money for payment of price, see Subrogation, § 23.

(A) Lien and Recovery of Land.

Fraud in inducing acceptance of reconveyance in satisfaction of lien, necessity of showing injury, see Fraud, § 25.

Limitation of action to enforce lien against purchaser from vendee as affected by statements of vendee, see Limitation of Actions, § 143.

Transfer to law docket of proceedings for enforcement for purpose of jury trial on issue as to amount due, see Trial, § 11.

§ 252. The recital in a purchase-money note *held* to constitute a reservation of title in vendor.—Buckley v. Runge (Tex. Civ. App.) 596.

§ 253. The recital in a purchase-money note *held* to constitute a reservation of an express lien.—Buckley v. Runge (Tex. Civ. App.) 596.

§ 253. A lien created by the recital in a purchase-money note is a contract lien, and not a mere implied vendor's lien.—Buckley v. Runge (Tex. Civ. App.) 596.

§ 265. Land conveyed by the purchaser should be subjected to the payment of vendor's lien notes in the reverse order of its alienation.—John M. Bonner Memorial Home v. Collin County Nat. Bank (Tex. Civ. App.) 430.

§ 265. One *held* a bona fide purchaser for value acquiring title good as against a lien.—Buckley v. Runge (Tex. Civ. App.) 596.

§ 266. Where the grantee of land orally reconveys it to his grantor, the consideration being the unpaid purchase price, and the agreement is void because not in writing, the original grantor notwithstanding the oral agreement to reconvey retains a lien on the land and its proceeds for the amount of said purchase money unpaid.—Shelton v. Cooksey (Mo. App.) 331.

§ 267. A vendor retaining a lien for the purchase money cannot take a reconveyance of part of the land in part payment, and subsequently convey to a third person, to the prejudice of one who had acquired an equitable interest at the time of such reconveyance, known to the parties at the time.—John M. Bonner Memorial Home v. Collin County Nat. Bank (Tex. Civ. App.) 430.

§ 281. Evidence *held* not to show that a note was given for a part of the price for which property was originally sold, so as to make it a vendor's lien.—Honaker v. Jones (Tex.) 529.

§ 285. In an action to foreclose a vendor's lien, no judgment except for foreclosure *held* to be rendered against a defendant succeeding to the rights of the purchaser under the pleadings in the case.—Dolinski v. First Nat. Bank (Tex. Civ. App.) 276.

§ 299. Whether a purchaser purchased for value and without notice of an express lien evidenced by his grantor's purchase-money note reserving an express lien *held* for the jury.—Buckley v. Runge (Tex. Civ. App.) 596.

§ 299. One asserting a title resulting from the reservation of an express lien on land for the purchase price as against a grantee of the purchaser has the burden of proving that the purchaser had notice of an express lien.—Buckley v. Runge (Tex. Civ. App.) 596.

§ 299. The heirs of a vendor *held* not barred by laches of their right to recover the land on the superior title based on a reservation of an express lien on the property for the price.—Buckley v. Runge (Tex. Civ. App.) 596.

(B) Actions for Purchase Money.

§ 308. A purchaser may defeat the collection of the purchase money by showing the existence of a superior outstanding title.—Blewitt v. Greene (Tex. Civ. App.) 914.

§ 314. A purchaser, in an executed conveyance of real estate, *held* not to show facts sufficient to defeat a collection of the price.—Blewitt v. Greene (Tex. Civ. App.) 914.

§ 315. Evidence *held* to sustain a finding that vendors represented the land sold to contain 157 acres, that the vendee relied thereon, and was damaged by a deficiency.—Landrum & Adams v. Wells (Ky.) 213.

§ 315. A purchaser holding under an executed contract of conveyance *held* required to

show certain facts to defeat the collection of the price.—Blewitt v. Greene (Tex. Civ. App.) 914.

§ 315. A conveyance of land to the purchaser *held* an executed contract within the rule determining the defenses available in an action for the price.—Blewitt v. Greene (Tex. Civ. App.) 914.

§ 318. The court in directing a purchaser in a contract of sale of real estate to repay a third person the sum deposited by him on his contract with the purchaser for an interest in a part of the real estate of the vendor *held* not authorized under the evidence to direct the vendor to pay the sum to the purchaser.—Smith v. Pitts (Tex. Civ. App.) 46.

VII. REMEDIES OF PURCHASER.

(A) Recovery of Purchase Money Paid.

§ 334. A purchaser taking a quitclaim *held* not entitled to recover for failure of consideration.—Goldman v. Hadley (Tex. Civ. App.) 282.

(B) Actions for Breach of Contract.

Application of general statutes of limitation, see Limitation of Actions, § 47.

VENUE.

Objections for purpose of review, see Criminal Law, § 1033.

Sufficiency of evidence to show in criminal prosecution, see Criminal Law, § 564.

III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 65. Under Kirby's Dig. §§ 7996 and 7998, where plaintiff sues in a county other than that of his residence, or of the county where the occurrence of which he complains took place, unless compelled to do so to get service on defendant, the latter *held* entitled as of right to a change of venue on presentation of his verified petition only.—St. Louis, I. M. & S. R. Co. v. McNamare (Ark.) 102.

VERDICT.

In civil actions, see Trial, § 330.

Necessity of conformity of judgment, see Judgment, § 256.

Operation and effect as curing defects in pleadings, see Pleading, § 433.

Review in civil cases, see Appeal and Error, § 238.

Review on appeal or writ of error, see Appeal and Error, §§ 1001-1003.

Setting aside, see New Trial, §§ 66-72.

VERIFICATION.

Of claim against estate of decedent, see Executors and Administrators, § 227.

Of pleading, see Pleading, §§ 291-301.

VERIFIED ACCOUNTS.

See Account, Action on, § 12.

VESTED RIGHTS.

Protection, see Constitutional Law, § 93.

VICE PRINCIPALS.

See Master and Servant, §§ 168-202.

VILLAGES.

See Municipal Corporations.

VOTERS.

See Elections.

WAGES.

See Master and Servant, §§ 70-83.

WAITING ROOMS.

Duties of railroads to keep supplied with drinking water, see Railroads, § 255.

WAIVER.

See Estoppel.

Of objections to particular acts, instruments, or proceedings.

See Appearance; Pleading, §§ 406-433.

Proceedings to recover mortgaged chattels, see Chattel Mortgages, § 172.

Of rights or remedies.

Conditions in lease, see Landlord and Tenant, § 103.

Exemption of homestead, see Homestead, §§ 164, 181.

Forfeiture of insurance, see Insurance, §§ 378, 755.

Right to appeal, see Appeal and Error, § 154.

Vendor's lieh, see Vendor and Purchaser, § 266.

WARDS.

See Guardian and Ward.

WAREHOUSEMEN.

Parol or extrinsic evidence to vary terms of receipt, see Evidence, § 406.

Purchasers of goods rescinding contract for breach of warranty as warehousemen for seller, see Sales, § 131.

§ 24. A warehouseman is not an insurer, and is only liable for loss or damage to goods caused by negligence or failure to exercise ordinary care.—*Lewis v. Louisville & N. R. Co. (Ky.) 184.*

WARRANT.

County warrants, see Counties, § 167.

Search warrant, see Searches and Seizures.

WARRANTY.

On sale of goods, see Sales, §§ 261-287, 435-442.

WASTE.

By occupants of homestead, see Homestead, § 142.

Liability of life tenant, see Life Estates, §§ 11, 12.

WATER.

Duties of railroad companies to keep waiting rooms supplied with drinking water, see Railroads, § 255.

WATERS AND WATER COURSES.

See Levees.

Water courses in cities, see Municipal Corporations, § 834.

II. NATURAL WATER COURSES.

(D) Diversion.

§ 78. Each riparian owner has for irrigation purposes equal rights in the stream, and

water of a stream for irrigation purposes held not confined to a use of the water as it flows by, but he may store it in reservoirs for future use, provided this can be done consistently with the rights of the lower owners.—*Stacy v. Delery (Tex. Civ. App.) 300.*

§ 78. A lower riparian owner is not entitled to water which has been stored by an upper owner while the stream was running, unless such water also included water which the latter caught and stored by entirely obstructing the flow while the stream was running, to the former's damage.—*Stacy v. Delery (Tex. Civ. App.) 300.*

§ 87. In an action for unlawfully detaining the water of a stream, the evidence held not to support the allegations of the petition.—*Stacy v. Delery (Tex. Civ. App.) 300.*

VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

Accrual of right of action for injuries from flowage, see Limitation of Actions, § 55.

§ 171. An obstruction in a stream caused by filling it, and resulting in damages to property through water being set back, held a nuisance.—*Hedrick v. City of St. Joseph (Mo. App.) 375.*

§ 171. Where an embankment maintained by defendant street railway company over a stream, and on which it had laid its tracks, caused an overflow and damage to plaintiff's property, it was immaterial whether defendant's acts in raising the height of and repairing the embankment had any effect in causing or contributing to the backing up of the water.—*Hedrick v. City of St. Joseph (Mo. App.) 375.*

§ 171. Where defendant maintained a nuisance consisting of an embankment in a stream which caused the water to overflow onto plaintiff's land, it was not necessary in an action for damages therefrom to show that defendant had anything to do with the erection of the embankment; proof of knowledge of its existence and that it obstructed the flow of water sufficing.—*Hedrick v. City of St. Joseph (Mo. App.) 375.*

§ 178. In an action for injuries from the flowage of land, the measure of damages stated.—*Illinois Cent. R. Co. v. Haynes (Ky.) 210.*

§ 179. In an action for damages for the overflowing of land, defendant held entitled to an instruction as to effect of prior overflows.—*Illinois Cent. R. Co. v. Haynes (Ky.) 210.*

IX. PUBLIC WATER SUPPLY.

(A) Domestic and Municipal Purposes.

Effect of partial invalidity of statute, see Statutes, § 64.

Sale of water service to manufacturing company beyond boundaries of city as constituting donation of public property, see Municipal Corporations, § 871.

Termination of contract with city for private supply, see Municipal Corporations, § 252.

§ 188. Facts held to justify the forfeiture of a water company's franchise to furnish a municipality with water, and the appointment of a receiver.—*Gainesville Water Co. v. City of Gainesville (Tex. Civ. App.) 959.*

§ 201. Under city charter of Paris (Sp. Laws 1905, p. 87, c. 6) § 252, held one could not predicate right to have water furnished to his residence out of the city on ownership of

land within the city.—*Sturgeon v. City of Paris* (Tex. Civ. App.) 967.

§ 201. One seeking to compel a city to supply water for his land, on which are only flowers and shrubs, *held* required to plead and prove such use of water is permitted by the city's water regulations.—*Sturgeon v. City of Paris* (Tex. Civ. App.) 967.

WAYS.

Private rights of way, see Easements.

Public ways, see Highways; Municipal Corporations, §§ 697, 759-821.

WEAPONS.

§ 11. One who was a traveler within the statute, could not carry concealed weapons around a town in his pocket while he was making purchases, but could leave them in his wagon on going out in town, and place them in his pocket again on returning to the wagon, without violating the law.—*Alexander v. State* (Tex. Cr. App.) 387.

§ 17. In a prosecution for carrying brass knucks about accused's person, conflicting evidence *held* to support a connection on the theory that accused, who was a traveler, had the weapon on his person when he left his wagon and went into town.—*Alexander v. State* (Tex. Cr. App.) 387.

WIDOWS.

Dower, see Dower.

WILLS.

See Descent and Distribution; Executors and Administrators.

Construction and execution of trusts, see Trusts.

Courts of probate, see Courts, § 202.

Restrictions on perpetuities, see Perpetuities.

II. TESTAMENTARY CAPACITY.

§ 38. "Insane delusion" rendering one incompetent to execute a will, defined.—*Buford v. Gruber* (Mo.) 717.

§ 50. An instruction, in a will contest, as to the capacity of the testator to make a will, *held* proper.—*Mowry v. Norman* (Mo.) 724.

§ 52. Proof that testator was insane, and had been insane for a long period of years, *held* to create a presumption that he was insane at the time of the execution of the will, and the burden of establishing a lucid interval was on the party asserting it.—*Buford v. Gruber* (Mo.) 717.

§ 52. In a will contest, the burden is on the proponent of the will to establish the mental capacity of the testator.—*Mowry v. Norman* (Mo.) 724.

§ 53. In an action to contest a will on the ground of insanity, evidence of the condition of testator's mind prior to and subsequent to the execution of the will *held* admissible.—*Buford v. Gruber* (Mo.) 717.

§ 53. In a will contest, evidence as to the financial condition of the natural objects of testator's bounty *held* admissible on the issue of mental capacity.—*Mowry v. Norman* (Mo.) 724.

§ 55. In an action to contest a will on the ground of testator's insanity, evidence *held* to justify a finding of insanity.—*Buford v. Gruber* (Mo.) 717.

IV. REQUISITES AND VALIDITY.

(F) Mistake, Undue Influence, and Fraud.

§ 135. An instruction, in a will contest, as to the effect of undue influence, *held* to properly state the law.—*Mowry v. Norman* (Mo.) 724.

§ 163. An instruction, in a will contest, as to undue influence of the beneficiary, *held* proper.—*Mowry v. Norman* (Mo.) 724.

§ 164. In a will contest, evidence as to the financial condition of the natural objects of testator's bounty *held* admissible on the issue of undue influence.—*Mowry v. Norman* (Mo.) 724.

(G) Revocation and Revival.

§ 170. Evidence *held* to show that one of two wills executed on the same day was testator's last will.—*St. Mary's Orphan Asylum of Texas v. Masterson* (Tex. Civ. App.) 587.

V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

Abandonment of contest of will as consideration of contract, see Contracts, § 71.

(E) Jurisdiction, Limitations, and Laches.

§ 200. Under Sayles' Ann. Civ. St. 1897, art. 1881, providing that probate of a will may not be had after four years unless applicant was not in default, *held* that a devisee or purchaser under him may have a will probated as a muniment of title in his favor, and that the "default" within the statute means the default of the applicant himself.—*St. Mary's Orphan Asylum of Texas v. Masterson* (Tex. Civ. App.) 587.

§ 260. Applicants for probate of a will as a muniment of their title *held* not in default within Sayles' Ann. Civ. St. 1897, art. 1881.—*St. Mary's Orphan Asylum of Texas v. Masterson* (Tex. Civ. App.) 587.

§ 260. Applicants to probate a will as a muniment of their title being entitled to do so under Sayles' Ann. Civ. St. 1897, art. 1881, *held* not to be deprived of the right by the offer of warranty deeds from the devisees of their grantor to perfect their title.—*St. Mary's Orphan Asylum of Texas v. Masterson* (Tex. Civ. App.) 587.

§ 260. Where certain applicants are entitled to probate a will as a muniment of their title under Sayles' Ann. Civ. St. 1897, art. 1881, *held* immaterial whether other applicants were entitled to its probate.—*St. Mary's Orphan Asylum of Texas v. Masterson* (Tex. Civ. App.) 587.

§ 260. Persons having the custody of a will and refraining for the statutory period from presenting it for probate for mere personal reasons *held* in default within Sayles' Ann. Civ. St. 1897, art. 1881, so as not to be entitled to its probate after four years from testator's death.—*St. Mary's Orphan Asylum of Texas v. Masterson* (Tex. Civ. App.) 587.

§ 260. Where persons in good faith acquire the right to apply for the probate of a will as a muniment of their title under Sayles' Ann. Civ. St. 1897, art. 1881, relating to probate of wills, the motives inducing them to assert that right are immaterial.—*St. Mary's Orphan Asylum of Texas v. Masterson* (Tex. Civ. App.) 587.

(H) Evidence.

§ 293. Where two instruments, executed on the same day, were offered for probate, and there was intrinsic evidence to show which was the later one, extrinsic evidence to prove that fact was inadmissible.—*St. Mary's Orphan Asylum of Texas v. Masterson* (Tex. Civ. App.) 587.

§ 293. In proceedings to probate an alleged will which was not produced in court, a torn draft of the will to be executed by testatrix, containing certain recitals, *held* irrelevant and immaterial.—*Buchanan v. Rollings* (Tex. Civ. App.) 962.

§ 297. In proceedings to probate a will not produced in court, testatrix's declarations tend-

held to sustain a finding that a testamentary executed the will probated.—*Buchanan v. Rollings* (Tex. Civ. App.) 962.

§ 306. In proceedings to probate an alleged holographic will which was not produced in court, evidence held to sustain a finding that the will, as probated, was not destroyed by testatrix during her lifetime to revoke it.—*Buchanan v. Rollings* (Tex. Civ. App.) 962.

(K) Review.

§ 400. In an action by a disinherited child to contest the parent's will on the ground of insanity, the Supreme Court held not authorized to disturb the verdict of the jury by undertaking to say that they placed an improper estimate on the weight of evidence.—*Buford v. Gruber* (Mo.) 717.

§ 400. An action to contest a will on the ground of the insanity of the testator is an action at law within the rule that, where the evidence is conflicting, the Supreme Court will not undertake to reconcile it.—*Buford v. Gruber* (Mo.) 717.

VI. CONSTRUCTION.

(A) General Rules.

§ 439. The court in construing a will should aim to ascertain testator's intention.—*Patrick v. Patrick* (Ky.) 159.

§ 439. In construing wills the object is to ascertain the intention of the testator, and an intention not inconsistent with the rules of law will govern.—*Haring v. Shelton* (Tex.) 13.

§ 450. The court in construing a will should, if possible, so construe it as to uphold each item or clause thereof.—*Patrick v. Patrick* (Ky.) 159.

(B) Nature of Estates and Interests Created.

§ 602. A will held to give to testator's son a fee, subject to be defeated by his death without living issue before the death or marriage of testator's wife.—*Patrick v. Patrick* (Ky.) 159.

§ 602. The rule that, where an estate is given by will which may be defeated on the happening of a contingency, it refers to an event within the lifetime of testator, held not to obtain when the will shows on its face with reasonable certainty that the event to which the contingency refers is in contemplation of testator to occur after his death.—*Patrick v. Patrick* (Ky.) 159.

§ 602. A will held to give testator's wife a fee simple, determinable on her remarriage.—*Haring v. Shelton* (Tex.) 13.

(G) Conditions and Restrictions.

Accrual of cause of action for enforcement of conditions in will, see *Limitation of Actions*, § 72.

Application of general statutes of limitations to action to enforce conditions, see *Limitation of Actions*, § 28.

§ 639. A provision in a will imposing on a devisee the duty to support children of the testatrix held neither a condition precedent to vesting of the devise nor a condition subsequent, which by failure to perform would forfeit the estate.—*Low v. Ramsey* (Ky.) 167.

§ 641. A will devising a life estate to testator's son on condition that, if a judgment was entered against him subjecting his interest in the property, the estate would cease at the date of the judgment, though appealed from,

(H) Estates in Trust and Powers.

§ 672. A will held to make the wife of testator the beneficiary for life, or during widowhood, of the entire estate.—*Patrick v. Patrick* (Ky.) 159.

§ 686. The fact that a testamentary trustee removed from the property of which he was trustee held not to affect the trust or the rights of the beneficiary.—*Patrick v. Patrick* (Ky.) 159.

VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

(A) Nature of Title and Rights in General.

Conditions in will as constructive notice affecting bona fide purchaser from devisee, see *Vendor and Purchaser*, § 229.

§ 748. A legatee to whom the executors have assigned as part of his share a negotiable note executed to testator occupies the same position as testator in suing thereon.—*O'Day v. Sanford* (Mo. App.) 3.

(D) Election.

§ 792. An agreement between the widow and children of a testator in executing a will and dividing the property among them held not to amount to a renunciation by the widow of her interest under the will.—*St. Mary's Orphan Asylum of Texas v. Masterson* (Tex. Civ. App.) 587.

(F) Legacies Charged on Property, Estate, or Interest.

§ 821. A will held to make a gift to testator's son conditional on his making payments to testator's daughters, which payments must be made at testator's death.—*Patrick v. Patrick* (Ky.) 159.

§ 821. A provision in a will, charging a son to whom all the property was given with the duty of caring for two younger children of the testatrix till they reached a certain age, created a lien on the land in their favor for this purpose.—*Low v. Ramsey* (Ky.) 167.

§ 824. A purchaser from a devisee is charged with notice of provisions of the recorded will, and holds the land subject to the liabilities imposed on the devisee.—*Low v. Ramsey* (Ky.) 167.

(I) Rights and Remedies of Creditors of Devisees and Legatees.

§ 872. In a proceeding to charge the estate of a testator with his widow's indebtedness, the executors and legatees of decedent held necessary parties.—*Pierce v. Pierce* (Mo. App.) 1147.

§ 872. A proceeding to establish a charge against the estate of a testator for an indebtedness of his wife held by bill in equity.—*Pierce v. Pierce* (Mo. App.) 1147.

§ 872. The two-year statute of limitations (Rev. St. 1899, § 185 [Ann. St. 1906, p. 399]), held inapplicable to a proceeding to establish a charge against the estate of a testator for an indebtedness of his wife.—*Pierce v. Pierce* (Mo. App.) 1147.

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Absence of as ground for continuance, see *Criminal Law*, § 594.

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II. COMPETENCY.

Competency of expert witnesses, see Witnesses, § 478.

(A) Capacity and Qualifications in General.

§ 45. Where a 7 year old boy testified that he knew that he would be punished if he testified falsely, and that to hold up his hand and swear meant that he would be punished if he did not tell the truth, he was a competent witness, though he testified that he did not know the nature of an oath, or what it meant to swear.—Munger v. State (Tex. Cr. App.) 874.

§ 53. The wife of accused, on cross-examination, cannot be made to testify to any matter not germane to her testimony in chief.—Ferguson v. State (Tex. Cr. App.) 551.

§ 53. In a prosecution for assault, certain cross-examination of accused's wife held proper.—Ferguson v. State (Tex. Cr. App.) 551.

(C) Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.

§ 140. In an action in the husband's name against an executor to recover on behalf of the community estate for services rendered testator, the wife is a real party to the suit, and cannot testify to transactions by herself or her husband with decedent, unless called by the opposite party.—Wells v. Hobbs (Tex. Civ. App.) 451.

§ 159. In an action against an executor to recover for services rendered testator, certain testimony held to relate to "transactions with" testator, and hence not admissible under 1 Sayles' Ann. Civ. St. 1897, art. 2302, while other testimony was admissible thereunder.—Wells v. Hobbs (Tex. Civ. App.) 451.

§ 160. The cashier of a bank, not a party to an action involving the title to a filly, held competent to testify to the execution of a mortgage on the filly by defendant alone in the presence of decedent, through whom plaintiff claimed.—Bailey v. Bailey (Mo. App.) 1099.

§ 176. In an action against an executor for services rendered testator in which defendant's witness testified to a conversation with plaintiff, testimony by plaintiff which merely gave a different version of such conversation was admissible.—Wells v. Hobbs (Tex. Civ. App.) 451.

§ 183. In an action against an executor for services rendered testator, in which defendant's witness testified to a conversation with plaintiff, whether plaintiff's testimony that he had no such conversation with the witness but made other and different statements to him referred to a different conversation than that testified to by the witness held for the trial court's determination under the circumstances.—Wells v. Hobbs (Tex. Civ. App.) 451.

(D) Confidential Relations and Privileged Communications.

§ 188. Where, in an action by plaintiff for injuries received in a railroad wreck, it was competent for him to prove impotency as a result of the accident by testimony that since it occurred he had not been able to have intercourse with his wife.—Epstein v. Pennsylvania R. Co. (Mo. App.) 366.

§ 219. Where three physicians were in attendance upon plaintiff at a hospital, one as

2539), to the principal physician, did not waive his privilege as to the assistants.—Epstein v. Pennsylvania R. Co. (Mo. App.) 366.

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§ 227. It was error to permit a clerk of the probate court to make a statement in the circuit court as to the making and filing of an affidavit for an appeal over objection without swearing him as a witness.—Walker v. Noll (Ark.) 488.

§ 240. A question held leading and properly excluded.—Williamson v. Chicago, R. I. & G. Ry. Co. (Tex. Civ. App.) 897.

§ 247. In a prosecution for fraudulent registration, evidence held to show that the offense was committed in a specified election precinct.—State v. Tiernan (Mo.) 728.

§ 248. The latter part of the answer to a question whether defendant's grantor claimed the ownership and possession of land that every one knew that he owned it; that it was his ranch and land there—was not responsive, and should have been stricken.—Merriman v. Black (Tex. Civ. App.) 403.

§ 255. In an action for injuries to a street car passenger, if the date of the accident was in doubt, the motorman could have refreshed his memory from the report made by him to the company, though the report was inadmissible.—Gardner v. Metropolitan St. Ry. Co. (Mo.) 1068.

(B) Cross-Examination and Re-Examination.

§ 277. Defendant's testimony as to confessions held to open a wide field for cross-examination, and to make it clearly proper to cross-examine him fully as to facts stated therein.—State v. Wilson (Mo.) 671.

(C) Privilege of Witness.

§ 297. Under Const. U. S. Amend. 5, and Const. Mo. art. 2, § 23 (Ann. St. 1906, p. 158), a witness held privileged to decline to answer questions asked him as to bets which he had made.—Ex parte Gauss (Mo.) 741.

§ 297. Under Const. U. S. Amend. 5, and Const. Mo. art. 2, § 23 (Ann. St. 1906, p. 158), a witness held privileged to decline to answer a question as to his betting on horse races.—Ex parte Eichel (Mo.) 743.

IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

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(A) In General.

§ 318. Evidence to support a witness held inadmissible, because of the absence of an effort to impeach the witness.—Welch v. State (Tex. Cr. App.) 880.

§ 319. One charged with larceny, having offered herself as a witness, may be impeached.—State v. Hubbard (Mo.) 694.

§ 319. A witness making a statement about an immaterial matter cannot be impeached by

(B) Character and Conduct of Witness.

§ 337. The credit of prosecutrix as a witness may be impeached by evidence that her general reputation for truth or immorality renders her unworthy of belief.—*Jackson v. State* (Ark.) 101.

§ 337. Under the express provisions of Rev. St. 1899, § 4680 (Ann. St. 1906, p. 2549), held that records of former convictions of accused may be introduced to affect her credibility, where she offers herself as a witness.—*State v. Hubbard* (Mo.) 694.

§ 337. In a prosecution for theft, evidence that accused had been sent to the penitentiary 24 or 25 years before for robbery was not admissible, being too remote; but evidence that he had pleaded guilty to the crime of theft 4 or 5 years before was admissible.—*White v. State* (Tex. Cr. App.) 391.

§ 343. Evidence, to impeach the reputation of a witness, held admissible.—*Lindsay v. Bates* (Mo.) 682.

§ 351. In an action to replevin property mortgaged to secure a note given for a store account, in which plaintiff's bookkeeper testified that the note had not been paid and defendants claimed it had, certain testimony held inadmissible to impeach the bookkeeper's testimony, in the absence of proper foundation.—*McCown v. Wilson* (Ark.) 478.

§ 359. In a larceny prosecution, the court records showing accused's former conviction for larceny and the state penitentiary records showing her service of sentence and discharge, were competent to impeach accused's testimony.—*State v. Payne* (Mo.) 1062.

§ 361. In a prosecution for theft of a mower, testimony by the officer who recovered it from accused's house as to statements by the owner as to how he identified the mower held not admissible; accused not being present when such statements were made.—*White v. State* (Tex. Cr. App.) 391.

(C) Interest and Bias of Witness.

§ 370. The testimony as to the friendship between a state's witness and decedent is immaterial, especially where the witness states that he was friendly with decedent.—*Welch v. State* (Tex. Cr. App.) 880.

§ 372. Accused can show that a state's witness had requested accused to furnish money to pay witness' fines, and became angered when he refused to do so.—*O'Neal v. State* (Tex. Cr. App.) 386.

§ 373. In a prosecution for rape, evidence of disclosures of accused to witness concerning the alleged familiarity of M. with prosecutrix held inadmissible, in the absence of proof that the disclosures were brought to the knowledge of the prosecutrix, or that they procured or induced the prosecution.—*Bader v. State* (Tex. Cr. App.) 555.

§ 377. A witness for accused may not be supported by proof that on a former trial she had been summoned as a witness and had testified for the state.—*Welch v. State* (Tex. Cr. App.) 880.

(D) Inconsistent Statements by Witness.

§ 379. A statement by a witness that his testimony could easily cause plaintiff to win or lose may be proved to impeach his credibility.—*Rippeteo v. Missouri, K. & T. Ry. Co.* (Mo. App.) 314.

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§ 388. Foundation for proof of an impeaching writing signed by the witness held sufficient.—*Batsch v. United Rys. Co. of St. Louis* (Mo. App.) 371.

§ 389. In a prosecution for rape, a sworn statement made by prosecutrix to the assistant county attorney of another county held admissible to impeach her.—*Bader v. State* (Tex. Cr. App.) 555.

(E) Contradiction and Corroboration of Witness.

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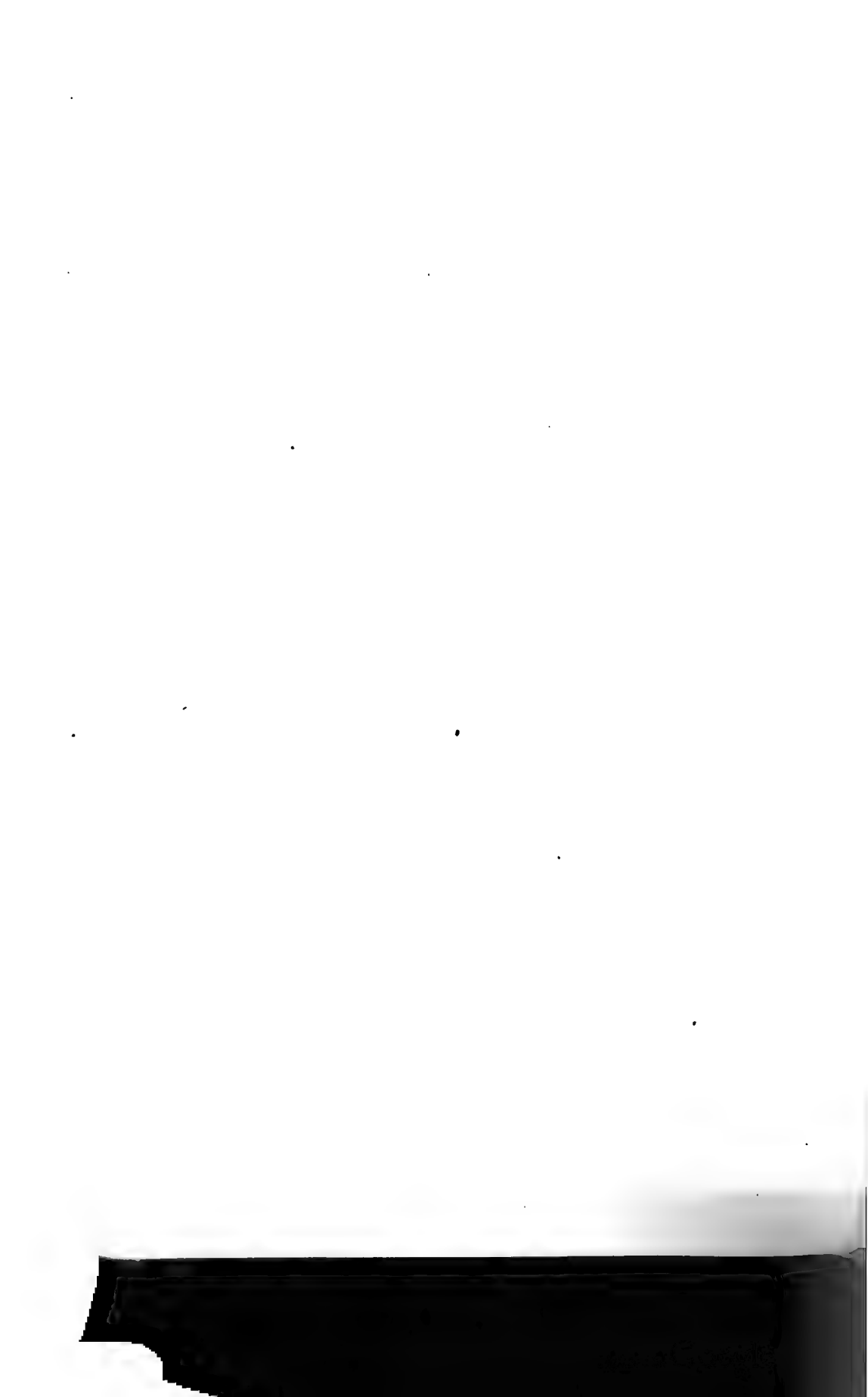
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